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I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases

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NOTES

I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases

Rule 33 of the Federal Rules of Criminal Procedure authorizes the trial court to grant a new trial to a defendant when "required in the interest of justice."[1] When rule 33 motions for a new trial are based upon newly discovered evidence,[2] judges have exercised their discretion with great caution.[3] Their reluctance to grant new trials on the basis of newly discovered evidence reflects the legitimate interest in protecting the finality of judgments.[4] Because of the great importance

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1. FED. R. CRIM. P. 33 states:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, 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 grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Courts have recognized that rule 33 places new trial decisions within the trial judge's discretion. *See, e.g.*, United States v. Hamilton, 559 F.2d 1370, 1373 (5th Cir. 1977) (citing Hudson v. United States, 387 F.2d 331 (5th Cir. 1976)). The trial court's ruling will be reversed on review only if the trial judge abused or failed to exercise his discretion. *See* United States v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980); United States v. Hamilton, 559 F.2d 1370, 1373 (5th Cir. 1977); United States v. Iannelli, 528 F.2d 1290, 1292 (3d Cir. 1976); United States v. Anderson, 509 F.2d 312, 328 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 991 (1975); United States v. Curran, 465 F.2d 260, 262 (7th Cir. 1972). In practice, the trial judge's ruling will stand unless his findings are wholly unsupported by the evidence. United States v. Johnson, 327 U.S. 106, 112 (1946); United States v. Johnson, 487 F.2d 1278, 1279 (4th Cir. 1973) (per curiam); United States v. Strauss, 443 F.2d 986, 990 (1st Cir.), *cert. denied,* 404 U.S. 851 (1971).

2. *See generally* United States v. Wright, 625 F.2d 1017 (1st Cir. 1980); United States v. Krasny, 607 F.2d 840 (9th Cir. 1979), *cert. denied,* 445 U.S. 942 (1980); United States v. Robinson, 585 F.2d 274 (7th Cir. 1978), *cert. denied,* 441 U.S. 947 (1979); United States v. Mackin, 561 F.2d 958 (D.C. Cir.), *cert. denied,* 434 U.S. 959 (1977); United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 427 U.S. 819 (1976); United States v. Meyers, 484 F.2d 113 (3d Cir. 1973); 8A J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 33.04[1] (2d ed. 1985) [hereinafter cited as 8A MOORE'S FEDERAL PRACTICE]; Annot., 59 A.L.R. FED. 657 (1982) (in which courts and commentators have discussed the issue of when it is appropriate for a trial judge to grant a motion for a new trial based on newly discovered evidence). When this Note uses the term "newly discovered evidence cases," it refers to newly discovered evidence cases generally; when it uses the term "false testimony cases," it refers only to those cases in which newly discovered evidence uncovers false trial testimony.

3. United States v. Hamilton, 559 F.2d 1370, 1373 (5th Cir. 1977) (citing United States v. Riley, 544 F.2d 237, 240 (5th Cir. 1976)); United States v. Curran, 465 F.2d 260, 262 (7th Cir. 1972); United States v. Austin, 387 F. Supp. 540, 542 (M.D. Pa. 1974) (citing United States v. Lombardozzi, 343 F.2d 127, 128 (2d Cir. 1965), *cert. denied,* 381 U.S. 938 (1965)). *See also* United States v. Turner, 490 F. Supp. 583, 595 (E.D. Mich. 1979) (motions for a new trial based on newly discovered evidence are "seldom granted") (citing United States v. Garner, 529 F.2d 962, 969 (6th Cir. 1976), *affd.,* 633 F.2d 219 (6th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981)).

4. *See* United States v. Stofsky, 527 F.2d 237, 243 (2d Cir. 1975), *cert. denied,* 427 U.S. 819

accorded this interest, the vast majority of courts have steadfastly adhered to the long-established rule that newly discovered evidence will not entitle the accused to a new trial unless that evidence would probably produce a different verdict.[5]

Recognizing, however, that the integrity of the judicial process depends not only upon the finality of judgments but also upon fairness to criminal defendants, courts have lowered the standard for retrial in certain situations.[6] One exception to the application of the probability standard arises when newly discovered evidence suggests that a government witness testified falsely at trial.[7] In this situation, most courts

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(1976); United States *ex rel.* Rice v. Vincent, 491 F.2d 1326, 1332 (2d Cir. 1974), *cert. denied,* 419 U.S. 880 (1974); United States v. Troche, 213 F.2d 401, 403 (2d Cir. 1954); *Criminal Law & Procedure — Ninth Circuit Adopts* Berry *Standard For New Trial Based Upon Perjured Testimony,* 11 GOLDEN GATE 171, 174 (1981) [hereinafter cited as *Criminal Law & Procedure*]. The interest in finality is founded upon the notion of judicial economy. Trial courts rarely grant motions for new trial where a costly retrial would be unlikely to produce a different outcome. In Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961), *cert. denied,* 377 U.S. 909 (1964), the court stated:

> [W]here the conduct of the trial has been less censurable, or not censurable at all, a greater showing of prejudice is demanded, because the interest in obtaining an ideal trial, with the trier of the facts considering all admissible evidence that has ever become available, and nothing else, is not thus supplemented and may be outweighed by the interest in avoiding a retrial unlikely to have a different outcome — an interest especially weighty when, as is normally true on collateral attack, the second trial will come long after the first.

Appellate courts are reluctant to disturb the findings of trial courts on motions for new trial in deference to the "orderly administration of criminal justice." United States v. Johnson, 327 U.S. 106, 111 (1946); United States v. Troche, 213 F.2d 401, 403 (2d Cir. 1954). Because trial courts are better qualified to assess the impact of conflicting evidence, appellate courts will not intervene unless the factual findings of the trial court are not supported by any evidence. United States v. Johnson, 327 U.S. at 111, 112.

5. Berry v. Georgia, 10 Ga. 511, 527 (1851). In *Berry,* the Georgia Supreme Court first set forth the probability standard for new trial based upon newly discovered evidence. Almost all courts still apply the *Berry* rule to rule 33 motions for retrial based on newly discovered evidence. To succeed under *Berry* a defendant must show (a) that the evidence was unknown to him at the time of trial; (b) that the failure to discover the evidence was not due to lack of due diligence; (c) that the new evidence is neither cumulative nor impeaching; (d) that the new evidence would probably produce an acquittal. *See, e.g.,* United States v. Street, 570 F.2d 1, 2 (1st Cir. 1977); United States v. Frye, 548 F.2d 769 (8th Cir. 1977); United States v. Iannelli, 528 F.2d 1290, 1292 (3d Cir. 1976); United States v. Stofsky, 527 F.2d 237, 243 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976); United States v. Bertone, 249 F.2d 156, 160 (3d Cir. 1957); 8A MOORE'S FEDERAL PRACTICE, *supra* note 2, at ¶ 33.04[1].

6. Typically, these cases have involved a certain degree of prosecutorial misconduct. Thus, where the prosecutor has suppressed material evidence favorable to the accused, the Supreme Court has ruled that due process mandates a new trial irrespective of the good faith or bad faith of the prosecutor. United States v. Bagley, 105 S. Ct. 3375 (1985); Brady v. Maryland, 373 U.S. 83, 87 (1963). Where the prosecutor has knowledge that testimony by a government witness is false and fails to reveal that information, reversal of a criminal conviction is virtually automatic. United States v. Stofsky, 527 F.2d 237, 243 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976). *See, e.g.,* Moore v. Illinois, 408 U.S. 786, 797-98 (1972); Napue v. Illinois, 360 U.S. 264, 269 (1959); notes 46-48 *infra* and accompanying text. The standard for retrial is also lower when the prosecutor did not actually know of the perjury but should have known of it. Giglio v. United States, 405 U.S. 150 (1972).

7. This Note uses the term "false testimony cases" to describe situations involving no demonstrated prosecutorial misconduct in which newly discovered evidence suggests that a witness testified falsely at trial. False testimony includes testimony that is either deliberately or inadvertantly false. *See* State v. Caldwell, 322 N.W.2d 574, 587 (Minn. 1982) (reasoning that "the

have followed the rule set forth in *Larrison v. United States,*[8] requiring a new trial if, without the perjured testimony, the jury might have reached a different result.[9] Two circuits, however, have rejected the *Larrison* rule, arguing that there is no legitimate reason to distinguish between the discovery of false testimony and any other category of new evidence.[10]

This Note examines the question of what standard should be used for granting a new trial when a defendant's conviction is alleged to have been based, at least in part, on false testimony. Part I demonstrates the failure of the existing standards to strike a satisfactory balance between defendants' rights and the efficient administration of the criminal justice system. Part II argues that motions for retrial based upon false testimony should be governed by a standard drawn not only from newly discovered evidence cases generally, but also from cases involving prosecutorial misconduct. Finally, Part III suggests that the proper test for new trial based upon newly discovered evidence of false testimony is whether there is a significant chance that a jury with knowledge of false testimony would avoid conviction. This test both guards against convictions based upon false testimony and preserves the finality of judgments necessary for the sound and efficient administration of criminal justice. A proper balance between these often competing goals will enhance the interests of justice that rule 33 is designed to protect.

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witness' state of mind" should not "be the factor that determines whether a defendant is entitled to a new trial"); Martin v. United States, 17 F.2d 973, 976 (5th Cir.) (stating that "the duty of a trial court to grant a new trial" includes situations in which the witness "was mistaken in his testimony"), *cert. denied,* 275 U.S. 527 (1927). *See also* Carlson, *False or Suppressed Evidence: Why a Need for the Prosecutorial Tie?,* 1969 DUKE L.J. 1171, 1186 n.42 (1969) (arguing that as a practical matter, all false testimony should be treated alike since the evidentiary problem in proving perjury may be difficult or impossible to overcome). *But see* United States v. Strauss, 443 F.2d 986, 989-90 (1st Cir.), *cert. denied,* 404 U.S. 851 (1971); State v. Caldwell, 322 N.W.2d 574, 597-98 (Minn. 1982) (Peterson, J., dissenting).

8. 24 F.2d 82, 87 (7th Cir. 1928).

9. In *Larrison,* the principal government witness recanted his testimony, but subsequently repudiated the recantation. The Seventh Circuit denied the motion for retrial since it was not reasonably well satisfied that the trial testimony was false. Most courts have accepted the *Larrison* rule in cases involving perjured testimony. *See* United States v. Wright, 625 F.2d 1017, 1020 (1st Cir. 1980); United States v. Gabriel, 597 F.2d 95, 98-99 (7th Cir.), *cert. denied,* 444 U.S. 858 (1979); United States v. Runge, 593 F.2d 66, 74 (8th Cir.), *cert. denied,* 444 U.S. 859 (1979); United States v. Jackson, 579 F.2d 553, 557 (10th Cir.), *cert. denied,* 439 U.S. 981 (1978); United States v. Wallace, 528 F.2d 863, 866 n.3 (4th Cir. 1976) (applying *Larrison* at least where perjury relates to an essential element of the crime); United States v. Meyers, 484 F.2d 113, 116 (3d Cir. 1973); Newman v. United States, 238 F.2d 861, 862 n.1 (5th Cir. 1956); Gordon v. United States, 178 F.2d 896, 900 (6th Cir. 1949), *cert. denied,* 399 U.S. 935 (1950). *See generally* 8A MOORE'S FEDERAL PRACTICE, *supra* note 2, at ¶ 33.06[1]; 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D, § 557 (1982).

