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Percoco Highlights Pre-Verdict Remedies For False Testimony

By **Avi Weitzman** (March 28, 2018, 2:23 PM EDT)

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Few would dispute that the government's reliance on false testimony in a criminal trial is a fundamental corruption of its truth-seeking mission and debases the criminal justice system.[1] Perjury fundamentally "pollutes a trial, making it hard for jurors to see the truth."[2] Perjury thus must never be suborned, and upon its discovery, a government prosecutor — whose sole mission is to ensure that "justice shall be done," not to win at all costs — has a duty to correct that testimony.[3] This duty extends to correcting known misstatements that go to the credibility of its witnesses, not just to substantive evidence, for "the prosecution's fundamental responsibility [is] to promote justice, fairness, and truth."[4]

Despite these principles, the cases are legion in which the government has relied, whether knowingly or unwittingly, on false testimony to prove its case. This was well documented for decades, including with the Knapp Commission in the 1970s and the Mollen Commission in the 1990s, both of which uncovered deep-rooted corruption within the New York City Police Department and numerous instances of in-court perjury by law enforcement.[5] While the battles against institutional corruption by police departments have waged on, instances of police corruption have disturbingly persisted to this day. In 2012, it was discovered that Boston lab chemist Annie Dookhan had fabricated thousands of drug-test results in criminal cases, which resulted, just last year, in prosecutors' throwing out more than 20,000 cases handled by Dookhan.[6] In addition, since 2013, more than 70 convictions in murder investigations handled by NYPD homicide detective Louis Scarcella have been under review due to Scarcella's suspicious and frequent reliance on the same eyewitness — "a crack-addicted prostitute," as described by news reports — and confessions from suspects who denied having made inculpatory statements.[7] While the Brooklyn District Attorney's Office consented to vacate many of those convictions, it nevertheless long asserted that Scarcella never broke the law or committed misconduct.[8] And earlier this month, a recent investigation by the New York Times resulted in findings that the "stubborn problem" of police "testilying" persisted, with more than 25 documented occasions since January 2015 when "judges or prosecutors determined that a key aspect of a New York City police officer's testimony was probably untrue."[9]

False testimony is not a problem unique only to law-enforcement witnesses; it extends as well to government cooperating witnesses. Prosecutors spend days and weeks preparing — and in some instances, coaching — their cooperating witnesses. They learn about their backgrounds, their families, their lives. One prosecutor described this process as figuratively "falling in love with your rat."[10] The close relationship prosecutors develop with cooperating witnesses can result in blind spots — instances

where the cooperating witness embellishes or makes up details intended to inculpate a defendant. Even when those details are uncorroborated, because the witness has spun the yarn of "oak tree" corroboration — a phrase that references an archetypal witness who claims to have seen a crime under an oak tree, and to prove his eye-witness story he pulls out a picture of the oak tree — the government and the jury trust the witness's testimony. This "trust" is enhanced by the government's reliance on cooperator plea agreements that threaten the witness with lengthy imprisonment should she be caught lying on the witness stand or otherwise breaching the plea agreement.

The Prosecution of Joseph Percoco

The high-profile public corruption prosecution of Joseph Percoco, a former top aide to New York Gov. Andrew M. Cuomo, and three co-defendants, is a recent example of the government's reliance on a cooperating witness who was shown to have provided false testimony. In that criminal trial, prosecutors in the Southern District of New York relied heavily on the testimony of lead cooperating witness Todd Howe, a disgraced former lobbyist. On direct examination, Howe testified about his involvement in widespread criminal conduct with the defendants — conduct to which he pled guilty as part of his September 2016 cooperation plea agreement. Howe claimed to be a reformed criminal, though, stating that he pled guilty because he "needed to stand up and accept responsibility for the crimes" he had committed, and that he "realized the best thing I could do for myself and for my family was to be honest and plead guilty to the government."[11] He claimed to have had "a come-to-Jesus" moment before entry of his plea agreement and that he was a "completely changed man" since.[12] The terms of his plea agreement required him not to commit any further crimes and to tell the truth about all of his criminal conduct.

On cross-examination, however, it was revealed that Howe engaged in undisclosed credit card fraud following entry of his plea agreement. Specifically, Howe stayed at a luxury Manhattan hotel while proffering with the government before he received a cooperation plea agreement. Then, mere weeks after he entered into his cooperation plea agreement, he contacted his credit card company and falsely denied having traveled to New York and having stayed at the expensive hotel, in order to have those expenses credited back to his account. He did not disclose this conduct to the government pretrial. To the government's credit, when it learned of this criminal conduct on cross-examination, it moved to revoke Howe's bail, resulting in his stunning midtrial remand to prison.

