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RELIEF FROM CONVICTIONS BASED UPON PERJURED TESTIMONY—A PROPOSAL FOR A REASONABLE STANDARD

The defendant is charged with first degree murder for the shooting death of a gas station attendant. He is tried jointly with the co-defendant, who was allegedly an accomplice in the offense. At trial the prosecution presents a tenuous case against both of the defendants. Then the co-defendant presents his case, declining to testify. The defendant next offers an alibi, presenting two witnesses to support it. After the defendant concludes, the co-defendant takes the witness stand in rebuttal. He testifies to being at the scene of the murder, and to seeing the defendant murder the gas station attendant by shooting him in the back. The jury finds the defendants guilty of first degree murder and sentences them to death.

Approximately six months later, the co-defendant executes an affidavit admitting that he perjured himself in his testimony against the defendant and that the defendant's alibi was true. He further admits that it was he and not the defendant who had shot the gas station attendant. Upon the strength of this affidavit, the defendant seeks to have a new trial granted in light of this newly discovered confession.¹ He finds that there is no relief available under existing California law.² The penalty is carried out.

This comment explores the possible avenues of relief for a defendant convicted with perjured testimony, and demonstrates that neither a motion for new trial, nor writs of *habeas corpus* or *coram nobis* provide him with a remedy unless the perjured testimony was "knowingly" used by the prosecution. The comment then examines other jurisdictions' solutions to this problem, and proposes to rectify the present law's injustice by means of a new statute.

MOTION FOR NEW TRIAL

The California Penal Code provides that a defendant who has been convicted of an offense may receive a new trial on the grounds

¹ He would apply under California Penal Code Section 1181, subsection 8, which provides: "When a verdict has been rendered of a finding made against a defendant, the court may upon his application, grant a new trial, in the following cases only:

...

8. When evidence is discovered material to the defendant which he could not, with the exercise of reasonable diligence, have discovered and produced at trial. . . ."

CAL. PEN. CODE § 1181(8) (West 1970).

² This case is presently pending before the California Supreme Court. *People v. Schwerdtfeger and Magris*, Criminal Appeal #14559 (Cal. Sup., filed April 23, 1970); *In re Schwerdtfeger*, Criminal Appeal #14550 (Cal. Sup., filed August 26, 1970).

of newly discovered evidence.³ However, the defendant must show that the evidence qualifies under certain criteria.⁴ He must first demonstrate that the evidence could not have been discovered at trial with the exercise of due diligence.⁵ The evidence itself—and not merely its importance—must be newly discovered.⁶ The new evidence must be more than impeaching. Furthermore, the defendant is required to show that the verdict would probably have been changed, if this evidence had been introduced during the trial.⁷ In support of the above contentions, the defendant must file with the court affidavits of the witnesses he expects to call, stating that they will testify to the newly discovered evidence.⁸

Although it would appear that the defendant in the above hypothetical situation could obtain relief under this statute, California courts have held almost without exception that the admission of perjury by a prosecution witness does not constitute newly discovered evidence for the purposes of the statute.⁹ This is true even where a co-defendant has admitted sole responsibility for the offense.¹⁰

In *People v. McGaughran*¹¹ the defendant was convicted of rape on the testimony of the prosecutrix. After trial she executed an affidavit exonerating the defendant and admitting she had lied about the incident at trial. The trial court denied the defendant's motion for a new trial and the appellate court upheld the ruling. The court of appeal reasoned that the purported evidence was for the jury's consideration because it was cumulative and impeaching. Hence, a new trial was unwarranted.

California courts have been extremely reluctant to grant new

³ CAL. PEN. CODE § 1181 (West 1970).

⁴ *People v. Owens*, 252 Cal. App. 2d 548, 552, 60 Cal. Rptr. 687, 691 (1967).

⁵ Where perjury was suspected at the time of trial, the petitioner must show why it was not investigated and brought out at the trial. *People v. MacArthur*, 125 Cal. App. 2d 212, 218, 270 P.2d 37, 41 (1954). See also *People v. Lewis*, 105 Cal. App. 2d 208, 233 P.2d 30 (1951); *People v. McCoy*, 58 Cal. App. 534, 208 P. 1016 (1922).

⁶ *People v. Rodriguez*, 168 Cal. App. 2d 452, 461, 336 P.2d 266, 272 (1959).

