

HE LIES, YOU DIE: CRIMINAL TRIALS, TRUTH, PERJURY, AND FAIRNESS

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SUMMARY:

In cases such as these, where a federal prosecutor unwillingly uses perjured testimony to gain a conviction, the federal circuit courts conflict on the proper standard to apply in determining whether to disturb a conviction. . . . Armed with Perez's recantation of his trial testimony Sanders proceeded with a coram nobis motion in New York State Supreme Court alleging that the prosecution had knowingly used perjured testimony at the time of his trial. . . . Sanders then sought a writ of habeas corpus in federal court alleging a due process violation. . . . Citing Sanders' failure to show prosecutorial knowledge of the use of perjured testimony, the district court dismissed the petition without ruling on the credibility of Perez's recantation. . . . Judge Motley found Perez's recantation credible and held that, without his perjured testimony, Sanders would most likely not have been convicted. . . . The Fifth Circuit Court of Appeals addressed the issue of perjured testimony on a habeas corpus proceeding in *Smith v. Black* and reached the opposite conclusion of Sanders. . . . The Court found the perjured testimony, and the prosecutor's inaction to rectify the false testimony, turned a fair trial into a tainted one. . . . We believe that the Sanders approach to the latter issue is the best, with inaction by a federal court to vacate a conviction which rests on false testimony constituting state action.

I. INTRODUCTION

The ultimate goal of courts in the American criminal justice system is to ensure that the truth is served and that a fair procedure is followed. Under this system of "imperfect procedural justice," a man who committed murder may be found not guilty and a man who committed no crime may be found guilty. Americans are apparently willing to accept these "injustices" as long as the underlying process guarantees a "fair trial."

The boundaries of a fair trial have long provided grist for the Constitutional law mill. The Supreme Court precedents and their progeny are seemingly endless. Although it is well

settled in both state and federal courts that a prosecutor's knowing use of false testimony is violative of due process, it is a matter of considerable dispute whether due process has been violated when the prosecutor did not intentionally use the perjured testimony. In cases such as these, where a federal prosecutor unwillingly uses perjured testimony to gain a conviction, the federal circuit courts conflict on the proper standard to apply in determining whether to disturb a conviction. Furthermore, the federal circuit courts do not agree on whether they have jurisdiction over state cases involving unknowing use of perjury. The end result of this lack of uniformity is that a wrongly convicted defendant's chances for a retrial may depend on arbitrary factors such as the venue in which the crime was committed and whether state or federal prosecutors decided to pursue the case.

Lacking clear guidance from the Supreme Court on the issue, the Courts of Appeals have struggled with what standard should be applied if the perjury occurred at a federal trial and the defendant moves for a new trial pursuant to Federal Rule of Criminal Procedure 33 ("Rule 33"). Rule 33 allows the defendant to move the trial court for a new trial on the basis of "newly discovered evidence." 1 In such a case, the court may grant a new trial "if required in the interests of justice." 2 In cases where federal courts were satisfied that there was perjured testimony used unknowingly by prosecutors, they have applied numerous standards ranging from whether the perjury *might* have affected the verdict to whether the perjured testimony *probably* would have affected the verdict. 3 It is the authors' view that the court should vacate a conviction if it believes that perjury concerning a material element of the crime might have affected the jury's verdict, regardless of the prosecutor's scienter. Further, the federal reviewing court should apply a uniform standard in such cases whether they are habeas motions, which emanate from state trial courts, or Rule 33 motions, which derive from federal trial courts. 4

A related question, yet to be examined by the Supreme Court, is whether it violates an individual's federal Constitutional rights if a prosecution witness lies at a state court trial - regardless of the prosecution's knowledge of the perjured testimony - and the state keeps a defendant in jail after the perjury comes to light. Again, the federal circuit courts disagree. We believe federal appellate courts are well within their Constitutional mandate by interfering with state court convictions in such circumstances.

## II. BACKGROUND

### A. Criminal Trials and Fairness

A criminal trial is an example of "imperfect procedural justice." 5 "The desired outcome is that the defendant should be declared guilty if and only if he has committed the offense with which he is charged. The trial procedure is framed to search for and establish the truth in this regard." 6 The characteristic mark of imperfect procedural justice is that while there is an independent criterion for the correct outcome, there is no feasible procedure that is sure to lead to it. 7 This search for the truth within defined boundaries and procedures 8 is tempered by the Constitutional rights of the defendant. 9 "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." 10 As such, probative and incriminating evidence may be excluded from a trial, because it was gathered in violation of the Constitutional restraints on governmental

power. 11

In *Pyle v. Kansas*,<sup>12</sup> the Supreme Court ruled that deliberate suppression by state authorities of evidence favorable to the defendant violated due process.<sup>13</sup> Intentional introduction of false testimony at trial by a prosecutor is a clear violation of due process, regardless of whether the defendant was tried in state or federal court.<sup>14</sup> “Use of false evidence does not comport with fairness notions encompassed in the due process clause, and a conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.”<sup>15</sup> The line becomes blurred when there is no allegation the prosecution suborned the perjury, and the standard differs in the federal circuit courts if there is no contemporaneous knowledge of the perjury by the government.

## B. Early Precedent Concerning Perjury

Two cases decided before the enactment of Rule 33 are illustrative of how courts attempted to grapple with the issue of unknowing use of perjury. One of the earliest cases to examine the effect of perjured testimony on a trial is *Larrison v. United States*,<sup>16</sup> which had its jurisdiction over an appeal from a federal trial. Larrison and his accomplices were convicted of robbing a post office. Two of the principal government witnesses were accomplices, whose testimony was confirmed in some respects by non-participants in the crime.<sup>17</sup> After a hung jury on the first trial, the defendants were convicted at the re-trial.<sup>18</sup>

Defendants moved the district court for a new trial on the basis of newly-discovered evidence. They produced the affidavit of one of the accomplices turned witness, who swore that his damaging trial testimony was false. He explained that the government agents investigating the crime paid him to testify falsely against the defendants and that he had not participated in the robbery and had no knowledge of whether the defendants committed the crime.<sup>19</sup> He later testified that the recantation was false and that the defendants’ counsel had paid him to do so.<sup>20</sup> The question presented on appeal was not whether there had been a denial of due process, but rather whether a new trial should be granted because of the “so-called newly discovered evidence” (the recantation and subsequent recantation of the recantation).<sup>21</sup>

The court held a new trial should be granted “when the court is reasonably well satisfied that the testimony given by a material witness is false. That without [the perjured testimony] the jury *might* have reached a different conclusion. [And] that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.”<sup>22</sup> Using this test the court upheld the conviction, and it found that there could have been no surprise with the same disputed testimony being given at the second trial as at the first.<sup>23</sup> Additionally, and perhaps most importantly, the court stated that even if the original recantation was credible - which they found it was not - the conviction must stand, because the defendant was culpable without the perjured testimony.<sup>24</sup> The “*Larrison* test” remains an influential benchmark, even for cases in which the defendant was originally tried in state court and is in a federal court seeking habeas relief.

