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

By Brian Murray and Joseph C. Rosa*

The ultimate goal of courts of criminal justice in America is not only to ensure that the truth is ultimately served but to ensure 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 the knowing use of false testimony by a prosecutor is a violation 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 circuits are split on what standard to be applied in determining whether they will disturb the conviction. Furthermore, the circuits do not agree on whether they have jurisdiction on 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 prosecute 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

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federal trial and the defendant moves for a new trial pursuant to Federal Rule of Criminal Procedure 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." In cases where courts were satisfied that there was perjured testimony used unknowingly by prosecutors, the federal courts 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.[2] 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, and the federal reviewing court should apply a uniform standard in such cases whether they are derived from a habeas motion when the defendant was tried in state court or Rule 33 motion when the defendant was tried in federal court.[3]

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[1] Rule 33 states: "On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so required. 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 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."

[2] *See, e.g.*, *United States v. Stofsky*, 527 F.2d 237 (2d Cir. 1975) (applying probability standard), *cert. denied*, 429 U.S. 819 (1976); *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928) (applying "might" test).

[3] Procedurally, a federal proceeding involving perjured testimony can arise in one of two ways. 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, or the conviction could have been in a federal trial in which case the defendant moves for a new trial under Federal Rule of Criminal Procedure 33. The procedural distinction is significant, as two sets of rules have arisen based on where the trial took place.

A related question, also never 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, if the state keeps a defendant in jail after the perjury comes to light. Again the circuits disagree. We believe federal appellate courts are well within their constitutional mandate by interfering with state court convictions in such circumstances.

1. CRIMINAL TRIALS AND FAIRNESS

A criminal trial is an example of "imperfect procedural justice." "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."[4] The characteristic mark of imperfect procedural justice is that while there is an independent criterion for the correct outcome, there is no feasible procedure which is sure to lead to it.[5] This search for the truth within defined boundaries and procedures[6] is tempered by the Constitutional rights of the defendant.[7] "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."[8] 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.[9]

In *Pyle v. Kansas*,[10] the Supreme Court ruled that deliberate suppression by state authorities of evidence favorable to the defendant violated due process.[11] Intentional

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[4] JOHN RAWLS, A THEORY OF JUSTICE 85 (1971); *see 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).

[5] RAWLS, A THEORY OF JUSTICE at 86.

[6] Rules of evidence, procedure, etc.

[7] Right to a jury of your peers, due process, no cruel and unusual punishment, etc.

[8] *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).

[9] *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,* 242 N.Y. 13, 21 (1926).

[10] 317 U.S. 213 (1942).

introduction of false testimony at a trial by a prosecutor is a clear violation of due process, regardless of whether the defendant was tried in state or federal court.[12] "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."[13] The line becomes blurred when there is no allegation the prosecution suborned the perjury, and the standard differs in the circuits if there was no contemporaneous knowledge of the perjury by the government.

2. EARLY PRECEDENT CONCERNING PERJURY

Two cases decided before the enactment of Rule 33 of the Federal Rules of Criminal Procedure 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*,[14] which had its jurisdiction over an appeal from a federal trial. Larrison and his accomplices were convicted in a federal trial 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.[15] After a hung jury on the first trial, the defendants were convicted at the re-trial.[16]

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[11] *Id.* at 216.

[12] *See Pyle v. Kansas,* 317 U.S. 213, 216 (1942).

[13] *United States v. Wolf*, 645 F.2d 665, 668 (8th Cir. 1981).

[14] 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, *Berry v. Georgia,* 10 Ga. 311 (1851), an antebellum case which is still mentioned by modern courts. In *Berry*, a Georgia slave owner allegedly directed two of his slaves to burglarize a neighbor's home. *Id.* at 313. 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. *Id.* at 314. Berry, who was in the audience and allegedly outraged by the accusation, pulled a knife and attempted to attack his accuser. *Id.* At

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.[17] He later testified that the recantation was false and that the defendants' counsel had paid him to do so.[18]

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

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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. *Id.* The specific allegation made by the slave was inadmissible because of a the law which precluded the introduction of any adverse testimony from a black witness against a white man's interests. *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. *Id.* at 326. 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. *Id.* at 327. 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.* Using that standard, the court denied Berry's request, finding the evidence of the prosecutor's conduct inadmissible and irrelevant, stating, "[t]estimony like this would not weigh a feather, even if it were competent." *Id.* at 328.

[15] 24 F.2d at 83-83. 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.*

[16] *Id.* at 84.

[17] *Id.* at 84 n.1. The affidavit is reproduced in full in the opinion.