10. United States v. Krasny, 607 F.2d 840, 844 (9th Cir. 1979), *cert. denied,* 445 U.S. 942 (1980); United States v. Stofsky, 527 F.2d 237, 246 (2d Cir. 1975), *cert. denied,* 427 U.S. 819 (1976). One circuit has failed to express an opinion as to whether the probability or the might standard should be applied to cases involving perjured testimony. United States v. Mackin, 561 F.2d 958, 961 (D.C. Cir.), *cert. denied,* 434 U.S. 959 (1977).

I. CRITICISM OF EXISTING STANDARDS

The standards currently used in ruling on motions for retrial based upon false testimony fail to strike an acceptable balance between the rights of the accused and the demand for efficient administration of the criminal justice system in federal courts. The *Larrison* standard is prone to inconsistent application and disregards witness credibility in the determination of whether a jury would have reached a different verdict. The probability standard is capable of more consistent application but, in its deference to judicial economy, sacrifices the rights of some defendants who would have had a significant chance of acquittal or a hung jury on retrial.

A. *The* Larrison *Standard*

In *Larrison,* the Seventh Circuit ruled that a new trial should be granted when each of three conditions are met:

> (a) The court is reasonably well satisfied that the testimony given by a material witness is false.
>
> (b) That without it the jury *might* have reached a different conclusion.
>
> (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.[11]

The first prong of the *Larrison* test unfairly disadvantages defendants because it fails to provide for retrial even when a material witness is totally discredited. Because the test initially requires that the trial court be "reasonably well satisfied that the testimony given by a mate-

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11. Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir. 1928) (emphasis in original). Analysis of the third prong of the *Larrison* test — "that the party seeking the new trial was taken by surprise" — is beyond the scope of this Note. Detailed examination of this requirement is unnecessary since there is little controversy surrounding it. The requirement that the defense must exercise "due diligence" exists in cases governed by both the *Larrison* and the *Berry* rule. *See* United States v. Robinson, 585 F.2d 274, 278-79 (7th Cir), *cert. denied,* 441 U.S. 947 (1978); United States v. Becker, 466 F.2d 886, 889-90 (7th Cir. 1972), *cert. denied,* 409 U.S. 1109 (1973); United States v. Costello, 255 F.2d 876, 879 (2d Cir.), *cert. denied,* 357 U.S. 937 (1958); United States v. Flynn, 131 F. Supp. 742, 743 (S.D.N.Y. 1955). This condition is related to the efficient administration of justice. *See* note 4 *supra.* If the lack of due diligence on the part of defense counsel is of such significance as to deny the accused a fair trial, the defendant may raise an ineffective assistance of counsel claim on appeal. Strickland v. Washington, 466 U.S. 668 (1984). One commentator has noted that the due diligence requirement of *Larrison* actually adds very little to the test:

> An additional test for a recantation is said to be whether the defendant was surprised by the testimony and unable to meet it. This seems to be no more than an extension of the probability-of-acquittal test. That is, if defendant was able to meet the testimony (e.g., by impeaching the witness), it can hardly be claimed that the recantation might result in a different verdict.

8A MOORE'S FEDERAL PRACTICE, *supra* note 2, at ¶ 33.05. Moore's analysis can be empirically verified. Of the 50 cases surveyed in which the *Larrison* test was employed, there was not a single case in which a motion for retrial was denied solely because of the defendant's failure to show he was taken by surprise.

rial witness is false,"[12] retrials may be denied when judges are unable reasonably to determine whether a witness was, in fact, telling the truth.[13] Such confusion frequently occurs when the inherently suspect testimony of an accomplice witness[14] is followed by an equally suspect recantation.[15] The witness may be thoroughly discredited at this point, but the defendant will not be entitled to a new trial under the *Larrison* test.[16]

12. 24 F.2d at 87. Although *Larrison* itself did not address the issue of whether the court's test should apply only to testimony that is deliberately false, courts have subsequently interpreted *Larrison* as applying to false testimony generally. *See* note 7 *supra. See also* United States v. Costello, 255 F.2d 876, 879 (2d Cir.), *cert. denied,* 357 U.S. 937 (1958); United States v. Johnson, 142 F.2d 588, 591 (7th Cir.), *cert. dismissed,* 323 U.S. 806 (1944); United States v. Hiss, 107 F. Supp. 128, 136 (S.D.N.Y. 1952), *aff'd.,* 201 F.2d 372 (2d Cir.), *cert. denied,* 345 U.S. 942 (1953).

13. *See* United States v. Troche, 213 F.2d 401, 403 (2d Cir. 1954). In *Troche,* the Second Circuit affirmed the district court's denial of a motion for new trial. Although he regarded the government witness to be "completely irresponsible," the district court judge denied a retrial, finding that the law required him to "be reasonably well satisfied that the testimony given by the witness was false" and that he had "no reason to believe that on one occasion more than another [the witness] was telling the truth."

14. *See* note 62 *infra.*

15. Because bribery, coercion, and collusion may constitute great incentives to recant, recantations are "looked upon with the utmost suspicion." United States v. Johnson 487 F.2d 1278, 1279 (4th Cir. 1973) (per curiam) (quoting United States v. Lewis, 338 F.2d 137, 139 (6th Cir. 1964)). *See also* Pelegrina v. United States, 601 F.2d 18, 21 (1st Cir. 1979); United States v. Mackin, 561 F.2d 958, 961 (D.C. Cir.), *cert. denied,* 434 U.S. 959 (1977); United States *ex rel.* Sostre v. Festa, 513 F.2d 1313, 1318 (2d Cir.), *cert. denied,* 423 U.S. 841 (1975); United States *ex rel.* Rice v. Vincent, 491 F.2d 1326, 1332 (2d Cir.), *cert. denied,* 419 U.S. 880 (1974); United States v. Smith, 433 F.2d 149, 150-51 (5th Cir. 1970); Newman v. United States, 238 F.2d 861, 862 n.1 (5th Cir. 1956); United States v. Troche, 213 F.2d 401, 403 (2d Cir. 1954).

16. The failure to establish the falsity of trial testimony is the dominant reason for denial of rule 33 motions for new trial based on perjured testimony. Of 50 cases in which the *Larrison* test or its substantial equivalent was employed, retrials were denied in 40. Of these 40 cases, the failure to establish that the trial testimony was false was a factor in all but 8. The 50 cases analyzed include almost all federal circuit court and district court cases in which motion for retrial was based at least in part on an allegation of false testimony at trial. In 32 cases retrials were denied solely or in part on the basis of a failure to show that the trial testimony was false or perjurious. *See* United States v. Jarett, 705 F.2d 198, 206 (7th Cir. 1983), *cert. denied,* 465 U.S. 1004 (1984); United States v. Mangieri, 694 F.2d 1270, 1287 (D.C. Cir. 1982); United States v. Wright, 625 F.2d 1017, 1020-21 (1st Cir. 1980); Pelegrina v. United States, 601 F.2d 18, 20 (1st Cir. 1979); United States v. Gabriel, 597 F.2d 95, 99 (7th Cir.), *cert. denied,* 444 U.S. 858 (1979); United States v. Runge, 593 F.2d 66, 74 (8th Cir.), *cert. denied,* 444 U.S. 859 (1979); United States v. Mackin, 561 F.2d 958, 961 (D.C. Cir.), *cert. denied,* 434 U.S. 959 (1977); United States *ex rel.* Sostre v. Festa, 513 F.2d 1313, 1317-19 (2d Cir.), *cert. denied,* 423 U.S. 841 (1975); United States v. Anderson, 509 F.2d 312, 327 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 991 (1975); United States *ex rel.* Rice v. Vincent, 491 F.2d 1326, 1332 (2d Cir.), *cert. denied,* 419 U.S. 880 (1974); United States v. Johnson, 487 F.2d 1278, 1280 (4th Cir. 1973) (per curiam); United States v. Briola, 465 F.2d 1018, 1022 (10th Cir. 1972), *cert. denied,* 409 U.S. 1108 (1973); United States v. Sloan, 465 F.2d 406, 407 (9th Cir. 1972) (per curiam); United States v. Strauss, 443 F.2d 986, 990 (1st Cir.), *cert. denied,* 404 U.S. 851 (1971); United States v. DeSapio, 435 F.2d 272, 286-87 (2d Cir. 1970); United States v. Smith, 433 F.2d 149, 150 (5th Cir. 1970); United States v. Polisi, 416 F.2d 573, 578 (2d Cir. 1969) (retrial granted on other grounds); United States v. Higgins, 412 F.2d 789, 791 (7th Cir. 1969); United States v. Lombardozzi, 343 F.2d 127, 128 (2d Cir.) (per curiam), *cert. denied,* 381 U.S. 938 (1965), Newman v. United States, 238 F.2d 861, 863 (5th Cir. 1956); United States v. Troche, 213 F.2d 401, 403 (2d Cir. 1954); Golden v. United States, 178 F.2d 896, 900 (6th Cir. 1949), *cert. denied,* 399 U.S. 935 (1950); Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir. 1928); Martin v. United States, 17 F.2d 973, 976 (5th Cir.), *cert. denied,* 275 U.S. 527 (1927); United States v. Sutton, 557 F. Supp. 15, 18-20 (D.D.C. 1982), *aff'd.,* 702

The second part of the *Larrison* test, requiring that without the false testimony, "the jury *might* have reached a different conclusion," is equally flawed.[17] When a material government witness is discovered to have committed perjury, it is virtually impossible to say that the jury might not have acquitted. Literally applied, therefore, the *Larrison* test would require reversal in almost every case involving false testimony.[18] This interpretation of the might standard would unduly burden the judicial system with new trials based on the slightest possibility of a different verdict.

In *Stofsky,* the Second Circuit contended that most courts profes-

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F.2d 1206 (D.C. Cir.), *cert. denied,* 464 U.S. 827 (1983); United States v. Provenzano, 521 F. Supp. 403, 414-15 (D.N.J. 1981), *affd.,* 681 F.2d 810 (3d Cir.), *cert. denied,* 459 U.S. 861 (1982); United States v. Bonilla, 503 F. Supp. 626, 630 (D.P.R. 1980); United States v. Austin, 387 F. Supp. 540, 542-43 (M.D. Pa. 1974); United States v. Wapnick, 202 F. Supp. 716, 718 (E.D.N.Y. 1962); United States v. Aviles, 197 F. Supp. 536, 549 (S.D.N.Y. 1961), *affd.,* 315 F.2d 186 (2d Cir.), *vacated on other grounds sub nom.,* Barcellona v. United States, 375 U.S. 32 (1963); United States v. Passero, 185 F. Supp. 665, 669-70 (E.D.N.Y. 1960), *affd.,* 290 F.2d 238 (2d. Cir.), *cert. denied,* 368 U.S. 819 (1961); United States v. Rogers, 182 F. Supp. 786, 787 (E.D.N.Y. 1960). In only 8 of the cases denying retrials was the failure to establish false testimony at trial not an issue. *See* United States v. Jackson, 579 F.2d 553, 556-57 (10th Cir.) (retrial denied since false testimony would have no effect at trial), *cert. denied,* 439 U.S. 981 (1978); United States v. Hamilton, 559 F.2d 1370, 1374-75 (5th Cir. 1977) (retrial denied since the new evidence was neither "likely" nor "probable" to produce a different result); United States v. Becker, 466 F.2d 886, 889-90 (7th Cir.) (retrial denied since the defense was not taken by surprise and the jury would not have reached a different result), *cert. denied,* 409 U.S. 1109 (1972); Kyle v. United States, 297 F.2d 507, 512 (2d Cir. 1961) (retrial denied where the court stated that there was no more than an "outside chance" that jury would have reached a different result), *cert. denied,* 377 U.S. 909 (1964); United States v. Capece, 287 F.2d 537, 538-39 (2d Cir.) (retrial denied since jury would not have reached a different result and defense failed to exercise due diligence), *cert. denied,* 368 U.S. 847 (1961); Winer v. United States, 228 F.2d 944, 952 (6th Cir.) (retrial denied because no probability of a different verdict), *cert. denied,* 357 U.S. 906 (1956); United States v. Diecidue, 448 F. Supp. 1011, 1019 (M.D. Fla. 1978) (retrial denied since jury would not have reached a different verdict); United States v. Garrison, 192 F. Supp. 195, 197 (E.D. Wis.) (retrial denied since defendants did not show that the allegedly false statements were material or that the evidence was newly discovered), *affd.,* 296 F.2d 461 (7th Cir. 1961), *cert. denied,* 369 U.S. 804 (1962). This Note offers an alternative approach to the frequent problem of the thoroughly discredited witness. *See* note 89 *infra* and accompanying text.