In *Jones v. Kentucky*,<sup>25</sup> the defendant was convicted of murdering his wife in a capital trial. There were no direct eyewitnesses to the shooting, except the prosecution proffered a

six-year-old girl's testimony that she overheard *Jones* threatening his wife, as well as that of a "woman of ill repute," who testified to the wife's incriminating dying declaration. 26 *Jones'* defense was that his wife threatened to kill herself and as he tried to disarm her, the gun discharged. 27 After the trial, new evidence came to light clearly showing that neither prosecution witness was telling the truth. In spite of the new evidence, the Kentucky appellate courts failed to overturn *Jones'* conviction. 28 Having exhausted his local remedies, *Jones* petitioned the federal district court for a writ of habeas corpus, 29 wherein he alleged a due process violation of his federal Constitutional rights. 30

The Attorney General of Kentucky, who cross-examined both witnesses at the habeas hearing, was persuaded that *Jones* was convicted by perjured testimony unknown to the prosecution at the time of trial. 31 Without the perjured testimony, the jury would have most likely acquitted *Jones*. The record was also clear that the perjury was not known to *Jones* before trial. 32 It appeared that all of the elements of the *Larrison* test had been met. The district court found that the conviction was procured by perjured testimony. The court, presaging a controversy that continues to haunt federal courts, 33 questioned whether the federal district court could reverse the decision of a state's highest court, and it certified the question for appeal. 34 The Sixth Circuit answered in the affirmative. 35 Relying heavily on a Supreme Court case concerning knowing use of perjured testimony, 36 the court held that it must condemn equally a conviction based on knowing or unknowing use of perjured testimony. 37 Holding that the judicial process of the state had been vainly invoked and that Constitutional right to due process was violated, the court ordered *Jones* be released, because due process "requirements in safe-guarding the liberty of the citizen against deprivation though the action of the state embodies those fundamental conceptions of justice which lie at the base of our civil and political institutions." 38

### C. The Supreme Court and the Use of Perjured Testimony

The Sixth Circuit Court of Appeals in *Jones* relied heavily on *Mooney v. Holohan*, 39 a case in which the Supreme Court first visited the issue of a conviction that rested on perjured testimony. *Mooney* asked the Supreme Court for leave to file an original petition for habeas corpus on the grounds that the state of California was holding him in confinement without due process of law. 40 Indeed, *Mooney* alleged the state knowingly used false testimony against him and suppressed evidence that would have impeached the perjured testimony. 41 The Supreme Court agreed with *Mooney* that the requirement of due process "embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." Accordingly, a conviction contrived by the state, which knowingly used perjured testimony, is "inconsistent with the rudimentary demands of justice." 42

The Supreme Court visited the issue of perjured testimony again in *Durley v. Mayo*, 43 but this time there was no allegation the prosecution was aware of the perjury. *Durley* was convicted on six counts of cattle theft. 44 His convictions rested mainly on the testimony of his co-defendants. 45 In 1952, *Durley* filed a writ of habeas corpus in the Florida Circuit Court, which was quashed. 46 In 1955, *Durley* filed another petition for habeas corpus where he claimed his continued detention was an abuse of due process. 47 The petition was argued in the Supreme Court of Florida and was denied without opinion. 48 *Durley* then petitioned the

Supreme Court for a writ of certiorari. 49

The state of Florida objected to the Supreme Court's jurisdiction over the petition. 50 It argued that the 1955 denial of the writ of the habeas petition by the Florida Supreme Court *might* "have rested . . . upon adequate state grounds" and therefore there was no federal issue in the case. 51 The majority of the Supreme Court agreed, and it held that the Florida Supreme Court's denial of the 1955 petition *might* have rested in either of those state grounds identified by the state. Consequently, there was no federal issue to establish jurisdiction in the Supreme Court. 52 Thus, the petition was dismissed on procedural grounds without the majority addressing the merits of *Durley's* petition.

Four justices dissented. The dissent, led by Justice Douglas, interpreted the Florida case law on *res judicata* more liberally than did the majority. Specifically, he interpreted the state Supreme Court's opinion to require only that an issue must have been explicitly raised in a prior proceeding, and is not barred on a subsequent proceeding if not explicitly raised previously. 53 The dissent read the Florida Supreme Court's denial to be based on the merits of the case (thereby vesting the Court with jurisdiction) rather than on *res judicata* grounds. Thus, reaching the merits, Justice Douglas immediately found a due process violation:

While the petition did not allege that the prosecution knew that petitioner's codefendants were lying when they implicated petitioner, the State now knows that the testimony of the only witnesses against petitioner was false. No competent evidence remains to support the conviction. Deprivation of a hearing under these circumstances amounts in my opinion to denial of due process of the law. 54

*Mesarosh v. United States* 55 addressed the issue of perjured testimony in an unusual procedural setting. The defendants were accused of violating the Smith Act by advocating the overthrow of the United States government. 56 The principal government witness was Joseph Mazzei. 57 *Mesarosh* was convicted in a federal trial, and the conviction was affirmed by a divided Third Circuit Court of Appeals sitting *en banc*. 58 A writ of certiorari was granted. 59

Before the argument was held before the Supreme Court, the Solicitor General filed a motion, *sua sponte*, that questioned Mazzei's veracity, because of his previous testimony before Senate subcommittees and in other trials that turned out to be completely false. 60 The Solicitor General asked that the Court remand the case to the district court for full consideration of whether Mazzei's testimony was truthful. 61

The Court found that Mazzei was "wholly discredited." 62 The Court noted that subsequent allegations of perjury "ordinarily will not support a motion for a new trial," if the "new evidence is 'merely cumulative or impeaching,'" 63 and Mazzei's testimony was that of an eyewitness concerning a material aspect of the crime charged. 64 The Court held that no court could determine conclusively that the testimony was insignificant and only a jury (the original finder of fact) could determine what it would decide on a new "body of evidence." 65 Stating that "the dignity of the United States Government will not permit the conviction of any person on tainted testimony" 66 and "the government of a strong and free nation does not need

convictions based upon such [perjured] testimony,” the Court reversed *Mesarosh’s* conviction.  
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While the Supreme Court has yet to address the issue of non-deliberate use of perjured testimony, a line of cases tend to show how it might rule if presented with the opportunity. In 1935, in *Mooney*, knowing use of false testimony was held to be unconstitutional. 68 By 1959, the standard had become relaxed somewhat in that the prosecution need not solicit the false testimony, but merely allow false testimony to go uncorrected in order to be deemed unconstitutional. 69 *Brady v. Maryland*, 70 decided in 1963, held that suppression of material evidence justified a new trial “irrespective of the good faith or bad faith of the prosecution.” 71 If the prosecution’s scienter is irrelevant for purposes of suppression of evidence, it should also be irrelevant in the context of false testimony.

Interpreting *Mooney* and the cases which followed it, the Supreme Court stated in 1976 that “the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury.” 72 The Court stated this standard applied “not just because [such cases] involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process . . . .” 73

Although in *Agurs* the Supreme Court expressed concern over procedural fairness and the truth, it recently has become less concerned with these fundamental rights. In *Jacobs v. Scott*, 74 for example, the Court denied an application for a stay of execution and petition for writ of certiorari after the state no longer believed the defendant committed the crime. 75 The defendant was convicted of murder based largely on his confession, which he later recanted. 76 The state of Texas then sought to try another person for the crime while still proceeding with the execution of the original defendant. 77 Justice Stevens, dissenting from the denial of stay, opined that “it would be fundamentally unfair to execute a person on the basis of a factual determination that the State has formally disavowed.” 78 Although Justice Stevens wrote of unfairness, the trial did not seem to get at the truth of the matter either. There can be little dispute that the “truth-seeking function of the trial process” is corrupted, if not perverted, when the prosecution tries a defendant for a crime for which someone else was convicted, and argues that the convicted person is actually innocent. 79 Only one of the two defendants could have committed the crime, so one trial did not get to the truth of the matter. Apparently, the seven silent Justices believed the trial was procedurally fair and the conviction must therefore stand.

### III. THE CONFLICT AMONG THE CIRCUITS

In the absence of Supreme Court precedent directly addressing this issue, the federal courts of appeal are divided regarding the impact of perjured testimony on cases which do not involve negligence or knowledge of the perjury by the prosecution. The circuits have differing opinions on the standard to be used in reviewing cases that have their original jurisdiction in the state courts and those that are the subject of Rule 33 motions. This article will focus on the Second, Fifth, and Seventh Circuits, all of which have a well-developed body of case law and very different views.

When courts are faced with a Rule 33 motion, most of them have abandoned the *Larrison* test for a more rigorous test under which the defendant “probably would have been found innocent.” When the original jurisdiction was in state court and the case is on review of denial of a habeas corpus motion, most federal circuit courts decline to find a jurisdictional basis for review. Only the Second Circuit has come forward and declared it is competent to decide whether such state action amounts to a due process violation.

## A. Original Federal Jurisdiction

The standard of review for Rule 33 motions in most federal circuit courts is the “probability” test used by the Second Circuit. The Second Circuit is most lenient with regard to finding jurisdiction over habeas cases involving perjured testimony, but uses the strictest standard for overturning convictions based on perjured testimony. On the other end of the spectrum is the Seventh Circuit, which still uses a form of the *Larrison* test when considering Rule 33 motions.

