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The Effect of Perjured Testimony on Due Process: Should Prosecutors Assume Their Witnesses Are Lying?

Nicholas D. Velez

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I. Introduction

There are few more terrifying propositions than a person spending time in prison for a crime that they did not commit. Even worse than convicting an innocent person is the possibility that he or she may be sentenced to death despite being factually innocdent. What if the only thing that caused a jury to convict you was the lies of another person? What if that person only told those lies to curry favor with the government because they were covering for their own wrongdoings or because of malice towards you? Our justice system provides multiple safeguards to protect individuals from this possibility, but in some respects, it has fallen short.

This Comment will address the area of perjured or false testimony and the situations in which it may has been used to convict factually innocent individuals. These individuals are able to appeal their convictions directly, but if those appeals fail, they often turn to the writ of habeas corpus as a last resort. Habeas Corpus is an attempt to argue that one's detention is unlawful. As the law currently stands, there is disagreement amongst courts over how to deal with habeas corpus claims where the petitioner asserts they were wrongfully convicted due to the false testimony of a witness at their trial. Both views hinge on the Due Process Clause, the Constitutional right that restricts the government from depriving someone of life, liberty, or property without "a fair trial in a fair tribunal."[1] On one hand, some courts will look to whether the government, through the prosecutors, knew that the testimony being given was false. At this step of the inquiry, if the court has insufficient evidence to conclude that the prosecutors knowingly elicited false testimony, it

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[1] *See* Weiss v. United States, 510 U.S. 163, 176–79 (1994).

looks to whether the perjured testimony was material to the conviction to decide if the defendant's due process rights were violated. These courts have essentially held that any material perjured testimony violates a defendant's rights even if the government had no knowledge that it was false. Other courts apply a stricter standard of review. The majority of the circuit courts that have weighed in on the issue have held that the government can unknowingly elicit false testimony without violating a defendant's due process rights. These courts will only find a due process violation in cases where the government puts a witness on the stand, knowing that they are going to perjure themselves. At first blush, this view seems to align more closely with a plain reading of the Due Process Clause. The Due Process Clause is directed towards the government, so the decision of a private individual to lie on the witness stand seems like it falls out of the reach of the Clause. This standard, however, has led to some alarming results, and it may be time to rethink it.

In *Farrar v. Raemisch*, Charles Farrar was charged with sexual assault and child abuse following complaints from his stepdaughter.[2] At trial, the only direct evidence of Farrar's guilt proffered by the State was the testimony of the victim, who testified that she had been abused by the defendant since she was in eighth grade.[3] A Colorado jury found Farrar guilty of abuse and sexual assault and he was sentenced to a minimum prison sentence of 145 years.[4] While the case was pending appeal, Farrar's stepdaughter recanted her trial testimony.[5] The defendant was granted a remand to the trial court, which held a hearing where the victim testified that she had fabricated the allegations against Farrar.[6] The trial court, however, did not find the recantation to be credible, and denied Farrar's motion for a new trial.[7]

[2] Farrar v. Raemisch, 924 F.3d 1126 (10th Cir. 2019).
[3] *Id.* at 1129
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

Farrar applied in federal court for habeas corpus relief.[8] The court noted that federal relief cannot be granted on the basis of innocence but must instead rely on constitutional violations.[9] Farrar argued that in addition to being innocent, the false testimony of his stepdaughter violated his Due Process rights.[10] The Tenth Circuit held that Farrar failed to allege a constitutional violation regarding the use of the stepdaughter's testimony that she later recanted because there was no proof that the government knew that it was false.[11] The Court acknowledged a contrary view in the Ninth Circuit,[12] which authorizes habeas corpus relief even in cases "when the government unwittingly elicits false testimony," but rejected that approach.[13]

The *Farrar* case presents an example of prosecutors unknowingly using false testimony to secure a criminal conviction. This case is particularly noteworthy because the testimony was the only direct evidence linking the defendant to the crime.[14] In this case, the state court did not find the recantation of the witness to be credible.[15] Because the witness testified to two contradictory accounts, she necessarily perjured herself in at least one of the hearings. This draws serious concerns to the fairness of the trial, and invokes the thought that Farrar was not afforded due process of law. As a society, do we want to allow people to be sent to prison solely based on the word of someone who has lied in court? Or should the due process standard change depending on whether there is corroborating evidence separate from a single witness's testimony? Currently, multiple circuit courts do not afford any relief to defendants seeking federal habeas relief, asserting

[8] *Farrar*, 924 F.3d at 1130.
[9] *Id.*
[10] *Id.* at 1130.
[11] *Id.* at 1132.
[12] Hall v. Dir. Of Corr., 343 F.3d 976, 981–85 (9th Cir. 2003).
[13] *Id.*
[14] *Farrar*, 924 F.3d at 1129
[15] *Id.*

that their due process rights were violated by the prosecution unknowingly presenting perjured testimony at trial.

This Comment will lay out the current state of the law regarding due process and material perjured testimony being offered and relied upon at trial. First, because these cases often arise during litigation relating to the writ of habeas corpus, which contains its own standard of review, this Comment will briefly explain the history and purpose of habeas relief, and how it has developed in the federal system over the last seventy years. This includes the codification of the writ of federal habeas corpus, as well as subsequent legislation that has further refined its application. The scope of federal habeas relief, including the number of petitions and successful applications will be discussed as well. The applicability of the writ of habeas corpus has been limited to decisions that are made contrary to an interpretation by the Supreme Court,[16] which makes it imperative that the Supreme Court takes up the issue and not leave it to the circuits. Next, this Comment will touch on the Due Process Clause of the Fourteenth Amendment, especially as it has been held to apply to criminal trials in state courts. The final background issue to be discussed is the pervasiveness of perjury and false testimony in criminal trials, and particularly how it has played a role in wrongful convictions.

This Comment will then lay out the two competing approaches taken by the federal circuit courts when adjudicating habeas corpus actions involving allegedly perjured testimony—one being that the Due Process Clause is violated only if a government knowingly elicits false testimony at trial, while others hold the Due Process Clause is violated even when the government unknowingly elicits false testimony, as long as the false testimony was material. Finally, this

[16] Williams v. Taylor, 529 U.S. 362, 412 (2000)

Comment will discuss the arguments for and against each of these views, as well as arguments that have been offered by other commenters.

