

# New York Law Journal



Web address: <http://www.nylj.com>

VOLUME 232—NO. 3

TUESDAY, JULY 6, 2004

## WHITE-COLLAR CRIME

BY ELKAN ABRAMOWITZ AND BARRY A. BOHRER

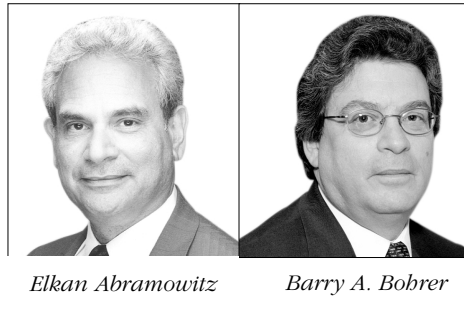
### *Perjury by Government Witnesses: Exposed and Punished*

Although defense lawyers for many years have challenged convictions obtained by federal prosecutors in reliance upon perjured testimony, they have for the most part met with little success.<sup>1</sup> That trend appears to be changing, however, at least in the Eastern District of New York, where two judges have issued opinions in three cases finding that the government relied on witnesses who perjured themselves and affording relief to the aggrieved defendants.<sup>2</sup> These rulings “highlight the rarely acknowledged problem of deceit by prosecution witnesses.”<sup>3</sup>

#### Second Circuit

The U.S. Court of Appeals for the Second Circuit recently restated the standard for granting a motion for a new trial based on the introduction of perjured testimony: where the prosecution knew or should have known of the perjury, the conviction must be set aside “if there is any

**Elkan Abramowitz** is a member of Morvillo, Abramowitz, Grand, Iason & Silberberg. He is a former chief of the criminal division in the U.S. Attorney's Office for the Southern District of New York. **Barry A. Bohrer** is also a member of Morvillo, Abramowitz and was formerly chief appellate attorney and chief of the major crimes unit in the U.S. Attorney's Office for the Southern District of New York. **Elizabeth J. Carroll**, an attorney, assisted in the preparation of this article.



Elkan Abramowitz

Barry A. Bohrer

reasonable likelihood that the false testimony could have affected the judgment of the jury.’ ”<sup>4</sup> Use of false evidence does not comport with notions of fairness encompassed in the due process clause. The Supreme Court thus “has applied a strict standard of materiality, not just because [these cases] involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process.”<sup>5</sup> The Second Circuit has long held that “if it is established that the government knowingly permitted the introduction of false testimony reversal is ‘virtually automatic.’ ”<sup>6</sup> If the government was not aware of the perjury, “a new trial is warranted only if the testimony was material and ‘the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.’ ”<sup>7</sup>

Despite the court's strong language cautioning the government against knowingly introducing false testimony, it has rarely reversed convictions based on perjured testimony. The leading Second

Circuit case to do so is *United States v. Wallach*,<sup>8</sup> in which the convictions at issue stemmed from the defendants' dealings with the Wedtech Corporation. After the completion of the trial in that case before U.S. District Judge Richard Owen of the Southern District of New York, one of the government's two primary witnesses was indicted and charged with committing perjury during his testimony at trial.<sup>9</sup>

During that witness' testimony on redirect, the prosecution “sought to rehabilitate the witness.” In response to the testimony, the defendants proffered testimony and disclosed to the government records showing that the witness had lied. Judge Owen sustained the government's objection to the testimony and the introduction of the records. The defendants again presented the issue of the witness' perjury to Judge Owen in the context of their motion for a new trial. At that time, the government conceded that the witness had committed perjury, but claimed that it had not learned of the perjury until well after the trial. The District Court denied the defendants' motion, finding that there was “neither allegation nor evidence that the prosecution had any knowledge of” the perjury. Thus, the court applied the materiality standard and concluded that the perjurious testimony was immaterial and that the jury's decision would not have been different.

The Second Circuit, in reversing all convictions, stated, “[a]lthough the ...prosecution did not ‘sit on its hands’ after becoming aware that [the witness] may have perjured himself, we are not satisfied that the government properly utilized the available information.” Specifically, the court found, the government “should have been on notice that [the witness] was perjuring himself” and “should have proceed[ed] with great caution.” Instead, the prosecution set out to rehabilitate the witness. In addition, the “powerful evidence” defendants placed before the government and the court that the witness was lying, though not formally admitted, “cast a dark shadow on the veracity” of the witness’ statements. Thus, the court was “convinced that the government should have known” that the witness — “the centerpiece of the government’s case” — was committing perjury.

