CONVICTIONS OBTAINED BY PERJURED TESTIMONY: A COMPARATIVE VIEW

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You have just been tried, convicted, and imprisoned for a crime you did not commit. Furthermore, you know but cannot prove that all prosecution witnesses were vindictive liars, and the prosecuting attorney knew nothing of this. The time for taking an appeal has run. Now, for the first time, evidence is uncovered which could convict each of the witnesses against you for perjury. You are still incarcerated. A layman might think that the presentation of that evidence to the nearest magistrate would result almost reflexively in your release. You might secure an executive pardon on these facts, but pardoning procedure is beyond the scope of this article. Our question: What are the judicial consequences of such a set of facts in the various states and western countries?

UNITED STATES

The United States Supreme Court has said that a conviction obtained by the use of perjured testimony violates due process rights to a fair trial[1] when the false nature of the testimony was known to the prosecuting attorney[2] or the police[3] at the time of its use. The allega-

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1 Mooney v. Holohan, 294 U.S. 103 (1935) (dictum), 35 Colum. L. Rev. 282.

2 Alcorta v. Texas, 355 U.S. 28 (1957), 11 Vand. L. Rev. 922 (1958). Seemingly in accord is Price v. Johnston, 334 U.S. 266 (1948). The same rule applies even when the perjured testimony goes only to the credibility of a prosecution witness. Bentley v. Alaska, 374 U.S. 107 (1963); Napue v. Illinois, 360 U.S. 264 (1959). White v. Ragen, 324 U.S. 760 (1945); Hysler v. Florida, 315 U.S. 411, as amended by 316 U.S. 642 (1942).

3 The United States Supreme Court and lower federal courts have held that if the perjured testimony is introduced by the police without the prosecuting attorney having any knowledge of its falsity, then there is a violation of the due process rights of the accused. Pyle v. Kansas, 317 U.S. 213 (1942); Curran v. Delaware, 259 F.2d 707 (3d Cir. 1958). Seemingly in accord is Sears v. United States, 265 F.2d 301 (5th Cir. 1959). For a good analysis of what agents of the state are included within the concept of "the prosecution," see Note, 7 Duke L.J. 150 (1958). Even more recently, the Supreme Court has held that the suppression of exculpatory evidence by the prosecuting attorney is a denial of due process "irrespective of good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). A circuit court had reached the same result in 1950. Griffin v. United States, 183 F.2d 990 (D.C. Cir. 1950). This rationale was extended in Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964), which held that the withholding of exculpatory evidence by the police is a violation of due process even though the prosecuting attorney did not know of the existence of the evidence. If the prosecuting attorney deliberately withholds exculpatory or mitigating evidence favoring the accused, it is a denial of due process. United States v. Baldi, 195 F.2d 815 (3d Cir. 1951). When the state fails to disclose,

tions in these cases were consistent in that the prosecution knew of the false nature of the testimony when it was introduced, and the decisions were limited to these allegations. It appears that the Court was taking the knowing aspect for granted as a requisite to find state action.[4] If the perjury were committed without the knowledge of the prosecution, it would be private rather than state action.

In any event, the lower federal courts with monotonous regularity interpreted *Mooney v. Holohan* and its progeny as requiring allegations and proof that the prosecution made a knowing use of the perjured testimony in federal criminal cases, as well as in habeas corpus cases attacking state convictions.[5] This construction in the lower federal courts was paralleled in a majority of the state courts which might be expected to construe the cases as narrowly as possible in order to sustain the processes of the state law against attack on a constitutional basis.[6] Some of the narrowness of construction by the state courts may be attributed to the fact that the remedies for attacking a conviction

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or suppresses, evidence which affects the credibility of a prosecution witness because of his alleged insanity, it is contrary to the fourteenth amendment. Powell v. Winman, 287 F.2d 275 (5th Cir. 1961).

[4] See Hysler v. Florida, 315 U.S. 411, 423 (1942) (Black, J., dissenting). The phrase "state action" is used in this article in its generic sense whether it be a state or the federal government.