This Comment will ultimately advocate for the position that prosecutors who rely solely on the testimony of a single witness without other evidence should be on constructive notice that the testimony may be false, and that the defendant's Due Process rights are violated even if the prosecutor lacked knowledge that the testimony was false or perjured. The government should only pursue a conviction based solely on the testimony of one person when they are reasonably certain that the person is telling the truth. Prosecutors should do everything in their power to investigate the truth of what is being asserted. This will not expand the Fourteenth Amendment's Due Process Clause to include the private action of an individual lying on the witness stand. Instead, it will instead create a duty in prosecutors to discover the falsity, or search for more evidence to corroborate the witnesses they put forward. Any violation would lie not with the person testifying on the stand but with the prosecutors. The Supreme Court should adopt this constructive notice standard because it would give prosecutors advanced notice and an incentive to closely scrutinize single witness cases. The outcome is similar to the unknowing use standard, in which courts, upon finding that the prosecution unknowingly set forth perjured testimony, woulrd find defendant's Due Process were violated grant a new trial, but the legal reasoning is sounder and comports with existing case law such as *Brady* and *Giglio*, which both possess a knowledge requirement.[17]

II. Habeas Corpus, Due Process, and Wrongful Convictions

[17] *See* Brady v. Maryland, 373 U.S. 83, 86 (1936) (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935) ("It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.")); Giglio v. United States, 405 U.S. 150, 153 (1972) ("Deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.").

This Comment will study whether the due process protections afforded to criminal defendants are affected when prosecutors use perjured testimony at trial. While criminal defendants have other avenues to seek a redress of their conviction, such as a direct appeal, this Comment will focus mainly on the writ of habeas corpus. A brief overview of Habeas Corpus and Due Process is essential to properly frame the issue. The issue and scope of wrongful convictions, especially those based on lies and perjured testimony, will also be discussed.

A. Habeas Corpus

The writ of habeas corpus allows a detained defendant to petition that their detention is unlawful.[18] The framers enshrined the writ in the U.S. Constitution,[19] but the general right can be traced to the Magna Carta in 1215.[20] Habeas Corpus is a Latin phrase that translates to "that you have the body."[21] Habeas Corpus serves as a safeguard against false imprisonment and allows a prisoner to petition to have the state produce the evidence against them for a court to review.[22] Habeas actions are considered civil actions and are thus governed by the Federal Rules of Civil Procedure and the Federal Habeas Corpus Rules promulgated by the United States Supreme Court.[23] Habeas corpus actions have been described by the Supreme Court as not being a "proceeding in the original criminal prosecution but an independent civil suit."[24] As such, when a federal court reviews a habeas petition, it is not reviewing the lawfulness of the judgment but the lawfulness of the petitioner's detention.[25]

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[18] JONATHAN HAFETZ, BRENNAN CTR. FOR JUSTICE, TEN THINGS YOU SHOULD KNOW ABOUT HABEAS CORPUS (2007), https://www.brennancenter.org/sites/default/files/2019-08/Report_Ten-Things-You-Should-Know-About-Habeas-Corpus.pdf

[19] U.S. CONST. art. I § 9, cl. 2. ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[20] HAFETZ, *supra* note 18, at 2.

[21] *Id.* at 3.

[22] *Id.*

[23] 2 United States Supreme Court Cases and Comments P 5B.02 (2020).

[24] Riddle v. Dyche, 262 U.S. 333, 336 (1923).

[25] Coleman v. Thompson 501 U.S. 722, 729–32 (1991).

The Supreme Court has stated that Habeas Corpus proceedings are governed by equitable principles.[26] Although Habeas Corpus actions have a long history at common law and are now codified in statute, the Supreme Court has suggested that it is not a settled area of law.[27] In *Wainwright v. Sykes*, the Supreme Court noted that it had an "historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged."[28]

Starting in the 1950s, the Supreme Court began to apply Fourteenth Amendment protections to defendants in state court proceedings.[29] These protections were previously only afforded to federal defendants.[30] The Supreme Court also extended the writ of habeas corpus during these decades, which lead to "an explosion in habeas filings."[31] In the 1980s the Court began to narrow the writ. In *Teague v. Lane*, the Court held that states must apply the interpretation of the Constitution that was operative at the time of the trial.[32] Despite the narrowing of the scope of federal habeas relief, there was a growing apprehension amongst Congress that federal courts were unduly interfering in state trials.[33]

To address these concerns, Congress passed The Antiterrorism and Effective Death Penalty Act in 1996 (AEDPA).[34] Title 1 of AEDPA significantly reformed federal habeas relief.[35] The Act established a statute of limitations of one year from either the conclusion of a state appeal or one year from the expiration of time to file an appeal. AEDPA also changed how courts dealt with

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[26] Fay v. Noia, 372 U.S. 391, 438 (1963).
[27] Wainwright v. Sykes, 433 U.S. 75, 80 (1977).
[28] *Id*.
[29] 2 United States Supreme Court Cases and Comments P 5B.02 (2020)
[30] NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 7 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf.
[31] *Id*.
[32] Teague v. Lane, 489 U.S. 288, 309 (1989).
[33] KING, *supra* note 30, at 8.
[34] *Id*.
[35] *Id*.

unexhausted claims—petitions brought by inmates who had not exhausted all state court remedies.[36] The Act gave federal judges the authority to deny unexhausted claims on the merits, where previously, the law required judges to dismiss these claims without prejudice.[37] Finally, AEDPA set a new standard of review under which federal courts are required to give heightened deference to state court decisions.[38] This standard of review is laid out in 28 U.S.C. § 2254, which will be discussed below.[39]

B. Statutory Habeas Relief

The common law writ of habeas corpus has been codified in 28 U.S.C. § 2254, which provides an avenue for defendants who have exhausted all state court remedies to apply for federal habeas corpus relief. In order to be meritorious in their claim, applicants for federal habeas corpus relief must prove that they are "in custody in violation of the Constitution or laws or treaties of the United States."[40] Additionally, a federal court cannot grant relief with respect to a claim decided on the merits in the state court, unless the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or was "based on unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.[41]

In federal habeas actions, the state trial court is given a large amount of deference. The reviewing federal court must presume that any factual determinations made by the trial court are correct, and the habeas applicant "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."[42] In situations where the applicant did not develop the factual

[36] *Id.*
[37] *Id.* at 9.
[38] *Id.*
[39] *Supra* Section.B.
[40] 28 U.S.C. § 2254 (d).
[41] *Id.*
[42] *Id.* § 2254 (e).

issue in the trial court, the federal statute authorizes the reviewing court to hold an evidentiary hearing, but only if the claim rests on a new ruling that the Supreme Court has prescribed to apply retroactively or based on facts that could not have been discovered through due diligence at trial.[43]

As noted above, an applicant for federal habeas action must show that the court decision providing for their detention was made "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"[44] The Supreme Court has construed this narrowly, clarifying that applicants may only rely on the holding of a Supreme Court decision, and may not rely on any dicta.[45] This precludes the use of any holdings from circuit courts. The requirement of relying on Supreme Court precedent is an issue in this case because the question of whether unknowing use of perjured testimony violated due process has never been specifically addressed by the Supreme Court.[46] This standard is one of the most important reasons why the Supreme Court should address this issue—until the Court clarifies how perjured testimony affects an individual's Due Process rights, petitioners will be barred from raising this issue in habeas claims, even if the circuit precedent in their jurisdiction supports their position.