[18] *Id.* at 86 n.2.

newly discovered evidence" (the recantation and subsequent recantation of the recantation).[19]

> The court held a new trial should be granted when:
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> (a) the court is reasonably well-satisfied that the testimony given by a material witness is false;
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> (b) without the perjured testimony the jury *might* have reached a different conclusion; and
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> (c) the defendant was surprised by the perjury and either unable to meet it or did not discover the perjury until the trial was over.[20]

Using this test the court upheld the conviction, finding that there could have been no surprise with the same disputed testimony being given at the second trial as at the first. Additionally, and perhaps most importantly, the court stated that even if the original recantation was credible—which they found it wasn't—the conviction would stand because the defendant would have been convicted without the perjured testimony.[21] 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*,[22] the defendant was convicted of murdering his wife in a capital trial in a Kentucky state court. There were no eye witnesses to the shooting, but a six year old girl who testified about having overheard Jones threatening his wife and a "woman of repute" testified to the wife's incriminating dying declaration.[23] Jones's defense was that his wife threatened to kill herself and as he tried to disarm her, the gun

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[19] *Id.* at 87.

[20] *Id.* at 86 n.2.

[21] *Id.* at 88.

[22] 97 F.2d 335 (6th Cir. 1938).

[23] *Id.* at 366.

discharged.[24] 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 his conviction.[25] Having exhausted his local remedies, Jones petitioned the federal district court for a writ of habeas corpus,[26] alleging a due process violation of his federal constitutional rights.

The Attorney General of Kentucky, who cross-examined both witnesses at the habeas hearing, was convinced Jones was convicted with the use of perjured testimony unknown to the prosecution at the time of trial.[27] Without the perjured testimony the jury would have almost definitely acquitted Jones. The record was also clear that the perjury was not known to Jones before trial.[28] 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, but presaging a controversy which continues to haunt federal courts,[29] questioned whether the federal district court could reverse the decision of a state's highest court and certified the question for appeal.[30] The Sixth Circuit answered in the affirmative. Relying heavily on a Supreme Court case

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[24] *Id.*

[25] *Id.* at 336.

[26] 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. 28 U.S.C. § 2254.

[27] *Id.*

[28] *Id.* at 337. Jones's 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. *Id.* at 336-37. One ground Jones pressed on his habeas appeal was that he was denied effective counsel.

[29] *See* notes 89-146 *infra* and accompanying text.

[30] *Id.* at 336.

concerning knowing use of perjured testimony,[31] the court held that a court must condemn equally a conviction based on knowing or unknowing use of perjured testimony.[32] Holding that the judicial process of the state had been vainly invoked and that constitutional right to due process was violated, the court ordered that Jones be released stating "[due process] requirements in safeguarding the liberty of the citizen against deprivation though the action of the state embodies those fundamental conceptions of justice which lies at the base of civil and political institutions."[33]

3. THE SUPREME COURT AND USE OF PERJURED TESTIMONY

The case heavily relied upon by the Sixth Circuit in *Jones*, and the case in which the Supreme Court first visited the issue of a conviction which rested on perjured testimony, is *Mooney v. Holohan.*[34] 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.[35] Mooney alleged the state knowingly used perjured testimony against him and suppressed evidence which would have impeached the perjured testimony.[36] The Supreme Court agreed with Mooney. It held the requirement of the due process "embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions," and a conviction contrived by

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[31] *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam). *See* notes 34-37 accompanying text, *infra*.

[32] *Id.* at 338.

[33] *Id.* The court relied on *Herbert v. Louisiana*, 272 U.S. 312 (1972), which stated "[t]he due process of law clause of 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.

[34] 294 U.S. 103 (1935) (*per curiam*).

[35] *Id.* at 110.

[36] *Id.*

the state knowingly using perjured testimony is "inconsistent with the rudimentary demands of justice."[37]

The issue of perjured testimony arose again in *Durley v. Mayo*,[38] but this time there was no allegation the prosecution was aware of the perjury. Durley was convicted on six counts of cattle rustling. His convictions rested mainly on the testimony of his co-defendants.[39] In 1952, Durley filed a writ of habeas corpus in Florida Circuit Court, which was quashed.[40] In 1955, Durley filed another petition for habeas corpus, claiming his continued detention was an abuse of due process.[41] That petition was argued in the Supreme Court of Florida and was denied without opinion.[42] Durley then petitioned the Supreme Court for a writ of certiorari.

The State of Florida objected to the Supreme Court's jurisdiction over the petition. The state argued that the 1955 denial of the writ of the habeas petition by the

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[37] *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 on the grounds stated in his petition her." "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.* The Court repeated 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 right guaranteed under the Federal Constitution." *Id.* at 216.

[38] 351 U.S. 277 (1956).

[39] *Id.* at 286 (Douglas, J., dissenting).

[40] 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. *Id.* (Douglas, J., dissenting). His appeal of the quashing was denied by the Supreme Court of Florida.