[5] Holt v. United States, 303 F.2d 791 (8th Cir. 1962); Enzor v. United States, 296 F.2d 62 (5th Cir. 1961); Black v. United States, 269 F.2d 38 (9th Cir. 1959); Kyle v. United States, 266 F.2d 670 (2d Cir. 1959); Dean v. United States, 265 F.2d 544 (8th Cir. 1959); Sears v. United States, 265 F.2d 301 (5th Cir. 1959); Dunn v. United States, 259 F.2d 269 (6th Cir. 1958); Hickman v. United States, 246 F.2d 178 (8th Cir. 1957); United States v. Ragen, 231 F.2d 442 (7th Cir. 1956); Taylor v. United States, 229 F.2d 826 (8th Cir. 1956); *In re* Sawyer's Petition, 229 F.2d 805 (7th Cir. 1956); United States v. Rutkin, 212 F.2d 641 (3d Cir. 1954); United States v. Spadaford, 200 F.2d 140 (7th Cir. 1952); Ryles v. United States, 198 F.2d 199 (10th Cir. 1952); Wild v. Oklahoma, 187 F.2d 409 (10th Cir. 1951); Hinley v. Burford, 183 F.2d 581 (10th Cir. 1950); Story v. Burford, 178 F.2d 911 (10th Cir. 1949); Cobb v. Hunter, 167 F.2d 888 (10th Cir. 1948); Tilgham v. Hunter, 167 F.2d 661 (10th Cir. 1948); Cobb v. United States, 161 F.2d 814 (6th Cir. 1947); Wagner v. Hunter, 161 F.2d 601 (10th Cir. 1947); Hodge v. Huff, 140 F.2d 686 (D.C. Cir. 1944); Casebeer v. Hudspeth, 121 F.2d 914 (10th Cir. 1941).

[6] See, *e.g.*, *Ex parte* Burns, 247 Ala. 98, 22 So. 2d 517 (1945); People v. Adamson, 210 P.2d 13 (Cal. 1949); Harris v. State, 167 So. 2d 312 (Fla. Ct. App. 1964); Burke v. State, 205 Ga. 656, 54 S.E.2d 350 (1949); Townsend v. Hudspeth, 167 Kan. 366, 205 P.2d 483 (1949); Madison v. State, 109 A.2d 96 (Md. 1954); Aranson v. Commonwealth, 331 Mass. 599, 121 N.E.2d 669 (1954); Roberson v. Quave, 211 Miss. 398, 51 So. 2d 777 (1951); State v. Eaton, 280 S.W.2d 63 (Mo. 1955); Hawk v. State, 151 Neb. 561, 39 N.W.2d 561 (1949); People v. McElroy, 11 App. Div. 2d 556, 200 N.Y.S.2d 442 (1960); Hurt v. State, 312 P.2d 169 (Okla. Crim. App. 1957) *(semble)* (dictum); Smyth v. Godwin, 188 Va. 753, 51 S.E.2d 230 (1949).

based upon fraud had to be developed from a matrix of the writs of habeas corpus and coram nobis; many of the cases obviously devoted more discussion to which remedy, if any, was applicable than to the basic question of the underlying unfairness of a conviction allegedly obtained by perjury.[7]

Another reason for the narrowness of construction was the fear that a convicted person would be able to proceed through the appellate system in the state or federal system on other grounds, and then be able to attack his sentence collaterally on the basis that a material witness furnished false testimony.[8] Before *Mooney*, some state courts had held that the pardon remedy was exclusive.[9] This rule may have some post-*Mooney* vitality.[10] The inability or unwillingness of the courts to afford a remedy to persons convicted by perjury or innocently false testimony—introduced without the prosecutor's knowing of its falsity —was starkly portrayed in two cases where the court stated that the convicted persons' only avenue of hope was in appeal to the executive branch for clemency.[11]

Few cases dispensing with any requirement that the prosecution must have known of the false nature of the testimony when it was introduced exist. In *Jones v. Kentucky*[12] the accused was sentenced to death for murder and, after exhausting his remedies under the laws of Kentucky, he petitioned for a writ of habeas corpus in the federal district court. The Attorney General of Kentucky indicated his belief that the petitioner had been convicted on perjured testimony. It also appeared that the Governor of Kentucky would refuse any appeal for clemency. There was no indication of any knowledge of the prosecution that the testimony was perjured at the time it was introduced. The court of appeals, in reversing the district court and granting the writ, cited the *Mooney* case as authority, but gave it a liberal interpretation by stating:

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[7] See, *e.g.*, People v. Touhy, 397 Ill. 19, 72 N.E.2d 827 (1947).

[8] Price v. Johnston, 334 U.S. 266, 295 (1948) (dissenting opinion). It should be noted that state prisoners who intentionally by-pass state appellate remedies may, within the sound discretion of the federal court, be denied relief by federal habeas corpus. Fay v. Noia, 372 U.S. 391, 433, 438 (1963).

[9] Springstein v. Saunders, 182 Iowa 658, 164 N.W. 622 (1917); Asbell v. State, 62 Kan. 209, 61 Pac. 690 (1900); Humphreys v. State, 129 Wash. 309, 224 Pac. 937 (1924); State v. Superior Court, 15 Wash. 339, 46 Pac. 399 (1896).