C. Scope of Habeas Relief

Each year, approximately 18,000 habeas corpus petitions are filed in federal court.[47] More than 6,000 of these cases reach the federal circuit courts.[48] According to one empirical study, forty-two percent of petitions brought under AEDPA were of prisoners convicted of capital

[43] *Id*.
[44] *Id*.
[45] Williams v. Taylor, 529 U.S. 362, 412 (2000) ("the phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' refers to the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state court decision.").
[46] Anne Bowen Poulin, *Conviction Based on Lies: Defining Due Process Protection*, 116 PENN ST. L. REV. 331, 393 n.290 (2011).
[47] KING, *supra* note 30, at 9.
[48] *Id*.

offenses.[49] The same study found that all capital defendants in their sample had pursued an appeal in the state courts.[50] Eighty-seven percent of the sample had information about representation available, of which ninety-eight percent of the defendants were represented by counsel.[51] In the NJCRS sample, the average time between state court judgment and the filing of a federal habeas action was 7.4 years for capital offenses and 6.3 years in non-capital cases.[52] In the sample, the average number of claims raised was twenty-eight for capital cases.[53] In the sample's capital cases, 43.1% "raised a claim that the state had lost evidence, failed to disclose evidence, or presented false evidence."[54] This is compared to only 13% in non-capital cases. [55] The average number of docket entries, a relative measure of the complexity of a case, was fifty-five for capital cases and eighteen for non-capital cases.[56] In the sample, the average time for federal habeas disposition in capital cases was 28.7 months, with the longest case taking 6.8 years.[57] In non-capital cases, the average time to disposition was 9.5 months, with the longest taking 3.7 years.[58] Of the 368 capital cases in the sample, thirty-three were granted relief.[59] Twenty of these were only relief from the sentence but did not disturb the underlying conviction.[60] Of the 2,384 non-capital cases in the sample, relief was granted in seven cases.[61] "None of the cases ending in a grant raised a claim of innocence, only one grant was based on ineffective assistance."[62]

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[49] *Id.* at 20.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 21.
[53] KING, *supra* note 30, at 27.
[54] *Id.* at 30.
[55] *Id.*
[56] *Id.* at 38.
[57] *Id.* at 39.
[58] *Id.* at 41.
[59] KING, *supra* note 30, at 51.
[60] *Id.*
[61] *Id.* at 52.
[62] *Id.* at 52.

These statistics inform us that many of the individuals bringing habeas petitions have been convicted of very serious crimes and are facing the prospect of life in prison or the death sentence. The length of time it takes for a petition to be heard forecloses the possibility that minor offenders will bring claims before the end of their sentences. While there are a large number of petitions, very few are given relief. It is important to keep this in mind because an expansion of the writ to allow for a larger number of new petitions without also increasing the success of the petitions may not be looked at favorably by federal judges with ever-expanding dockets. [63]

D. The Due Process Clause

The Fourteenth Amendment of the U.S. Constitution prohibits states from depriving an individual of "life, liberty, or property, without due process of law."[64] This powerful clause grants certain protections to criminal defendants. At trial, criminal defendants are entitled to a presumption of innocence and other safeguards.[65] Additionally, the Supreme Court has held that the Due Process Clause requires that prosecutors prove every element of a charged crime beyond a reasonable doubt.[66] Due process, however, "does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."[67]

In *Mooney v. Holohan*,[68] the Supreme Court clarified how a defendant's due process rights are implicated when material perjured testimony is offered at trial. The defendant, Thomas Mooney, was convicted of first-degree murder and was serving a life sentence when he filed for a writ of habeas corpus.[69] Mooney asserted that his due process rights were violated because the

[63] *See* Judge Information Center, As Workloads Rise in Federal Courts, Judge Counts Remain Flat (2014), https://trac.syr.edu/tracreports/judge/364/
[64] U.S. CONST. amend XIV, § 1.
[65] *In re* Winship, 397 U.S. 358 (1970).
[66] *Winship*, 397 U.S. at 364.
[67] Patterson v. New York, 432 U.S. 197, 208 (1977).
[68] Mooney v. Holohan, 294 U.S. 103 (1935).
[69] *Id.* at 109.

prosecution knowingly put forth false testimony, and suppressed evidence that would have refuted the false testimony.[70] The Court found the due process standard was not satisfied if a state has "contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."[71] *Mooney* informs us and clearly holds that the prosecutors cannot *knowingly* offer false testimony, but how much farther does this protection reach?

The Supreme Court further extended its reading of the Due Process Clause in *Napue v. Illinois*, where it found that the state violated the Due Process Clause when prosecutors allowed false evidence to go uncorrected.[72] In *Brady v. Maryland*, the Supreme Court found that "the suppression by the prosecution of evidence favorable to an accused upon request 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."[73] *Giglio v. U.S.* clarifies the standard set forth in *Brady*, holding that evidence that is not turned over to the defense must be material and have a reasonable likelihood of affecting the outcome in order to grant the defendant a new trial.[74]

E. Wrongful Convictions

To grasp the gravity and scope of the issue, and how important it is for the Supreme Court to address the concern of perjured testimony at trial, the first step is to look to the frequency at which individuals who were convicted due to false testimony have been exonerated. The National Registry of Exonerations defines an exoneration as the legal concept that "a defendant who was convicted of a crime was later relieved of all legal consequences of that conviction through a

[70] *Id.* at 110.
[71] *Id.* at 112.
[72] Napue v. Illinois, 360 U.S. 264, 269 (1959).
[73] Brady v. Maryland, 373 U.S. 83, 87 (1963).
[74] Giglio v. United States, 405 U.S. 150 (1972).

decision by a prosecutor, a governor or a court, after new evidence of his or her innocence was discovered."[75] Under this definition, defendants who are involved in some way in the original offense but are guilty of a lesser charge are not included.[76] Defendants who plead guilty to a lesser, factually related crime are also excluded.[77]

From 1989 to 2012, the National Registry reports 873 exonerations.[78] Of these, 97% were men, 37% were exonerated with DNA evidence, and more than 75% had been imprisoned for more than five years.[79] The total number of exonerations, and thus the statistics that follow, are severely limited by two constraints: misclassification and under inclusion.[80] Since the National Registry on Exonerations intends to only report individuals who are factually innocent, there are issues of guilty individuals being classified as innocent, and innocent ones being classified as guilty.[81] An example of a guilty defendant being misclassified as innocent may be someone who had their conviction overturned but was factually guilty or involved with the crime.[82] On the other hand, there are those who are innocent but are classified as guilty because they may have taken a plea deal to avoid a retrial.[83]