Despite his lies on the witness stand and breach of the cooperation plea agreement, the government continued to rely on Howe's testimony at trial. Indeed, in its rebuttal summation, the government contended that the defense's focus on Howe's continued undisclosed criminal conduct and lies was "a distraction," because Howe did not lie about any of the material allegations against the defendants. Ultimately, the jury convicted Percoco and one co-defendant.

The Inadequacy of Post-Verdict Remedies for the Presentation of False Testimony at Trial

Despite the numerous instances where cooperating witness perjury has been uncovered, the appellate remedies for such perjury are unsatisfying. In the Second Circuit, for example, the knowing introduction of perjured testimony will warrant a new trial where "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[13] But if the perjury was not knowingly presented, reversal will be warranted only where "the court is left with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted."[14] This harmless error standard is similarly applied by other circuit courts of appeals.[15]

Appellate reversals of criminal convictions based on the presentation of perjured testimony remain rare. Consider United States v. Cargill — a Fourth Circuit case in which the court acknowledged "the government ha[d] engaged in prosecutorial misconduct."[16] The government knowingly permitted the false testimony of one of its key witnesses to go uncorrected — the witness had falsely testified that he had no involvement in a drug conspiracy, despite having been previously prosecuted for his involvement in that very conspiracy by the same assistant United States attorney prosecuting the defendants in Cargill — and then attempted to bolster the witness's testimony on both redirect examination and in closing argument.[17] As a result, the district court vacated the convictions and granted defendants' motion for a new trial. But the Fourth Circuit reversed and held that the district court's ruling was an abuse of discretion because ample other evidence supported the defendants' conviction. This is just one of numerous examples where courts refuse to overturn convictions, despite the existence of perjured testimony, either because the government was unaware of the false testimony or because the perjury was held to be immaterial to conviction.[18]

Nor do post-verdict motions fare better before the district courts. While district court judges have occasionally granted new trials due to the government's reliance on false testimony,[19] like appellate reversals, this post-verdict remedy is rarely granted.[20]

Practitioners Should Consider More Robust Pre-Verdict Remedies

Undoubtedly, district court judges have broad discretion to manage the presentation of evidence and fashion a trial remedy for any range of trial misconduct. The most common pre-verdict remedy for perjured testimony appears to be the standard Falsus in Uno jury instruction, which advises juries that, if they find that a witness testified falsely as to any material fact, they have the discretion to disregard that witness's testimony, in part or in whole.[21] Judges are often reluctant to employ broader pre-verdict remedies, for fear that those remedies will serve as a replacement for the traditional adversary system, which relies on vigorous cross-examination as the appropriate means of attacking a witness's credibility, and the modern presumption that it is the jury — not the court — that serves a "lie-detecting function" in the criminal justice system.[22]

Criminal practitioners — defense counsel, prosecutors and district court judges alike — should consider more robust pre-verdict remedies for the presentation of false testimony at a criminal trial. The standard Falsus in Uno jury instruction — which amounts to a needle in an instructional haystack — is an unsatisfying remedy, because the evidence amply shows that juries are ineffective at detecting lies;[23] and, equally important, juries lack the institutional knowledge and competency to police the integrity of the criminal justice system. Criminal practitioners should strongly consider seeking other potential pre-verdict remedies that will better deter the government's reliance (whether intentional or not) on false testimony and better protect the integrity of the criminal justice system. Those broader remedies include striking the testimony of perjuring witnesses,[24] issuing adverse inference jury instructions, striking the counts that relate to the false testimony,[25] and even dismissing the indictment.[26]

Indeed, these judicial remedies are frequently used in civil cases, and should be pursued with equal vigor by criminal practitioners in criminal cases. For example, spoliation of evidence — a corruption of the judicial process no worse than reliance on perjured testimony — often results in a robust adverse inference jury instruction, where the jury is invited to presume that the spoliated evidence would likely have been favorable to the innocent party deprived of the evidence.[27] This is true even where the spoliation was the result not of intentional misconduct, but of a party's gross negligence or recklessness.[28] Similarly, when confronted with witness perjury, courts should consider fashioning a

more robust instruction, inviting the jury to scrutinize the witness's testimony more closely. Indeed, in the O.J. Simpson murder trial, Judge Lance Ito provided a more robust instruction that can serve as a helpful model: "A witness who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who has willfully testified falsely as to a material point unless, from all the evidence, you believe the probability of truth favors his or her testimony and other particulars."[29]