17. 24 F.2d at 87 (emphasis in original). Although most courts imposing the "might" test have not addressed the issue, it seems clear that the test requires only that the jury might have avoided a conviction, not that all twelve jurors would have changed their votes and acquitted. In other words, the *Larrison* test is met if, without the false testimony, there might have been a hung jury. *See* United States v. Meyers, 484 F.2d 113, 116 (3d Cir. 1973); United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969); 8A MOORE'S FEDERAL PRACTICE, *supra* note 2, at ¶¶ 33.04[1], 33.06[1].

18. United States v. Krasny, 607 F.2d 840, 844 (9th Cir. 1979), *cert. denied,* 445 U.S. 942 (1980), which interprets *Larrison* as requiring new trials in all cases involving false testimony. *See* United States v. Stofsky, 527 F.2d 237, 245 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976), explaining that, under the *Larrison* standard, reversal would be required:

> in cases of perjury with respect to even minor matters, especially in light of the standard jury instruction that upon finding that a witness had deliberately proffered false testimony in part, the jury may disregard his entire testimony. Thus, once it is shown that a material witness has intentionally lied with respect to any matter, it is difficult to deny that the jury, had it known of the lie, "might have acquitted."

See also United States v. Agurs, 427 U.S. 97, 109 (1976) ("[A] jury's appraisal of a case 'might' be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt."); notes 22-26 *infra* and accompanying text.

sing to follow the *Larrison* might test have actually circumvented its harsh effect by failing to recognize that the trial testimony was perjurious or by simply concluding that the might standard remains unsatisfied.[19] This criticism of *Larrison* assumes that whenever a court does not apply the might standard literally it is being dishonest in its application of the test. Courts may, however, interpret the word "might" to have a broader meaning than that used by the *Stofsky* court without engaging in judicial dishonesty.[20]

A better criticism of the *Larrison* test is that "might" is a poor word choice because it is susceptible to differing interpretations. The word has been given different meanings by different courts, and the results have therefore been inconsistent.[21] These problems of vague-

19. United States v. Stofsky, 527 F.2d 237, 246 n.10 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976). *See also Criminal Law & Procedure, supra* note 4, at 181-82. A similar argument has been made about application of the probability standard. United States v. Strauss, 443 F.2d 986, 989 n.3 (1st Cir.), *cert. denied,* 404 U.S. 851 (1971).

20. Even assuming that courts are confined to the narrow meaning of "might" that the *Stofsky* court believed was the necessary interpretation, most courts have not subverted the test in practice. First, while courts have been reluctant to grant retrials in false testimony cases, the *Larrison* test has resulted in more retrials than the *Stofsky* court was willing to acknowledge. The *Stofsky* court surveyed seven cases and found a retrial in only one, and "even in that case the court concluded that the perjury was so serious that it would have called for a retrial under *either Berry* or *Larrison.*" 527 F.2d at 246 n.10 (emphasis in original) (citation omitted). A more comprehensive investigation reveals that of 50 cases, retrials were granted in 9 using the *Larrison* test, and in only 3 of those 9 cases did the court explicitly state that a retrial would have been granted using either test. The cases which did *not* state that a retrial would have been granted using either test are United States v. Wallace, 528 F.2d 863 (4th Cir. 1976); Williams v. United States, 500 F.2d 105 (9th Cir. 1974) (using the *Larrison* "might" standard, but not labeling it as such); United States v. Johnson, 149 F.2d 31 (7th Cir. 1945), *revd. on other grounds,* 327 U.S. 106 (1946); Jones v. Kentucky, 97 F.2d 335 (6th Cir. 1938) (implicitly relying on the "might" test); United States v. Willis, 467 F. Supp. 1111 (W.D. Pa. 1979); United States v. Flynn, 130 F. Supp. 412 (S.D.N.Y. 1955). The three cases which would have granted a new trial using either the *Berry* or *Larrison* rule are United States v. Meyers, 484 F.2d 113, 117 (3d Cir. 1973); United States v. Atkinson, 429 F. Supp. 880, 887 (E.D.N.C. 1977); United States v. Mitchell, 29 F.R.D. 157, 158 (D.N.J. 1962). Moreover, because these decisions are typically recorded at the appellate level and the standard for review at that level is extremely deferential, *see* note 1 *supra,* these results would tend to underestimate the number of retrials actually granted under *Larrison* at the trial court level. Second, the *Larrison* standard is not necessarily circumvented every time a court makes a finding that there is no perjury. The greater likelihood is that in a substantial number of cases the judge had good reason to believe that the recantation itself was false. *See* note 15 *supra.* Finally, as already indicated, because the *Larrison* standard provides no guidelines for dealing with the effect on a jury of a discredited witness, it is extremely difficult for the defense to prove falsity in the first place. *See* notes 12-16 *supra* and accompanying text.

21. *See, e.g.,* United States v. Krasny, 607 F.2d 840, 843 (9th Cir. 1979) (equating "might" with "possibility"), *cert. denied,* 445 U.S. 942 (1980); United States v. Jackson, 579 F.2d 553, 556 (10th Cir.) (same), *cert. denied,* 439 U.S. 981 (1978); United States v. Hibler, 463 F.2d 455, 460 (9th Cir. 1972) (*Larrison* test met where court could not say "that the withheld information was so unimportant that it would have had little, if any, effect on the jury's verdict"); Kyle v. United States, 297 F.2d 507, 512 (2d Cir. 1961) (" 'might' means something more than an outside chance although much less than the 'would probably' of the *Berry* rule"), *cert. denied,* 377 U.S. 909 (1964); United States v. Provenzano, 521 F. Supp. 403, 412 (D.N.J. 1981) (equating "might" with "possibility"), *affd.,* 681 F.2d 810 (3d Cir.), *cert. denied,* 459 U.S. 861 (1982); United States v. Wapnick, 202 F. Supp. 716, 717 (E.D.N.Y. 1962) ("more than an outside chance"); United States v. Garrison, 192 F. Supp. 195, 197 (E.D. Wis. 1961) (*Larrison* test not met where "alleg-

ness and inconsistent application render the *Larrison* standard an unreliable guide for new trial decisions.

Perhaps the strongest criticism of the *Larrison* test is that it does not require consideration of the effect that knowledge of perjury would have had on a jury's evaluation of the witness's credibility.[22] The *Larrison* test requires a showing that the verdict might have been different had the false testimony simply not been in the record in the previous trial.[23] The false testimony is thus considered only for its probative impact on the factual elements of the prosecution's case.[24] The existence of false testimony is equally germane, however, to the credibility of the government's witness.[25] In cases in which the defense documents that a government witness has perjured a portion of his perti-

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edly false testimony concerns minor details not material to the guilt of the defendants"), *affd.*, 296 F.2d 461 (7th Cir. 1961), *cert. denied,* 369 U.S. 804 (1962).

22. *See Stofsky,* 527 F.2d at 246; *Criminal Law & Procedure, supra* note 4, at 178. The language of the test itself seems to suggest that the appellate court is to assume that the jury did not have knowledge of the perjury since the test looks to the original trial and asks what verdict the jury would have reached without the perjured testimony. Some courts, however, have modified *Larrison* to include the effects of the perjury on jury evaluation of witness credibility. In United States v. Johnson, 149 F.2d 31, 44 (7th Cir. 1945), *revd. on other grounds,* 327 U.S. 106 (1946), for example, the court for the Seventh Circuit indicated that under *Larrison,* the jury may be charged with knowledge of the perjury. The court quoted Martin v. United States, 17 F.2d 973, 976 (5th Cir.), *cert. denied,* 275 U.S. 527 (1927), for the proposition that "a new light is thrown on [the perjured testimony] by the admission that it was false; so that, on a new trial, there would be strong circumstance in favor of the losing party that did not exist and therefore could not have been shown, at the time of the original trial." *See also* United States v. Willis, 467 F. Supp. 1111, 1113 (W.D. Pa. 1979) (expanding *Larrison* to include the effect of the jury's knowledge of the perjury on a future trial).

23. The Seventh Circuit set forth the theoretical framework for looking backward to the effect on the previous trial in United States v. Johnson, 149 F.2d 31, 44 (7th Cir. 1945), *revd. on other grounds,* 327 U.S. 106 (1946):

> On an ordinary motion for new trial, the court is concerned with the probable effect which the newly discovered evidence might have upon another trial. In contrast, where the motion is based on false swearing, the concern of the court must be as to the probable effect produced on the trial already had. In the former case, the court looks to the future, in the latter case to the past, and the sole question is whether the defendants' right to a fair and impartial trial has been prejudiced by reason of the false testimony.

24. *See* note 22 *supra.* If the court is doing no more than analyzing the previous trial for prejudice, all it need do is remove the factor that caused the jury's verdict to be prejudiced, in this case the perjured testimony. It need not take the additional step of injecting the entirely new element of witness credibility.

25. It is ironic that in United States v. Johnson, 149 F.2d 31 (7th Cir. 1945), *revd. on other grounds,* 327 U.S. 106 (1946), the first decision stating that the sole concern in false testimony cases is the effect of the false swearing on the original jury, the court also quoted Martin v. United States, 17 F.2d 973, 976 (5th Cir. 1927), to support the proposition that because of the effect of the perjury on the witness's credibility at "a *new trial,* there would be a strong circumstance in favor of the losing party that did not exist . . . at the time of the original trial." (emphasis added). Both fairness and efficiency suggest strong reasons for looking at the potential effect of the new evidence on retrial. In fairness terms, the credibility of the witness may have been the key factor that led the jury to convict. *See* Napue v. Illinois, 360 U.S. 264, 269 (1959); United States v. Atkinson, 429 F. Supp. 880, 885 (E.D.N.C. 1977). In efficiency terms, it makes more sense to ask whether a new trial would make any difference rather than to have retrials every time a prosecution witness's perjury caused some degree of prejudice no matter how frivolous. *But cf.* United States v. Krasny, 607 F.2d 840 (9th Cir. 1979), in which the Ninth Circuit was unable to see "any practical difference" between the previous trial and a new trial in evaluat-

nent testimony, it would be unfair to the defendant to consider the remainder of the witness's testimony unimpeached. Indeed, the jury's assessment of witness credibility may ultimately determine the guilt or innocence of the accused.[26]

B. *The* Stofsky *Test*

In *United States v. Stofsky,*[27] the Second Circuit rejected the *Larrison* standard for new trial in false testimony cases in favor of the probability-of-acquittal standard traditionally applied in newly discovered evidence cases. Under the probability test, retrial will be granted only when the new evidence is so material that it "probably" would produce a different verdict at the new trial.[28] The *Stofsky* court found that the probability test would allow courts to "act forthrightly" and would result in fewer retrials than the might test.[29] In addition, unlike the *Larrison* test, the *Stofsky* standard properly focuses on the effect that evidence of perjury has on witness credibility as well as on the factual elements of the government's case.[30]

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ing the weight of perjured testimony. This observation only has merit, however, if the effect of the perjured testimony on witness credibility is considered in both cases.