Under inclusion is the other major statistical issue that must be confronted when studying wrongful convictions.[84] The amount of exoneration data for a particular crime tends to depend on the seriousness of the offense.[85] There is a vast amount of data available for rape and murder, but

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[75] SAMUEL R. GROSS ET AL., NATIONAL REGISTRY OF EXONERATIONS, EXONERATION IN THE UNITED STATES, 1989–2012, 7 (2012), https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf .
[76] *Id.*
[77] *Id.* at 12.
[78] *Id.* at 1.
[79] *Id.* at 7–8.
[80] *Id.*
[81] GROSS, *supra* note 75, at 10.
[82] *Id.* at 11.
[83] *Id.* at 12–13.
[84] *Id.* at 14.
[85] *Id.* at 15.

almost nothing for assault cases.[86] The exact reason for the disparity is not known, but the lack of DNA evidence, shorter sentences, and lack of reporting in assault cases as compared to murder and rape may help to explain the disparity.[87]

Now to the issue of perjury. Perjury is one of the most common factors associated with wrongful convictions, and according to data from the National Registry is the leading cause of exonerations for homicide and child sexual abuse cases.[88] In the study, 64% of homicide exonerations involved perjury or false accusations, while 74% of child sexual abuse cases involved perjury or false accusations.[89] The study found that the misidentifications and lies in homicide cases were mostly deliberate, while many sexual assault and robbery convictions were mistaken identity.[90] The exonerations in child sexual abuse cases were primarily "fabricated crimes that never occurred at all."[91]

Overall, the study by the National Registry found perjury or false accusations to be the most common factor in exonerations, presenting in 51% of exonerations.[92] There are two main categories of lies in criminal investigations: deliberate misidentifications and fabricated crimes.[93] Deliberate misidentifications were mostly discovered because the witness was familiar with the person and could not have reasonably mistaken them for the perpetrator.[94] Additionally, 46% of deliberate misidentifications were made by the accomplices of the defendant.[95] The other category of false testimony, fabrication, is most common in child sexual abuse cases.[96] The false testimony

[86] *Id.* at 15.
[87] GROSS, *supra* note 75, at 15–16.
[88] *Id.* at 40.
[89] *Id.*
[90] *Id.*
[91] *Id.* at 41.
[92] GROSS, *supra* note 75, at 50.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 50.
[96] *Id.*

in these cases is "usually produced by pressure on the children from relatives, police officers or therapists; they generally unravel when the witnesses recant."[97]

III. The Circuit Split: When are a Defendant's Due Process Rights Violated?

Are a defendant's due process rights violated when the prosecution unknowingly relies on material perjured testimony to secure a conviction? The circuit courts have split on this question, and the Supreme Court has not granted certiorari to answer it once and for all.[98] The Supreme Court had the opportunity to consider the issue in the *Farrar* case but denied the petition.[99] The Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have answered this question in the negative, holding that the Due Process Clause is only violated if prosecutors possess simultaneous knowledge that the testimony is perjured.[100] On the other hand, the Second and Ninth Circuits have held that the Due Process Clause may be violated if material perjured testimony is used to convict a defendant, regardless of the prosecution's level of knowledge.[101]

A. The Knowingly Eliciting False Testimony Standard

To illustrate this view, consider the case of *Kutzmer v. Cockrell.*[102] Defendant Richard William Kutzer was convicted of murder in a Texas state court and sentenced to death.[103] During the murder investigation, police discovered skin scrapings and two strands of hair on the victim's body.[104] The state disclosed the discovery of the scraping and only one of the hairs which matched

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[97] *Id.* at 51.
[98] *Compare* Kutzner v. Cockrell, 303 F.3d 333, 337 (5th Cir. 2002) (requiring prosecutorial knowledge of perjured testimony) *with* Ortega v. Duncan 333 F.3d 102 (2d Cir. 2003) (holding that a defendant's due process rights may be violated without the prosecutor's knowing use of false testimony).
[99] *Farrar v. Williams*, 141 S. Ct. 243 (2020).
[100] *See, e.g.*, Kutzner v. Cockrell, 303 F.3d 333, 337 (5th Cir. 2002); Blalock v. Wilson, 320 Fed. Appx. 396 (6th Cir. 2009); United States v. Jakalski, 237 F.2d 503 (7th Cir. 1956); Farrar v. Raemisch, 924 F.3d 1126 (10th Cir. 2019); United States v. Lopez, 985 F.2d 520 (11th Cir 1993).
[101] *See, e.g.*, Ortega v. Duncan 333 F.3d 102 (2d Cir. 2003); Hall v. Dir. of Corr., 343 F.3d 976, 981–85 (9th Cir. 2003)
[102] Kutzner v. Cockrell, 303 F.3d 333 (5th Cir. 2002).
[103] *Id.* at 335.
[104] *Id.*

samples taken from Kutzner.[105] The scraping and hair were not tested during the original trial.[106] In his petition for habeas relief, Kutzner asserted three issues: that the state withheld exculpatory evidence in the form of a hair discovered at the scene, put on false testimony regarding the possibility of DNA testing of fingernail scraping at the crime scene, and allowed the false testimony to go uncorrected.[107]

Kutzner pointed to testimony from a DNA expert, who testified with some uncertainty over how many hairs had been collected from the crime scene, for the proposition that the second hair had been suppressed.[108] The court held that the Kutzner failed to prove that the state knowingly put forth false testimony.[109] The court noted, "importantly, due process is not implicated by the prosecution's introduction or allowance of false or perjured testimony unless the prosecution actually knows or believes the testimony to be false or perjured; it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements."[110] The court based this conclusion, in part, on *Brady and Giglio*, which both require knowing use of false testimony before the Due Process Clause is implicated.[111]

In addition to the Fifth Circuit's view set forth in *Kutzner*, the Sixth, Seventh, Tenth, and Eleventh Circuits take a similar view that a defendant's due process rights are not implicated if the prosecution unknowingly sets forth perjured testimony.[112] *In Blalock v. Wilson*, the Sixth Circuit reviewed the denial of a habeas petition by an inmate convicted of aggravated murder and other related weapons offenses.[113] The petitioner argued that a key government witness lied at trial, and

[105] *Id.*
[106] *Id.* at 336.
[107] *Id.*
[108] *Kutzner*, 303 F.3d at 336.
[109] *Id.* at 337.
[110] *Kutzner*, 303 F.3d at 337.
[111] *Id.*
[112] *Id.*
[113] Blalock v. Wilson, 320 Fed. Appx. 396, 397 (6th Cir. 2009).