Moreover, in the civil context, courts can and have responded to perjury with more robust pre-verdict remedies, including ordering that certain designated facts be taken as established for purposes of the action, striking particular claims or defenses, striking a party's pleadings, and dismissing the action in its entirety.[30] These remedies are expressly provided for in Federal Rule of Civil Procedure 37(b) if a party or its witness disobeys a discovery order, which courts have interpreted to include perjury in a proceeding. While there is no similar Federal Rule of Criminal Procedure, that is of no moment, because a criminal court has the inherent authority to police itself, to safeguard against the perpetration of any fraud upon the court.[31]

Criminal cases present the highest stakes in our justice system, not just to the individual defendant, but also to the credibility of our entire system of justice. Witness perjury stains and undermines the citizenry's trust in our justice system, casting a shadow on the reliability of its verdicts. To better protect the integrity of the criminal justice system, criminal practitioners must consider all available remedies in response to false testimony. Indeed, even prosecutors must consider sua sponte appropriate remedies when they discover false testimony by their own witnesses.[32] When prosecutors fail to address testimony they know or should know to be false, they indisputably fail in their duties. But it is defendants — and the justice system as a whole — that pay the price.

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[1] Mesarosh v. United States, 352 U.S. 1, 9. 13–14 (1956) (the "dignity of the United States Government will not permit" conviction on perjured testimony).

[2] United States v. LaPage, 231 F.3d 488, 492 (9th Cir. 2000).

[3] Berger v. United States, 295 U.S. 78, 88 (1935); Napue v. Illinois, 360 U.S. 264, 270 (1959) ("[The government] has the responsibility and duty to correct what [it] knows to be false and elicit the truth.") (quotation marks and citation omitted).

[4] United States v. Alli, 344 F.3d 1002, 1007 (9th Cir. 2003) (citations omitted).

[5] Human Rights Watch, Shielded from Justice: Police Brutality and Accountability in the United States, https://www.hrw.org/legacy/reports98/police/uspo100.htm; Barbara Davidson, The Knapp

Commission Didn't Know It Couldn't Be Done, The New York Times (Jan. 9, 1972), https://www.nytimes.com/1972/01/09/archives/the-knapp-commission-didnt-know-it-couldnt-be-done-the-knapp.html.

[6] Shawn Musgrave, Prosecutors Will Drop Thousands of Cases in Dookhan Scandal, Boston Globe (April 19, 2017), https://www.bostonglobe.com/metro/2017/04/18/prosecutors-file-lists-thousands-dookhan-cases-for-dismissal/VTLYebLQ1BbtyQOyJmENoI/story.html.

[7] Frances Robles & N.R. Kleinfield, Review of 50 Brooklyn Murder Cases Ordered, N.Y. Times (May 11, 2013), http://www.nytimes.com/2013/05/12/nyregion/doubts-about-detective-haunt-50-murder-cases.html?pagewanted=all&_r=0&mtrref=nymag.com.

[8] Alan Feuer, Despite 7 Scrapped Convictions, Prosecutors Say Ex-Detective Broke No Laws, N.Y. Times (May 25, 2017), https://www.nytimes.com/2017/05/25/nyregion/louis-scarcella-murder-dismissals.html

[9] Joseph Goldstein, "Testilying" by Police: A Stubborn Problem, N.Y. Times (March 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html?mtrref=undefined

[10] Bennett L. Gershman, Witness Coaching by Prosecutors, 23 Cardozo L. Rev. 829 (2002).

[11] Percoco Trial Tr. at 2087

[12] Percoco Trial Tr. at 2104, 3214

[13] United States v. Wallach, 935 F.2d 445, 456 (2d Cir. 1991) (alterations and citation omitted).

[14] Id.

[15] See, e.g., United States v. Harmon, 681 F. App'x 152, 155–56 (3d Cir. 2017); United States v. Manners, 384 F. App'x 302, 306 (5th Cir. 2010); United States v. Alli, 344 F.3d 1002, 1006 (9th Cir. 2003); United States v. Williams, 233 F.3d 592, 593 (D.C. Cir. 2000); United States v. Lopez, 985 F.2d 520, 523–24 (11th Cir. 1993); United States v. Tierney, 947 F.2d 854, 860–61 (8th Cir. 1991).

[16] 17 F. App'x 214, 229 (4th Cir. 2001).

[17] Id. at 227–28.