[41] *Id.*

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

Florida Supreme Court *might* have rested on adequate state grounds and therefore there was no federal issue in the case.[43] The majority of the Supreme Court agreed, holding that the Florida Supreme Court's denial of the 1955 petition *might* have rested in either of those state grounds identified by the state, and accordingly, there was no federal issue to establish jurisdiction of the Court.[44] Thus, the petition was dismissed on procedural grounds without the majority addressing the merits of Durley's petition.

Four justices dissented. The dissent, lead by Justice Douglas, interpreted the Florida case law on *res judicata* more liberally than did the majority, reading it 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.[45] The dissent read the Florida Supreme Court's denial to go to the merits (thereby vesting the Court with jurisdiction) rather than being based 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 petitioners' co-defendants were lying when they implicated petitioner, the State now knows that the testimony of the only witness against petitioner is 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."[46] It mattered not to the dissent that the state was not accused of knowingly using the perjured testimony.

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[43] The state grounds upon which the denial might have been based were *res judicata* and failure to raise the issue on a prior proceeding. *Id.* Under Florida State Ann. 79.10, 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. *Id.* 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. *Id.* This is now federal law as well. *See* 28 U.S.C. § 2244.

[44] 351 U.S. at 284-85.

[45] *Id.* at 289-90.

[46] *Id.* at 291.

The issue of perjured testimony arose in an unusual procedural setting in *Mesarosh v. United States*.[47] In *Mesarosh,* the defendants were accused of violating the Smith Act by advocating the overthrow of the United States government. The principal government witness was Mazzei. Mesarosh was convicted in a federal trial, and the conviction was affirmed by a divided Third Circuit sitting *en banc*. A writ of certiorari was granted.

Before the argument was held before the Supreme Court, the Solicitor General filed a motion *sua sponte*, suggesting that Mazzei's testimony and truthfulness had been thrown into question by recent events.[48] The recent events were that Mazzei's previous testimony before Senate Subcommittees and other trials turned out to be completely false, causing the Solicitor General to doubt whether his testimony at Mesarosh's trial was truthful. The Solicitor General asked that the Court remand the case to the district court for full consideration of whether Mazzei's testimony was truthful.[49]

The Court found that Mazzei was "wholly discredited." Noting that subsequent allegations of perjury will not ordinarily support a motion for a new trial if the new evidence is merely cumulative or impeaching, the Court then noted that Mazzei's testimony was that of an eyewitness concerning a material aspect of the crime charged.[50] 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.[51] Stating that "the dignity of the United States

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[47] 352 U.S. 1 (1956).

[48] *Id.* at 4.

[49] 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.

[50] *Id.* at 10. There were other witnesses at the trial. *Id.*

[51] *Id.* at 12.

Government will not permit the conviction of any person on tainted testimony" and "the government of a strong and free nation does not need convictions based upon such [perjured] testimony," the Court reversed Mesarosh's conviction.[52]

While it has never addressed the issue of non-deliberate use of perjured testimony, a line of cases indicate which way the Supreme Court's thinking is evolving on this issue. In 1935, in *Mooney*, knowing use of false testimony was held to be unconstitutional. By 1959, the standard had been relaxed somewhat, in that the prosecution need not solicit the false testimony, but merely allow false testimony to go uncorrected in order to be unconstitutional.[53] In *Brady v. Maryland*,[54] decided in 1963 suppression of material evidence was held to justify a new trial "irrespective of the good faith or bad faith of the prosecution."[55] If the prosecution's scienter is irrelevant for purposes of suppression of evidence, it should be irrelevant for purposes of false testimony, which seems to be a more serious matter.

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 set it aside if there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury."[56] The Court stated this standard applied "not just because [such cases] involve

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[52] *Id.* at 14.

[53] *Napue v. Illinois*, 360 U.S. 264, 269 (1959)

[54] 373 U.S. 83 (1963)

[55] *Id.* at 87.

[56] *United States v. Agurs*, 427 U.S. 97, 103 (1976) (footnote omitted) (emphasis added). 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. *See United States v. Oxman*, 740 F.2d 1298, 1310 (3d Cir. 1984), *cert. granted, judgment vacated sub nom, United States v. Pflaumer*, 473 U.S. 922 (1985).

prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process."[57]

Although in *Agurs* the Supreme Court expressed concern over procedural fairness and the truth, the Supreme Court recently has seemed concerned with neither fairness nor truth. In *Jacob v. Scott,*[58] the Court denied an application for a stay of execution and petition for writ of certiorari when the state no longer believed the defendant commited the crime.[59] The defendant was convicted of murder based largely on his confession. He later recanted the confession. The State of Texas then sought to try another person for the crime (while still proceeding with the execution of the original defendant), claiming the State changed its mind about the facts and that it believed the

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[57] 427 U.S. at 104. The truth-seeking theme was repeated in *In re Winship*, 397 U.S. 358 (1970), in which the Court stated "[t]he reasonable-doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363.