26. The Supreme Court in Napue v. Illinois, 360 U.S. 264, 269 (1959) recognized that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

27. 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 427 U.S. 819 (1976).

28. While the *Stofsky* test allows a new trial when newly discovered evidence of false testimony would probably have produced "a different verdict," 527 F.2d at 247, most courts applying the probability test in cases involving other types of newly discovered evidence have required that "the newly discovered evidence probably would have resulted in *acquittal*" on retrial. United States v. Agurs, 427 U.S. 97, 111 (1976) (emphasis added); *see also* United States v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980); Pelegrina v. United States, 601 F.2d 18, 21 (1st Cir. 1979); United States v. Krasny, 607 F.2d 840, 844 (9th Cir. 1979), *cert. denied,* 445 U.S. 942 (1980); United States v. Robinson, 585 F.2d 274, 278 n.4 (7th Cir. 1978), *cert. denied,* 441 U.S. 947 (1979); United States v. Jackson, 579 F.2d 553, 557 (10th Cir.), *cert. denied,* 439 U.S. 981 (1978); United States v. Mackin, 561 F.2d 958, 961 (D.C. Cir.), *cert. denied,* 434 U.S. 959 (1977); United States v. Frye, 548 F.2d 765, 769 (8th Cir. 1977); United States v. Iannelli, 528 F.2d 1290, 1292 (3d Cir. 1976); Garrison v. Maggio, 540 F.2d 1271, 1274 (5th Cir. 1976), *cert. denied,* 431 U.S. 940 (1977); United States v. Williams, 415 F.2d 232, 233 (4th Cir. 1969); Pitts v. United States, 263 F.2d 808, 810 (9th Cir.), *cert. denied,* 360 U.S. 919 (1959); United States v. Bertone, 249 F.2d 156, 160 (3d Cir. 1957); Thompson v. United States, 188 F.2d 652, 653 (D.C. Cir. 1951); Johnson v. United States, 32 F.2d 127, 130 (8th Cir. 1929). The slight difference in wording between "probably produce an acquittal" and "probably produce a different verdict" is most likely not intended to have any effect on the applicable standard of review. What the difference does reflect, however, is an obvious confusion on the part of the courts as to whether the test is to be measured against a twelve-juror standard or a hung-jury standard. Given the extreme difficulty of predicting how a jury will react whenever any new evidence is introduced, one wonders whether such subtle distinctions really make any difference in practice. *See generally* Teitelbaum, Sutton-Barbere & Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?,* 1983 WIS. L. REV. 1147.

29. 527 F.2d at 246. *Cf.* notes 19-21 *supra* and accompanying text.

30. In concluding that the impact on a jury of witness credibility should be assessed in ruling on motions for new trial, the *Stofsky* court stated:

> Another problem that does not appear to have been the subject of explicit reported judicial consideration, at least in this circuit, is whether, in considering a motion for a new trial on

Despite these apparent improvements over the *Larrison* test, there are good reasons for viewing the *Stofsky* test with skepticism. First, by placing disproportionate emphasis on efficient judicial administration, the probability test may deprive defendants of their constitutionally guaranteed right to a fair trial.[31] Since the test denies retrial to defendants with improbable yet significant chances of acquittal,[32] many defendants will be convicted on the basis of false testimony. A trial that results in conviction on the basis of false testimony may be so fundamentally unfair as to constitute a denial of due process.[33] Thus,

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grounds of perjury, the court should assume that the jury would have had before it the newly-discovered evidence not only for its probative value with respect to the issues but also to demonstrate that the witness had perjured himself with respect to that evidence, the latter being pertinent, of course, for its impeaching value. Put another way, should we, in determining whether truthful testimony by the witness would probably have changed the jury's verdict, also assume that the jury would have known that he had lied under oath about the matter? Since the witness's credibility could very well have been a factor of central importance to the jury, indeed every bit as important as the factual elements of the crime itself, . . . we would answer this question in the affirmative. Upon discovery of previous trial perjury by a government witness, the court should decide whether the jury probably would have altered its verdict if it had 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.

527 F.2d at 246 (citations omitted).

31. The concept of due process set forth in the fifth amendment and extended to the states by the fourteenth amendment includes more than merely notice and an opportunity to be heard. Mooney v. Holohan, 294 U.S. 103, 112 (1935). Due process "embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." 294 U.S. at 112. *See also* Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

32. If, as the *Stofsky* court argued, a literal application of the might standard would make retrials virtually automatic, then it may be argued with equal force that a literal application of the probability standard would deny retrials to defendants whenever a judge determined there was a 50% or lower chance of acquittal at a new trial. Thus, convictions may be upheld even where defendants have a significant chance of acquittal. The meaning of "significant" in this context is not a precise mathematical figure that can be empirically verified. Instead, what is meant is a common sense or intuitive judgment that the chances that the innocent will be made to suffer are simply too high to tolerate.

33. Although intuitively it might seem that convictions based even in part on perjured testimony are fundamentally unfair and, therefore, implicate due process concerns, this is not the majority view. *See* United States *ex rel.* Williams v. Walker, 535 F.2d 383, 386-87 (7th Cir. 1976) ("The introduction of perjured testimony without more does not violate the constitutional rights of the accused. It is the knowing and intentional use of such testimony by the prosecuting authorities that is a denial of due process of law."); *see also* Hysler v. Florida, 315 U.S. 411, 413 (1942) (dicta suggesting that petitioner "cannot, of course, contend that mere recantation of testimony is in itself ground for invoking the Due Process Clause against a conviction"); Jackson v. United States, 384 F.2d 375, 376 (5th Cir. 1967), *cert. denied,* 392 U.S. 932 (1968); Marcella v. United States, 344 F.2d 876, 880 (9th Cir. 1965) (stating that the "movant must show that the testimony was perjured and that the prosecuting officials knew at the time such testimony was used that it was perjured"), *cert. denied,* 382 U.S. 1016 (1966); Green v. United States, 313 F.2d 6, 8 n.2 (lst Cir.) (holding that "it is not enough that perjury be shown; there must be proof that it was committed with the knowledge of the prosecution"), *petition for cert. dismissed,* 372 U.S. 951 (1963); Holt v. United States, 303 F.2d 791, 794 (8th Cir. 1962), *cert. denied,* 372 U.S. 970 (1963); Clark v. Warden, 293 F.2d 479, 482 (4th Cir. 1961), *cert. denied,* 369 U.S. 877 (1962); Kyle v. United States, 266 F.2d 670, 674 (2d Cir.), *cert. denied,* 361 U.S. 870 (1959); United States v. Jakalski, 237 F.2d 503, 504-505 (7th Cir. 1956) (arguing that "introduction of perjured testimony without more does not violate the constitutional rights of the accused"), *cert. denied,* 353 U.S. 939 (1957); Taylor v. United States, 229 F.2d 826, 832 (8th Cir.) (stating that "the fact that there may be false testimony does not alone and of itself vitiate a judgment"), *cert. denied,*

while the introduction of false testimony of low materiality would not be a per se violation of the due process clause, the introduction of false testimony that has a significant chance of affecting the jury's verdict is so fundamentally unfair that it jeopardizes the defendant's due process rights.[34]

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351 U.S. 986 (1956); Tilghman v. Hunter, 167 F.2d 661, 662 (10th Cir. 1948) (stating that "the mere introduction of perjured testimony in the trial of a criminal case is not enough to void the judgment"). Nevertheless, there is some authority suggesting that the mere introduction of false testimony at trial may constitute a denial of due process:

> It is well settled that to obtain a conviction by the use of testimony known by the prosecution to be perjured offends due process. While the petition did not allege that the prosecution knew that petitioner's codefendants were lying when they implicated petitioner, the State now knows that the testimony of the only witnesses against petitioner was false. No competent evidence remains to support the conviction. Deprivation of a hearing under these circumstances amounts in my opinion to a denial of due process of law.

Durley v. Mayo, 351 U.S. 277, 290-91 (1956) (Douglas, J., dissenting, joined by Warren, Black, and Clark, J.J.) (citations omitted). *See also* United States v. Diecidue, 448 F. Supp. 1011, 1018 (M.D. Fla. 1978) (observing the "strong suggestion in some decisions that the same, less stringent standard of materiality applies whenever perjury is shown regardless of prosecutorial entanglement"); People v. Hilliard, 65 Ill. App. 3d 642, 382 N.E.2d 441 (1978) ("Known to the state or not, the use of its judicial process to convict and imprison on perjured testimony is a miscarriage of justice which is abhorent to fundamental fairness and as such intolerable."); State v. Caldwell, 322 N.W.2d 574, 586 (Minn. 1982) (although basing its decision on the supervisory role of an appellate court and not "feel[ing] the need to reach the constitutional issue," nevertheless stating that the defendant had a "right to be tried, insofar as possible, on the basis of true and correct evidence; to deny him this right is to deny him a fair trial"); Carlson, *supra* note 7, at 1171, 1176. The leading case advocating due process protection in perjured testimony cases is Jones v. Kentucky, 97 F.2d 335, 338 (6th Cir. 1938), in which the Sixth Circuit stated:

> "[T]he 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 . . . is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired. . . . The appellant is not to be sacrificed upon the altar of a formal legalism too literally applied when those who from the beginning sought his life in effect confess error, when impairment of constitutional right may be perceived, and the door to clemency is closed.

See also Kelly v. Ragen, 129 F.2d 811, 814 (7th Cir. 1942) (citing *Jones* with approval); Imbler v. Craven, 298 F. Supp. 795, 804-05 (C.D. Cal. 1969) (also citing *Jones* with approval); United States *ex rel.* Montgomery v. Ragen, 86 F. Supp. 382, 390 (N.D. Ill. 1949) (citing *Jones* as authority that defendant was deprived of due process of law). *But see* United States *ex rel.* Williams v. Walker, 535 F.2d 383, 387 (7th Cir. 1976) (refusing to apply *Jones*); Burks v. Egeler, 512 F.2d 221, 229 (6th Cir.) ("unable to approve of the precise language" of *Jones* "as a continuing guideline"), *cert. denied,* 423 U.S. 937 (1975); Hodge v. Huff, 140 F.2d 686, 688 (D.C. Cir.) (limiting *Jones* to a narrow set of facts), *cert. denied,* 322 U.S. 733 (1944). This Note is not in conflict with the weight of the authority to the extent that such authority concludes that the mere introduction of false testimony *without more* does not violate the rights of the accused. It is the position of this Note that when the introduction of false testimony rises to a sufficiently high level of materiality, meaning evidence which has a significant chance of affecting the jury, due process rights are implicated. *See* notes 34, 72-74 *infra* and accompanying text.