supported his claim by putting forth statements made in recordings to "challenge the veracity and legality of [the witness's] testimony."[114] The court rejected the habeas petition, holding that because the petitioner did not show that the government "played a knowing role in the presentation of the allegedly perjured testimony," the use of the testimony did not violate the Constitution.[115] The Seventh Circuit took a similar view in *Shore v. Warden*.[116] In that case, a witness from trial recanted her testimony that implicated the defendant.[117] The court noted that "within [the Seventh Circuit] the introduction of perjured testimony, without more, does not rise to the level of a constitutional violation warranting federal habeas relief."[118]

B. Unknowing Use of False Testimony Standard

The second approach can be seen in the Second Circuit case of *Ortega v. Duncan*.[119] In the case, three men, Diaz, Betances, and Navarez, were standing on the street corner in Brooklyn when a car carrying three other men pulled up.[120] Two men exited the car, and one of them shot Diaz.[121] Navarez and Betances ran but the men shot them as well.[122] Diaz died but the other two survived.[123] A witness, Garner, was at the police station reporting an unrelated murder, when police asked him if he knew of the events of the Diaz murder.[124] Garner identified Ortega as one of the men in the car, and later as the shooter.[125] At trial, Garner testified that Ortega was the

[114] *Id*, at 411.
[115] *Id*.; *see also* Burks v. Egeler, 512 F.2d 221 (holding unknowing perjured testimony did not present a Constitutional Violation).
[116] Shore v. Warden, Stateville Prison, 942 F.2d 1117 (7th Cir. 1991).
[117] *Id*. at 1119.
[118] *Id*. at 1122
[119] Ortega v. Duncan, 333 F.3d 102 (2d Cir. 2003).
[120] *Id*. at 104.
[121] *Id*.
[122] *Id*.
[123] *Id*. at 104.
[124] *Id*.
[125] *Ortega*, 333 F.3d at 104.

shooter.[126] Betances, however, testified that Ortega was not the shooter.[127] Ortega was convicted of murder and sentenced to 25 years to life.[128] Seven years later, the District Attorney's office informed Ortega's lawyer that Garner had perjured himself at another trial, and that he was not in New York at the time the murder was committed.[129] Garner executed an affidavit stating that he did not actually witness the murder that he testified to.[130] At a hearing in state court, Garner again recanted his testimony.[131] In response to this recantation, the state offered an affidavit from Navarez, who recanted his testimony which stated that Ortega was not the shooter.[132] Nevarez's new statement stated Ortega was the shooter.[133] Ortega was convicted of murder and sentenced to twenty-five years to life.[134] The state court denied motion for a new trial, finding that the outcome would be the same.[135] Ortega filed for federal habeas relief claiming that his due process rights were violated by Garner's false testimony at trial.[136] The district court denied the petition, finding that Ortega failed to carry his burden of proving Garner was lying.[137]

The Second Circuit reversed the district court, finding that Garner's testimony was material, and that he would not have been convicted without it.[138] The court relied on its own precedent, *Sanders v. Sullivan*, for the proposition that "[f]ew rules are more central to an accurate determination of innocence or guilt than the requirement . . . that one should not be convicted on false testimony."[139] The court expanded the Due Process Clause without citing Supreme Court

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[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.* at 105.
[130] *Id.* at 105.
[131] *Ortega*, 333 F.3d at 105.
[132] *Id.*
[133] *Id.*
[134] *Id.* at 104.
[135] *Id.*
[136] *Ortega*, 333 F.3d at 105–06.
[137] *Id.*
[138] *Id.* at 108–09.
[139] Sanders v. Sullivan, 900 F.2d 601, 607 (2d Cir. 1990).

precedent, stating "[w]e hold as a matter of law that Ortega's conviction is in violation of his due process rights because without Garner's testimony, the jury would probably not have found Ortega guilty. We therefore grant Ortega's petition for habeas corpus."[140] This is a case, like *Farrar*, that raises serious concerns to any reader, and it is comforting to know that Ortega was granted relief. Unfortunately, *Ortega* would not have had the same result if he was charged in a jurisdiction that fell within a federal circuit with a different understanding of the Due Process Clause. This underscores the importance of the Supreme Court clarifying the due process standard that applies to perjured testimony in criminal cases.

IV. The Supreme Court Should Clarify the Due Process Standard in Federal Habeas Actions

Federal habeas actions are the last resort for prisoners who have exhausted all state court remedies,[141] and since they involve an interpretation of the Constitution, it is important that these actions are viewed uniformly amongst the circuit courts. In addition to being unevenly applied in the circuit courts, state high courts have also differed in their interpretation of the U.S. Constitution.[142] The Supreme Court must clarify the appropriate standard of the Fourteenth Amendment instead of allowing the state courts to come up with their own interpretations. It is in the interest of justice and the perception of the federal courts that a petitioner's last-ditch effort to gain their freedom is viewed fairly and not based on differing views of the Due Process Clause.

As noted above, federal habeas can be granted if a prisoner was convicted in contradiction to a well-established precedent of the United States Supreme Court; it is imperative that the Supreme Court establishes a clear precedent.[143] It is uncontroverted that a prosecutor knowingly

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[141] 28 U.S.C § 2254.
[142] Compare Commonwealth v. Spaulding, 991 S.W.2d 651, 657 (Ky. 1999) (requiring prosecutor knowledge) with People v. Brown, 660 N.E.2d 964, 970 (Ill. 1995) (finding that failure to investigate may create a sufficient violation of due process even without actual knowledge).
[143] 28 U.S.C. § 2254.

eliciting perjured testimony during a trial violates a defendant's Fourteenth Amendment Due Process rights.[144] The question for this Comment is, however, does the government's *unknowing* use of perjured or false testimony also violate a defendant's right to due process?

A. Three Possible Routes to be Taken

This Comment will set forth three possible ways to resolve the split. The first option is to apply a standard requiring prosecutorial knowledge of false testimony or suppression of evidence. The second is a standard requiring a new trial if material perjured testimony is offered in a trial regardless of a prosecutor's knowledge. The third is that prosecutors who rely solely on the testimony of a single witness without other evidence or witnesses are on constructive notice that the testimony may be false, and that the defendant's due process rights are violated even if the prosecutor had no actual knowledge.

Each of these approaches has distinct advantages and disadvantages, which will be discussed below. The concerns of fairness, administration of justice, the burden on the court system and the weight of existing precedent will be all be factored in to decide which standard should be adopted. Ultimately, this Comment will advocate for the third argument.