[58] 513 U.S. 1067.

[59] 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 *Jacob*, one person was guilty, one was innocent, and both were in jail.

first defendant's confession was false in many respects.[60] Justice Stevens, dissenting from the denial of stay, stated "it would be fundamentally unfair to execute a person on the basis of a factual determination that the State has formally disavowed."[61]

[60] 513 U.S. at 1067.

[61] *Id*.

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.[62] 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.

4. 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 don't involve negligence or knowledge of the perjury by the prosecution. The

circuits have differing opinions on the standard to be used in reviewing cases which have their original jurisdiction in the state courts and those which are the subject of Rule 33 motions. This article will focus on the Second, Fifth, and Seventh Cirucits, all of which have a well-developed body of case law and very different views.

When the courts hear a Rule 33 motion, most circuits 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 circuits decline to find a jurisdictional basis for review, with only the Second Circuit holding that it is competent to decide whether such state action amounts to a due process violation.

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[62] Which is what the prosecution did in *Jacob*. *See id*. at 711.

A. Original Federal Jurisdiction

The standard for review for Rule 33 motions in most circuits is a "probability" test, such as that used by the Second Circuit, which is most lenient with regard to finding jurisdiction over habeas cases involving perjured testimony, but which has the strictest standard for overturning a conviction based on perjured testimony. On the other end of the spectrum is the Seventh Circuit, which still uses a form of the *Larrison* test on Rule 33 motions.

1. The Second Circuit

One of the most frequently cited cases in the Second Circuit is *United States v. Stofsky*,[63] in which the Second Circuit refused to apply the *Larrison* test on a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33 based on, *inter alia*, the discovery of perjury after conviction. 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 cases where there is no showing of prosecutorial misconduct.[64] The *Stofsky* court rejected the *Larrison* test for cases not involving prosecutorial misconduct with regard to the perjury. The court reasoned that the *Larrison* test, if literally applied, would require reversal even if the perjury was on a minor matter since the jury would be entitled to disregard all of the witness testimony upon finding the witness deliberately proffered false testimony.[65] 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. 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," or, simply put, a new trial

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[63] 527 F.2d 237 (2d Cir. 1975).

[64] *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. In cases where the government was unaware of 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.* at 456.

[65] 527 F.2d at 245.

should be granted if the jury probably would have acquitted in the absence of the false testimony.[66]

An example of the standard set in *Stofsky* can be found in the Second Circuit's decision in *United States v. Gugino*.[67] Gugino and an accomplice were convicted in federal court for using a stolen credit card.[68] 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.[69] 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.[70] The court found the affidavit to be merely cumulative evidence concerning the credibility of Lauricella.[71] Citing *Stofsky,* it ruled that the standard is "whether the jury probably would have altered

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[66] *Id.* at 246. 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 merely impeaching nature of the testimony and held out the possibility the *Larrison* test would apply if the government knowingly, recklessly, or negligently used perjured testimony. The District of Columbia Court of Appeals, when faced with a similar choice between the "might" and "probably" tests, refused to decide the issue, finding instead that neither test was met. *United States v. Mangieri*, 694 F.2d 1270, 1286 (D.C. Cir. 1982); *United States v. Mackin*, 561 F.2d 958, 961 (D.C. Cir.), *cert. denied sub nom, Gibson v. United States*, 434 U.S. 959 (1977); *United States v. Morris*, 781 F. Supp. 428, 434 (E.D. Va. 1991) (stating the appropriate test was an open question in the Fourth Circuit but finding the witness testified truthfully so no decision was necessary), *vacated*, 988 F.2d 1335 (4th Cir. 1993).

[67] 860 F.2d 546 (2d Cir. 1988).

[68] *Id.* at 547.

[69] *Id.* at 550.

[70] *Id.* at 551.

[71] *Id.*

its verdict if it had the opportunity to appraise the impact of the newly discovered evidence,"[72] and that the jury would not have done so.

2. <u>The Seventh Circuit</u>

In *United States v. Mazzanti*[73] the Seventh Circuit stated that in determining whether a new trial ought to be granted on the ground that newly discovered evidence disclosed false trial testimony, "this court has employed the test set forth in *Larrison v. United States.*"[74]

Mazzanti was convicted of conspiring to distribute cocaine after he was arrested following a Drug Enforcement Agency operation.[75] Following his conviction, it was determined that an informant had perjured himself at the time of trial.[76] The perjured testimony implicated two of Mazzanti's co-conspirators but did not specifically concern Mazzanti.[77]

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[72] *Id.* The First Circuit, in a recent opinion, discussed *Larrison, Stofsky*, and *Agurs* at length, ultimately rejecting *Larrison* and settling on the "reasonable likelihood" standard. *United States v. Huddleston*, 194 F.3d 214, 219-20 (1st Cir. 1999). In *Huddleston*, the First Circuit held the *Larrison* standard would almost always result in a new trial, and/that in *Agurs*, the Supreme Court applied the reasonable likelihood test to knowing use of perjured testimony in the context of a *Brady* violation. *Id.* If the test for knowing use of perjured testimony is reasonable likelihood, the court reasoned, the test should not be more lenient for unwitting use.