[18] See, e.g., United States v. Surgent, 278 F. App'x 32, 34 (2d Cir. 2008); United States v. Cole, 63 F. App'x 4 (2d Cir. 2003); United States v. Salameh, 16 F. App'x 73, 75 (2d Cir. 2001); United States v. Moreno, 181 F.3d 206, 213 (2d Cir. 1999), abrogated on other grounds, 420 F.3d 111 (2d Cir. 2005); United States v. Zappola, 101 F.3d 686 (2d Cir. 1996).

[19] See, e.g., United States v. D'Angelo, 2004 WL 315237, at *15–16 (E.D.N.Y. Feb. 18, 2004); United States v. King, 232 F. Supp. 2d 636 (E.D. Va. 2002), aff'd, 71 F. App'x 192 (4th Cir. 2003); United States v. Brown, 130 F. Supp. 2d 552 (S.D.N.Y. 2001); United States v. McLaughlin, 89 F. Supp. 2d 617 (E.D. Pa. 2000).

[20] See, e.g., United States v. Stewart, 323 F. Supp. 2d 606 (S.D.N.Y. 2004) (holding that a new trial was

not warranted, even though an expert witness for the government had been charged with presenting perjured testimony during the trial); see also United States v. Seck, 175 F. Supp. 2d 526, 529–31 (S.D.N.Y. 2001); United States v. Edmonds, 870 F. Supp. 1140, 1146–48 (D.D.C. 1994), aff'd, 84 F.3d 1453 (D.C. Cir. 1996).

[21] See, e.g., United States v. Walker, 97 F.3d 253, 255 (8th Cir. 1996).

[22] See generally George Fisher, The Jury's Rise As Lie Detector, 107 Yale L. J. 575, 703 (1997).

[23] Id. at 707 ("most of the evidence we have suggests that juries have no particular talent for spotting lies. Not only do experimental subjects rarely perform much better than chance at distinguishing truth from falsehood, but they think they are better lie detectors than they are.")

[24] See, e.g., United States v. Jackson, 327 F.3d 273, 296-97 (4th Cir. 2003) (district court struck testimony of government witness who provided false testimony at trial and instructed the jury to disregard the witness's testimony).

[25] See, e.g., United States v. Freeman, 2009 WL 2748483, (N.D. Ill. Aug. 26, 2009) (defendant sought mid-trial dismissal of counts tainted by government cooperating witness's trial perjury).

[26] See, e.g., United States v. Annappareddy, Dkt. #430, 497, No. 13 Cr. 374 (GLR) (D. Md. Aug. 1 and Sept. 1, 2016) (granting motion to dismiss indictment based on government's presentation of false evidence).

[27] See generally Hon. Shira A. Scheindlin & Natalie M. Orr, The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal, 83 Fordham L. Rev. 1299 (2014).

[28] See, e.g., Reilly v. NatWest Markets Grp. Inc., 181 F.3d 253, 267–68 (2d Cir. 1999).

[29] For a copy of the instructions in People v. Simpson, No. BA097211, see https://www.lectlaw.com/files/cas62.htm; Cf. In re Heparin Prod. Liab. Litig., 803 F. Supp. 2d 712, 751–52 (N.D. Ohio 2011) (agreeing to provide jury "a cautionary instruction . . . that [expert witness] lied under oath in this proceeding and others about some aspects of his credentials, and his opinions are therefore subject to greater scrutiny").

[30] See, e.g., Monsanto Co. v. Ralph, 382 F.2d 1374, 1382 (Fed. Cir. 2004); see also Chavez v. City of Albuquerque, 402 F.3d 1039, 1046 (10th Cir. 2005) (affirming order dismissing case as a result of plaintiff's perjury); Martin v. DaimlerChrysler Corp., 251 F.3d 691, 694 (8th Cir. 2001) (affirming district court's striking of plaintiff's pleadings as a sanction for her repeated perjury).

[31] See United States v. Holloway, 778 F.2d 653, 655 (11th Cir. 1985) (court has inherent authority to dismiss indictment on grounds of prosecutorial misconduct); Daye v. Attorney Gen. of New York, 712 F.2d 1566, 1571 (2d Cir. 1983) ("[F]ederal courts have authority under their supervisory powers to oversee the administration of criminal justice within federal courts.").

[32] D'Angelo, 2004 WL 315237, at *16 (granting defendant's motion for a judgment of acquittal in light of the "rampant perjury" pervading trial, and admonishing the government for "cling[ing] to the jury's verdict like it is the only conviction it ever obtained").