⁷ *People v. Greenwood*, 47 Cal. 2d 819, 306 P.2d 427 (1957); accord, *People v. Huskins*, 245 Cal. App. 2d 859, 54 Cal. Rptr. 253 (1966), where the court states: "Newly discovered evidence which would tend merely to impeach a witness is not of itself sufficient ground for granting a new trial." *Id.* at 862, 54 Cal. Rptr. 256; see also *People v. Long*, 15 Cal. 2d 590, 607, 103 P.2d 969, 978 (1940).

⁸ CAL. PEN. CODE § 1181(8) (West 1970).

⁹ See generally *People v. Love*, 51 Cal. 2d 751, 336 P.2d 169 (1959); *People v. Andrus*, 159 Cal. App. 2d 673, 324 P.2d 617 (1958); *People v. Jones*, 89 Cal. App. 2d 151, 200 P.2d 65 (1948); *People v. Yankee*, 79 Cal. App. 2d 431, 179 P.2d 528 (1947); *People v. Snyder*, 36 Cal. App. 2d 582, 97 P.2d 976 (1940); *People v. Lim Foon*, 29 Cal. App. 270, 155 P. 477 (1915).

¹⁰ *People v. Monroe*, 162 Cal. App. 2d 248, 328 P.2d 483 (1958).

¹¹ 197 Cal. App. 2d 6, 17 Cal. Rptr. 121 (1961).

trials on the strength of affidavits,¹² even in situations where the foundation of the prosecution's case has been totally destroyed by affiants who admit their former testimony or identification was intentionally erroneous.¹³ In *People v. Smith*¹⁴ the defendant was convicted of child stealing.¹⁵ After the trial four of the prosecution's prime witnesses swore in affidavits that they had testified falsely during the trial and that the defendant was innocent. Nevertheless, the court held the fact "that perjured testimony was given in the case at the time of trial, does not afford a basis for a reversal of the judgment."¹⁶ Motions for new trial are always looked upon with disfavor and distrust, and reversal will only be ordered in cases of a clear abuse of discretion by the trial court in overruling the defendant's motion for a new trial.¹⁷

The situation changes little when the perjured testimony is that of a co-defendant rather than a disinterested witness. The earliest California case dealing with the recantation of a co-defendant is *People v. Tallmadge*.¹⁸ In *Tallmadge* the defendant and co-defendant were charged with larceny. The co-defendant became the principal witness in the case by admitting to the crime and implicating the defendant. Both were convicted. The defendant moved for a new trial on the ground of newly discovered evidence. The motion was supported by an affidavit in which his co-defendant admitted that the defendant had not participated in the crime. He further swore that his perjured testimony was solicited by the prosecutor, who promised the co-defendant that if he would testify against the defendant the state would dismiss his charges and pay him \$200. The appellate court held that such an affidavit did not warrant overruling the trial court for its refusal to grant the motion for new trial. The trial court is presumed to have properly exercised its discretion, and:

The affidavit of such a person is not entitled to so much weight as to justify the conclusion that the evidence given by him, and which the jury may have regarded as reliable and credible, was corruptly and willfully false. The conclusion of the jury would rather warrant the presumption that his testimony was truthful and his affidavit false.¹⁹

¹² *People v. Munton*, 218 Cal. App. 2d 556, 32 Cal. Rptr. 508 (1963) (affidavits alone rarely sufficient for new trial).

¹³ *See People v. Smith*, 17 Cal. App. 2d 468, 476, 62 P.2d 436, 440 (1963).

¹⁴ 17 Cal. App. 2d 468, 62 P.2d 436 (1936).

¹⁵ CAL. PEN. CODE § 278 (West 1970).

¹⁶ *People v. Smith*, 17 Cal. App. 2d 468, 476, 62 P.2d 436, 440 (1936).

¹⁷ *See People v. Langlois*, 220 Cal. App. 2d 831, 34 Cal. Rptr. 116 (1963); *People v. Loar*, 165 Cal. App. 2d 765, 333 P.2d 49 (1958).

¹⁸ 114 Cal. 427, 46 P. 282 (1896).

¹⁹ *Id.* at 431, 46 P. at 283.