[73] 925 F.2d 1026 (7th Cir. 1991).

[74] *Id.* at 1029. The Seventh Circuit had previously followed a truncated version of its own *Larrison* test, requiring 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. *United States v. Jarrett*, 705 F.2d 198, 206 (7th Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984). The surprise prong of the *Larrison* test was not used. *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) (noting third prong of *Larrison* test adds little to inquiry).

[75] 925 F.2d at 1027.

[76] *Id.* at 1028.

[77] *Id.*

The prosecution, on appeal, urged that the Seventh Circuit abandon the *Larrison* test and asked that requests for new trials on the basis of false testimony be governed by the same standard used for all other motions for a new trial on the basis of newly discovered evidence, i.e., the newly discovered evidence would *probably* lead to an acquittal in the event of a retrial.[78]

While the court stated the differences between *Larrison* and "[t]he more general formulation" had become "elusive" and may even require "reexamination" in the future, and failed to do so because under the "more lenient" *Larrison* test, Mazzanti's conviction was still affirmed.[79]

3. <u>The Fifth Circuit</u>

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*,[80] Judge Walter Nixon, a federal district court judge in Mississippi was convicted of two counts of perjury in conviction with his role in a drug conspiracy case involving Drew Fairchild. One "important" witness for the government was Wiley Fairchild, Drew's father, who had previously pled guilty to giving Nixon an illegal gratuity in return for Nixon's help with Drew's drug case.[81] 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."[82] 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, assuring

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[78] *Id.* at 1029.

[79] *Id.* at 1028.

[80] 881 F.2d 1305, 1311 (5th Cir. 1989).

[81] *Id.* at 1307.

[82] *Id.*

him that his son's case would be disposed of, which it later was.[83] Judge Nixon testified he never discussed the case with anyone.[84]

Following his conviction, Wiley gave sworn testimony contradicting and recanting his trial 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.[85]

Based on the recantation, Nixon moved for a new trial. The Fifth Circuit rejected his motion, stating less than enthusiastically that in instances such as the Fifth Circuit "arguably" follows the same general standard as they do in all cases involving newly discovered evidence, "rather than the Larrison rule governing motions for a new trial based specifically on false testimony."[86]

The court refused to clarify this point because "Nixon's motion founders at an earlier point."[87] The court reasoned the new evidence did not go directly to the *perjury* counts, which were the only counts on which he was convicted, so therefore it was immaterial.[88]

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[83] *Id.* at 1311.

[84] *Id.*

[85] *Id.* at 1307.

[86] *Id.* at 1311.

[87] *Id.*

[88] *Id.* at 1312.

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 not 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.[89]

1. The Second Circuit

The Second Circuit directly addressed the perjured testimony issue in a habeas proceeding in *Sanders v. Sullivan*.[90] 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.[91] Perez would later testify that the two men, Sanders and Sabir, while armed with handguns, robbed him.[92] Hearing a commotion in the hallway, Perez's common-law wife, Semiday, opened the apartment door and observed Perez being robbed.[93] According to the trial testimony of both Perez and Semiday, Sanders shot at Semiday, but instead accidentally shot his accomplice, Sabir, killing him.[94]

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[89] The difference may be explained by the different procedural posture–post-trial motion versus Constitutional attack. "[F]ederal 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 can correct errors of fact.

[90] 863 F.2d 218 (2d Cir. 1988).

[91] *Id.* at 219.

[92] *Id.*

[93] *Id.*

[94] *Id.*

Sanders testified during the trial in New York State Supreme Court. He claimed that while he was in the hallway and observed the shooting, he was there simply to buy drugs and had nothing to do with either the robbery or shooting.[95] Most importantly, he claimed that it was in fact Semiday who had shot Sabir.[96] Nonetheless, the jury found Sanders guilty of, *inter alia*, manslaughter in the second degree and robbery in the first degree.[97]

Two years after his conviction, while serving his sentence, Sanders fortuitously met Perez again.[98] 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.[99]

Armed with Perez's recantation of his trial testimony Sanders proceeded with a coram nobis motion[100] in New York State Supreme Court alleging that the prosecution had knowingly used perjured testimony at the time of his trial. Sanders's motion was devoid of any factual evidence to support his claim of prosecutorial misconduct, and his motion was denied without a hearing.[101] His leave to appeal was also denied.