34. *See, e.g.,* United States v. Bagley, 105 S. Ct. 3375, 3381 (1985) ("[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial"); United States v. Agurs, 427 U.S. 97, 109-10 (1976) ("The mere possibility that an item of undisclosed information . . . might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."); United States v. Miller, 499 F.2d 736, 743-44 (10th Cir. 1974); Shuler v. Wainwright, 491 F.2d 1213, 1223 (5th Cir. 1974) (stating that "the real question is whether the prosecution failed to disclose evidence so material to the guilt or innocence of the accused that *he was denied a fair trial*") (emphasis in original). In cases involving the inadvertent suppression of evidence

Even if the probability standard does not result in fundamental unfairness to defendants having a significant chance of a different verdict on retrial, it may violate the rule of fairness implicit in rule 33. The "interest of justice" requires that judicial efficiency be balanced against the need for the "untainted administration of justice."[35] Conviction on the basis of false testimony, especially where there is a significant chance that the conviction would not have occurred but for the perjury, arguably violates this standard of fairness. The fairness requirement of rule 33 may be invoked without regard to an independent constitutional violation.[36]

Third, by needlessly confusing the roles of judge and jury, the *Stofsky* probability standard threatens the defendant's sixth amendment right to a jury trial.[37] The right to trial by jury means that a jury, not a judge, must make the final determination of the innocence or guilt of the accused.[38] The function of the trial judge is to decide only whether the newly discovered evidence should be submitted to the jury, not what its ultimate weight should be.[39] Because there is "no way for a court to determine that the perjured testimony did not have controlling weight with the jury," when the judge attempts to second-guess

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by the prosecutor, courts have found due process violations when the evidence rose to such a level of significance that its nondisclosure resulted in fundamental unfairness. *See* United States v. Harris, 462 F.2d 1033, 1034-35 (10th Cir. 1972), *cert. denied,* 419 U.S. 993 (1974); Link v. United States, 352 F.2d 207, 212-13 (8th Cir. 1965), *cert. denied,* 383 U.S. 915 (1966); Ashley v. Texas, 319 F.2d 80, 85 (5th Cir.), *cert. denied,* 375 U.S. 931 (1963).

35. Communist Party of the United States v. Subversive Activities Control Bd., 351 U.S. 115, 124 (1956).

36. *See* 8A MOORE'S FEDERAL PRACTICE, *supra* note 2, at ¶ 33.06[1].

37. U.S. CONST. amend. VI ("the accused shall enjoy the right to . . . an impartial jury."). The argument that the probability standard confuses the roles of judge and jury applies to a certain extent to all rule 33 newly discovered evidence cases. The problem is much more serious when false testimony is involved, however, because in false testimony cases it is probable that the resulting trial was in some way substantively "unfair" to the defendant. In newly discovered evidence cases, on the other hand, the omission may have had a neutral, rather than a negative, impact. Because the false testimony may be presumed to have had a negative impact, and because it is difficult to estimate how much weight the jury gave it, the power of the judge to determine how the jury would have reacted in the absence of the false testimony should be narrow. *See* notes 80-82 *infra* and accompanying text.

38. *See* United States v. Agurs, 427 U.S. 97, 116-118 (1976) (Marshall, J., dissenting); Pettine v. Territory of New Mexico, 201 F. 489, 494 (C.C.N.M. 1912); United States v. Mitchell, 29 F.R.D. 157, 159 (D.N.J. 1962).

39. United States v. Mitchell, 29 F.R.D. 157, 159 (D.N.J. 1962). In Mesarosh v. United States, 352 U.S. 1, 12 (1956), a case involving a witness who had been thoroughly discredited, the Court stated:

> The district judge is not the proper agency to determine that there was sufficient evidence at the trial, other than that given by Mazzei, to sustain a conviction of any of the petitioners. Only the jury can determine what it would do on a different body of evidence, and the jury can no longer act in this case.

See also Agurs v. United States, 427 U.S. 97, 117 (1976) (Marshall, J., dissenting) (arguing that the Court's rule which "explicitly establishe[d] the judge as the trier of fact with respect to evidence withheld by the prosecution resulted in 'usurp[ing] the function of the jury as the trier of fact in a criminal case' "); Williams v. United States, 500 F.2d 105, 107-08 (9th Cir. 1974) (quoting *Mesarosh*); Pettine v. Territory of New Mexico, 201 F. 489, 493-94 (C.C.A.N.M. 1912).

the jury by determining whether it probably would have acquitted, he usurps the jury's function.[40]

The principal justification for the probability standard is avoidance of needless trials. This, in turn, is said to protect the integrity of the judicial process.[41] But judicial integrity also requires a proper balance between fairness and efficiency.[42] The probability test actually sacrifices judicial integrity by placing a disproportionate emphasis on the finality interest and relegating the goal of ensuring that convictions are based upon truthful testimony to secondary status.[43] In order to preserve the balance between fairness and efficiency, the courts must exercise a higher degree of scrutiny than the probability standard requires for evaluating the effects of false testimony at trial.[44]

In the final analysis, neither the *Larrison* test nor the *Stofsky* test has been the subject of close scrutiny, and both are demonstrably inadequate standards for retrial. A comprehensive analysis of the circumstances surrounding the false testimony cases is necessary in order to arrive at a more appropriate solution. This analysis is aided by examining the way courts have handled situations related to the false testimony cases.

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40. Martin v. United States, 17 F.2d 973, 976 (5th Cir.), *cert. denied,* 275 U.S. 527 (1927). It could, of course, be argued that the judge must second-guess the jury and thereby usurp its function no matter what standard is used for granting new trials. The problem is, nevertheless, more severe when the probability standard is used. First, the probability test obviously requires the judge to predict how the jury would react with a greater degree of certainty than other standards that would give the dispute back to the jury in borderline cases. Second, because the probability test requires the judge to make the more precise prediction of whether twelve jurors would acquit, it requires more accuracy and creates greater problems of usurpation than does the hung-jury standard. *See* notes 17 & 28 *supra.*

41. *See, e.g.,* United States v. Stofsky, 527 F.2d 237, 243 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976); United States *ex rel.* Rice v. Vincent, 491 F.2d 1326, 1332 (2d Cir.), *cert. denied,* 419 U.S. 880 (1974).

42. The concept of judicial integrity is illustrated in the court's statement in *Jones v. Kentucky*:

> It is, of course, perfectly true . . . that great and inexcusable delay in the enforcement of the criminal law has been a serious evil of the times and has brought the administration of the criminal laws into disrepute. But we progress little if freeing the administration of justice from one evil we permit it to become enmeshed in a second, and in our effort to achieve promptness go forward with such haste as to close the door upon the "calm spirit of regulated justice."

Jones v. Kentucky, 97 F.2d 335, 337-38 (6th Cir. 1938). *See* note 33 *supra. See also* Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961), *cert. denied,* 377 U.S. 909 (1964); note 4 *supra.* Judicial integrity is in jeopardy when a constitutional violation has occurred. The existence of such a violation is not, however, prerequisite to judicial concern with preserving the integrity of the criminal process. Rule 33 is itself a means of insuring judicial integrity. *See* note 76 *infra.*

43. *Cf.* United States v. Curran, 465 F.2d 260, 262 (7th Cir. 1972); Jones v. Kentucky, 97 F.2d 335, 337-38 (6th Cir. 1938); United States v. Ochs, 548 F. Supp. 502, 512 (S.D.N.Y. 1982), *aff'd.,* 742 F.2d 1444 (2d Cir. 1983).

44. *Cf.* Mesarosh v. United States, 352 U.S. 1, 9 (1956) ("The dignity of the United States Government will not permit the conviction of any person on tainted testimony."); Communist Party of the United States v. Subversive Activities Control Bd., 351 U.S. 115, 124 (1956) (stating that "fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made . . . manifest").

II. STANDARDS FOR NEW TRIAL IN CONTEXTS RELATED TO THE FALSE TESTIMONY CASES

Probability of acquittal is well established as the measure of a defendant's motion for a new trial based upon newly discovered evidence. Courts have also articulated clear standards for retrial in cases involving prosecutorial misconduct. The rules governing the granting of retrials in both the prosecutorial misconduct and the newly discovered evidence cases provide important insights into the resolution of the conflict surrounding false testimony.

A. *The Prosecutorial Misconduct Cases*

Although the Supreme Court has declined to answer the question of what the appropriate new trial standard should be in false testimony cases,[45] the standards in cases involving prosecutorial misconduct are well established. The test for new trial in cases in which the prosecutor has knowingly allowed the use of perjured testimony is whether there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury."[46] This rule applies even when the

45. *See* United States v. Johnson, 327 U.S. 106, 111 n.5 (1946).

46. United States v. Agurs, 427 U.S. 97, 103 (1976). *See also* Giglio v. United States, 405 U.S. 150, 154-55 (1972). *Agurs* did not deal with either deliberate prosecutorial misconduct or "the veracity of any of the prosecution witnesses." 427 U.S. at 104. Instead, *Agurs* involved the more common type of case in which the prosecution possesses evidence which is in some way favorable to the defense. In such cases, the prosecutor may have a constitutional duty to disclose exculpatory evidence. The *Agurs* Court delineated separate rules, depending upon whether or not the defense had made a request for specific information prior to trial pursuant to the Court's holding in Brady v. Maryland, 373 U.S. 83 (1963). Where such a *Brady* request is made, the *Agurs* Court argued that *Brady* required only "that the suppressed evidence might have affected the outcome of the trial." 427 U.S. at 104. *See* Comment, *The Prosecutor's Duty of Disclosure: From* Brady *to* Agurs *and Beyond,* 69 J. CRIM. L. & CRIMINOLOGY 197, 201-202 (1978). *But see* United States v. Bagley, 105 S. Ct. 3375, 3384 (1985) (changing the rule in specific request cases to granting a new trial only if there is a "reasonable probability" that, had the evidence been disclosed to the defense the result of the proceeding would have been different). Where no specific request for exculpatory information is made — the situation in *Agurs* — the Court held that the proper standard to determine constitutional error was whether "the omitted evidence creates a reasonable doubt that did not otherwise exist." 427 U.S. at 112. The *Agurs* Court claimed that its reasonable doubt standard accurately "describe[d] the test which courts appear to have applied in actual cases," 427 U.S. at 113, and the Court obviously believed that this standard was less strict than that of probable acquittal applied in newly discovered evidence cases. *See* 427 U.S. at 111. But, as Justice Marshall argued in dissent, the Court's standard imposes on the defendant a burden which

> is at least as 'severe' as, if not more 'severe' than, the burden he generally faces on a Rule 33 motion. Surely if a judge is able to say that evidence actually creates a reasonable doubt as to guilt in his mind (the Court's standard), he would also conclude that the evidence "probably would have resulted in acquittal" (the general Rule 33 standard). In short, in spite of its own salutary precaution, the Court treats the case in which the prosecutor withholds evidence no differently from the case in which evidence is newly discovered from a neutral source.

427 U.S. at 115-16 (footnote omitted). Actually, the Court and Marshall were in complete agreement in their analyses of the case. They differed only with respect to the correct solution. The majority believed it was adopting a lesser standard of materiality, while Marshall saw it as a higher standard. Similarly, this Note agrees with the majority's analysis in *Agurs*, but it favors the "significant chance" test offered by Justice Marshall in dissent simply because that test is

suppression of evidence is relevant only to witness credibility.[47] In practice, lower courts have interpreted these Supreme Court rulings to mean that a showing of intentional misconduct on the part of the prosecutor "will mandate a virtual automatic reversal of a criminal conviction."[48]

Courts have developed a flexible new trial standard in cases involving prosecutorial negligence.[49] In cases in which the prosecution has inadvertently suppressed evidence favorable to the accused, the courts have almost universally required some intermediate showing of materiality that is higher than the standard of automatic reversal for deliberate suppression, but lower than the probability-of-acquittal standard for the innocent discovery of false testimony.[50] The nature of the showing required to assess the impact of perjury or other newly discovered evidence on a jury depends largely upon the degree of

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more precise and less susceptible to misinterpretation than the majority's "reasonable doubt" formulation. Marshall not unreasonably saw the Court's rule as "explicitly establish[ing] the judge as the trier of fact with respect to evidence withheld by the prosecution," and thus "usurp[ing] the function of the jury as the trier of fact in a criminal case." 427 U.S. at 117. The standard put forth by Marshall, that there must be "a significant chance that the withheld evidence . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction," 427 U.S. at 119, was the prevailing standard of materiality used in the federal courts at the time. *See* notes 60, 73 & 90 *infra.* In contrast to the reasonable doubt test, the significant chance rule avoids the problem of usurpation by recognizing that "the determination must be in terms of the impact of an item of evidence on the jury." 427 U.S. at 119. *See* note 92 *infra.*

47. Napue v. Illinois, 360 U.S. 264, 269-70 (1959). *See also* Giglio v. United States, 405 U.S. 150, 154-55 (1972); Moore v. Illinois, 408 U.S. 786, 797-98 (1972); United States v. Runge, 593 F.2d 66, 73 (8th Cir.), *cert. denied,* 444 U.S. 859 (1979); United States v. Seijo, 514 F.2d 1357, 1364 (2d Cir. 1975), *cert. denied,* 429 U.S. 1043 (1977).