Only two cases in the history of California jurisprudence have permitted a new trial on the basis of affidavits alleging non-knowing use of perjury by the prosecution. These decisions, however, rested upon highly unusual facts. For example, in *People v. Williams*²⁰ the California Supreme Court granted a motion for a new trial to a defendant who had been convicted of ordering his ex-wife's lover to disrobe, and then stealing his clothes which were valued at less than one hundred dollars. After the conviction the defendant's former wife's mother swore in an affidavit that she was at the scene of the alleged robbery, and that no robbery ever took place. She stated that the entire story had been fabricated by the victim of the robbery and the defendant's ex-wife for the purpose of discrediting the defendant. In ordering a new trial the court based its decision upon the fact that the victim's testimony was totally uncorroborated, that the affiant was unbiased and had no motive to swear falsely, and that the affiant had not been called as a witness during the trial.²¹

In an equally unique case, *People v. Huskins*,²² the defendant had been convicted of molesting²³ his six-year-old daughter. The mother brought the charges against the defendant. After his trial and conviction, the defendant discovered that the mother had suggested the story to her daughter to keep the defendant from taking the child in divorce proceedings. The mother had a history of mental illness and was committed to an asylum shortly after the conclusion of the trial. The court, in granting a new trial, held that the combination of these highly unusual factors destroyed the veracity of the prosecution's case.²⁴

However, in *People v. Gaines*,²⁵ where the credibility of the prosecution's case was destroyed as in the above cases, the court held that a motion for new trial was unwarranted. In that case the appellant was convicted of robbery upon the testimony of his co-defendant. After trial the co-defendant, who had also been convicted, admitted that the defendant's alibi was true and he, not the defendant, had committed the robbery. Again the court rejected the affidavit filed by the defendant in support of his motion for new trial. The court distinguished *People v. Williams*,²⁶ noting that in *Williams* the witness was unbiased and disinterested. The court, however,

²⁰ 57 Cal. 2d 263, 18 Cal. Rptr. 729, 368 P.2d 353 (1962).

²¹ *Id.* at 271-74, 18 Cal. Rptr. at 733-36, 368 P.2d at 357-60.

²² 245 Cal. App. 2d 859, 54 Cal. Rptr. 253 (1966).

²³ CAL. PEN. CODE § 288 (West 1970).

²⁴ 245 Cal. App. 2d 859, 862, 54 Cal. Rptr. 253, 255 (1966).

²⁵ 204 Cal. App. 2d 624, 22 Cal. Rptr. 556 (1962).

²⁶ 57 Cal. 2d 263, 18 Cal. Rptr. 729, 368 P.2d 353 (1962).

failed to recognize that the co-defendant in *Gaines* had much more at stake than the affiant in *Williams*. At the very least the co-defendant was guilty of perjury, a felony under California law.²⁷ The co-defendant also jeopardized his chance for an early parole by admitting that he had lied during the trial.

Nevertheless, the courts have steadily upheld convictions in the face of false testimony. In *People v. Monroe*²⁸ the defendants had been found guilty of robbery. The co-defendant arose after the verdict was rendered and informed the court that in the interest of justice he did not want to see an innocent man go to jail. The co-defendant then told the court that he had committed the robbery with two other individuals and the defendant had not participated in the crime. The defendant then made a motion for a new trial based upon the co-defendant's statement, but the trial court and the appellate court both held that a new trial was not in order.

The basis for these decisions is clear. The appellate courts are unwilling to overrule the trial court's exercise of discretion since questions of the veracity of witnesses are for the determination of the jury. For this reason the appellate courts have refused to overrule cases where the credibility of the prosecution's case is based upon admittedly perjured testimony, even though the witness subjected himself to the possibility of criminal liability for perjury.²⁹

WRIT OF CORAM NOBIS

Coram nobis is a common law writ designed to supply a remedy for criminal convictions where statutes fail to do so.³⁰ In California *coram nobis* has found recognition in both case³¹ and statutory law.³² Thus it would seem that a defendant convicted on the basis of

²⁷ CAL. PEN. CODE § 118 (West 1970): "Every person who, having taken an oath that he will testify . . . in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, . . . is guilty of perjury."

²⁸ 162 Cal. App. 2d 248, 328 P.2d 483 (1958).

²⁹ Cf. *People v. Asher*, 273 Cal. App. 2d 876, 78 Cal. Rptr. 855 (1969); *People v. Lerner*, 11 Cal. App. 2d 208, 53 P.2d 194 (1936).

³⁰ A writ of *coram nobis* is the same as a writ of *coram vobis* except that the latter is addressed to an appellate court while the former to the trial court. *Accord In re Imbler*, 60 Cal. 2d 554, 387 P.2d 6 (1963).