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[95] *Id.*

[96] *Id.*

[97] *Id*. He was sentenced to five-to-fifteen years in prison.

[98] *Id.* at 220.

[99] *Id.*

[100] A *coram nobis* motion is a post-verdict application before the trial court to vacate judgement. Grounds for such a motion include "material evidence adduced at trial resulting in the judgement was, before the entry of judgment, known by the prosecutor or by the court to be false." New York Crim. Pro. L. § 440.10:(1)(c). In federal court, a district court may issue a writ of *coram nobis* pursuant to the All Writs Act. *United States v. Mandanici*, 205 F.3d 519, 521, n.1 (2d Cir. 2000).

[101] 863 F.2d at 220.

Sanders then sought a writ of habeas corpus in federal court alleging a due process violation. The judge allowed Sanders to conduct a hearing with respect to his claim of prosecutorial use of perjured testimony. 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.[102] Perez also testified, however, that the trial prosecutor was not aware of the perjury.[103]

Citing Sanders's 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 did grant 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.[104] 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 only be fulfilled by a showing of "prosecutorial involvement" and said such a requirement "elevates form over substance."[105] The court then stated the state action component necessary for a due process violation is more than adequately fulfilled by the state's *failure* to disturb a

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[102] *Id.*

[103] *Id.*

[104] 863 F.2d at 222 (citing *United States ex rel Burnett v. Illinois,*619 F.2d 668, 674 (7th Cir.), *cert. denied,* 449 U.S. 880 (1980) and *Burks v. Egeler,* 512 F.2d 221, 229 (6th Cir.), *cert. denied,* 423 U.S. 937 (1975)).

[105] *Id.* at 224.

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."[106] 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.[107] 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.[108]

Having found that the state's failure to act fulfilled that state action requirement for a due process violation, the Second Circuit turned its attention to the standard to apply in determining if remand was required. In doing so, the Second Circuit reexamined the standard used under ordinary Rule 33 applications, i.e. "the new evidence be so material that it would probably cause a result of acquittal."[109] The court then acknowledged that in cases alleging the use of perjured testimony, they had in the past used the *Larrison* test (if the court determined that new evidence might alter the verdict a new trial would be warranted).[110]

The Second Circuit concluded that the standard required under these circumstances was (1) the recanted testimony be false and material, and (2) the jury probably would have acquitted the defendant.[111] The court cautioned that the perjured

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[106] 863 F.2d at 224; *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").

[107] 863 F.2d at 222.

[108] 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).

[109] *Id.* at 225.

[110] *Id.*

[111] *Id.* at 226.

testimony which will trigger a due process violation must be "extraordinary" in nature. "It must leave the court with the firm belief that but for the perjured testimony, the defendant would likely not been convicted."[112] The Second Circuit standard in a habeas case is thus no different than the Rule 33 standard.[113]

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.[114] 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."[115] Answering both questions in the affirmative, Judge Motley granted the writ of habeas corpus on both the manslaughter and robbery counts.[116] However, on appeal once more, the Second Circuit reversed in part, holding that the recantation and perjured testimony related only to the manslaughter charge, and had no effect on the robbery charge.[117] The second Second Circuit decision evidences how perjury at a trial need not

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[112] *Id.*

[113] 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).

[114] 1989 U.S. Dist. LEXIS 9534, at *19 (S.D.N.Y. Aug. 14, 1989).

[115] *Id.* at *13.

[116] *Id.* at *19. It is precisely such concerns that let *Stofsky* court to reject the "might" test.

[117] 900 F.2d 601, 607-08 (2d Cir. 1990).

result in a reversal of convictions on counts which the perjured testimony did not address.[118]

[118] A similar result was reached in *United States v. Massac,* 867 F.2d 174 (3d Cir. 1989), in which the Third Circuit, applying the *Larrison* test without holding it to be the law of the circuit, held that perjury not connected a count will not result in a new trial under Rule 33. *Id.* at 178; *see also United States v. Jackson*, 579 F.2d 553, 557-58 (10th Cir.) (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).

2. The Seventh Circuit

In the Seventh Circuit, the habeas rules do not come into play unless there was knowledge of the perjury by the prosecution.[119] In *United States v. Walker*,[120] 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.[121] 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. The defendant relied upon *Jones v. Kentucky*[122] 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. The *Walker* court instead ruled: "The introduction of perjured testimony without more does not violate the constitutional right of the accused. It is the knowing and intentional use of such testimony by the prosecuting authorities that is denial of due process of law." This rule has been repeatedly reaffirmed by the Seventh Circuit.[123]

3. The Fifth Circuit

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[119] 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*).