### 1. The Second Circuit

One of the most frequently cited cases in the Second Circuit is *United States v. Stofsky*,<sup>80</sup> where the Second Circuit declined to follow the *Larrison* test on a motion for a new trial pursuant to Rule 33 based on, *inter alia*, the discovery of perjury after conviction.<sup>81</sup> The *Stofsky* court distinguished between the standard to apply in cases where the prosecution knew of the perjured testimony (i.e., a new trial is “virtually automatic”) and those where there is no showing of prosecutorial misconduct.<sup>82</sup> Ultimately, the *Stofsky* court rejected the *Larrison* test for cases not involving prosecutorial misconduct with regard to perjury.<sup>83</sup> The court reasoned that if it literally applied *Larrison* to perjury cases, convictions would be frequently reversed, as the jury would be entitled to disregard witness testimony that was found to be false.<sup>84</sup> The court felt under such circumstances it would be impossible to find the jury “might” not have voted differently and thus reversal would always be the result.<sup>85</sup> The court instead opted for a “probability” standard, under which the reviewing “court should decide whether the jury probably would have altered its verdict if it had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government’s case but also upon the credibility of the government’s witness.”<sup>86</sup> Simply put, a new trial should be granted if the jury probably would have acquitted in the absence of the false testimony.<sup>87</sup>

An example of the standard set in *Stofsky* is the Second Circuit decision of *United States v. Gugino*.<sup>88</sup> *Gugino* and an accomplice were convicted in federal court for using a stolen credit card.<sup>89</sup> At trial, the government introduced the testimony of a former friend of *Gugino*’s, Lauricella, who claimed that *Gugino* admitted to him that he had used a stolen card.<sup>90</sup> Following the conviction, the defense proffered an affidavit from a third-party saying that Lauricella had perjured himself at trial when he denied ever having used the card himself.<sup>91</sup> The court found the affidavit to be merely “cumulative” evidence concerning the credibility of Lauricella.<sup>92</sup> Citing *Stofsky*, it ruled that the standard is “whether the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly discovered evidence,”<sup>93</sup> and that the jury would not have done so.

## 2. The Seventh Circuit

In *United States v. Mazzanti*,<sup>94</sup> the Seventh Circuit stated that “in determining whether a new trial ought to be granted on the ground that newly discovered evidence discloses false trial testimony, this circuit has employed the test set forth in *Larrison v. United States*.”<sup>95</sup>

*Mazzanti* was convicted of conspiring to distribute cocaine after he was arrested following a Drug Enforcement Agency operation.<sup>96</sup> Following his conviction, it was determined that an informant had perjured himself at the time of trial.<sup>97</sup> The perjured testimony implicated two of *Mazzanti*'s co-conspirators but did not specifically concern *Mazzanti*.<sup>98</sup>

The prosecution, on appeal, urged the Seventh Circuit to abandon the *Larrison* test and apply an alternative standard, which asks whether the newly-discovered evidence “would probably lead to an acquittal in the event of a retrial.”<sup>99</sup> While the court acknowledged that the “differences between *Larrison* and the [alternative proposed by the government] had become . . . elusive” and may even require “reexamination” in the future, it declined to specifically address the issue and determined *Mazzanti*'s conviction would stand even under the “more lenient” *Larrison* test.<sup>100</sup>

## 3. The Fifth Circuit

The Fifth Circuit “arguably” follows the same probability standard with evidence of perjury as is employed with any other newly-discovered evidence on a motion made under Rule 33.

In *United States v. Nixon*,<sup>101</sup> Judge Walter Nixon, a federal district court judge in Mississippi, was convicted of two counts of perjury in connection with his role in a drug conspiracy case involving Drew Fairchild, a defendant before Judge Nixon's court, who was facing drug charges.<sup>102</sup> One “important” witness for the government was Drew's father, Wiley Fairchild (“Wiley”), who had previously pled guilty to giving Nixon an illegal gratuity in return for Nixon's help with Drew's drug case.<sup>103</sup> At trial, Wiley testified that Drew's attorney sought him out after Drew's arrest “to put Judge Nixon in an oil and gas investment.”<sup>104</sup> He also testified that prior to the disposition of his son's case, he received a phone call from Judge Nixon and the local prosecutor, who assured him that his son's case would be disposed of, which it later was.<sup>105</sup> Judge Nixon testified he “never” discussed the case with anyone.<sup>106</sup>

Following his conviction, Wiley gave sworn testimony contradicting and recanting his testimony to the chronology of events. He stated that he entered into the gas deal with Judge Nixon *before* his son's arrest and he received the judge's reassuring phone call *after* the disposition of his son's case.<sup>107</sup>

Based on the recantation, *Nixon* moved for a new trial. The Fifth Circuit rejected his motion, stating less than enthusiastically that, in cases involving discovery of perjured testimony, it “arguably” follows the same general standard for cases involving newly-discovered evidence, “rather than the ‘*Larrison* rule’ governing motions for a new trial based specifically on false

testimony.” 108 The court refused to clarify this point because “*Nixon’s* motion founders at an earlier point.” 109 Accordingly, it reasoned the new evidence did not go directly to the *perjury* charges, which were the only counts Judge Nixon was found guilty of, so therefore it was immaterial. 110

## B. Original State Jurisdiction

The threshold question in cases with their original jurisdiction in state courts is whether a defendant may complain of perjured testimony if there was no prosecutorial knowledge of the perjury at the trial. The minority view is that it is a habeas corpus violation to allow a conviction to remain intact if it rests on perjured testimony, with the Second Circuit blazing a new trail on this issue. In addition, the standards employed by federal courts when examining cases on a habeas motion differ than those standards used on a Rule 33 motion. 111

### 1. The Second Circuit

The Second Circuit directly addressed the perjured testimony issue in a habeas proceeding in *Sanders v. Sullivan*. 112 The facts of *Sanders* are relatively straightforward. On October 18, 1980, Perez, an admitted drug dealer, was approached by two men as he stood near the door of his Manhattan apartment. 113 Perez would later testify that the two men, *Sanders* and Sabir, while armed with handguns, robbed him. 114

Hearing a commotion in the hallway, Perez’s common-law wife, Semiday, opened the apartment door and observed Perez being robbed. 115 According to the trial testimony of both Perez and Semiday, Sanders shot at Semiday, but instead accidentally shot his accomplice, Sabir, killing him. 116

Sanders testified in his own defense that he happened to be at the scene to buy drugs and had nothing to do with either the robbery or the shooting. 117 Most importantly, he claimed that it was in fact Semiday who had shot Sabir. 118 Nonetheless, the jury found *Sanders* guilty of, *inter alia*, manslaughter in the second degree and robbery in the first degree. 119

Two years after his conviction, while serving his sentence, Sanders fortuitously met Perez again. 120 During the meeting, Perez acknowledged that it was Semiday who had shot Sabir, indicating that he perjured himself in an effort to protect Semiday, who had since died. 121

Armed with Perez’s recantation of his trial testimony Sanders proceeded with a *coram nobis* motion 122 in New York State Supreme Court alleging that the prosecution had knowingly used perjured testimony at the time of his trial. Sanders’ motion was devoid of any factual evidence to support his claim of prosecutorial misconduct, and his motion was denied without a hearing. 123 His leave to appeal was also denied.

*Sanders* then sought a writ of habeas corpus in federal court alleging a due process violation. 124 The judge allowed *Sanders* to conduct a hearing with respect to his claim of prosecutorial use of perjured testimony. 125 Perez was called at the hearing where he again

admitted that he had perjured himself during the trial and conceded that it was Semiday who had shot Sabir. 126 Perez also testified, however, that the trial prosecutor was not aware of the perjury. 127

Citing *Sanders*' failure to show prosecutorial knowledge of the use of perjured testimony, the district court dismissed the petition without ruling on the credibility of Perez's recantation. In doing so, the court granted certification to the Second Circuit on the question of whether due process rights are violated when a conviction rests on perjured testimony, even when there is no prosecutorial complicity or knowledge of the perjury.