³¹ See *In re Dapper*, 77 Cal. Rptr. 897, 454 P.2d 905 (1969); *People v. Cantrell*, 197 Cal. App. 2d 40, 16 Cal. Rptr. 905 (1961); *People v. MacFadden*, 130 Cal. App. 2d 131, 278 P.2d 99 (1955); *Application of Carr*, 73 Cal. App. 2d 697, 167 P.2d 243 (1946).

³² CAL. PEN. CODE § 1265 (West 1970): "After the certificate of the judgment has been remitted to the court below, the appellate court has no further jurisdiction of the appeal . . . ; provided, however, that if a judgment has been affirmed on appeal no motion shall be made or proceeding in the nature of a petition for a writ of error

perjured testimony, being unable to obtain a new trial on the statutory ground of newly discovered evidence, might reasonably argue that a writ of *coram nobis* should be issued ordering a new trial.

In order for a petition of *coram nobis* to be granted, a petitioner must show that some fact existed which, without any fault or negligence on his part, was not presented at the trial—and which, if presented, would have prevented rendition of judgment.³³ The standard for *coram nobis* approximates that of granting a new trial on the ground of newly discovered evidence.³⁴ This similarity has led some courts to hypothesize that the writ of *coram nobis* is dead as a practical matter in California.³⁵

Consequently, the defendant suffering from a conviction based upon perjured testimony can find no remedy through this writ. A writ of *coram nobis* is not available to review errors where a statutory remedy, such as an appeal or a motion for new trial, is provided.³⁶ In *People v. Reid*³⁷ the California Supreme Court observed:

At the time this writ [*coram nobis*] came into general use there was no remedy by appeal or by motion for new trial. . . . As these new [statutory and appellate] remedies have come into existence by statutory enactment, they have supplanted this ancient writ as to so much of its former scope as is comprehended in and covered by the statutory remedies. . . .³⁸

California Penal Code Section 1181³⁹ precludes the use of a writ *coram nobis* even though the evidence is not discovered until after the time for filing a motion for new trial has elapsed or the motion for new trial has been denied.⁴⁰ In the case of *In re De La Ro*⁴¹ the Supreme Court of California denied reversal of the petitioner's conviction even though the newly discovered evidence consisted of a confession by a fellow convict that he, and not the petitioner, had

coram nobis shall be brought to procure the vacation of said judgment, except in the court which affirmed the judgment on appeal. . . ."

³³ See *People v. Mendez*, 28 Cal. 2d 686, 171 P.2d 425 (1946); *People v. Gilbert*, 25 Cal. 2d 422, 154 P.2d 657 (1944).

³⁴ See CAL. PEN. CODE § 1181(8) (West 1970).

³⁵ See generally *People v. Reid*, 195 Cal. 249, 232 P. 457 (1924); *People v. Davis*, 187 Cal. 750, 203 P. 990 (1922); *People v. Mooney*, 178 Cal. 525, 174 P. 325 (1918).

³⁶ *People v. Williams*, 238 Cal. App. 2d 585, 48 Cal. Rptr. 67 (1965). See generally *People v. Sutton*, 115 Cal. App. 2d 751, 252 P.2d 633 (1953); *People v. Vernon*, 9 Cal. App. 2d 138, 146, 49 P.2d 326, 328 (1935) (the court stated that it is only when no trial on the merits has been had and no remedy provided that we may look to the common law).

³⁷ 195 Cal. 249, 232 P. 457 (1924).

³⁸ *Id.* at 255, 232 P. at 460.

³⁹ CAL. PEN. CODE § 1181(8) (West 1970).

⁴⁰ *People v. Shipman*, 62 Cal. 2d 226, 42 Cal. Rptr. 1 (1965).