[120] 535 F.2d 383 (7th Cir. 1976). The Seventh Circuit recently reiterated this rule. *See Schaff v. Snyder*, 190 F.3d 513, 530 (7th Cir. 1999).

[121] 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. *Id.*

[122] *See* notes 22-33, *supra*, and accompanying text.

[123] *See, e.g., Reddick v. Haws*, 120 F.3d 714, 718 (7th Cir. 1997); *Del Vecchio v. Illinois Dep't of Corrections*, 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 intentionally introduced the false testimony at trial. *Id.* at 1387.

The Fifth Circuit Court of Appeals addressed in issue of perjured testimony on a habeas corpus proceeding in *Smith v. Black*[124] and reached the opposite conclusion of *Sanders.* The facts of *Smith* are worthy of thorough review.[125] 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.[126] 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.[127] Searching the area, the officer observed evidence of a struggle strewn about the parking lot, including a broken necklace, eyeglasses, and one women's sneaker.[128] The initial investigation revealed that the woman involved in the incident was a store employee who was scheduled to open the store that morning.[129] Less than one-half hour later, the officer observed a black man in a red Pinto approach the store parking lot. When the man observed the police at the scene, he made a U-turn and sped in the opposite direction. 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. At that time, Smith was placed under arrest.[130]

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[124] 904 F.2d 950 (5th Cir. 1990).

[125] Smith has been the product of 23 post-verdict judicial reviews. The most comprehensive and concise recitation of the facts of the case can be found at 689 F. Supp. 644 (S.D. Miss. 1988). It is from that opinion that the facts below are derived.

[126] 689 F. Supp. at 646.

[127] *Id.*

[128] *Id.* at 647.

[129] *Id.* at 646.

[130] *Id.*

Within the hour, the investigation led to the Smith's home.[131] 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.[132] The police also found mud and blood on a pair of Smith's pants and shoes.[133] 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.[134]

Both Thomas and Wells indicated a post-arrest line-up procedures that they were unable to identify that man that they saw forcing the victim in the Pinto.[135] Additionally, in the pretrial interviews with defense counsel and Smith's family, both stated that they were unable to identify Smith.[136] In spite of these facts, at trial both men identified Smith as the man they saw in the parking lot.[137] 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.[138] Wells claimed that his recollection was refreshed that day prior to trial when he was shown a photo of Smith.[139] After one hour of juror deliberation, Smith was convicted of capital murder.

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[131] *Id.* at 647.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.* at 654.

[136] *Id.* at 654-55.

[137] *Id.* at 654.

[138] *Id.* at 653.

[139] *Id.* at 655.

Following Smith's conviction, Thomas and Wells were interviewed again by Smith's lawyer.[140] 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.[141] The Mississippi Supreme Court conducted a hearing on the issue of the recantations of Thomas and Wells and concluded that the two had perjured themselves, but affirmed the conviction.[142]

On habeas review, the district court found that 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.[143] From the denial of defendant's petition, he appealed to the Fifth Circuit.

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 in harmony with the *Agurs* decision, writing that while the Court in *Agurs* suggests that due process violations *may* occur when a prosecutor negligently uses perjured testimony to obtain a conviction, it ultimately relied

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[140] *Id.*

[141] *Id.*

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

[143] 689 F. Supp. 644, 657 (D. Miss. 1988).

on the settled rule that knowing use "is required,"[144] and therefore the language concerning negligent use of perjury was mere dictum.

The court paid little attention to the *Sanders* decision, describing it as such: "At its core, *Sanders* disputes the necessity of demonstrating prosecutorial involvement in knowledge of the perjury."[145] It then dismissed the rationale used by the *Sanders* court, stating that the prosecutorial knowledge requirement was more consistent with the view of the Supreme Court as expressed in *Agurs*.[146]

[144] *Id.* at 961.

[145] *Id.* at 962.

[146] *Id.*

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

Because "all perjured relevant testimony is at war with justice,"[147] 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*,[148] 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 proceeding should be applied on a Rule 33 motion.[149] 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.[150] Thus framed, the *Ortega* court turned to *Sanders* as the most current law of the circuit.[151]

A. Perjury concerning a material element of the crime.

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[147] *In re Michael*, 326 U.S. 224, 227 (1945).

[148] 842 F. Supp 48 (D. Conn.), *aff'd*, 43 F.3d 1459 (2d Cir. 1994), *cert. denied*, 514 U.S. 1089 (1995).

[149] *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), *cert. denied*, 504 U.S. 922 (1992).

[150] The same approach was taken in *United States v. Silvers*, 888 F. Supp. 1289, 1301 (D. Md. 1995), 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.