Judge Kaufman, writing for the panel, acknowledged that there had to be some state action for a due process violation to occur and that the rule "in many jurisdictions" with respect to this area is that a due process violation requires a prosecutorial involvement; *i.e.*, state action in the perjury. 128 The typical prosecutorial involvement would be knowing use of the perjured testimony. The court rejected the argument that the required mandatory state action component can be fulfilled only by a showing of "prosecutorial involvement," and it said such a requirement "elevates form over substance." 129 Subsequently, the court opined that the state action component necessary for a due process violation is more than adequately fulfilled by the state's *failure* to disturb a conviction after an eyewitness credibly recants *material* testimony which was used to obtain the conviction, or fails to act to free "an innocent person [who] remains incarcerated on the basis of lies." 130 According to *Sanders*, a Constitutional error occurs when a "credible recantation of material testimony" would likely change the outcome and the state leaves the conviction in place. 131 In effect, in order to satisfy due process requirements, the state action is inaction. The Second Circuit is decidedly in the minority on this question. 132

Having found that the state's failure to act fulfilled the state action requirement for a due process violation, the Second Circuit turned its attention to the standard to apply in determining if a remand was required. In doing so, the Second Circuit reexamined the standard used under ordinary Rule 33 applications; *i.e.*, "the new evidence [must] be so material that it would 'probably' cause a result of acquittal." 133 The court then acknowledged that in cases alleging the use of perjured testimony, it had, in past cases, used the *Larrison* test (if the court determined that new evidence might alter the verdict a new trial would be warranted). 134

The Second Circuit concluded that the standard required under these circumstances was "(1) the recanted testimony be false and material, (2) the jury probably would have acquitted the defendant, and (3) the movant [must] be surprised by the false testimony or be unaware of its falsity until after the trial, and be unable to discover it with due diligence." 135 The court cautioned that perjured testimony, which will trigger a due process violation, must be "extraordinary" in nature. 136 "It must leave the court with the firm belief that but for the perjured testimony, the defendant would likely not been convicted." 137 Thus, the Second Circuit standard in a habeas case is no different than the *Stofsky* rule used for Rule 33. 138

The Second Circuit remanded the case to Judge Motley for further proceedings. Judge Motley found Perez's recantation credible and held that, without his perjured testimony, Sanders would most likely not have been convicted. 139 As Judge Motley phrased the issue, it was a question of whether "the jury *probably would have* acquitted the defendant had the jury known

that Perez perjured himself” or, put another way, “whether or not, in the absence of Perez’s perjured testimony concerning such a material issue of fact, the jury’s perception *could have* been altered to such an extent that it would probably have discounted Perez’s testimony altogether and acquitted petitioner.” 140 Answering both questions in the affirmative, Judge Motley granted the writ of habeas corpus on both the manslaughter and robbery counts. 141 On appeal, however, the Second Circuit reversed in part, and it held that the recantation and perjured testimony related only to the manslaughter charge and had no effect on the robbery charge. 142 The Second Circuit decision evidences how perjury at trial need not result in a reversal of convictions on counts, which the perjured testimony did not address. 143

## 2. The Seventh Circuit

In the Seventh Circuit Court of Appeals, the habeas rules do not come into play unless there was knowledge of the perjury by the prosecution. 144 In *United States v. Walker*, 145 the defendant was convicted in a trial at which one of the state’s rebuttal witnesses was later shown to have given demonstrably false testimony. 146 There was no allegation that the prosecution was aware of the falsity at the time the testimony was given. The defendant brought a habeas proceeding in federal court to obtain relief from the conviction. 147 The defendant principally relied on *Jones v. Kentucky* 148 to support his petition that a state’s unintentional use of perjured testimony raised a federal question sufficient to warrant a writ of habeas corpus. 149 The *Walker* court instead ruled: “The introduction of perjured testimony without more does not violate the constitutional rights of the accused. It is the knowing and intentional use of such testimony by the prosecuting authorities that is a denial of due process of law.” 150 This rule has been repeatedly reaffirmed by the Seventh Circuit. 151

## 3. The Fifth Circuit

The Fifth Circuit Court of Appeals addressed the issue of perjured testimony on a habeas corpus proceeding in *Smith v. Black* 152 and reached the opposite conclusion of *Sanders*. The facts of *Smith* are worthy of thorough review. 153 Early one morning in 1981, a Mississippi police officer stopped at a closed convenience store to use the public telephone located in the store’s parking lot. 154 While there, he was approached by two men, Thomas and Wells, who explained that a few moments earlier, while driving past the store, they observed a black man forcing a white woman into a red Ford Pinto. 155 Searching the area, the officer observed evidence of a struggle strewn about the parking lot, including a broken necklace, eyeglasses, and a woman’s sneaker. 156 The initial investigation revealed that the woman involved in the incident was a store employee who was scheduled to open the store that morning. 157 Less than one-half hour later, the officer observed a black man in a red Pinto approach the store parking lot. 158 When the man observed the police at the scene, he made a U-turn and sped in the opposite direction. 159 The Pinto was quickly stopped and as the police approached, he was observed trying to conceal a woman’s sneaker, identical to the one found earlier in the parking lot. 160 At that time, *Smith* was placed under arrest. 161

Within the hour, the investigation led to the *Smith*’s home. 162 Concerned about the safety of the victim, the police entered the home without a warrant and found the victim’s purse and sweater in *Smith*’s bedroom. 163 The police also found mud and blood on a pair of *Smith*’s

pants and shoes. 164 They also found mud and leaves in *Smith's* kitchen, which formed a “drag trail” leading into *Smith's* back yard to a drainage ditch, where the victim was found partially covered by sticks and mud. 165

Both Thomas and Wells indicated at the post-arrest line-up that they were unable to identify the man that they saw forcing the victim in the Pinto. 166 Additionally, in the pretrial interviews with defense counsel and *Smith's* family, both stated that they were unable to identify *Smith*. 167 In spite of these facts, both men identified *Smith* at trial as the man they saw in the parking lot. 168 Upon cross-examination, Thomas stated that at the line-up he was able to identify *Smith*, but purposely failed to do so in the hopes that he would not be called as a witness at trial. 169 Wells claimed that his recollection was refreshed that day prior to trial when he was shown a photo of *Smith*. 170 Despite the recanted testimony, *Smith* was convicted of capital murder.

Following *Smith's* conviction, Thomas and Wells were interviewed again by *Smith's* lawyer. 171 During the interviews, and in subsequent affidavits, the two offered a version which substantially contradicted their trial testimony insofar as it concerned their identification of *Smith*. 172 The Mississippi Supreme Court conducted a separate hearing on the issue of the recantations of Thomas and Wells and concluded that the two had perjured themselves, but affirmed the conviction. 173

On habeas review, the district court found the recantations did not rise to the level of perjury, but pointed out that the issue was irrelevant absent a finding of the prosecutor's knowing use of the perjured testimony. 174 From the denial of defendant's petition, the defendant appealed to the Fifth Circuit. 175

Relying on prior rulings of the court, the Fifth Circuit steadfastly adhered to the prosecutorial knowledge requirement. In its decision, the panel examined both *Agurs* and *Sanders*. The Court found its decision more in harmony with the *Agurs* decision. However, it distinguished *Agurs* on the grounds that it stood for the proposition that due process violations *may* occur when a prosecutor negligently uses perjured testimony to obtain a conviction; whereas, this court ultimately relied on the settled rule that knowing use “is required,” and therefore the Supreme Court's language concerning negligent use of perjury in *Agurs* was mere dictum. 176 The court paid little attention to the *Sanders* decision, which it described as such: “At its core, *Sanders* disputes the necessity of demonstrating prosecutorial involvement in or knowledge of the perjured testimony.” 177 It then dismissed the rationale used by the *Sanders* court, and it stated that the prosecutorial knowledge requirement was more consistent with the view of the Supreme Court as expressed in *Agurs*. 178