⁴¹ 28 Cal. 2d 264, 275, 169 P.2d 363, 370 (1946).

committed the offense. Nor does discovery and proof that perjury was used at trial justify issuance of the writ.⁴²

Furthermore, the existence of the writ of *habeas corpus* prevents use of *coram nobis*. The California Supreme Court held in *People v. Adamson*⁴³ that the expansion of the function of the writ of *habeas corpus* has precluded the use of a writ of *coram nobis* in examining convictions relying on perjured testimony. "Thus, the appropriate writ to secure relief from a judgment of a conviction obtained by the use of false testimony . . . is not *coram nobis* but *habeas corpus*."⁴⁴

WRIT OF HABEAS CORPUS

The writ of *habeas corpus* is recognized in Section 1473 of the California Penal Code as the means by which "[e]very person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may . . . inquire into the cause of such imprisonment or restraint."⁴⁵

A petition for *habeas corpus* is the appropriate avenue to challenge a judgment and sentence based upon perjured testimony,⁴⁶ but the petitioner must show that such perjured testimony was "knowingly" used by the prosecution.⁴⁷ In the case of *In re Mooney*⁴⁸ the petitioner was convicted for the bombing deaths of ten persons. The petitioner alleged that key prosecution witnesses had perjured themselves. The California Supreme Court refused to issue the writ holding that the petitioner must not only prove perjury, but also that the perjury was "knowingly" used by prosecuting officials. The court noted that "[p]roof of perjury alone, without satisfactory substantial proof of knowledge thereof or connivance therein by the prosecuting official can avail the petitioner nothing in this proceeding. . . ."⁴⁹

This principle has been affirmed by the court in numerous decisions,⁵⁰ and was extended in the case of *People v. Smith*.⁵¹ In *Smith*

⁴² *Mooney v. Holohan*, 294 U.S. 103 (1935).

⁴³ 34 Cal. 2d 320, 210 P.2d 13 (1949).

⁴⁴ *Id.* at 327, 210 P.2d at 16.

⁴⁵ CAL. PEN. CODE § 1473 (West 1970).

⁴⁶ *Mooney v. Holohan*, 294 U.S. 103 (1935); *People v. Adamson*, 34 Cal. 2d 320, 210 P.2d 13 (1949).

⁴⁷ *People v. Rosoto*, 62 Cal. 2d 684, 43 Cal. Rptr. 828, 401 P.2d 220 (1965).

⁴⁸ 10 Cal. 2d 1, 73 P.2d 554 (1937).

⁴⁹ *Id.* at 15, 73 P.2d at 561.

⁵⁰ See, e.g., *In re Imbler*, 60 Cal. 2d 554, 387 P.2d 6 (1963) (the California Supreme Court denied petitioner's writ for *habeas corpus*). In 1969 the Federal District Court in effect overruled the California Supreme Court and granted petitioner's

the appellate court held the fact "that perjured testimony was given in the case at the time of the trial, does not afford a basis for a reversal of the judgment."⁵²

Unless state officials "knowingly" used the perjured testimony, a writ of *habeas corpus* will not be issued.⁵³ A defendant could, hypothetically, have all of the prosecution's witnesses swear that they had been paid by a third party to testify falsely against the defendant, but unless he could prove that the prosecution "knew" of the perjury, no relief from the conviction would be available in California.

The problem is that neither a motion for new trial nor a writ of *habeas corpus* provides relief from perjured testimony—except in the narrowly defined situation of the prosecutor's "knowing" use of that testimony. The courts have taken out of the province of the writ of *coram nobis* relief obtained with ordinary, non-knowing use of perjured testimony.⁵⁴ However, they have nowhere provided an alternative means of relief. This problem was recognized by the court of appeal in *People v. Williams*.⁵⁵ However, the court declined to correct the situation in the absence of a pronouncement from a higher court.⁵⁶

ALTERNATIVES—OTHER JURISDICTIONS' SOLUTIONS

By a liberal construction and application of their statutes allowing new trial on the ground of newly discovered evidence,⁵⁷ the courts in jurisdictions outside of California solve the problem of non-knowing use of perjured testimony. Kentucky's interpretation of its statute is illustrated in *Mullins v. Commonwealth*.⁵⁸ There the

writ of *habeas corpus*. The court recognized that there was authority that knowing use by the prosecution should not be the sole criterion for determining whether or not the conviction was tainted by the perjury. However, the court held there was sufficient knowledge of the perjury by the prosecution to grant a new trial in this case. *Imbler v. Craven*, 298 F. Supp. 795 (C.D. Cal. 1969). See generally *In re Carman*, 48 Cal. 2d 851, 313 P.2d 817 (1957); *In re Allen*, 47 Cal. 2d 55, 301 P.2d 577 (1956); *In re Razutis*, 35 Cal. 2d 532, 219 P.2d 15 (1950); *People v. Adamson*, 34 Cal. 2d 320, 210 P.2d 13 (1949); *In re Wallace*, 24 Cal. 2d 933, 152 P.2d 1 (1944); *People v. Hollins*, 164 Cal. App. 2d 191, 330 P.2d 246 (1958); *In re Bronaugh*, 100 Cal. App. 2d 220, 223 P.2d 256 (1950).