[10] Smith v. State, 200 Ark. 767, 140 S.W.2d 675 (1940).

[11] Hickman v. United States, 246 F.2d 178 (8th Cir. 1957); United States v. Kaplan, 101 F. Supp. 7 (D.C.N.Y. 1951). *Accord*, Springstein v. Saunders, 182 Iowa 658, 164 N.W. 622 (1917).

[12] 97 F.2d 335 (6th Cir. 1938).

> If it be urged that the concept thus formulated but condemns convictions obtained by the state through testimony known by the prosecuting officers to have been perjured, then the answer must be that the delineated requirement of due process in the Mooney Case embraces no more than the facts of that case require, and that "the fundamental conceptions of justice which lie at the base of our civil and political institutions" must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective process to remedy the alleged wrong, if constitutional rights are not to be impaired.[13]

Was the court suggesting that *failure* to grant relief from a conviction obtained by perjured testimony is unconstitutional, in that failure to undo a conviction violative of due process amounts to a reconviction?

A few years later the court of appeals of Kentucky in *Anderson v. Buchanan*[14] followed the rationale of *Jones v. Kentucky*, stating that *Jones* had gone beyond the *Mooney* requirement that there must be a knowing use of the perjured testimony by the prosecution. The court buttressed its opinion by stating that "the arm of justice in Kentucky ought not to be any weaker or shorter than it is in the federal courts. Our State Constitution also insures every person a 'remedy by due course of law' for an injury done him in his person."[15] It would appear that the court in *Anderson* was of the view that *Mooney* merely set minimum standards of due process under the federal constitution, and that the state courts could extend due process to encompass cases in which the prosecution did not know that material testimony was perjured when introduced.

The view of the Kentucky court was preceded by an earlier decision of the Supreme Court of Florida. In *Skipper v. Schumacher*[16] a person had been convicted upon allegedly perjured testimony which was procured by pressures brought to bear upon certain witnesses by two or three members of the grand jury which indicted the accused. There was no allegation that the prosecuting officials knew of this conduct of the grand jurors, and the court held that this conduct, if true, would not constitute state action under the *Mooney* decision. However,

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[13] *Id.* at 338. This language was approved and apparently followed in United States v. Ragen, 86 F. Supp. 382 (N.D. Ill. 1949). However, the district judge seemingly found knowing use by the prosecution.

[14] 292 Ky. 810, 168 S.W.2d 48 (1943).

[15] *Id.* at 818, 168 S.W.2d at 52. The Kentucky cases are discussed in Comment, "The Writ of Error Coram Nobis—Kentucky's Answer to the Expanding Federal Concept of Procedural Due Process in Criminal Cases," 39 Ky. L.J. 440 (1951).

[16] 124 Fla. 384, 169 So. 58 (1936).

the court held that this conviction, if in fact obtained by perjured testimony, was contrary to the due process clause of the state constitution and a writ of error coram nobis would lie. One year later, the court in an inexplicable decision refused to grant the writ of error coram nobis and completely ignored the first decision.[17] Florida now follows the view that knowing use of the perjured testimony must be shown to attack the conviction.[18]

The Pennsylvania superior court in *Commonwealth v. Coroniti*[19] stated that new trials should be granted "if perjury by an essential witness is admitted or shown by incontrovertible evidence . . . but if there is doubt as to the falsity of the testimony a new trial is properly refused."[20] The court failed to mention possible knowing use of the perjured testimony by the prosecution, nor did it question the right to ask for a new trial which was raised eight years after the conviction; the motion was denied because of a failure to prove the alleged perjury by incontrovertible evidence. Indiana may follow this minority view; however, the rationale of the Indiana cases is not clear.[21]

The majority view seems to give an unduly restrictive view to the concept of state action. The fact that the perjured testimony was unwittingly used by the prosecution does not change the fact that there was state action in indicting, trying, and convicting the accused. Nor should the fact that the imprisoned person is serving a sentence for a crime which he may not have committed be ignored. A court appears to do violence to the notion that due process is based upon a concept of fairness when it admits that a miscarriage of justice may have resulted but then says that due process has not been violated.

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[17] Skipper v. State, 127 Fla. 553, 173 So. 692 (1937). See the strong dissent by Mr. Justice Brown, who raised the issue of the original holding in this case.

[18] Harris v. State, 167 So. 2d 312 (Fla. Ct. App. 1964); Ingrim v. State, 166 So. 2d 805 (Fla. Ct. App. 1964); Austin v. State, 160 So. 2d 730 (Fla. Ct. App. 1964).

[19] 170 Pa. Super. 245, 85 A.2d 673 (1952).