#### IV. THERE SHOULD BE ONE TEST FOR PERJURY CASES, REGARDLESS OF THE PROCEDURAL POSTURE

Because “all perjured relevant testimony is at war with justice,” 179 there seems to be little reason to have different standards for granting new trials in habeas proceedings and Rule 33 motions. In fact, one court has already taken this approach. In *United States v. Ortega*, 180 in the context of a Rule 33 motion, the district court applied the probability test announced in

*Sanders* (which is a habeas case) with no discussion as to whether the rule announced in habeas proceedings should be applied on a Rule 33 motion. 181 This is not surprising, given that the Second Circuit has developed the same rules in each type of case, even though it never explicitly merged the analyses. The only issue before the *Ortega* court, in its view, was what test to apply when a conviction is alleged to rest on perjured testimony of which the prosecution was unaware at the time of the trial. 182 Thus framed, the *Ortega* court turned to *Sanders* as the most current law of the circuit. 183

#### A. Perjury Concerning a Material Element of the Crime

Any trial in which perjury concerned a material aspect of the crime charged, regardless of whether it occurred in state or federal court, has denied a defendant the right to a fair trial. We suggest the proper test is the “might” test when the perjured testimony concerns a material aspect of the crime and is not on a collateral matter, such as impeachment. 184 For collateral or impeachment testimony, the proper test is the stricter “reasonable probability” standard.

In the context of a Brady violation, the Supreme Court recently explained how the “reasonable probability” test is to be applied. In *Kyles v. Whitley*, 185 the Court explained the test was “not whether the defendant would more likely than not have received a different verdict with the [undisclosed exculpatory] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” 186 Put another way, the question is whether the “favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” 187

More recently, the Court explained its holding in *Kyles* that “the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury’s conclusions.” 188 In *Strickler*, the Court affirmed the conviction and held that the “record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if [the relevant testimony] had been severely impeached.” 189 Harmonizing the two cases, the test seems to be not simply whether there is some evidence remaining which could support a conviction, but whether there is “strong support” for the conviction absent the Constitutional violation. In *Kyles and Strickler*, a fair trial is thus defined as one in which the truth-seeking function of the court prevails, and the truly guilty are convicted. 190 The fairness, or lack thereof, of the introduction of perjured testimony or failure to disclose exculpatory evidence, is of little or no concern.

Despite the current Supreme Court’s focus on the truth-seeking function at the expense of procedural fairness, there is support for the notion that the “might” test should be applied to cases where material testimony has been fabricated such was the case in *Napue v. Illinois*. 191 *Napue* involved the prosecutor’s knowledge of the perjured testimony and his failure to correct it. 192 The Court found the perjured testimony, and the prosecutor’s inaction to rectify the false testimony, turned a fair trial into a tainted one. 193 This taint presumably exists even if the prosecutor is unaware of the perjury.

The rule is also consonant with the Supreme Court’s decision in *United States v. Gaudin*.

194 In *Gaudin*, the Court stated:

The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without “due process of law”; and the Sixth, that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. 195

If the perjury at issue concerns a material element of the crime charged, a fair and impartial jury has not made a proper determination of the guilt of the defendant. Under the reasoning of *Gaudin*, if the perjury might have changed the verdict concerning an element of the crime, 196 the case should be retried and the jury given the opportunity to make a determination as to whether there is sufficient evidence on every element to convict the defendant without the perjured testimony. One court, when faced with this scenario, found that the perjured testimony, even though it concerned a material element of the crime, was merely cumulative of other testimony, and it affirmed the conviction. 197 In such circumstances, the appellate court would appear to be usurping the jury’s function.

#### B. Perjury Concerning Non-Material Elements of the Crime

When the perjured testimony does not concern a material element of the crime charged, but rather relates to either a collateral fact or the witness’ credibility, a stronger standard for reversal should apply. In such circumstances, the *Stofsky* test in the Second Circuit - whether the jury *probably* would have decided differently had it known of the perjury - should apply.

This was precisely the approach taken in *Ortega*. In *Ortega*, a government witness lied at trial concerning his recent drug use. 198 The witness’ drug use was not relevant to the crime charged, but related solely to the witness’ credibility. 199 The *Ortega* court found such perjury was merely cumulative, as the witness’ credibility was already in serious doubt. 200 Under such circumstances, a higher standard is warranted, because if the perjury concerns a collateral issue, presumably the jury found there is otherwise sufficient evidence to convict the defendant on all elements of the crime regardless of the perjured testimony. 201 On the other hand, in *Smith* and *Sanders*, the perjury concerned eyewitness testimony to the crime, warranting use of the more lenient “might” standard. 202

### V. CONCLUSION

If an adverse witness commits perjury at a criminal trial, the defendant’s right to a fair trial has been violated. Differences in the severity of the violation justify differences in the standard used to grant a new trial. When a supposed eyewitness lies about the defendant’s participation in the crime, the abject unfairness warrants a lesser standard of review than when an eyewitness lies about an episode from his personal history, which would merely serve to impeach his credibility.

While it seems beyond argument that a criminal trial is not fair if false testimony was part

of the evidence that led to a conviction, it is unclear what standard courts should use in determining whether a new trial is warranted and most federal courts refuse to find jurisdiction over such a case if the trial was in state court. We believe that the *Sanders* approach to the latter issue is the best, with inaction by a federal court to vacate a conviction which rests on false testimony constituting state action.

FOOTNOTES:

n1. FED. R. CRIM. P. 33. Federal Rules of Criminal Procedure 33 states:

On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may - on defendant's motion for new trial - vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other ground may be made only within 7 days after the verdict finding of guilty or within such further time as the court may fix during the 7-day period.

Id.

n2. *Id.*

n3. *See, e.g., United States v. Stofsky*, 527 F.2d 237 (2d Cir. 1975) (applying probability standard), stay denied by *U.S. v. Hoff*, 425 U.S. 902, and *cert. denied*, 429 U.S. 819 (1976); *see also Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928) (applying "might" test).

n4. Procedurally, a federal proceeding involving perjured testimony can arise in one of two ways: (1) the defendant can have been convicted in a state court proceeding, in which instance the case is a habeas corpus proceeding based on a denial of due process under the Constitution, *see* 28 U.S.C. 2254, or (2) the conviction could have been in a federal trial in which case the defendant moves for a new trial under Fed. R. Crim. P. 33. The procedural distinction is significant, as two sets of rules have arisen based on where the trial took place.

n5. John Rawls, *A Theory Of Justice* 85 (1971).

n6. *Id.*; *see also United States v. Leon*, 468 U.S. 897, 900-01 (recognizing general goal of "establishing procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth'") (quoting *Alderman v. United States*, 394 U.S. 165, 175 (1969)).

n7. Rawls, *supra* note 5, at 86.

n8. The Federal Rules of Evidence and Federal Rules of Criminal Procedure, for example.

n9. A person's Constitutional rights include, for instance, the Sixth Amendment right to a jury trial, the Eight Amendment prohibition against cruel and unusual punishment, and the Fifth Amendment right to due process of law.

n10. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (Douglas, J.); *see also In re Michael*, 326 U.S. 224, 227 (1945) (acknowledges procedural safeguards of Bill of Rights but stating "sole ultimate objective of a trial" is truth).

n11. *See Mapp v. Ohio*, 367 U.S. 643, 655-60 (1962). As then-Judge Cardozo once put it "The criminal is to go free because the constable has blundered." *New York v. Defore*, 150 N.E. 585, 587 (1926).

n12. 317 U.S. 213 (1942).

n13. *Id.* at 216.

n14. *See id.*

n15. *United States v. Wolf*, 645 F.2d 665, 668 (8th Cir. 1981) (internal quotations and citation omitted).