⁵¹ 17 Cal. App. 2d 468, 62 P.2d 436 (1936).

⁵² *Id.* at 477, 62 P.2d at 440.

⁵³ *In re Mooney*, 10 Cal. 2d 1, 73 P.2d 554 (1937).

⁵⁴ Accord *People v. Adamson*, 34 Cal. 2d 320, 210 P.2d 13 (1949).

⁵⁵ 238 Cal. App. 2d 585, 48 Cal. Rptr. 67 (1965).

⁵⁶ *Id.* at 597, 48 Cal. Rptr. at 75. See also, *In re Branch*, 74 Cal. Rptr. 238 (1969).

⁵⁷ See *State v. Greeno*, 342 P.2d 1052 (1959); *State v. Sullivan*, 43 N.J. 209, 203 A.2d 177 (1964).

⁵⁸ 375 S.W.2d 832 (1964).

defendant was a police officer convicted of voluntary manslaughter of a suspect he was apprehending pursuant to an arrest warrant. At trial the decedent's common law wife testified that the defendant had shot her husband while he sat eating at a table. After the officer's conviction, the witness sent a sworn affidavit to the authorities stating that her testimony at trial was false and that the decedent had attacked the officer. On the strength of the affidavit the court reversed the officer's conviction, granting him a new trial. Quoting from an earlier case,⁵⁹ the court noted:

We recognize the general rule to be that a new trial will not be granted for newly discovered evidence which is only impeaching in its nature. But the rule should be cautiously applied and when the discovered evidence is of such a compelling weight that it probably would have induced the jury to reach a different verdict, a new trial will be granted.⁶⁰

Similarly, when the prosecutrix retracted her testimony that the defendant raped her, an Oklahoma court granted the defendant's motion for a new trial.⁶¹ Again, in Texas a new trial was allowed when a witness stated in an affidavit that he did not know he was under oath at the time of trial, and he now wanted to tell the truth.⁶²

Illinois applied its new trial statute in *People v. Busch*⁶³ where the defendant, who had been indicted with others, was convicted for conspiracy to burn a stock of goods with intent to defraud an insurance company. Two weeks after the trial a co-conspirator, who had testified for the prosecution, swore in an affidavit that he had been paid by the insurance company to perjure himself in his testimony against the defendant. The appellate court, recognizing that without the affiant's testimony the defendant would probably not have been convicted, granted him a new trial.

Decisions holding that a new trial should be ordered in cases where the conviction of a defendant has been obtained through the non-knowing use of perjured testimony can be found in eleven states,⁶⁴ as well as in the federal courts.⁶⁵

⁵⁹ *McGregor v. Commonwealth*, 253 S.W.2d 624 (1952).

⁶⁰ *Id.* at 652. *Accord* *Shepard v. Commonwealth*, 267 Ky. 195, 101 S.W.2d 918 (1937); *Elkins v. Commonwealth*, 245 Ky. 199, 53 S.W.2d 358 (1932); *Hensley v. Commonwealth*, 241 Ky. 367, 43 S.W.2d 996 (1931); *Tyree v. Commonwealth*, 160 Ky. 621, 170 S.W. 33 (1914).

⁶¹ *Martin v. State*, 34 Okla. Crim. 274, 246 P. 647 (1926).

⁶² *Wadkins v. State*, 102 Tex. Crim. 292, 277 S.W. 684 (1925).

⁶³ 228 Ill. App. 11 (1923).