“Had it been brought to the attention of the jury,” the court observed, “his entire testimony may have been rejected by the jury.”

This led the court to “conclude as a matter of law that had the jury been aware of [the] perjury it probably would have acquitted the defendants.” The court further found that, “[e]ven assuming that the government had no knowledge of the perjury at the time of trial ...reversal would still be warranted” based on the fact that the government received additional information about the witness’ perjury after the conclusion of the trial.

### Eastern District Decisions

Earlier this year, in a lengthy and strongly worded opinion in a murder case, U.S. District Judge John Gleeson of the Eastern District of New York in *United States v. D’Angelo*<sup>10</sup> granted the defendant’s motion for a new trial based on the perjured testimony of three accomplices who were key witnesses.<sup>11</sup> Judge Gleeson began his discussion of the motion by stating, “[t]he only difficult aspect of the motion for a new trial is understanding why the government has

opposed it.” Judge Gleeson then made the following findings, using language that shows just how strongly Judge Gleeson, a former federal prosecutor himself, felt.

The three accomplices’ testimony was “patently incredible” as well as “conflicting and evolved,” with “fundamental conflicts.” They committed “rampant perjury” both at trial and in their dealings with the government and had “grievous credibility defects.” The testimony of two of the accomplices “[e]l[ft] the impression that two perjurers made up facts about a murder without having had a chance to get their stories straight.” The testimony of the first accomplice contained “many oddities” and “numerous defects” and “was rife with anomalies as well as perjury.”

---

*These rulings  
“highlight the rarely  
acknowledged problem  
of deceit by prosecution  
witnesses.”*

---

The second accomplice had a “sordid history of perjury and subornation of perjury, of which the government was aware.” The testimony of the third accomplice was “all over the map” and “especially ridiculous.” Before the trial, he gave “numerous” and “conflicting” accounts of the murder; after the trial he lied to prosecutors on two occasions.

The court was no less harsh with respect to the government’s arguments, which it said “ring especially hollow.” According to the court, one argument was “utterly disingenuous”; another “ridiculous”; a third position was “unbecoming.” Judge Gleeson found not only that the government’s case was “implausible” but also that the “implausibility of [its] case was not limited to its overarching theory. It surfaced in details that are almost too numerous to mention. Viewed individually, they are all trouble-

some. Viewed as a whole, they render the jury’s verdict indefensible.”

The “most troubling” aspect of the government’s case was that the government was, “at the very least, negligent in eliciting” certain perjured testimony. The perjury, by one of the three key witnesses, was “in itself unfortunately unremarkable, as the trial was rife with accomplice witness perjury.” (A post-trial investigation by the government caused even the government to concede that “the accomplice testimony was rife with perjury on critical factual issues going to the heart of the case.”) But the government’s role in eliciting the perjury was even more disturbing to the court. However, because the court found that the defendant “ha[d] readily satisfied the standard applicable when the prosecutor [i]s unaware of the perjury,” it did not need to determine whether the prosecutors actually knew during the witness’ redirect examination that his testimony was false. The court was “left with the strong belief that but for [the three key witnesses’] perjured testimony, [the defendant] would most likely not have been convicted” and stated that the jury’s finding of guilt was “a miscarriage of justice.”

### ‘United States v. Hiruko’

Last month, Judge Gleeson again found that a government witness had given perjurious testimony, though this time it was a New York police detective who testified falsely, in the context of a motion to suppress. In *United States v. Hiruko*,<sup>12</sup> a counterfeiting case, the defendants moved to suppress counterfeit money allegedly seized from one of the defendants and from the floor of the back seat of the car in which they were arrested. Judge Gleeson found that the detective’s testimony “contained inconsistencies and anomalies that cause[d] [the court] not to credit the testimony.” Specifically, the court did not credit the detective’s testimony that he observed two bills on the floor of the car because of the

“small size of the car and the large size of its rear-seat passengers” and because the detective testified three different ways as to the timing of his discovery of the bills. The court was further troubled by the fact that the two bills were commingled with other bills that were seized from different locations, when the usual custom is to voucher them separately.

The Court also discredited the detective’s testimony to the Secret Service<sup>13</sup> that he noticed the bills were counterfeit because the ink was smeared — “[t]hat too, I find, would not have been possible, given the clear appearance of the bills and [the detective’s] vantage point.”

In addition, the detective’s testimony that he “observed a bulge” in one of the defendant’s pants “strain[ed] credulity” given that when the bills were folded in half they measured barely half an inch in thickness. Also, the court pointed out, had the detective in fact observed a bulge that he thought might be a gun — as he testified — “common sense would suggest that he would have patted down [that defendant] the moment he exited the vehicle. But he did not.” This fact caused Judge Gleeson to label the detective’s story about the bulge “a recent fabrication” and to suppress the counterfeit money seized from that defendant and from the floor of the car.