1. A standard requiring a prosecutor to knowingly elicit false testimony for the Due Process Clause to be violated.

First and foremost, this approach has the advantage of being supported by a larger number of federal circuit courts.[145] This approach also comports closely with the Supreme Court precedents set forth in *Brady* and *Giglio*, discussed above.[146] *Brady* and *Giglio* both deal with conduct by

[144] *See* Brady v. Maryland, 373 U.S. 83, 85 (1963).
[145] *See, e.g.*, Kutzner v. Cockrell, 303 F.3d 333, 337 (5th Cir. 2002); Blalock v. Wilson, 320 Fed. Appx. 396 (6th Cir. 2009); United States v. Jakalski, 237 F.2d 503 (7th Cir. 1956); Farrar v. Raemisch, 924 F.3d 1126 (10th Cir. 2019); United States v. Lopez, 985 F.2d 520 (11th Cir 1993).
[146] Brady v. Maryland, 33 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972).

prosecutors that is intentional or negligent but do not cover the due process ramifications in cases where they unwittingly call a witness who offers perjured testimony.

This standard will allow for the most efficient administration of the federal habeas docket and would not risk a flood of new litigation. As noted above, there are around 18,000 federal habeas petitions each year.[147] An expansion of this docket may overly burden the federal system. Defendants seeking to have their cases reviewed spend on average over six years in prison.[148] Keeping a more restrictive approach will lend itself to allowing these Defendants to have their cases heard in a reasonable amount of time.

On the other hand, the increased burden on the court system pales in comparison to the hardship suffered by defendants who are wrongfully convicted. Those who are exonerated from crimes they did not commit often face serious mental health concerns, have difficulty re-entering society, and sometimes turn to a life of crime.[149] This standard makes it significantly more difficult for a defendant to prove a due process violation, because they not only have to prove that the testimony was false, but also that the government knew it was false. Such a rigid standard may create a sense of unfairness and lack of confidence in the judicial system.

This standard also gives prosecutors an incentive to not discover adverse information, or, at the very least, dissuade them from fully investigating and vetting those that they put on the stand. If ignorance can be used as a safeguard, what incentive is there for a prosecutor to zealously research the truth of what is being asserted by her witness? This is the clearest and most objective standard but is also the harshest to the defendant.

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[147] KING, *supra* note 30, at 9.
[148] *Id.* at 21.
[149] Leslie Scott, *It Never, Ever Ends: The Psychological Impact of Wrongful Conviction*, American University Criminal Law Brief 5, 10–12 (2010)

2. A standard allowing for relief whenever government unknowingly utilizes material perjured testimony at trial.

Because federal habeas cases rely on the trials of state courts, this can present an evidentiary issue. As discussed above, 28 U.S.C. §2254 requires a defendant to exhaust all state court remedies before filing for federal habeas relief. This has the effect of creating long spans of time between the conviction at the state trial to the commencement of a federal habeas petition. For capital cases, the average is 7.4 years, and for non-capital cases the average is 6.3 years.[150] After this amount of time, a witness who perjured themselves in the original trial may no longer be available or may simply not remember the events as well. 28 U.S.C. §2254 requires that the federal court relies on the findings of fact of the state court. This rule can create issues, as in *Farrar*, where a victim recants but the state court does not find the recantation to be credible. Since the state court has the benefit of having the litigants before them, they are in a far better position to make these determinations than a federal court deciding based on the record.

Can a private citizen violate the due process of a defendant without the government knowing that the testimony was false? The issue with this standard is that it takes private conduct and attributes it to the government. The Fourteenth Amendment restricts the *state* from depriving citizens of "life, liberty, or property, without due process of law."[151] The witnesses in many of the cases that make up the circuit split made the conscious choice to lie on the witness stand without any incentive from the government. The state was only involved insofar as prosecutors unknowingly allowed them to lie on the witness stand. In *Ortega*, for example, the witness fabricated witnessing a murder.[152] There was no evidence to indicate the prosecutor knew the

[150] KING, *supra* note 30, at 21
[151] U.S. CONST. amend. XIV
[152] Ortega v. Duncan, 333 F.3d 102 (2d Cir. 2003).

testimony was false.[153] To later hold that the Due Process Clause was violated by the private citizen testifying, instead of the government, would be to misconstrue the very meaning of the Fourteenth Amendment. Additionally, violations of the Fourteenth Amendment have typically been found only when the deprivation is found to be *intentional.*[154] The next standard will address this issue of state action.

3. Prosecutors who rely solely on the testimony of a single witness without other evidence or witnesses are on constructive notice that the testimony may be false, and a defendant's due process rights are violated if it turns out to be false and material.

To understand why this may be the best option, it is important to first understand why people lie on the stand. According to the Innocence project of New Orleans, there are a multitude of reasons why people lie, including "personal ill-will, desire to get paid, desire to get a deal from prosecutors or police, an effort to deflect attention from a person's own crime or involvement."[155] The Innocence Project also points out that witnesses who give false testimony can be lay witnesses as well as government officials and police officers.[156] In order to combat this, the Innocence Project lists ways that the risk of false convictions based on perjury can be mitigated. It advocates for increased training for investigators, technological support for detectives, and more robust discovery requirements.[157] These are all important, but ultimately outside of the scope of this

[153] *Id*.
[154] *See, e.g.*, J.E.B. v. Ala. *Ex. Rel*. T.B., 511 U.S. 127, 144–45 (1994) ("a party alleging gender discrimination must make a prima facie showing of intentional discrimination. . . ."); Parents Involved in Cmty. Sch. V. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) ("Racial imbalance without intentional state action to separate the races does not amount to segregation.").
[155] INNOCENCE PROJECT NEW ORLEANS, PERJURY, https://ip-no.org/what-we-do/advocate-for-change/shoddy-evidence/perjury/.
[156] *Id*.
[157] *Id*.

Comment.[158] The final recommendation, however, is germane to the topic at hand—it suggests that corroboration rules are put in place to "ensure that nobody is convicted on the word of a single witness without corroboration."[159]

As noted above, false convictions are a pervasive problem in the American justice system—false testimony is the largest contributor to this problem, presenting in over 51% of exonerations.[160] To combat this, the Supreme Court should set forth a standard that prosecutors are on constructive notice that when they rely on the testimony of a single witness, that testimony is inherently suspect, and any finding of falsity that was material would violate the defendant's due process rights. The standard for falsity and materially will be discussed more below.

Applying this legal fiction will strike a balance between the more predominant standard of requiring the government to have knowledge that testimony is false, and the more lenient standard allowing for a defendant's due process rights to be implicated by the lies of a private citizen without the knowledge of the government. This approach will combat the issue of false testimony from two primary avenues—during the investigation phase, and after a conviction. During the investigation and trial phases, the prosecution must comply fully with *Brady* and *Giglio* as discussed, above. Imputing constructive knowledge onto prosecutors in cases where the government relies on the testimony of a single witness is warranted due to the widespread issue of false testimony, especially in homicide and child sexual abuse cases.[161] The goal of a standard like this would be to create a heightened standard for prosecutors to meet in investigating the claims of a single, uncorroborated witness.