[20] *Id.* at 675. *But see* Commonwealth *ex rel.* v. Burke, 176 Pa. Super. 60, 107 A.2d 207 (1954), which held that habeas corpus is not appropriate when alleging knowing use of perjured testimony. This case failed to cite the *Coroniti* case.

[21] In Davis v. State, 200 Ind. 88, 161 N.E. 375 (1928), a writ of error coram nobis was granted upon a petition which alleged perjury induced by the prosecutor. The court did not state that the knowing use or inducement of perjury by the prosecution was a requisite; the point was not even discussed. However, the dissenting opinion in Yessen v. State, 234 Ind. 311, 126 N.E.2d 760 (1955), stated that the *Davis* case held that knowing use was not a requisite. Kleihege v. State, 177 N.E. 60 (1931), as superseded by Kleihege v. State, 206 Ind. 206, 188 N.E. 786 (1934), seems to be in accord with the *Davis* case. However, Hicks v. State, 213 Ind. 277, 12 N.E.2d 501 (1938), held that neither a new trial nor a writ of error coram nobis could be granted for a conviction obtained by false testimony; the court failed to suggest that any relief could be granted. See Note, 26 Ind. L.J. 529 (1951).

There is also a practical objection to the continuation of the majority rule. It is unrealistic in most cases to expect the police or the prosecuting attorneys to admit that they knew the testimony was perjured when it was introduced; it is even more unrealistic to expect that they will admit this fact when they were the instigators of the perjured testimony[22] for an admission in either case might subject them to criminal or disciplinary proceedings. As a result, even though there may be no question that perjured testimony was used, it is virtually impossible to prove the knowledge of the prosecuting authorities because it will be the word of a confessed perjurer against the word of the authorities.

The Supreme Court of the United States should have little difficulty under its ever expanding definitions of due process[23] to declare that any conviction obtained as a result of perjured testimony unknowingly utilized by the prosecution in a state or federal trial does violence to the right of due process. However, it is believed that legislation which clearly delineates the grounds and procedures for vacating sentences would be preferable since it would eliminate any need for the courts to devote attention to the choice of the applicable remedial tool.[24] The Uniform Post-Conviction Procedure Act of 1955[25] and the United States Code[26] provide a remedy when the sentence was formerly subject to collateral attack upon any ground available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy. The substantive grounds are, however, rather limited in that these codifications fail to provide specific detailed grounds for an attack of a sentence: a sentence may be attacked if it was imposed in violation of the federal or state constitutions or laws of the state, if

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22 United States v. Ragen, 86 F. Supp. 382, 390 (N.D. Ill. 1949). It should be noted, however, that the prosecutor in Alcorta v. Texas, 355 U.S. 28 (1957), did admit that he knew that the testimony was untrue when it was introduced.

23 *E.g.*, Jackson v. Denno, 378 U.S. 368 (1964). However, Mr. Justice Warren's opinion in Napue v. Illinois, 360 U.S. 264 (1959), one of the more recent Supreme Court decisions on the use of perjured testimony, still seems to reflect a narrow due process approach in this area.

24 See Reitz, "Federal Habeas Corpus: Post-Conviction Remedy for State Prisoners," 108 U. Pa. L. Rev. 461 (1960); Comment, "The Relation Between Habeas Corpus and Coram Nobis in New York," 34 Cornell L.Q. 596 (1949); Comment, "Post-Conviction Remedies—The Need for Coram Nobis," 57 Nw. U.L. Rev. 467 (1962).

25 9B Uniform Laws Ann. 352 (1957). This act, or a variation of it, has been adopted in Illinois, Maryland, North Carolina, and Oregon. See Meador, "Accommodating State Criminal Procedure and Federal Post-Conviction Review," 50 A.B.A.J. 928 (1964).

26 28 U.S.C. § 2255 (1964).

the court was without jurisdiction, or if the court was otherwise subject to collateral attack upon any ground.

In 1833 Georgia enacted a statute which provides that any judgment, verdict, or order of court may be set aside if it were entered as a consequence of corrupt and willful perjury.[27] However, the court may not set aside the judgment "unless the person charged with such perjury shall have been thereof duly convicted, and unless it shall appear to the said court that the said verdict . . . could not have been obtained and entered up without the evidence of such perjured person." This statute has been held to be a rule of evidence which is in harmony with the *Mooney* line of cases, and is, therefore, constitutional.[28] It is submitted that this statute, although supposedly remedial in nature, creates an additional roadblock in the release of an unjustly convicted person. Under this statute, even if the witnesses in the former trial recant their testimony or the prosecuting authorities admit the knowing use of the perjured testimony, the convicted person is apparently not entitled to a new trial until the perjurers have been convicted for the perjury.[29] This appears contrary to the *Mooney* line of cases.