[151] 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. 842 F. Supp. at 51. Furthermore, there was sufficient evidence to convict even absent the witness' testimony. *Id.*

Any trial in which perjury concerned a material aspect of the crime charged, regardless of whether it occurs in state of 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.[152] 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*,[153] 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] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."[154] Put another way, the question is whether "the favorable evidence could reasonably be taken tp put the whole case in such a different light as to undermine confidence in the verdict."[155] The Court later explained its *Kyles* holding, stating "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."[156] In *Strickler*, the Court wound up affirming the conviction holding 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.[157] Harmonizing the

[152] This is consistent with the approach taken by the Supreme Court in *Mesarosh v. United States*, 352 U.S. 1 (1956). *See* notes 47-52, *supra*, and accompanying text.

[153] 514 U.S. 419 (1995)

[154] *Id*. at 434.

[155] *Id*. at 435.

[156] *Strickler v. Greene*, 527 U.S. 263, 290 (1999).

[157] *Id*. at 294.

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.[158] 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 Court's focus on the truth-seeking function at the expense of procedural fairness, support for the motion that the test in cases of material testimony should be the "might" test can be found in the Supreme Court's decision in *Napue v. Illinois*.[159] *Napue* involved the prosecutor's knowledge of the perjured testimony and failure to correct it. The Court found the perjured testimony, and failure to correct it, turned a fair trial into a tainted one.[160] 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*.[161] In *Gaudin*, the Court stated:

> The Fifth Amendment of the United States Constitution guarantees that no one will be deprived of liberty without "due process of law;" and the Sixth, that "[i]n 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 jury determination that the defendant is guilty of every element of

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[158] *See Kyles*, 514 U.S. at 440 (the criminal trial is "the chosen forum for ascertaining the truth about criminal accusations").

[159] 360 U.S. 264, 270 (1959).

[160] *Id.; 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").

[161] 515 U.S. 506 (1995).

> the crime with which he is charged, beyond a reasonable doubt.[162]

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,[163] the case should be retried and the jury given the opportunity to make 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 affirmed the conviction.[164] In such circumstances, the appellate court would appear to be usurping the jury's function.

C. <u>Perjury concerning non-material elements of the crime.</u>

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[162] *Id.* at 509-10. 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. 1, 9 (1956). However, one court 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. *See Lamberti v. United States*, 22 F. Supp. 2d 60, 84 (S.D.N.Y. 1998).

[163] Rather than, e.g., a witness' credibility, such as was the case in *Ortega*. *See* note 151 *supra*; *see also United States v. Gabriel,* 587 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* Daniel Wolf, *I cannot Tell a Lie: The Standard for Perjury in False Testimony Cases*, 83 MICH. L. REV. 1925, 1932 (1985) (arguing that even perjury which relates to a witness' credibility should result in a new trial): *see also Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence"); *Sanders v. Sullivan*, 1989 U.S. Dist. LEXIS 9534, at *17 (S.D.N.Y.) Aug. 18, 1989) (perjury concerning a material aspect of the crime might affect jury's perception of testimony concerning other counts), *rev'd in part*, 900 F.2d 601 (2d Cir. 1990).

[164] *See Malone v. Steiner*, 94 F.3d 652 (9th Cir. 1996); *see also United States v. McVicar*, 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").

When the perjured testimony does not concern a material element of the crime charged, but rather concerns 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 of whether the jury *probably* would have decided differently had it known of the perjury should apply.

This is a precisely the approach taken in *Ortega*. In *Ortega*, a government witness lied at trial concerning his recent drug use. The witness' drug use was not relevant to the crime charged, but related solely to the witness' credibility.[165] The *Ortega* court found such perjury was merely cumulative, as the witness' credibility was already in serious doubt. Under such circumstances, a higher standard is warranted, because if the perjury concerns a collateral issue, there is otherwise sufficient evidence to convict the defendant on all elements of the crime regardless of the perjured testimony.[166] On the other hand, in *Smith* and *Sanders*, the perjury concerned eyewitness testimony to the crime, warranting use of the more lenient "might" standard.[167]

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[165] 842 F. Supp. 48, 51 (D. Conn.), *aff'd*, 43 F.3d 1489 (2d Cir. 1994), *cert. denied*, 514 U.S. 1089 (1995); *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"), *aff'd* 27 F.3d 564 (4th Cir. 1994).

[166] 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); *see also United States v. Wallach*, 733 F. Supp. 769, 771 (S.D.N.Y. 1990) ("where the subsequently discovered perjury concerning the witness's credibility alone ... then it is unlikely that the jury would have acquitted on this basis"). Judge Krasny based his dissent on his reading of *Larrison* and *Mesaroch*, which he felt compelled the use of a more lenient standard when a principle eyewitness recanted material parts of her testimony. 607 F.2d at 847 (Ely, J., dissenting).

[167] *See Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (in context of *Brady* violation, "effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to other").