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[158] *Id*.
[159] *Id*.
[160] GROSS, *supra* note 75, at 40.
[161] *Id*.

Farrar was convicted based solely on the testimony of his stepdaughter, who claimed he sexually assaulted her.[162] Despite her recantation, the state court and federal district and circuit courts did not reverse his conviction.[163] The Supreme Court should hold that even without the government having knowledge that the witnesses' testimony was perjured, the conviction solely on false testimony violated the Due Process Clause. This also comports with the notion that "federal courts are not forums in which to relitigate state trials."[164] This strikes a balance between relitigating a trial and affording fundamental fairness. This hybrid approach will be able to safeguard against some of the concerns that are raised by the other prevailing applications.

This hybrid standard does raise the concern that prosecutors will be reluctant to charge cases where the only evidence is the testimony of a single individual. This Comment does not suggest that all, or even most, cases with a single witness testifying are inherently unfair—the crux is that these situations present a unique opportunity that raises the possibility of a wrongful conviction. It must be stressed that prosecutors are absolutely immune from civil liability for actions taken in the normal course of their duties.[165] This standard should not cause prosecutors to fear, it should cause them to more closely scrutinize the cases that they are charging. It should also give the public more confidence in the system, which only helps prosecutors who have to stand before a jury and convince twelve people that they have proved the defendant's guilt beyond a reasonable doubt. Every story of someone who was wrongfully convicted and spent years behind bars erodes the public trust in the system that prosecutors rely on.[166]

[162] Farrar v. Raemisch, 924 F.3d at 1129 (10th Cir. 2019).
[163] *Id.* at 1129.
[164] Herrera v. Collins, 506 U.S. 390, 401 (1993).
[165] Imbler v. Pachtman, 42 U.S. 409 (1976).
[166] *See* Symposiun, *Wrongful Convictions: Science, Experience & the Law* 19 RICH. PUB. INT. L. REV. 171 (2015).

This will not lead to an influx of new federal habeas petitions. In a study of federal habeas corpus claims, 43.1% "raised a claim that the state had lost evidence, failed to disclose evidence, or presented false evidence."[167] This is compared to only thirteen percent in non-capital cases.[168] This area already presents a large area of appeals, especially in capital cases, but there is no evidence to suggest this method would expand it particularly, although a comprehensive look into whstever effect it may have is outside of the scope of this commnet. This will add an extra layer of fairness to defendants, without creating a standard that makes it too biased towards granting the writ. This standard will alleviate one of the issues set forth in *Killian v. Poole*, where the defendant was convicted based off of the testimony of a felon looking to have his sentence reduced.[169] When someone, for example a co-defendant, has an incentive to testify to false facts to help their own situation, it is in keeping with the interest of fairness to scrutinize this very closely. The current standard of many of the circuit courts, which require prosecutor knowledge, would have led to a severe injustice in this situation.

The ultimate presumption upon which this position rests, is that the government should only pursue a conviction based solely on the testimony of one person when they are reasonably certain that the person is telling the truth, and they have done everything in their power to investigate the truth of what is being asserted. The Due Process violation will not be so expanded to have been violated by the witness testifying, but by the government failing to discover the falsity, or search for more evidence to corroborate the witness.

[167] KING, *supra* note 30, at 30.
[168] *Id*.
[169] Killian v. Poole, 282 F.3d 1204 (9th Cir. 2002).

To show how this standard would apply in practice, compare the cases of *Farrar*[170] and *Kutzner*.[171] Under this new standard, the outcome of Farrar's habeas action would have been different. Farrar was convicted solely based off of the testimony of his step daughter.[172] The Court relied on circuit precedent to hold that Farrar's failure to allege that the government knew this testimony was false was "fatal because the government's knowledge is required for a constitutional violation."[173] Under this new standard, the government would have been on constructive notice from the beginning of the case since they were only relying on the testimony of one witness. This legal fiction of constructive notice is warranted because of the pervasiveness of wrongful convictions based on false testimony.

The idea that the testimony of one witness is inherently less reliable is not a new one. At common law, convictions for perjury required the oath of two witnesses to establish that the testimony given was false.[174] This is known as the "two witness rule."[175] The court reaffirmed the rule in *Weiler v. United States*, and discussed the countervailing interests of the efficiency of the criminal justice system and protecting innocent witnesses from malicious prosecution.[176] This Comment does not advocate for the position that the two witness rule should be expanded from perjury to cover the gamut of the criminal code, it just asks that the inherent issues that come along with lone witnesses are properly taken into account.

The inherent distrust of single witness cases is also evident in foreign jurisdictions. Most notably, Scotland employs a "corroboration rule" which "requires the facts in issue to be proved

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[170] Farrar v. Raemisch, 924 F.3d 1126 (10th Cir. 2019).
[171] Kutzner v. Cockrell, 303 F.3d 333, 337 (5th Cir. 2002).
[172] *Farrar*, 924 F.3d at 1132.
[173] *Id.*
[174] Hammer v. U.S., 271 U.S. 620, 626 (1926) ("The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury. The application of that rule in federal and state courts is well-nigh universal.").
[175] Weiler v. U.S., 323 U.S. 606, 608 (1945).
[176] *Id.* at 3.

by two independent sources of evidence."[177] The Scottish rule, however, has been the subject of considerable criticism, and independent commissions have called for its abolition.[178] This Comment does not advocate for a rule as strict as the Scottish rule. Instead, it attempts to realize the dangers of uncorroborated witness testimony without hamstringing the efficient administration of justice.

This approach begs the question of how to handle cases where there is more than one witness, but no other corroborating physical evidence. The single witness case is obviously the biggest concern.[179] It would follow logically that with each additional witness the risk of false testimony leading to a conviction would lessen. This does not take into account the possibility that witnesses may collude to each testify falsely against the defendant. One possible safeguard against this would be to extend the constructive notice approach advocated for in this comment to cases where the witnesses have a commonality of interest. For example, the prosecutor would be on constructive notice if he or she utilizes the testimony of two members of the same criminal organization, but not two strangers.

The outcome in *Kutzner*[180] would not have been different under this approach. In *Kutzner*, there was an issue regarding a strand of hair that the government did not know was excluded, and the expert witness seemed slightly confused about.[181] *Kutzner* was not solely convicted based on this testimony, so this exception to the proposed rule would not apply. This is to suggest that

[177] Fraser Davidson & Pamela Ferguson, *The Corroboration Requirement in Scottish Criminal Trials*, 18 INT'L J. OF EVIDENCE AND PROOF 2 (2014).
[178] *Id.*
[179] Benjamin Weiser, *Single-Witness Cases Raise Biggest Questions*, WASHINGTON POST, Nov. 27, 1981, https://www.washingtonpost.com/archive/politics/1981/11/27/single-witness-cases-raise-biggest-questions/24a0fe70-dea9-4bd8-bbb2-a8d60da71556/ ("If there is one thing about which prosecutors and defense attorneys agree, it is that single-witness identification cases are trouble.").
[180] Kutzner v. Cockrell, 303 F.3d 333, 337 (5th Cir. 2002).
[181] *Id.*

Kutzner may not have any other forms of redress, but pursuing federal habeas claim under an alleged violation of his due process rights will not be one of them.