n16. 24 F.2d 82 (7th Cir. 1928). Although *Larrison* is the first important federal case, it was preceded by almost eight decades by the state landmark case, *Berry v. State of Georgia*, 10 Ga. 511 (1851), an antebellum case that is still mentioned by modern courts. In *Berry*, a Georgia slave owner allegedly directed two of his slaves to burglarize a neighbor's home. *See id.* at 513. Upon being apprehended, one of the slaves was "whipped for the purpose of forcing him to disclose who were concerned with him in the larceny." *Id.* During the public flogging, the apprehended slave announced that he had committed the crime at the direction of his master, *Berry*. *See id.* at 514. *Berry*, who was in the audience and allegedly outraged by the accusation, pulled a knife and attempted to attack his accuser. *See id.* At *Berry's* trial for conspiracy to commit burglary, the prosecutor's case consisted of the testimony of a disinterested witness who had heard *Berry* make pre-arrest inculpatory statements as well as other testimony regarding the reaction of *Berry* when implicated by his former slave. *See id.* The specific allegation made by the slave was inadmissible because of the law which precluded the introduction of any adverse testimony from a black witness against a white man's interests. *See id.* *Berry* was found guilty. Following his conviction, but prior to appeal, it was revealed that the prosecutor on the case had hired a man to befriend *Berry* in an effort to procure incriminating statements from him. *See id.* at 526. The attempt failed, but was not revealed to the defendant until after his conviction. *Id.* This "newly discovered evidence" was the basis of *Berry's* appeal and request for a new trial. *See id.* at 527. In denying *Berry's* request, the court ruled that the new evidence needed to be "so material that it would probably produce a different verdict" if a new trial were granted. *Id.* (emphasis added). Using that standard, the court denied *Berry's* request, finding the evidence of the prosecutor's conduct inadmissible and irrelevant, stating, "testimony like this would not weigh a feather, even if it were competent." *Id.* at 528.

n17. 24 F.2d at 83. The court noted that the defendants mounted virtually no defense, with no

character witnesses being called and several defendants not testifying on their own behalf. *Id.*

n18. *Id.* at 84.

n19. *Id.* at 84 n.1. The affidavit is reproduced in full in the opinion.

n20. *Id.* at 86 n.2.

n21. *Id.* at 87.

n22. *Id.* (emphasis added).

n23. *See* 24 F.2d at 89.

n24. *See id.* at 88.

n25. 97 F.2d 335 (6th Cir. 1938).

n26. *See id.* at 336.

n27. *See id.*

n28. *See id.*

n29. A prisoner is entitled to a writ of habeas corpus if he is being held under a state court judgment obtained in “violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. 2254.

n30. 97 F.2d at 336.

n31. *See id.*

n32. *See id.* at 337. Jones’ counsel had only three days to prepare for the trial, and would have discovered the perjury had he been given an adequate time to prepare for the trial. *See id.* at 336-37. One ground Jones pressed on his habeas appeal was that he was denied effective counsel. *See id.*

n33. *See infra* notes 111-178 and accompanying text.

n34. 97 F.2d at 336.

n35. *See id.* at 338.

n36. *See Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam); *see also infra* notes 39-42 and accompanying text.

n37. *See* 97 F.2d at 338.

n38. *Id.* (quoting *Hebert v. Louisiana*, 272 U.S. 312 (1926)). The court relied on *Hebert v. Louisiana*, which stated the “due process of law clause in the Fourteenth Amendment . . . does require . . . that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions and not infrequently are designated as ‘law of the land.’” *Id.* at 316-17.

n39. 294 U.S. 103 (1935) (*per curiam*).

n40. *See id.* at 110.

n41. *See id.*

n42. *Id.* at 112. *Mooney’s* petition was denied without prejudice, however, on the grounds that he had failed to make such an application in state court and exhaust his local remedies before filing the petition in the Supreme Court:

We do not find that petitioner has applied to the state court for a writ of habeas corpus upon the grounds stated in his petition here . . . Orderly procedure . . . requires that before this Court is asked to issue a writ of habeas corpus, in the case of a person held under state commitment, recourse should be had to whatever judicial remedy afforded by the state may still remain open.

*Id.* (citations omitted). The Supreme Court continued to apply the *Mooney* rule seven years later in *Pyle v. Kansas*, 317 U.S. 213 (1942), in which it held knowing use of perjured testimony is a “deprivation of rights guaranteed under the Federal Constitution.” *Id.* at 216.

n43. 351 U.S. 277 (1956).

n44. *See id.* at 278.

n45. *See id.* at 286 (Douglas, J., dissenting).

n46. *See id.* at 279. Durley claimed the information upon which his convictions rested charged only two, rather than six, offenses and he had served maximum sentence for two offenses; and charged his imprisonment violated his constitutional rights. *See id.* at 286 (Douglas, J., dissenting). His appeal of the quashing was “dismissed without opinion” by the Supreme Court of Florida. *Id.*

n47. *See id.* at 279-80.

n48. *Id.* at 280. Only counsel for the state argued, and neither Durley nor his counsel were present. *Id.*

n49. *See* 350 U.S. 872 (1955).

n50. *See* 351 U.S. at 280.

n51. *Id.* The state grounds upon which the denial might have been based were *res judicata* and failure to raise the issue on a prior proceeding. *See id.* Under Florida's habeas corpus statute, when a judgment denying a petition for writ of habeas corpus remains in effect, no one shall bring another habeas proceeding except by writ of error or action for false imprisonment. *See* FLA. STAT. ANN. 79.10 (West. Supp. 2000). Alternatively, under case law in Florida, a prisoner cannot raise in subsequent proceeding issues that were raised or could have been raised in a prior proceeding. *See, e.g., Pannier v. Wainwright*, 423 So. 2d 533 (1982). This is now federal law as well. *See* 28 U.S.C. 2244.

n52. 351 U.S. at 284-85.

n53. *See id.* at 289-90 (Douglas, J., dissenting).

n54. *Id.* at 291.

n55. 352 U.S. 1 (1956).

n56. *See id.* at 3 n.2.

n57. *See id.*

n58. *See id.* at 3-4.

n59. *See* 350 U.S. 922 (1955).

n60. *See* 352 U.S. at 4.

n61. *See id.* at 3. The Solicitor General said Mazzei did not necessarily commit perjury (which requires scienter); he said perhaps the false testimony was "caused by a psychiatric condition." *Id.* at 8.

n62. *Id.* at 9.

n63. *Id.*

n64. *Id.* at 10. In addition to Mazzei, other witnesses testified at the trial. *Id.*

n65. *Id.* at 12.

n66. 352 U.S. at 9.

n67. *Id.* at 14.

n68. *See Mooney v. Holohan*, 294 U.S. at 103.

n69. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) (citations omitted).

n70. 373 U.S. 83 (1963).

n71. *Id.* at 87.

n72. *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added) (footnote omitted). Thus articulated, the test seems very close to the *Larrison* standard. Under *Agurs*, if the prosecutor knew or should have known of the perjured testimony, then the disclosure of this fact is required by due process if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

n73. *Id.* at 104. The truth-seeking theme was repeated in *In re Winship*, 397 U.S. 358 (1970), in which the Court stated “the reasonable-doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error . . . .” *Id.* at 363.

n74. 513 U.S. 1067 (1995).

n75. The Court denied the stay and writ without opinion. The denial of the writ seems at odds with the holding in *Herrera v. Collins*, 506 U.S. 390, 398 (1992), in which the Court stated in “the central purpose of any system of criminal justices to convict the guilty and free the innocent.” In *Jacobs*, one person was guilty, one was innocent, and both were in jail.

n76. *See* 513 U.S. at 1067.

n77. *See id.*

n78. *Id.* (Stevens, J., dissenting).

n79. Which is what the prosecution did in *Jacobs*. *See* 31 F.3d 1319 (5th Cir. 1994)..

n80. 527 F.2d 237 (2d Cir. 1975), *cert. denied* 427 U.S. 819 (1976).

n81. *See id.* at 246. n82. *Id.* at 243. In *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991), the Second Circuit consolidated the analysis, saying that if the “prosecution knew or should have known of the perjury, the conviction must be set aside ‘if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.’” *Id.* at 456 (citations omitted). In cases “where the government was unaware of a witness’ perjury, . . . ‘the test is whether there was a significant chance that this added item, developed by skilled counsel . . . could have induced a reasonable doubt in the minds of enough of the jurors to avoid a conviction.’” *Id.* (alteration in original) (quoting *United States v. Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975)).

n83. *See* 527 F.2d at 243.

n84. *Id.* at 245.