48. United States v. Stofsky, 527 F.2d 237, 243 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976). *See also* United States v. Butler, 567 F.2d 885, 891 (9th Cir. 1978); United States v. Harris, 462 F.2d 1033, 1035 (10th Cir. 1972), *cert. denied,* 419 U.S. 993 (1974); Kyle v. United States, 297 F.2d 507, 513 (2d Cir. 1961), *cert. denied,* 377 U.S. 909 (1964); United States v. Turner, 490 F. Supp. 583, 608 (E.D. Mich. 1979), *affd.,* 633 F.2d 219 (6th Cir.), *cert. denied,* 450 U.S. 912 (1980). *But see* United States v. Bagley, 105 S. Ct. 3375 (1985) (reversal not required when willfull suppression by prosecutor of evidence specifically requested by the defense does not undermine the confidence in the outcome of the trial).

49. Cases of prosecutorial negligence typically involve situations in which the prosecution inadvertently fails to disclose information favorable to the accused. When the nondisclosure concerns evidence bearing upon the veracity of government witnesses, as, for example, the negligent failure to disclose promises of favorable treatment made to accomplice witnesses, the nondisclosure resembles false testimony. *See, e.g.,* Giglio v. United States, 405 U.S. 150 (1972); United States v. Morell, 524 F.2d 550 (2d Cir. 1975); United States v. Seijo, 514 F.2d 1357 (2d Cir. 1975), *cert. denied,* 429 U.S. 1043 (1977); United States v. Harris, 462 F.2d 1033 (10th Cir. 1972), *cert. denied,* 419 U.S. 933 (1974).

50. Where there has been negligent nondisclosure of evidence relating to false testimony, courts have suggested a number of intermediate tests of materiality. *See, e.g.,* Giglio v. United States, 405 U.S. 150, 154 (1972) (new trial required if false testimony could "in any reasonable likelihood have affected the judgment of the jury"); United States v. Butler, 567 F.2d 885, 889-90 (9th Cir. 1978) (requiring a new trial "wherever the nondisclosed evidence might reasonably have affected the jury's judgment of some material point, without necessarily requiring a supplementary finding that it also would have changed its verdict"); United States v. Turner, 490 F. Supp. 583, 607 (E.D. Mich. 1979), *affd.,* 633 F.2d 219 (6th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981).

prosecutorial participation.[51]

Courts have articulated three reasons for departing from the traditional probability test in cases involving prosecutorial misconduct. The principal concern of the courts, as expounded in *United States v. Agurs*,[52] is the extent to which the presence of false or perjured testimony and the failure to disclose information related to such testimony "involve[s] a corruption of the truth-seeking function of the trial process."[53] A second and related problem is the need to deter prosecutorial malfeasance. The *Agurs* Court reasoned that if the same standard were applied in misconduct cases as in other newly discovered evidence cases, "there would be no special significance to the prosecutor's obligation to serve the cause of justice."[54] Finally, the Supreme Court has concluded that the knowing use of false testimony by the prosecution constitutes a denial of the due process right to a fair trial.[55] If the defense requests exculpatory evidence, negligent suppression of this evidence by the prosecutor may violate due process even if she acts in good faith.[56]

The reasons justifying lenient treatment of motions for new trial in prosecutorial misconduct cases — particularly in those cases where mere negligence is demonstrated — suggest the application of a similar standard in false testimony cases where misconduct is absent.[57] First, "corruption of justice" is a central concern in all false testimony cases regardless of prosecutorial misconduct, since the introduction of false testimony material to the guilt of the accused subverts the truth-seeking function of the trial process.[58] Indeed, the *Agurs* court emphasized that it is the presence of perjured testimony, more than the fact of misconduct, that leads to the corruption of the trial process.[59]

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51. *See* United States v. Agurs, 427 U.S. 97, 103-04 (1976).

52. 427 U.S. 97 (1976).

53. 427 U.S. at 103-04.

54. 427 U.S. at 111. *See also* United States v. Morell, 524 F.2d 550, 554 (2d Cir. 1975).

55. Napue v. Illinois 360 U.S. 264, 269 (1959). *See also* United States v. Agurs, 427 U.S. 97, 109 (1976); Moore v. Illinois, 408 U.S. 786, 797-98 (1972); Mooney v. Holohan, 294 U.S. 103, 112 (1935); notes 31-34 *supra* and accompanying text.

56. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that when a specific request for the information is made "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution").

57. Unless clearly specified in the text, when this Note refers to a lenient or strict standard of materiality, it means lenient or strict from the point of view of the defense. In other words, a strict standard of materiality is one that is difficult for the defense to meet whereas a lenient standard is one that is easy for the defense to meet.

58. *See* Jones v. Kentucky, 97 F.2d 335, 337 n.1 (6th Cir. 1938). *See also In re* Michael, 326 U.S. 224, 227 (1945) ("All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial.").

59. United States v. Agurs, 427 U.S. 97, 103-04 (1976). *See also* Mesarosh v. United States, 352 U.S. 1, 9 (1956) (stating that "the dignity of the United States government will not permit the conviction of any person on tainted testimony"). *Mesarosh* did not involve a claim of

Although there might be no great cause for concern when the false evidence is of such a low level of materiality that it could not reasonably have affected the jury's judgment, when there is at least a significant chance that the jury would not have convicted the defendant but for the false testimony, the correct administration of justice would seem to mandate a new trial.[60]

Second, because the threat of automatic reversal is a strong deterrent in prosecutorial misconduct cases, it is possible to lower the standard for new trial in false testimony cases and still retain an incentive for prosecutors to be particularly diligent in their obligation to serve the cause of justice. A flexible standard of materiality is essential to reach those false testimony cases in which prosecutorial participation in the perjury is difficult or impossible to prove.[61]

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prosecutorial misconduct, yet the Supreme Court ruled that the fact that a principal government witness had been totally discredited was alone sufficient to mandate a new trial. Although lower courts have attempted to distinguish *Mesarosh* from other false testimony cases, the distinctions drawn in these later cases are ultimately unpersuasive. *Mesarosh* has been distinguished on two grounds. First, the witness in *Mesarosh* had been totally discredited. *See* United States v. Krasny, 607 F.2d 840, 845 (9th Cir. 1979), *cert. denied,* 445 U.S. 942 (1980); United States v. Stofsky, 527 F.2d 237, 244 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976). Second, *Mesarosh* did not involve a ruling on a motion of the defendant pursuant to rule 33, but was instead the result of information volunteered by the Attorney General. *See Krasny,* 607 F.2d at 845; United States v. Gabriel, 597 F.2d 95, 99 n.7 (7th Cir.), *cert. denied,* 444 U.S. 858 (1979). The argument that *Mesarosh* is different because it involved a wholly discredited witness is flawed since any witness who perjures himself may be completely discredited. *See* Pettine v. Territory of New Mexico, 201 F. 489, 493 (C.C.N.M. 1912); Criminal Law Survey, 13 LOY. L.A. L. REV. 591, 844-45 (1980). Indeed, typically the judge will instruct the jury that if certain testimony of a given witness is false, the jury may disregard the entire testimony of that witness. *See* note 18 *supra.* The fact that *Mesarosh* did not involve a rule 33 motion is irrelevant. The cases suggest no reason why it should make a difference that the government rather than the defendant raised the motion, and given that rule 33 motions are evaluated in light of justice rather than due process, it is arguable that the standard for evaluating these motions should be even lower than the one for constitutional claims. The *Mesarosh* case, however, offers little guidance for determining what standard of materiality is appropriate for granting new trials in false testimony cases. As the *Stofsky* court noted, *Mesarosh* itself would not have survived even the probability test. *Stofsky,* 527 F.2d at 246. *But see Krasny,* 607 F.2d at 847 (Ely, J., dissenting) (considering application of *Larrison* test "required by the teachings of Mesarosh v. United States"); Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961), *cert. denied,* 377 U.S. 909 (1964) (*Mesarosh* suggests that while there must be some showing of materiality, "very little will do").

60. Courts have utilized the "correct administration of justice" rationale to justify the granting of new trials in negligent nondisclosure cases. United States v. Consolidated Laundries Corp., 291 F.2d 563, 571 (2d Cir. 1961) (denial of new trial "inconsistent with the correct administration of criminal justice in the federal courts, which it is our duty as an appellate court to supervise"); Levin v. Katzenbach, 363 F.2d 287, 290-91 (D.C. Cir. 1966) ("fair administration of criminal justice" mandates new trial in negligent suppression cases if disclosure "might have led the jury to entertain a reasonable doubt about appellant's guilt"). A denial of a new trial in inadvertent suppression cases is "inconsistent with the correct administration of justice" only when "there was a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969). *See also* United States v. Mayersohn, 452 F.2d 521, 525-26 (2d Cir. 1971); notes 90 & 92 *infra. Cf.* State v. Caldwell, 322 N.W.2d 574, 586 n.9 (Minn. 1982) (employing "correct administration of criminal justice" rationale to justify a "might" standard in false testimony cases).

61. *See* Carlson, *supra* note 7, at 1185-87. A looser standard of materiality might also be necessary in order to reach those cases in which the prosecutor is innocent, but the police or

Even absent demonstrated prosecutorial mis- or malfeasance, there are good reasons to believe that the government has acted with tacit complicity in a false testimony case. In many cases, although the prosecutor has no knowledge of the perjury, she takes action that induces the false testimony. The vast majority of recantation and perjury cases involve situations in which the government has given its witness great incentives to lie.[62] Typically, these witnesses are paid informants or co-conspirators who have been promised something in return for their testimony.[63] Having made convictions easier and false testimony more likely by purchasing the testimony of its witnesses, the

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other local officials have participated in the perjury. Suppression by the police may be as destructive to the fair administration of criminal justice as suppression by the prosecutor. *Id.* at 1177-78. Thus, courts have held that the prosecutor should be charged with the knowledge of lower government agents. *See, e.g.,* Barbee v. Warden, 341 F.2d 842, 846 (4th Cir. 1964); *see also* Giles v. Maryland, 386 U.S. 66, 96 (1967) (White, J., concurring).