Judge Nicholas G. Garaufis faced a similar situation on a motion to suppress earlier this year in *United States v. Big Apple Bag Company*,<sup>14</sup> though he, unlike Judge Gleeson, chose not only to criticize the FBI special agent whose affidavit was in question, but also to single out the Assistant United States Attorney involved in the case.

In *Big Apple Bag Company*, the defendants were indicted for trafficking in drug paraphernalia and conspiracy. They moved to suppress evidence seized from their warehouse pursuant to a warrant granted based on an affidavit drafted by the

Assistant United States Attorney with assistance from and signed by the FBI agent, which they alleged contained material false statements. The court initially denied the motion, but then decided to hold a hearing after receiving on the eve of trial a Form 302 report prepared by a second FBI special agent that suggested that the affidavit might contain falsehoods.

In the affidavit, the FBI special agent who signed it stated that on a prior visit to the warehouse he had observed “hundreds of glass crack pipes” and “thousands of ‘bullets,’ which I have learned ...dispense ...cocaine.” The Form 302 report, however, “failed to mention specifically observing any crack pipes at the warehouse.” In the meantime, the government had conceded that the statement concerning the “thousands of ‘bullets.’” was an error; in fact, the government could find only three such “bullets.”

Because the court found during the hearing that the FBI special agent who had signed the affidavit “was not a credible witness,” it “also [found] that he recklessly if not deliberately disregarded the truth in his statement concerning the crack pipes he swore he observed in the affidavit.” Judge Garaufis “d[id] not believe thathe personally actually saw any crack pipes in the warehouse” and found his sworn statement about the “bullets” to be “grossly false.” Furthermore, the court, in granting defendants’ motion, concluded that, “had these false statements been expunged from the affidavit ...probable cause would not have existed to issue a search warrant.”

## Conclusion

White-collar criminal attorneys should be heartened by the three recent opinions by Judges Gleeson and Garaufis because they show that judges, and even the government, are now acknowledging the disturbing problem of tainted government

witnesses — a problem that can arise just as easily in the many cases being prosecuted today involving the more familiar white-collar crimes. To the extent that the court in these cases dealt forthrightly with an issue that involves a corruption of the truth-seeking process, perhaps it will usher in a new era of heightened scrutiny of perjured testimony introduced on the government’s watch and committed by a member of the prosecution team. Particularly in light of the increasingly harsh sentences being imposed, the perception that the process is free from taint is critical to public confidence in our system of justice.



1. For an explanation of the reasons why the criminal justice system has failed to control this type of perjury, see Gabriel J. Chin & Scott C. Wells, “The ‘Blue Wall of Silence’ as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury,” 59 U Pitt LRev. 233 (1998).

2. The authors’ firm currently represents parties in two cases in which issues relating to perjury by government witnesses are under consideration. *Rothstein v. Carriere*, Dkt. No. 02-7731 (2d Cir. June 23, 2004); *United States v. Stewart*, S1 03 Cr. 717 (MGC) (SDN.).

3. William Glaberson, “Judge Again Cites Lies by U.S. Witnesses,” NY Times, June 16, 2004.

4. *United States v. Monteleone*, 257 F3d 210 (2d Cir 2001), quoting *Wallach*, 935 F2d 445.

5. *United States v. Agurs*, 427 US 97 (1976).

6. *United States v. Wallach*, 935 F2d 445 (2d Cir. 1991), quoting *United States v. Stofsky*, 527 F2d 237 (2d Cir 1975).

7. *Wallach*, 935 F2d 445, quoting *Sanders v. Sullivan*, 863 F2d 218 (2d Cir 1988).

8. 935 F2d 445.

9. The other primary witness had perjured himself in a prior proceeding and the jury “was instructed to evaluate his testimony carefully.”

10. No. 02 CR 399, 2004 WL 315237 (EDNY Feb. 18, 2004).

11. The defendant made a Rule 29 motion for a judgment of acquittal and a Rule 33 motion for a new trial. The court granted the defendant’s Rule 29 motion and, in the alternative, his Rule 33 motion.

12. No. 03 CR 1124, 2004 WL 1260057 (EDNY June 9, 2004).

13. Counterfeiting is a federal offense that falls within the investigative jurisdiction of the United States Secret Service.

14. 306 F Supp 2d 331 (EDNY 2004).