n85. *See id.*

n86. *Id.* at 246.

n87. *Id.* Interestingly, the *Stofsky* court could have applied the *Larrison* test and still denied the motion, since the surprise prong would not have been met. *See id.* at 245 (evidence of perjury available to defendants six days before trial ended.) The Tenth Circuit recently rejected the *Larrison* test, opting for “the stricter probability standard.” *United States v. Sinclair*, 109 F.3d 1527, 1532 (10th Cir. 1997). The *Sinclair* court indicated its holding was influenced by the fact that the perjured testimony merely went to impeachment and held out the possibility the *Larrison* test would apply if the government “knowingly, recklessly, or negligently” used perjured testimony. *Id.* The District of Columbia Court of Appeals, faced with a similar choice between the “might” and “probably” tests, refused to decide the issue and instead found that neither test was met. *See United States v. Mangieri*, 694 F.2d 1270, 1286 (D.C. Cir. 1982).

n88. 860 F.2d 546 (2d Cir. 1988).

n89. *See id.* at 547.

n90. *See id.* at 550.

n91. *See id.* at 551.

n92. *Id.*

n93. *Id.* (internal quotations omitted) (quoting *Stofsky*, 527 F.2d at 246). The First Circuit, in a recent opinion, discussed *Larrison*, *Stofsky*, and *Agurs* at length, ultimately rejecting *Larrison* and settling on the “reasonable likelihood” standard. *See United States v. Huddleston*, 194 F.3d 214 (1st Cir. 1999). In *Huddleston*, the First Circuit found that application of the *Larrison* standard would almost always result in a new trial. Instead, it applied *Agurs*’ “reasonable likelihood” test. *See id.* at 220. Accordingly, the court held that a conviction should stand if a “defendant grounds [his] motion for a new trial . . . on a claim that he has newly discovered perjury on the part of one or more government witnesses . . . unless the force . . . and content of the corrected testimony are such that an acquittal probably would result upon retrial.” *Id.* at 221.

n94. 925 F.2d 1026 (7th Cir. 1991).

n95. *Id.* at 1029. The Seventh Circuit had previously followed a truncated version of its own *Larrison* test, which required that the court be reasonably convinced the testimony is material and false and the jury might have reached a different conclusion had the truth been known. *See United States v. Jarrett*, 705 F.2d 198, 206 (7th Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984). The *Jarrett* court did not consider the surprise prong of the *Larrison* test in its analysis. Indeed, commentators have noted that the third prong of the *Larrison* test adds little to the inquiry. *See Daniel Wolf, I Cannot Tell a Lie: The Standard for a New Trial in False Testimony Cases*, 83 Mich L. Rev. 1925, 1928 n.11 (1985).

n96. *See id.* at 1027.

n97. *See id.* at 1028.

n98. *See id.*

n99. *Id.* at 1029 (emphasis added) (internal quotations omitted) (quoting *United States v. Oliver*, 683 F.2d 224, 228 (7th Cir. 1982)).

n100. 925 F.2d at 1030.

n101. 881 F.2d 1305, 1311 (5th Cir. 1989).

n102. *See id.* at 1307.

n103. *See id.*

n104. *Id.*

n105. *See id.* at 1311.

n106. *See* 881 F.2d at 1307.

n107. *See id.*

n108. *Id.* at 1311.

n109. *Id.* at 1312.

n110. *Id.*

n111. The difference may be explained by the different procedural posture; that is, post-trial motion versus Constitutional attack. “Federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution - not to correct errors of fact.” *Herrera v. Collins*, 506 U.S. 390, 400 (1992). A post-trial Rule 33 motion, however, can correct errors of fact.

n112. 863 F.2d 218 (2d Cir. 1988), *rev’d in part*, 900 F.2d 601 (2d Cir. 1990).

n113. *See id.* at 219.

n114. *See id.*

n115. *See id.*

n116. *See id.*

n117. *See id.*

n118. *See* 863 F.2d at 219.

n119. *See id.* “He was sentenced to two five-to-fifteen year concurrent terms.” *Id.*

n120. *See id.* at 220.

n121. *See id.*

n122. A *coram nobis* motion is a post-verdict application before the trial court to vacate a judgment. Grounds for such a motion include “material evidence adduced at trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false . . . .” N.Y. Crim. Pro. Law 440.10(1)(c) (McKinney 2000). In federal court, a writ of error *coram nobis* may be issued pursuant to the All Writs Act. *See United States v. Mandanici*, 205 F.3d 519, 521 n.1 (2d Cir. 2000).

n123. 863 F.2d at 220.

n124. *See id.*

n125. *See id.*

n126. *See id.*

n127. *See id.*

n128. 863 F.2d at 222 (citing *United States ex rel. Burnett v. Illinois*, 619 F.2d 668, 674 (7th Cir. 1980), *cert. denied*, 449 U.S. 880 (1980) and *Burks v. Egeler*, 512 F.2d 221, 229 (6th Cir. 1975), *cert. denied*, 423 U.S. 937 (1975)).

n129. *Id.* at 224.

n130. *Id.* at 225 (emphasis added); *see also Buitrago v. Scully*, 705 F. Supp. 952, 957 (S.D.N.Y. 1989) (“even absent a showing of prosecutorial misconduct, a conviction obtained in part by perjured testimony may violate due process”).

n131. *Id.* at 225.

n132. Only the Eighth Circuit agrees. *See Lewis v. Erickson*, 946 F.2d 1361, 1362 (8th Cir. 1991) (finding jurisdiction over habeas corpus proceeding based on recanted testimony).

n133. 863 F.2d at 225. This court adhered to the same “standard enunciated over a century ago in *Berry v. State of Georgia*, 10 Ga. 511 (1851).” *Id.*

n134. *See id.*

n135. *Id.* at 226 (citation omitted).

n136. *See id.* at 225.

n137. *Id.* at 226.

n138. This has been noted by other circuit courts. *See Shore v. Warden, Statesville Prison*, 942 F.2d 1117, 1122 (7th Cir. 1991) (noting standard is the same), *cert. denied*, 504 U.S. 922 (1992).

n139. 1989 U.S. Dist. LEXIS 9534, at 19 (S.D.N.Y. Aug. 14, 1989).

n140. *Id.* at 13 (emphasis added).

n141. *Id.* at 19. It is precisely such concerns that led the *Stofsky* court to reject the “might” test.

n142. *See* 900 F.2d 601, 607-08 (2d Cir. 1990).

n143. A similar result was reached in *United States v. Massac*, 867 F.2d 174 (3d Cir. 1989), where the Third Circuit, applying the *Larrison* test without holding it to be the law of the circuit, held that perjured testimony, not connected to the subject matter of the counts charged against a defendant, will not result in a new trial under Rule 33. *See id.* at 178; *see also United States v. Jackson*, 579 F.2d 553, 557-58 (10th Cir.) (holding on a Rule 33 motion, a credible recantation relating to identification of one defendant but not others will not result in a new trial for the other defendants), *cert. denied sub nom, Allen v. United States*, 439 U.S. 981 (1978). The *Massac* court also upheld the conviction on the count to which the perjury arguably did relate, finding it so immaterial that the jury would have convicted without it. 867 F.2d at 178-79. Recently, a district court in the Third Circuit, applying *Massac*, reversed a conviction based on newly-discovered evidence of perjured testimony. *See United States v. McLaughlin*, 89 F. Supp. 2d 617, 628 (E.D. Pa. March 15, 2000).

n144. The Eleventh Circuit agrees. *See Jacobs v. Singletary*, 952 F.2d 1282, 1287 n.3 (11th Cir. 1992) (finding only knowing use of perjured testimony violates due process and declining to follow *Sanders*).

n145. 535 F.2d 383 (7th Cir. 1976) (per curiam). The Seventh Circuit recently reiterated this rule. *See Schaff v. Snyder*, 190 F.3d 513, 530 (7th Cir. 1999).

n146. The witness testified the defendant never worked for him, when in fact the defendant later produced a pay stub and W-2 Form. 535 F.2d at 385. The testimony was relevant to the defendant’s alibi that he was issued a pistol from the employer which would have made it unnecessary to carry a bulky, sawed-off shotgun. *See id.*

n147. *See id.* at 384.