This statute appears deficient in one further aspect: if the statute of limitations for the prosecution of perjury has run, there would be no opportunity for a conviction of perjury and the unjustly convicted person would be denied relief.

This statute does, however, enable a court to rectify its own mistakes, and it permits an unjustly convicted person to plead the statute without resorting to any constitutional issue.

ENGLAND

The English Criminal Appeal Act[30] provides for an unusual blending of the cooperative efforts of the executive and judicial branches of the government in post-appeal proceedings to examine fresh evidence of perjury or of any other kind of evidence which was not introduced at the trial. Under section 19(1) of this Act, the Home Secretary, with or without application made to him by a person convicted on indictment may either: (a) refer the whole case to the Court of Criminal Appeal and the case shall then be treated for all purposes as an appeal to that court by the person convicted; or (b) if he desires the assistance of the Court of Criminal Appeal on any point

[27] Ga. Code Ann. § 110-706 (1963).

[28] Burke v. State, 205 Ga. 656, 54 S.E.2d 350 (1949).

[29] *Id.* at 660, 54 S.W.2d at 353.

[30] Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, as amended by the Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65.

arising in the case, refer that point to the Court of Criminal Appeal for its opinion thereon, and the court shall consider the point so referred and furnish the Home Secretary with its opinion thereon.

A convicted person may use the above procedure even after he had appealed on other grounds,[31] or even though he failed to ask for leave to appeal.[32]

When an application by a convicted person has been made to the Home Secretary, the Secretary is not bound by any court rules of evidence and he "can hear and consider any evidence he likes which would influence him in considering whether or not he should advise the exercise of the royal prerogative."[33] If the Secretary refers the matter to the Court of Criminal Appeal, the court seems also to have a wide latitude in hearing any fresh evidence which may tend to show that it would have affected the jury which returned the verdict.[34] This evidence may consist of a witness to prove a case of mistaken identity even though the witness was available at the original trial,[35] of further testimony by an expert witness in order to elucidate testimony which he gave at the trial,[36] of a passport to support an alibi even though the passport was available at the trial,[37] or of a subsequent explanatory confession of an accomplice which clears the convicted person.[38]

The author has been unable to discover any case brought under this section which involved any allegation of perjured as distinguished from mistaken testimony.[39] However, the Court of Criminal Appeal has permitted the introduction of fresh evidence in direct appeals in cases involving the perjury of a Crown witness[40] and the impeachment of the prosecuting witness for a lack of veracity.[41] Neither case even implied that knowing use of the perjury by the prosecution was a

31 *E.g.*, R. v. Sparkes, 40 Crim. App. R. 83 (1956); R. v. McGrath, [1949] 2 All. E.R. 495 (C.C.A.); R. v. Fratson, 22 Crim. App. R. 29 (1930).

32 Regina v. Caborn-Waterfield, [1956] 2 Q.B. 379, 385 (C.C.A.); R. v. Gray, 12 Crim. App. R. 244 (1917).

33 R. v. McGrath, *supra* note 31, at 497.

34 *Ibid.*

35 R. v. McGrath, *supra* note 31.

36 R. v. Fratson, *supra* note 31.

37 R. v. Sparkes, *supra* note 31.

38 R. v. Gray, *supra* note 32. Compare Shaver v. Ellis, 255 F.2d 509 (5th Cir. 1958).

39 Regina v. Caborn-Waterfield, *supra* note 32, certainly involved a series of contradictory statements which could be classified as perjured; however, the inconsistent witnesses were not called by the appellant on the appeal and the case was decided on other grounds.

40 R. v. Donovan & Hurley, 2 Crim. App. R. 1 (1909).

41 R. v. Parks, [1916] 3 All E.R. 633.

requisite for overturning the conviction. If the test is for the court to consider "whether, if that evidence had been given before the jury, it might have had the effect of raising in the minds of the jury a reasonable doubt,"[42] it would seem that the question of the knowing or unknowing use of the perjured testimony by the prosecution would be irrelevant.