A. Standards of materiality

In deciding whether there is a due process violation, courts must also look to see if the false testimony was material.[182] There are multiple ways that the court can address this. The court can conclude that the standard is whether the jury having known the truth would have affected the outcome. On the other hand, the court could assess whether the complete absence of the false testimony would have affected the trial. Finally, the court may conclude, as some commenters have noted, that the standard for materiality should be whether it would affect the outcome if the jury knew that the witness was lying on the stand. Each option will be addressed below, with this Comment ultimately advocating in favor of the second standard requiring a reviewing court to remove the instance of false testimony and to order a new trial if there would be no other way to convict them.

1. A standard of applying how the jury would decide if they knew the truth

This standard of materiality presents an issue because the truth may not be clear. This is evident particularly in cases such as Farrar where there is conflicting testimony but no clear truth. In *Farrar*, we may never know the truth because the alleged victim testified under oath that she was sexually assaulted, and then testified under oath that she was not sexually assaulted.[183] This standard will not lend itself to efficient administration of justice and will likely lead to courts making guesses instead of relying on evidence in the record.

2. Standard that removes the offending evidence from the record.

[182] *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 401 (1993).
[183] *Farrar*, 924 F.3d at 1132.

This standard is the easiest for courts to apply and would simply have the Court remove the offending evidence. This would be the best standard to apply. This Comment focuses on cases where a defendant is convicted based on the testimony of one person who the court decides has lied on the witness stand. For example, the defendant in *Farrar* was convicted solely on the testimony of his stepdaughter, who later recanted.[184] To apply this standard to *Farrar,* simply remove the testimony of his daughter and allow the court to make a determination if there would still be enough evidence to sustain the conviction. In cases such as *Farrar,* with no other evidence, the obvious answer would be that there is not enough evidence.

3. Standard applying how the jury would react if they had the knowledge that the witness was lying.

Finally, the court may conclude, as some commenters have noted,[185] that the standard for materiality should be whether it would affect the outcome if the jury knew that the witness was lying on the stand. This standard can show undue bias in favor of the defendant and is simply more difficult to apply. This Comment advocates for applying a heightened standard for cases where only a single witness testifies, so simply removing the testimony of that witness makes more sense.

B. Standard of assessing the falsity testimony

To decide a standard for dealing with cases where false, testimony utilized to convict a defendant is used, it is imperative to decide on a clear definition of "false testimony." Glossing over this definition would lead to a confusing and inconsistent application.

[184] Farrar v. Raemisch, 924 F. 3d 1126, 1129 (10th Cir. 2019).
[185] Anne Bowen Poulin, *Conviction Based on Lies: Defining Due Process Protection*, 116 PENN ST. L. REV. 331, 339 (2011).

One option for assessing the falsity of testimony would be to only consider that testimony is false if it resulted in a perjury conviction of the witness. While state perjury laws vary, the federal perjury law is codified in 18 U.S.C. §1621, and states in relevant part that a person is guilty of perjury if he or she takes an oath and "willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true."[186] At the federal level, perjury carries with it the possibility of fine and imprisonment for up to five years.[187] The standard of requiring a perjury conviction is fraught with issues that are unlikely to outweigh the main advantage that it will provide the highest level of assurance that the testimony was actually false. Perjury has been referred to as "the forgotten offense" due to its low charge rate.[188] Statistics published by the U.S. Department of Justice show that out of 172,248 federal arrests from 2011 to 2012, only 144 were for perjury, contempt, and intimidation (a rate of 0.1%).[189] Because many instances of perjury go unprosecuted by being unnoticed or believed, being too inconsequential to warrant a charge, or too hard to prove, it is impossible to know just how frequent perjury is, but those in the profession seem to agree that it is far more common than charged.[190] Finally, there would be no incentive for prosecutors to pursue perjury convictions that would unravel their other convictions. This is especially true because, as discussed above, many of the cases that are the subject of habeas petitions are high profile crimes with long prison sentences. Prosecutors would be throwing away cases that were likely career-makers to secure a minor conviction for perjury.

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[186] 18 U.S.C. §1621.
[187] *Id*.
[188] *Perjury, The Forgotten Offense*, https://www.jstor.org/stable/1142605?mag=why-is-perjury-so-rarely-prosecuted&seq=1#metadata_info_tab_contents
[189] *Id*.
[190] Ken Armstrong, *Hard to Prove, Perjury Often Goes Unpunished*, CHICAGO TRIBUNE, September 25, 1998, https://www.chicagotribune.com/news/ct-xpm-1998-09-25-9809250145-story.html ("If you converted perjury to water . . . it would flood the place.")

Ultimately, this is an overly strict standard that would rely too heavily on prosecutors to police themselves. Notwithstanding the concerns that perjury conviction is relatively rare, the government may be less likely to pursue perjury charges if they would cause a possible reversal of a conviction, especially if the conviction was high-profile or the perjury conviction would bring into question whether the government fully complied with *Brady* and *Giglio*. Another concern, and one expressed in *Farrar*, is that states may not seek perjury convictions against alleged victims of sexual assault.

Instead of required an elusive perjury conviction to right the possible wrongs of perjured testimony. First, the courts should consider that any testimony given by a witness that later recantation of that testimony under oath. This touches on the issue set forth in *Farrar*, where the victim testified that the defendant abused her, and then recanted in court.[191] It becomes difficult to rely on the testimony of the witness who has offered contradictory statements under oath. Once someone has necessarily perjured themselves in one hearing or another, the testimony they gave should not be the sole evidence used to convict someone.

Finally, in cases where there has been no recantation of testimony, the courts should look to apply a preponderance of the evidence standard to decide whether the evidence is false.

V. Conclusion

In the interest of fairness to criminal defendants, adherence to precedent, and concerns about the federal docket, the Supreme Court should apply a standard where prosecutors who rely solely on the testimony of a single witness without other evidence or witnesses are on constructive notice that the testimony may be false, and a defendant's due process rights are violated if it turns out to be false and material. The Court should apply a preponderance of the evidence standard to

[191] *Farrar*, 924 F.3d at 1132.

determine whether evidence is false and consider the effect of removing the offending testimony from trial in determining whether it is material.