n148. 97 F.2d at 335. *See supra* notes 25-38 and accompanying text.

n149. *See* 535 F.2d at 384.

n150. *Id.* at 387 (citation omitted).

n151. *See, e.g., Reddick v. Haws*, 120 F.3d 714, 718 (7th Cir. 1997); *Del Vecchio v. Illinois Dep't of Corr.*, 31 F.3d 1363, 1387 (7th Cir. 1994) (en banc), *cert. denied*, 514 U.S. 1037 (1995). In *Del Vecchio*, the Seventh Circuit stated that the defendant was required to show the prosecutors “knowingly and intelligently introduced the allegedly false testimony at trial.” *Id.* at 1387.

n152. 904 F.2d 950 (5th Cir. 1990), *vacated by* 503 U.S. 930 (1992), *remanded to* 970 F.2d 1383 (1992), *cert. denied* sub nom., *Smith v. Lucas*, 513 U.S. 851(1994).

n153. *Smith* has been the product of twenty-three post-verdict judicial reviews. The most comprehensive and concise recitation of the facts of the case can be found in *Smith v. Thigpen*, 689 F. Supp. 644 (S.D. Miss. 1988). It is from *Thigpen* that the facts below are derived.

n154. 689 F. Supp. at 646.

n155. *See id.*

n156. *See id.* at 647.

n157. *See id.* at 646.

n158. *See id.*

n159. *See id.*

n160. *See* 689 F. Supp. at 646.

n161. *See id.*

n162. *See id.* at 647.

n163. *See id.*

n164. *See id.*

n165. *Id.*

n166. *See* 689 F. Supp. at 654.

n167. *See id.* at 654-55.

n168. *See id.* at 654.

n169. *See id.* at 653.

n170. *See id.* at 655.

n171. *See id.*

n172. *See* 689 F. Supp. at 655.

n173. *See Smith v. State*, 492 So. 2d 260, 264 (Miss. 1986). The court reasoned that the “criminal judicial system, which relies so heavily on witness testimony, could not function if final judgments were constantly vacated on the basis of repudiation of testimony.” *Id.* As such, the court ruled that “petitioner [would be] entitled to a new trial only if he *clearly* proves his allegations concerning perjured testimony” and only if the newly-discovered evidence will “*probably* change the result if a new trial is granted.” *Id.* at 263-64 (emphasis added). The court further held that in capital cases the standard becomes whether there is a “reasonable probability that a different result will be reached if a new trial is had without the perjured testimony.” *Id.* at 265. The court affirmed the conviction even using this lesser standard, citing “overwhelming” circumstantial evidence against *Smith*: “A close look at the circumstantial evidence presented at trial shows beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence, that *Smith* did murder Shirley Roberts.” *Id.* at 266.

n174. *See Thigpen*, 689 F. Supp. at 657.

n175. *See Smith v. Black*, 904 F.2d 950 (5th Cir. 1990).

n176. *Id.* at 961.

n177. *Id.* at 962 (citation omitted). .

n178. *See id.*

n179. *In re Michael*, 326 U.S. 224, 227 (1945).

n180. 842 F. Supp. 48 (D. Conn. 1994), *aff'd*, 43 F.3d 1459 (2d Cir. 1994), *cert. denied*, 514 U.S. 1089 (1995).

n181. *See id.* at 50; *see also Shore v. Warden, Statesville Prison*, 942 F.2d 1117, 1122 (7th Cir. 1991) (noting standard in Second Circuit is the same for habeas hearings and Rule 33 motions).

n182. *See* 842 F. Supp. at 51. The same approach was taken in *United States v. Silvers*, 888 F. Supp. 1289, 1301 (D. Md. 1995), *vacated by* 90 F.3d 95 (4th Cir. 1996), in which the court, on a habeas motion, debated whether the rules announced in *Larrison and Stofsky* (which are Rule 33 cases) applied to unintentional use of perjured testimony.

n183. The court upheld the conviction, finding that the perjury, which was beyond doubt, related only to the witness’ credibility, who was already discredited, making the new evidence

merely cumulative. *See* 842 F. Supp. at 51. Furthermore, there was sufficient evidence to convict even absent the witness' testimony. *See id.*

n184. This is consistent with the approach taken by the Supreme Court in *Mesarosh v. United States*, 352 U.S. at 1. *See supra* notes 55-67 and accompanying text.

n185. 514 U.S. 419 (1995).

n186. *Id.* at 434.

n187. *Id.* at 435.

n188. *Strickler v. Greene*, 527 U.S. 263, 290 (1999).

n189. *Id.* at 294. n190. *See Kyles*, 514 U.S. at 440 (the criminal trial is “the chosen forum for ascertaining the truth about criminal accusations”).

n191. 360 U.S. 264 (1959).

n192. *See id.* at 265.

n193. *See id.* at 270; *see also United States v. Bagley*, 473 U.S. 667, 680 (1985) (“the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt”).

n194. 515 U.S. 506 (1995).

n195. *Id.* at 509-10 (alteration in original) (citation omitted). This harks back to a theme sounded in *Mesarosh*, where the Court held that only the original trier of fact can determine whether there is sufficient evidence to convict absent the tainted testimony. 352 U.S. at 1, 12. One court, however, has upheld a conviction where the perjured testimony concerned a material element of the crime, because “there was an abundance of independent evidence” about those elements. *Lamberti v. United States*, 22 F. Supp. 2d 60, 84 (S.D.N.Y. 1998).

n196. Rather than, *e.g.*, a witness' credibility, such as was the case in *Ortega*. *See supra* note 183; *see also United States v. Gabriel*, 597 F.2d 95, 99 (7th Cir. 1978) (on a Rule 33 motion, a recantation which touches only on witness' credibility is subject to “probably” test, not the “might” test). *But see Wolf, supra* note 95, at 1932 (arguing that even perjury which relates to a witness' credibility should result in a new trial): *see also Napue v. Illinois*, 360 U.S. at 269 (“jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence”); *Sanders v. Sullivan*, 863 F.2d 218 (2d Cir. 1988), *rev'd in part*, 900 F.2d 601 (2d Cir. 1990) (perjury concerning a material aspect of the crime might affect jury's perception of testimony concerning other counts).

n197. *See Malone v. Steiner*, 94 F.3d 652 (9th Cir. 1996) (unpublished); *see also United States v. McVicar*, No. 97 C 5704, 1999 WL 261697, at 11 (N.D. Ill. Apr. 22, 1999) (district court

decided perjured eyewitness testimony placing defendants at scene of crime was “merely cumulative”).

n198. See *United States v. Ortega*, 842 F. Supp. 48 (D. Conn. 1994), *aff’d*, 43 F.3d 1459 (2d Cir. 1994), *cert. denied*, 514 U.S. 1089 (1995).

n199. 842 F. Supp. at 51; see also *United States v. Sabbagh*, 888 F. Supp. 714, 720 n.17 (D. Md. 1993) (“evidence that a witness has committed perjury on a collateral issue only serves on retrial to impeach the credibility of that witness”).

n200. See *id.*

n201. In fact, one judge, in a dissent, has already drawn such a distinction. In *United States v. Krasny*, Judge Ely, in a dissenting opinion, stated “newly discovered evidence of trial perjury by a material government witness should not be treated in the same manner as other post-conviction revelations.” 607 F.2d 840, 846 (9th Cir. 1979) (Ely, J., dissenting), *cert. denied*, 445 U.S. 942 (1980) (citation omitted). Indeed, Judge Ely based his dissent on his reading of *Larrison and Mesarosh*, which would have led him to apply a more lenient standard when a principal eyewitness recants material parts of her testimony. See *id.* at 847 (Ely, J., dissenting); see also *United States v. Wallach*, 733 F. Supp. 769, 771 (S.D.N.Y. 1990) (“where the subsequently discovered perjury concerning the witness’ credibility alone . . . then it is unlikely that the jury would have acquitted on this basis”).

n202. See *Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (stating that in the context of *Brady* violation, “effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others”).