62. The fact that co-conspirators and accomplice witnesses have great incentives to lie has been well documented. *See, e.g.,* United States v. Meinster, 619 F.2d 1041, 1044-45 (4th Cir. 1980); United States v. Rosner, 516 F.2d 269, 273 n.2 (2d Cir. 1975), *cert. denied,* 427 U.S. 911 (1976); United States v. Lee, 506 F.2d 111, 119 (D.C. Cir. 1974) ("The need for careful scrutiny of an uncorroborated accomplice reflects the danger, underscored by experience, that he may be giving a false account to secure lenient treatment."), *cert. denied,* 421 U.S. 1002 (1975); United States v. Leonard, 494 F.2d 955, 974-75 (D.C. Cir. 1974) (Bazelon, C.J., concurring in part and dissenting in part); United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1933) (testimony of accomplice witnesses is suspect since they might have "reason to expect that their sentence might depend upon their testimony"); Marrs, *The Informant and Accomplice Witness: Problems for the Prosecution,* 9 J. MAR. J. PRAC. & PROC. 243, 244 (1975); Note, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution,* 94 HARV. L. REV. 887, 890 (1981) [hereinafter cited as *A Prosecutor's Duty to Disclose*]; Note, *Accomplice Testimony and Credibility: "Vouching" and Prosecutorial Abuse of Agreements to Testify Truthfully,* 65 MINN. L. REV. 1169 (1981) [hereinafter cited as *Accomplice Testimony and Credibility*]. The accomplice testimony is still suspect even if there is no definite agreement, because the *prospect* of immunity or favorable treatment remains a factor. *See Lee,* 506 F.2d at 119; Boone v. Paderick, 541 F.2d 447, 451 (4th Cir. 1976) ("the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor"), *cert. denied,* 430 U.S. 959 (1977); Comment, *Accomplice Testimony Under Conditional Promise of Immunity,* 52 COLUM. L. REV. 138, 140 (1952); *A Prosecutor's Duty to Disclose, supra* at 890. *But see* United States *ex rel.* Sostre v. Festa, 513 F.2d 1313, 1318 (2d Cir.) (promise of lighter sentence might be motive to "testify truthfully"), *cert. denied,* 423 U.S. 841 (1975). While it is certainly the case that the defense is always free to discredit accomplice witnesses by arguing that they have a special incentive to lie, United States v. Rosner, 516 F.2d at 273 n.2, such methods are not always successful. Moreover, prosecutors may resort to methods such as "truthfulness agreements" (a written promise to testify truthfully, admissible as evidence at trial) to bolster the credibility of the accomplice witness in the eyes of the jury. *See Accomplice Testimony and Credibility, supra,* at 1175-77 (criticizing the use of such methods).

63. Use of agreements by the prosecution to gain the testimony of accomplice and informant witnesses is widespread. *See* Nemerson, *Coercive Sentencing,* 64 MINN. L. REV. 669, 679 (1980); *Accomplice Testimony and Credibility, supra* note 62, at 1169; *A Prosecutor's Duty to Disclose, supra* note 62, at 888-89. Of the 50 cases involving allegations of false testimony surveyed in this Note almost two thirds concerned the testimony of co-conspirators or informant witnesses. Of the 18 cases in which the prosecution did not use these suspect witnesses, 4 involved government agents. The government is certainly responsible for the false testimony of its own agents. In the co-conspirator and paid informant cases, the government is responsible for perjured testimony to the extent that it bought and encouraged such testimony through the promise of lenient treatment or monetary reward.

prosecution may be said to have involved itself in the perjury.[64] Lowering the new trial standard in false testimony cases will provide the prosecutor with incentives to elicit only truthtful testimony. In light of the government's tacit involvement, the distinction between false testimony cases and cases involving proven prosecutorial misconduct begins to break down, and the proferred reasons for treating these two types of cases differently may be called into question.

The prosecutorial suppression cases further demonstrate that the goal of deterrence does not require a meaningful distinction between false testimony cases and cases involving prosecutorial negligence. Deterrence is not an important consideration in inadvertent nondisclosure cases.[65] The fact that courts have nevertheless demanded a significant degree of scrutiny in such cases[66] indicates a shift in focus from preventing prosecutorial abuse to protecting the rights of the accused.[67]

Finally, the due process rationale for granting new trials in misconduct cases does not disappear in cases involving the unknowing use of false testimony. Admittedly, the constitutional duty to disclose exculpatory evidence applies only to cases involving prosecutorial participation.[68] If, however, an essential function of due process is to safeguard the rights of the accused, the rationale for recognizing de-

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64. As one commentator has written:

> [P]romises of favorable treatment differ fundamentally from other forms of potentially exculpatory or impeaching evidence. The prosecutor, or his agent, discovered the eyewitness, the glass covered with fingerprints, and the evidence reflected in the police report. These items existed independently of the prosecutor's initiative. A promise of favorable treatment, however, exists only because of the prosecutor's deliberate action. The prosecutor, taking advantage of a power conferred on him but denied to the defendant, has himself provided a motive to lie.

A Prosecutor's Duty to Disclose, supra note 62, at 895. *But see* Marrs, *supra* note 62, at 246 (arguing that in the case of accomplice witnesses, "the defendant in effect selected the witnesses against him and, therefore, the defense can hardly blame the Government for the witness' less than laudatory resume").

65. United States v. Keogh, 391 F.2d 138, 148 (2d Cir. 1968). The court noted that an important concern in negligent nondisclosure cases was to avoid a rule which "would create unbearable burdens and uncertainties" on the prosecutor. This consideration, however, is unlikely to arise in false testimony cases since the duty of the prosecutor to disclose is by definition limited in scope to a narrow category of evidence that bears upon the veracity of witness testimony.

66. *See* note 60 *supra* and notes 87-90 *infra.*

67. *See* Ingram v. Peyton, 367 F.2d 933, 936 (4th Cir. 1966); Note, *The Prosecutor's Duty to Disclose after* United States v. Agurs, 1977 U. ILL. L.F. 690, 699. The change in focus was first noted in Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant,* 74 YALE L.J. 136, 142 (1964), in which the author pointed to the Supreme Court's decision in *Brady* as evidence of a shifting concern from the conduct of the prosecutor to the prejudicial effect on the defendant. *See also* United States v. Agurs, 427 U.S. 97, 110 (1976) ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."); Moynahan v. Manson, 419 F. Supp. 1139, 1147 (D. Conn. 1976). *But see* United States v. Morell, 524 F.2d 550, 554 (2d Cir. 1975) (noting that "our cases establish that in cases of deliberate suppression, 'prophylactic considerations,' designed to deter future prosecutorial misconduct are of overriding importance").

68. *See* note 33 *supra.*

fendants' due process rights only where prosecutorial misconduct is present is substantially weakened. The Supreme Court has recognized that the principle underlying the suppression of evidence cases "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."[69]

While courts have not entirely abandoned the link to prosecutorial behavior in formulating a standard for new trials in false testimony cases,[70] recent decisions have focused on the defendant's right to a fair trial rather than on the prosecutor's conduct.[71] In cases involving the inadvertent suppression of evidence, where the prevention of misconduct is not an issue, many courts have nevertheless found due process violations if the suppressed evidence rises to a sufficiently high degree of materiality.[72] Generally, these courts have held that fundamental fairness, and hence due process, is denied whenever disclosure of the inadvertently suppressed evidence would lead to a "significant chance" that the defendant could avoid conviction.[73] Because the effect on the accused is the same whether or not the prosecutor knew or should have known of the perjury, an approach that ties the denial of due process to the "character of the evidence" rather than to the "character of the prosecutor" makes good sense.[74]

Even if the introduction of false testimony without prosecutorial participation does not violate due process, courts may nevertheless conclude that a federal trial tainted by such testimony is "inconsistent

69. Brady v. Maryland, 373 U.S. 83, 87 (1963).

70. *See* note 33 *supra.*

71. *See* note 67 *supra.*

72. *See* note 34 *supra.* At least one court has argued that a stricter standard of materiality should be imposed when the inadvertently suppressed evidence is impeaching rather than exculpatory. Garrison v. Maggio, 540 F.2d 1271, 1273-74 (5th Cir. 1976) (standard for exculpatory evidence is "creates a reasonable doubt about defendant's guilt which did not otherwise exist"; standard for impeachment evidence is "probably would have resulted in an acquittal"). The Seventh Circuit has also advocated a different standard for false testimony cases when the evidence is purely impeaching in nature. United States v. Gabriel, 597 F.2d 95, 99 (7th Cir. 1979). The Supreme Court, however, rejected any such distinction between impeachment and exculpatory evidence when it held that the rule in intentional misconduct cases is the same regardless of whether the evidence goes only to witness credibility. *See* note 47 *supra* and accompanying text. As Judge Wisdom argued in dissent in *Garrison,* "[o]ur focus should be on the *impact* of the undisclosed evidence on the state's case against the defendant, not on the *type* of evidence that the prosecution failed to release." 540 F.2d at 1276 (emphasis in original).

73. *See, e.g.,* Ogden v. Wolff, 522 F.2d 816, 822 (8th Cir. 1975); Grant v. Alldredge, 498 F.2d 376, 380 (2d Cir. 1974); notes 31-34 *supra* and accompanying text; note 90 *infra.* Other courts have from time to time imposed differing standards of materiality to determine if due process has been violated in negligent nondisclosure cases. *See* United States v. Miller, 499 F.2d 736, 744 (10th Cir. 1974) (might standard); Shuler v. Wainwright, 491 F.2d 1213, 1224 (5th Cir. 1974) (delineating numerous standards including might, reasonable likelihood, apparent impact on jury, devalued case of prosecution); United States v. Harris, 462 F.2d 1033, 1033-35 (10th Cir. 1972) (apparent impact on jury), *cert. denied,* 419 U.S. 933 (1974); United States v. Keogh, 391 F.2d 138, 148 (2d Cir. 1968) (probability standard); Barbee v. Warden, 341 F.2d 842, 847 (4th Cir. 1964) (harmless error standard).

74. United States v. Agurs, 427 U.S. 97, 110 (1976). *See also* Carlson, *supra* note 7, at 1187; *Criminal Law & Procedure, supra* note 4, at 182.

with the correct administration of criminal justice," which the appellate courts must supervise.[75] Federal courts need not find a constitutional violation before exercising their power to ensure fair trials.[76] Rule 33 itself reflects a policy of "fastidious regard" for the untainted "administration of justice," which must be balanced against the desire for the efficient use of judicial resources.[77]

B. *The Newly Discovered Evidence Cases*

Any argument that a special standard should be applied in false testimony cases must distinguish that class of cases from other cases involving newly discovered evidence. Yet courts have not articulated persuasive reasons for applying a different new trial standard in false testimony cases than that applied in newly discovered evidence cases generally.[78] This failure to distinguish false testimony cases explains why many courts have departed from the *Larrison* standard.[79] While false testimony cases are similar to other cases involving newly discovered evidence, this Note suggests compelling reasons for applying a special standard for new trials in false testimony cases.

First, false testimony may deny the defendant his constitutionally protected right to a fair trial.[80] When a witness testifies falsely, he creates an error at trial that may very well prejudice the result. But in the case of newly discovered evidence, the question whether the evi-

75. United States v. Consolidated Laundries Corp., 291 F.2d 563, 571 (2d Cir. 1961). *See* note 60 *supra.* The Supreme Court has invoked its "supervisory jurisdiction" to require reversal in two cases in which the convictions had been tainted by false testimony. Mesarosh v. United States, 352 U.S. 1, 14 (1956); Communist Party of the United States v. Subversive Activities Control Bd., 351 U.S. 115, 125 (1956). *See also* State v. Caldwell, 322 N.W.2d 574, 586 n.9 (Minn. 1982). Federal Court supervisory power may be exercised over the administration of criminal justice in federal courts only. Thus, this rationale for overturning denials of retrial on appeal will not extend to collateral review of state court convictions. In federal habeas corpus review of state convictions, only denials of motions for retrial that raise federal constitutional questions will be considered. Federal courts may not exercise supervisory powers over state courts. *See* United States *ex rel.* Rice v. Vincent, 491 F.2d 1326, 1332 (2d Cir.), *cert. denied,* 419 U.S. 880 (1974).

76. *See* 8A MOORE'S FEDERAL PRACTICE, *supra* note 2, at ¶ 3306[1] ("Rule 33 is simply a means to protect the integrity of the fact-finding process and to insure a fair trial for the accused, and its exercise need not be predicated upon finding" a constitutional violation).