Until recently, the power of the Court of Criminal Appeal upon reference from the Secretary was limited to affirming or quashing the conviction; the court had no power to order a new trial.[43] However, the public furor created over the "Lucky Gordon-Christine Keeler-Lord Profumo" cases induced the enactment of an amendment to the Criminal Appeal Act which provides that

> *where an appeal against conviction is allowed by the Court of Criminal Appeal by reason only of evidence received or available to be received by that Court under section 9 of the Criminal Appeal Act 1907* and it appears to the Court that the interests of justice so require, the Court *may*, instead of directing the entry of a judgment and verdict of acquittal as required by section 4(2) of that Act, order the appellant to be retried.[44]

It is to be noted that the emphasized words would seem to refer exclusively to a case wherein the Court of Criminal Appeal allows a direct appeal from the conviction, rather than wherein the Secretary refers the case to the court under section 19(1) of the Criminal Appeal Act.[45] However, under the wording of section 19(1) which provides that when the Secretary refers the whole case to the Court of Criminal Appeal it "shall then be treated for all purposes as an appeal to that court by the person convicted," and under the wording of rule 48 of the Criminal Appeal Rules, 1908,[46] which provides that a petitioner whose case is referred shall be deemed for the purposes of the act to be a person who has obtained leave to appeal from the Court of Appeal, it would appear that the Court of Appeal now has the power to award a new trial in appropriate cases. This power may result in a more liberal utilization by the Home Secretary and the Court of Appeal of the power to investigate and correct convictions allegedly obtained by perjured testimony. Prior to this new legislation, there seems to have been a reluctance on the part of either to accept responsibility.[47] This

42 R. v. Harding, 25 Crim. App. R. 190, 196 (1936).

43 Rex v. Rowland, [1947] K.B. 460 (C.C.A.).

44 Criminal Appeal Act, 1964, 12 Eliz. 2, c. 43 [section 1(1)]. (Emphasis added.)

45 *Supra* note 30.

46 See Archbold, Criminal Pleading, Evidence and Practice 371-72 (35th ed. 1962).

47 For a succinct explanation of the background to the new and former legislation governing appeals for fresh evidence and the Home Secretary's prerogative of mercy,

reluctance may have been caused by a feeling that the opposite extremes of a judgment of acquittal or an affirmance of conviction were not appropriate when there was some, but not an overwhelming, doubt about the guilt or innocence of the petitioner. Now, the Home Secretary may refer a case to the Court of Appeal realizing that an unjustly convicted person may be acquitted without a retrial while a "guilty" person may be reconvicted at a retrial after his allegations of perjured testimony have been proven false.

FRANCE

In France revision of the judgment of conviction may be requested for the benefit of any person convicted of a felony or misdemeanor "when the witnesses heard [at the trial] have after the conviction been prosecuted and convicted for false testimony against the accused . . . the witness thus convicted may not be heard in the new trial;" and "when, after a conviction, a fact presents or reveals itself or when evidence unknown at the time of the trial is produced of a nature to establish the innocence of the convicted person."[48]

A petition for revision based upon the first ground may be brought by the Minister of Justice, the convicted person, or his legal representative if he lacks capacity or after his death by his wife, children, parents, universal legatees, or those by universal right who have received from him express permission to do so. Only the Minister of Justice may bring the petition when it is based upon newly discovered evidence, the second ground above.[49] The Court of Cassation has jurisdiction over the petition. It shall first determine the merits of the petition, and, if it deems that it is well founded, it shall annul the conviction. If it is possible to remand the case for a new trial it will be remanded to a court of the same jurisdiction and degree as the original court, but not to the same court. If it is impossible to proceed to a new trial, notably in case of the death, insanity, absence, or default of one or several of the convicted persons, penal irresponsibility or excusability, or if the running of the statute of limitations will make a new trial impossible, then the Court of Cassation may itself annul the conviction.[50]

The exonerating decision may award damages to the wrongfully convicted person upon his request. If the victim of judicial error is

see Committee on Criminal Appeals, A Report by Justice-Criminal Appeals 5, 13, 27-38, 70-76 (1964).

48 Code de Procédure Pénale, art. 622 (France 1959) [Hereinafter cited as French Code].

49 French Code, art. 623.

50 French Code, art. 625.

dead, his spouse, ascendents, or descendents have a right to request damages under the same conditions as the convicted person. The damages shall be charged to the State, subject to its recourse against the civil party, the accuser, or the false witness through whose fault the conviction was pronounced.[51]

GERMANY

The German Code of Criminal Procedure provides for the reopening of proceedings upon motion of a convicted person:

1. in the event a document, produced at the trial to his disadvantage, was false or forged;
2. in the event a witness or expert, during testimony made or while giving an opinion against a convicted person, was guilty of willful or negligent violation of the duty imposed by the oath, or of willfully making a false unsworn statement;

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5. in the event new facts or evidence were produced, which themselves or in connection with the evidence previously taken, are proper to support an acquittal of the accused or, by application of a less serious criminal statute, to allow a lower punishment or an essentially different decision on a measure of security and reform.[52]

The motion for the reopening of the proceedings will not be barred even though the punishment has been executed or the convicted person has died. In the case of death of the convicted person, his spouse, relatives in an ascending and descending line as well as his brothers and sisters are empowered to make the motion.[53]