⁶⁴ *See, e.g.,* *Roath v. State*, 185 Ark. 1039, 50 S.W.2d 985 (1932); *Tyree v. Commonwealth*, 160 Ky. 621, 170 S.W. 33 (1914); *People v. Busch*, 228 Ill. App. 11 (1923); *People v. Smallwood*, 306 Mich. 49, 10 N.W.2d 303 (1943); *State v. Greeno*, 342 P.2d 1052 (1959) (Montana Supreme Court); *State v. Sullivan*, 43 N.J. 209, 203 A.2d 177 (1964); *Martin v. State*, 34 Okla. Crim. 274, 246 P. 647 (1926); *Wadkins*

In *Martin v. United States*⁶⁶ the Court of Appeals for the Fifth Circuit ruled that the trial court has a duty to order a new trial where a witness has admitted that he had committed perjury, or was mistaken as to a material element of the case against the defendant. The court said:

There is no way for a court to determine that the perjured testimony did not have controlling weight with the jury, and, notwithstanding the perjured testimony was contradicted at the trial, a new light is thrown on it by the admission that it was false; so that, on a new trial, there would be a 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.⁶⁷

The problem of a defendant being convicted on the basis of perjured testimony was again considered in *United States v. Mitchell*,⁶⁸ where the defendant was convicted of selling narcotics and was sentenced to a five-year prison term. After trial an informant who had been instrumental in convicting the defendant admitted that he had lied in his identification and that the defendant was innocent. The court ordered a new trial, although the informant, at a post-trial examination of the evidence, again reversed his testimony and reaffirmed his earlier identification of the defendant. In its decision, the court held that since the police records contained a picture of another black man with the same name, the possibility of a mistaken identification was enough to merit granting a new trial in the interest of justice.

Unlike California, which gives primary importance to whether the testimony was for the consideration of the jury or whether the perjury was "knowingly" used by the prosecution, courts outside of California are concerned with the possibility that the defendant was wrongly convicted. This concern was demonstrated by the United States Supreme Court, which noted in *Mesarosh v. United States*.⁶⁹

The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted [with perjury], and there can be no other just result than to accord petitioner a new trial.⁷⁰

v. State, 102 Tex. Crim. 292, 277 S.W. 684 (1925); *Hodnett v. City of Danville*, 152 Va. 955, 146 S.E. 281 (1929); *State v. Elliot*, 6 Wash. 2d 393, 107 P.2d 927 (1940); *Epsy v. State*, 54 Wyo. 291, 92 P.2d 549 (1939).

⁶⁵ *Mesarosh v. United States*, 352 U.S. 1 (1956); *United States v. Mitchell*, 29 F.R.D. 157 (D. N.J. 1962); *Martin v. United States*, 17 F.2d 973 (5th Cir. 1927); *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928).

⁶⁶ 17 F.2d 973 (5th Cir. 1927), *cert. denied*, 275 U.S. 527 (1927).

⁶⁷ *Id.* at 976.

⁶⁸ 29 F.R.D. 157 (D. N.J. 1962).

⁶⁹ 352 U.S. 1 (1956).

⁷⁰ *Id.* at 9.

PROPOSED STATUTE

To conform to the principle enunciated by the Supreme Court that a defendant should not be convicted on the basis of perjured testimony as to a material element of the prosecution's case against him, the California legislature should enact the following curative statute:

When a material witness for the prosecution, subject to cross examination and being fully aware that he may incur criminal liability for perjury, appears before the court in which a conviction of a crime was decreed, and admits giving perjured testimony regarding a material element of the prosecution's case against the defendant, which may have changed the outcome of the proceedings against such defendant if discovered during the trial, such court may order a new trial on the motion of the defendant.

This statute deals only with situations in which the court is reasonably satisfied that the testimony given by a material witness was false, that without it the jury would probably have reached a different verdict, and that the party seeking the new trial did not know of the falsity at the time of the trial, or could not have countered it.⁷¹

The witness's admission is strengthened if he is aware of the fact that his recantation may subject him to criminal liability for perjury.⁷² Recognizing the inherent weakness of granting a new trial on mere affidavits, the witness, subject to cross examination, is required to admit the perjury before the original trial court. When the above criteria are fulfilled the court determines whether the recantation is reliable. If the trial judge concludes that it is reliable, he has the power to order a new trial.

CONCLUSION

If this proposed statute were enacted, a defendant who is convicted with admittedly perjured testimony could have a new trial, untainted by this perjury.

His remedy would not depend on the inadequate provisions presently regulating the motion for new trial, nor on the superficial criterion of "knowing use" for *habeas corpus*.

No rational distinction can be made between the test of "knowing use" and "non-knowing use" of the perjured testimony by the prosecution. A conviction in either case rests upon intentional falsehoods. Such convictions undermine the system of criminal justice.

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⁷¹ Larrison v. United States, 24 F.2d 82 (7th Cir. 1928).

⁷² CAL. PEN. CODE § 118 (West 1970); see note 27, *supra*.