77. Communist Party of the United States v. Subversive Activities Control Bd., 351 U.S. 115, 124 (1956).

78. The Court in *Larrison* gave no explanation for why it believed the might test was the appropriate rule in false testimony cases. Almost all courts that have applied the test since have simply cited *Larrison* without providing further justification for the rule. Similarly, in *Stofsky,* when the Court adopted the probability test it merely cited *Berry* without providing any concrete reasons as to why that particular test was satisfactory.

79. *See, e.g.,* United States v. Krasny, 607 F.2d 840, 844 (9th Cir. 1979), *cert. denied,* 445 U.S. 942 (1980), stating that "the case does not suggest any effective difference between perjured testimony and other new evidence, and we can conceive of none."

80. *See* notes 31-34 & 69-74 *supra* and accompanying text; Carlson, *supra* note 12 at 1187 argues that "the prosecutor may be completely innocent of wrongdoing and the defendant nonetheless denied a fair trial due to the impact on the jury of a mistaken or spiteful witness's testimony."

dence had a negative effect on the jury does not arise; the evidence at trial may have been incomplete, but it was all true. Thus, the false testimony cases raise a fair trial issue not present in the typical rule 33 case.[81]

Second, there is a greater risk that the integrity of the judicial process will suffer when tainted testimony is introduced at trial than when new evidence is discovered after trial.[82] When false testimony is introduced, it is likely that something suspicious (and unfair) is going on at trial. The omission of evidence, on the other hand, cannot be presumed to have a negative impact on the proceedings.

Third, because the government itself may be at fault in the perjured testimony cases by creating incentives for witnesses to testify falsely, it should bear a greater responsibility to ensure that the conviction was fair.[83] Moreover, a lower standard of materiality in false testimony cases may be necessary in order to reach those cases in which prosecutorial participation is likely to be present but cannot be proven.[84]

Finally, the danger of inefficient administration of criminal justice is less compelling in false testimony cases than in newly discovered evidence cases. In the typical rule 33 case the new evidence has not been tried and is thus of unknown reliability.[85] In false testimony cases, however, once a court makes a determination that the testimony was actually false, it is not as difficult to determine the impact on the jury of the false testimony in the first trial.[86] Thus, the risk of needless retrials is not as great as in the newly discovered evidence cases.

Although the distinctions between false testimony and other newly discovered evidence cases are subtle, they do suggest a rationale for a more lenient standard for new trials in cases involving false testimony. False testimony cases differ from other newly discovered evidence cases in that they contain some, but not all, of the characteristics of prosecutorial misconduct cases.[87] Because of these characteristics, a defendant who is convicted in part by the use of perjured testimony should have a better chance at getting a new trial than a defendant who presents some other newly discovered evidence. In the absence of

81. This appears to be the argument that the Seventh Circuit posited in United States v. Johnson, 149 F.2d 31, 44 (7th Cir. 1945), *revd.*, 327 U.S. 106 (1946). *See* note 23 *supra*. *See also* State v. Caldwell, 322 N.W.2d 574, 585-86 (Minn. 1982).

82. *See* notes 42-44 *supra* and accompanying text.

83. *See* notes 62-64 *supra* and accompanying text.

84. *See* notes 65-67 *supra* and accompanying text.

85. State v. Caldwell, 322 N.W.2d 574, 585 (Minn. 1982).

86. State v. Caldwell, 322 N.W.2d 574, 585 (Minn. 1982).

87. Even assuming that newly discovered evidence cases could not be properly distinguished, if persuasive reasons could be given for a new standard in perjured testimony cases then the implication would be that the standard should perhaps be reevaluated in the newly discovered evidence cases as well.

prosecutorial misconduct, however, a victim of false testimony should not be entitled to a presumption that his conviction was illegitimate. Thus, the standard for new trial should lie somewhere between a rule of automatic reversal and a rule of probability.

III. FORMULATION OF A NEW STANDARD

The underlying problem with the existing standards for a new trial in false testimony cases is the failure to strike a proper balance between the interest in the efficient administration of criminal justice and the interest in safeguarding the rights of the accused. Literal applications of the *Larrison* test would overburden the system with new trials based upon insubstantial claims. On the other hand, the probability standard will inevitably deny new trials even when the defendant has been treated unfairly. Courts can better accommodate the competing interests in fairness and efficiency by following a course between *Larrison* and *Stofsky*.[88]

The above analysis of the cases and policy considerations points toward a compromise test. In order to grant a rule 33 motion for a new trial based upon newly discovered evidence of false testimony at trial, the court must be reasonably well satisfied that (a) testimony given by a material witness at trial was false or that the witness has become so thoroughly discredited that the court is unable to determine whether the testimony was true or false;[89] (b) there is a significant chance that a jury with knowledge that the witness testified falsely would return a different verdict;[90] and (c) the defense was taken by

88. Some courts have suggested alternative standards that might ease the tension between the competing interests at stake, but thus far none have been used in false testimony cases. Although the most popular test applied in negligent suppression cases is the significant chance rule delineated at note 60 *supra,* courts have from time to time suggested a number of different standards. *See, e.g.,* United States v. Agurs, 427 U.S. 97, 112 (1976) (where no specific request was made retrial was appropriate if "the omitted evidence creates a reasonable doubt that did not otherwise exist"); Giglio v. United States, 405 U.S. 150, 154 (1972) (new trial in negligent suppression cases where a specific request for evidence was made if there was "any reasonable likelihood" that disclosure could "have affected the judgment of the jury"); United States v. Harris, 462 F.2d 1033, 1035 (10th Cir. 1972), *cert. denied,* 419 U.S. 933 (1974) (new trial if the "potential impact upon the result" of the suppression of evidence "was apparent"); Ingram v. Peyton, 367 F.2d 933, 936-37 (4th Cir. 1966) (new trial if there is a "substantial likelihood" that the jury, if aware of the evidence, would have "entertained a reasonable doubt" as to the guilt of the party); United States v. Turner, 490 F. Supp. 583, 607 (E.D. Mich. 1979) (new trial when there is a reasonable likelihood that false testimony could have affected judgment of jury as to a material point), *affd.,* 633 F.2d 219 (6th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981).

89. The *Larrison* test, which requires that the court be "reasonably well satisfied that the testimony given by a material witness is false," does not allow the judge to grant a new trial when the witness is so untrustworthy that the judge does not know what to believe. *See* notes 12-16 *supra.* The suggested modification of the *Larrison* test will permit the trial court to grant retrials in these situations.

90. The significant chance test suggested here is substantially the same as the standard applied by the majority of courts in the inadvertent suppression cases, *see* notes 60 & 73 *supra,* and advocated by Justice Marshall in his dissenting opinion in United States v. Agurs, 427 U.S. 97, 122 (1976). *See also* United States v. Frye, 548 F.2d 765, 769 (8th Cir. 1977); United States v.

surprise by the false testimony and was unable to meet it or know of its falsity at the time of the trial.[91]

Because a new trial should neither be always required nor always denied in false testimony cases, a balancing approach is essential. But a balancing approach, by its very nature, compromises both the finality and fair trial interests present in situations where false testimony has been given. The "significant chance" rule suggested in this Note is not a panacea, but it is an improvement over both a standard that "might" allow new trials in every case and a standard that would deny new trials to defendants unless they "probably" would have been acquitted. Thus, the "significant chance" rule would at least cure the most glaring defects in the existing tests.[92]

First, the "significant chance" rule eliminates the danger of the virtual automatic reversal inherent in the *Larrison* "might" test. A new trial could not be granted based upon the remote possibility of a different conclusion. Rather, the trial court would have to find a significant chance that the result would be different. Second, the proposed test properly takes into account the impact of the perjured testimony on witness credibility. Third, by providing a standard that

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Morell, 524 F.2d 550, 553 (2d Cir. 1975); Ogden v. Wolff, 522 F.2d 816, 822 (2d Cir. 1975), *cert. denied,* 427 U.S. 911 (1976); Shuler v. Wainwright, 491 F.2d 1213, 1223 (5th Cir. 1974).

91. This is, of course, the same wording used in Larrison v. United States, 24 F.2d 82, 88 (7th Cir. 1928). As has already been demonstrated, there seems to be little or no dispute concerning this third requirement. *See* note 11 *supra.*

92. The "significant chance" test would require new trials in all cases in which retrials would be granted under the "probability" test but not in cases covered by the "might" test where there is only a slight possibility of a different conclusion. What would be required is a significant chance of avoiding conviction. *See* note 32 *supra.* As the court made clear in United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969), the test requires only a significant chance that a reasonable doubt be created in the minds of enough jurors to result in a hung jury, not that there be a significant chance that twelve jurors would acquit. Some lower courts opinions have already attempted to give content to the term "significant chance." *See* United States v. Frye, 548 F.2d 765, 769 (8th Cir. 1977) (significant chance test requires lesser standard of materiality than probability test); United States v. Rosner, 516 F.2d 269, 273, 278 (2d Cir. 1975) (significant chance test not met where "highly unlikely" new evidence would have changed the result; "the standard demands more than the possibility of a different result upon retrial"), *cert. denied,* 427 U.S. 911 (1976); Grant v. Alldredge, 498 F.2d 376, 382-83 (2d Cir. 1974) (significant chance test met "in view of the serious doubts," court "entertain[ed] about whether the right person was convicted"); *Miller,* 411 F.2d at 832 (2d Cir. 1969) (significant chance test met where court could not confidently judge the effect of the new evidence). In United States v. Bagley, 105 S. Ct. 3375 (1985), the Supreme Court attempted to find a standard for cases involving specific requests for disclosure that was stricter than a harmless error standard but more lenient to the defense than the probability rule applied in newly discovered evidence cases. The Court came up with a standard of materiality that would require a new trial "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 105 S. Ct. at 3384. The Court explained that a "reasonable probability" is a probability sufficient to undermine confidence in the outcome. 105 S. Ct. at 3384. This was the same standard the court adopted in Strickland v. Washington, 466 U.S. 668 (1984), for cases in which evidence is not introduced because of the incompetence of counsel. This Note prefers a "significant chance" standard because it believes that the term "reasonable probability" is too difficult to distinguish from the "probability of acquittal" standard. The Note does agree, however, that a "significant chance" is a chance "sufficient to undermine confidence in the outcome."

is less rigid than either the "might" or the "probability" test, the significant chance standard allows for more forthright application of the law.[93] Fourth, the test prevents unfair convictions resulting from application of the *Stofsky* probability test because it allows an accused a new trial whenever he has a significant chance of avoiding conviction.[94] Fifth, the test better preserves the independent functions of judge and jury by clarifying that the case must go to the jury every time there is a significant chance of avoiding conviction. Thus, the judge need not usurp the jury's function by guessing what its probable verdict would be.[95] Finally, the test would preserve the prosecutor's incentive to serve the cause of justice by providing an intermediate standard that is less severe than the automatic reversal standard applied in the intentional misconduct cases, yet strong enough to reach those cases in which it is difficult to prove prosecutorial participation.

CONCLUSION

The integrity of the judicial process requires that defendants be accorded a fair trial free from the taint of perjured testimony. But the viability of the system also requires that criminal justice be administered efficiently and that the public have faith in the finality of judgments. Present standards for the granting of a new trial in false testimony cases have sacrificed judicial integrity in their failure to reconcile these competing interests. The intermediate test presented in this Note offers a viable resolution to this conflict.

— Daniel Wolf

93. See notes 18-20 *supra* and accompanying text for discussion of dishonest applications of the might and probability standards.

94. *See* note 32 *supra.*

95. *See* United States v. Agurs, 427 U.S. 97, 119 (1976) (Marshall, J., dissenting).