This German procedure of reopening uniquely provides a two-edged sword. The state may move for a reopening of the proceedings in the event of an acquittal if documents which were introduced at the trial in favor of the accused were false or forged, or in the event that testimony of witnesses or the opinions of experts were introduced in favor of the accused and the witnesses or experts were guilty of willful or negligent violation of the duty imposed by their oath or were guilty of making false unsworn statements. Further, if the acquitted defendant either in or out of the courtroom makes a credible confession of having committed the offense, the case may be reopened.[54]

The motion for reopening the judgment is filed in the court which

51 French Code, art 626.

52 Strasprozessordnung, art. 359 (Germany 1877) (as amended, 1950, 1953, 1957) [Hereinafter cited as German Code].

53 German Code, art. 361.

54 German Code, arts. 362-63.

entered the judgment and the court must admit it if it is submitted in the provided form in which a legal ground for reopening is presented and proper evidence is indicated in the motion.[55] Upon being accepted, the court appoints a judge to take evidence if it is necessary to do so. The court has discretion to decide whether the witnesses and experts should be heard under oath. After the closing of the evidence, the prosecution and the accused shall be summoned to make further comments within a fixed period.[56]

The motion to reopen the proceedings may be rejected without an oral trial if the court decides that the forged documents or false testimony did not influence the decision in the original case. In all other cases, the court will order the reopening of the proceedings and a new trial.[57] If the convicted person has died, the court may order an acquittal or reject the motion to reopen after taking evidence. The court may acquit a living convicted person immediately if sufficient evidence is available and if the prosecution consents in the case of public charges.[58]

If the court orders a renewed trial, the former judgment will either be sustained or, if reversed, another decision will be made. The original judgment as to the kind and amount of punishment may not be changed to the disadvantage of the convicted person if the reopening of the proceedings was moved by the convicted person, by his legal representative, or by the prosecution if the latter moved for the reopening in favor of the convicted person. However, the foregoing provision does not prevent the court from ordering the internment of the accused in an institution for cure and treatment, for the cure of alcoholism, or for the cure of drug addiction.[59]

SPAIN

The Spanish Code of Criminal Procedure clearly articulates a remedy for the person unjustly convicted as a result of false testimony. The recourse of revision shall take place:

> When any one is suffering a term of imprisonment by virtue of a sentence which has been based on a document or testimony later declared false by a final sentence in a criminal cause, [or on] a confession of the condemned person extracted by violence or exaction or any other punishable act executed by a third person, provided that said latter extremes also have been declared by a final sentence in a cause instituted to this effect. To this end there shall be

[55] German Code, art. 368.
[56] German Code, art. 369.
[57] German Code, art. 370.
[58] German Code, art. 371.
[59] German Code, art. 373.

> performed as many proofs as shall be considered necessary for the clarification of the controverted facts in the case, performing at once those [proofs] which by their special circumstances may make difficult and even the final sentence impossible, [which is] the base of the revision.[60]

The recourse of revision will also lie "when after the sentence there has occurred knowledge of new facts or of new elements of proof of such a nature that evidence the innocence of the condemned person."[61] This recourse of revision may be brought by the condemned person, his spouse, descendents, ascendents, or brothers or sisters.[62] The foregoing relatives may even institute the recourse after the death of the condemned person in order to clear his name and to punish the guilty person.[63] The prosecutor of the Supreme Court may also institute this recourse on his own initiative.[64] The prisoner who has been subsequently absolved or his heirs may secure an indemnification from the state for his unjust imprisonment "without prejudice to the right of the latter [the State] to claim against the sentencing judge or tribunal which has incurred responsibility or against the person declared directly responsible or his heirs."[65]

MEXICO

The Republic of Mexico has a Federal Code of Penal Procedure[66] which governs the procedure for the trial of crimes committed against the government or its agencies, *e.g.*, robbing the mails or railroads. The Republic also has a Code of Penal Procedure for the Federal District and the Federal Territories[67] which governs the procedure for crimes committed against nongovernmental entities in the Federal District (Mexico City) and federal territories. In addition, the various states have the right to enact codes of criminal procedure for crimes committed within their boundaries. Both of the federal codes provide that the final sentence in a criminal case becomes irrevocable after the time for filing recourse has expired.[68] However, both of these

[60] Law of Criminal Procedure, art. 954(3) (Spain 1882), as amended [Hereinafter cited as Spanish Code].

[61] Spanish Code, art. 954(4).

[62] Spanish Code, art. 955.

[63] Spanish Code, art. 961.

[64] Spanish Code, art. 957.

[65] Spanish Code, art. 960.

[66] Codigo Federal De Procedimientos Penales (Mexico 1934).

[67] Codigo De Procedimientos Penales para El Distrito y Territorios Federales (Mexico 1931).

[68] Codigo Federal De Procedimientos Penales, art. 360 (Mexico 1934); Codigo De Procedimientos Penales para El Distrito y Territorios Federales, art. 443 (Mexico 1931).

federal codes provide for a judicial system of procedure for obtaining a pardon of sentences obtained by false testimony or documents. It is surprising to note that the wording of these two codes is quite different. The Code of Penal Procedure for the Federal District and Federal Territories provides that the pardon is necessary "(1) when the sentence is founded on documents or declarations of witnesses which, after dictation [of sentence], are declared false in court; (2) when, after the sentence documents appear which invalidate the proof on which the sentence rests or [which invalidate] the proof presented to the jury and which were the basis on which the accusation and the verdict were founded . . . ."[69] The Federal Code of Penal Procedure provides for the pardon "(1) when the sentence is founded exclusively on proofs which subsequently are declared false; (2) when after the sentence there appear public documents which invalidate the proof on which the sentence was founded or [the proofs] presented to the jury and which served to base the accusation and the verdict . . . ."[70]

It is to be noted that under the first code, private documents can be used to invalidate the proof, while the second code requires that public documents be utilized. Further, the use of the modifying word "exclusively" may evidence a more strict application than would be appropriate in the first code. Both codes provide that after a favorable decision is rendered by the reviewing court, it is submitted to the Secretary of the Government for transmittal to the President who then is required to grant the pardon.[71] It would appear that this system eliminates any political considerations in the granting of the pardon, and the judicial branch retains the power to correct its own mistakes. It is submitted that this system is an improvement over the various systems in use in the United States.

CONCLUSION

The vexing problem presented by convictions obtained by perjured testimony could be solved in the United States by a uniform statute providing that any criminal conviction could be set aside by the court which entered it, if the conviction was obtained as the result of false testimony or of forged or false documents. The statute should state that it would not be necessary to allege and prove that the false testimony or false or forged documents were introduced knowingly by the

[69] Codigo De Procedimientos Penales para El Distrito y Territorios Federales, art. 614, §§ 1, 2 (Mexico 1931).

[70] Codigo De Procedimientos Penales, art. 560, §§ 1, 2 (Mexico 1934).

[71] Codigo Federal De Procedimientos Penales, art. 567 (Mexico 1934). *Cf.* Codigo De Procedimientos Penales para El Distrito y Territorios Federales, art. 618 (Mexico 1931), providing for a similar procedure.

prosecution. The convicted person could institute the collateral attack by a motion filed with the trial court at any time while he was serving his sentence or even after it had been completed. This proposed statute would provide expressly that the falsity of the testimony or document would not have to be first determined in a criminal trial for perjury before the motion could be filed.[72]

The movant would have to allege in his motion and prove a prima facie case at a preliminary hearing before the trial judge that perjury was utilized in his trial and that the conviction would not have ensued without this false testimony or documentary evidence. An adverse decision by the judge would be appealable as a final judgment.

If the trial judge under this proposed statute should find that the movant had proved a prima facie case, he would then order that a trial be held to determine the truth or falsity of the impugned testimony or documents. If this trial should determine that the testimony or document was false and the judge believes that the original conviction could not have been obtained without this false evidence, he would then acquit the accused. On the other hand, if the judge believes that the original conviction might have been obtained without this false evidence, or he is in doubt, he would order a new trial to be conducted on the original charges.

The trial to determine the truth or falsity of the impugned testimony or documents would be civil in nature, and the burden of proof prevailing in a criminal case for perjury would not be applicable. The proposed statute should also grant immunity to a witness who has recanted his original testimony before the convicted person has filed his motion to vacate the judgment.

If the assertion that perjury is present in seventy-five per cent of criminal cases is accurate,[73] there is a need for a simple remedy for the unjustly convicted person. The legal realists in the civilian legal systems have recognized the need for corrective devices; we delude ourselves by refusing to recognize the existence of the problem.

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[72] It is submitted that any requirement that the fact of a perjury must be established first in a criminal prosecution for perjury may tend to stultify any relief for the victim of the perjured testimony, because the prosecuting officials may refuse to initiate perjury proceedings against the witness and the courts may not have any power to compel the prosecutor to initiate proceedings. State v. Circuit Court, 214 Ind. 152, 14 N.E.2d 910 (1938); Hassan v. Magistrate's Court, 191 N.Y.S.2d 238 (Sup. Ct. 1959).

[73] Whitman, "A Proposed Solution to the Problem of Perjury In Our Courts," 59 Dick. L. Rev. 127 (1955).