Circuitous Thinking

PERJURY IN THE SECOND CIRCUIT

by Richard Ware Levitt

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The recent spate of cases addressing issues of testimonial perjury and other misconduct by federal witnesses, agents and prosecutors has shed much needed light on a problem all defense lawyers know exists but which generally doesn't see the light of day. I recently discussed the issue of prosecutorial misconduct with an assistant in the United States Attorney's Office for the Eastern District who emphasized that these recent cases are few in number compared to the hundreds of cases prosecuted by that office each year without any claim of wrongdoing. True enough, and it's fair to say that most prosecutors and most agents in most cases act honorably. But these are generally honorable people who toil in the competitive world of ferreting out crime, and the temptation to win at all costs or to engage in conscious avoidance of the wrongdoing of others, is greatest in the cases where the issues are close and the stakes are high. That only two instances of such misconduct have been identified in recent decisions should give comfort to no one; they are, many believe, but the tip of the iceberg.

What forms does government misconduct take? The possibilities are limited only by the ingenuity of ingenious prosecutors, agents and witnesses.

Some are subtle and some are blunt. Agents don't take notes during early debriefings or limit their note taking until they obtain from a cooperator the version of facts they are looking for. Or only a single agent takes notes to avoid discrepancies. Witnesses are provided informal opportunities to converse with one another. Agents show cooperators pictures or other evidence not to legitimately elicit information from a witnesses but to familiarize the witness with facts they want them to have. Prosecutors tell a witness's lawyer that several other persons have confirmed certain facts and that the client's failure to do so would be considered a breach of a cooperation agreement. *Brady* material is withheld. Prosecutors emphasize to juries the truth-telling provisions of cooperation agreements that warn of dire consequences for the dissembling cooperating witness, but which we all know to be bogus.

The fact is that federal prosecutors, agents and witnesses have precious little incentive, other than their own consciences, not to cross the line when the going gets tough because neither their offices nor the courts provide much of a disincentive to bend or break the rules. Defense attorneys know that their own perceived missteps will be answered with a criminal investigation, possibly leading to an indictment, and several members of the defense bar in fact have been investigated and charged. When was the last time you heard of a federal prosecutor or agent being criminally investigated or charged? Or even sanctioned for wrongdoing? Is it that defense lawyers are just less honest than prosecutors (who, in turn, become dishonest only when they leave the office to become defense lawyers?)

A review of Second Circuit law reveals that the court is commendably willing to confront issues involving the presentation of false testimony by state prosecutors (see, e.g., *Wei Su v. Filion*, 335 F.3d 119 (2d Cir. 2003); *Ortega v. Duncan,* 333 F.3d 102 (2d Cir. 2003); *Jenkins v. Artuz*, 294 F.3d 284 (2d Cir. 2002)); *Drake v. Portuondo*, 321 F.3d 338 (2d Cir. 2003); but is far more reticent when the shenanigans of federal prosecutors and/or agents are in issue. *United States v. Wallach,* 934 F.2d 445 (2d Cir. 1991), is often cited as an example of a federal trial court reversal based on perjured testimony, but it is as aptly cited as the exception that proves the rule. The task of obtaining relief from trial perjury is made no easier by the rule that tolerates perjury, even by agents, so long as it did not likely affect the verdict, unless the prosecutor knowingly presented the false testimony.

Typically, when faced with obvious wrongdoing by a federal prosecutor or agent the circuit court is more likely to express its displeasure and warn that similar conduct will not again be tolerated – though it is. These warnings, repeated often enough without impositions of sanctions, risk taking on a comical, if regrettable, air.

The sad truth is that with rare exceptions, few who can act upon these forms of misconduct care to do so and the message sent to prosecutors, agents and witnesses, therefore, is: you convict the bad guys any way you must and we'll look the other way at your overreaching. There are three principal problems, however, with this approach. First, we need only look at the results obtained by groups such as the Innocence Project to know that innocent people *are* wrongly convicted. Second, tolerating witness perjury is unethical and, depending on the particular circumstances, possibly criminal. And third, countenancing such misconduct breeds disrespect for the law.

It is refreshing, therefore, that federal prosecutors in the Eastern District were treated recently to two swift kicks resulting from their presentation of perjured testimony and related misconduct.

In the first case, *United States v. D'Angelo*, 2004 WL 315237 (EDNY February 18, 2004), the defendant was convicted of murder in aid of racketeering under 18 U.S.C. § 1959 and two related firearm counts. He moved under Rule 29 to dismiss the § 1959 count for want of evidence that he committed the murder to gain entrance into the racketeering enterprise and he moved for a new trial under Rule 33 on the ground that the government's cooperating witnesses committed perjury. Judge Gleeson, in an exhaustive opinion, first agreed that the evidence was, in fact deficient to prove D'Angelo's motive for the murder. He then granted, in the alternative, a new trial on all the charges, "in light of the rampant perjury at trial by the government's [three] accomplice witnesses." With respect to the latter finding the court said:

> The only difficult aspect of the motion for a new trial is understanding why the government has opposed it. The jury's finding that D'Angelo was guilty was a miscarriage of justice, not because the evidence was deficient on the jurisdictional element of the offense, as set forth above, but because the accomplice testimony implicating D'Angelo was patently incredible. I held that view at the time of trial. Subsequent events, including the government's concession that the accomplice testimony was rife with perjury on critical factual issues going to the heart of the case, have only confirmed what appeared obvious to me at trial.

The "government concessions" alluded to in the quotation above, included "that all three of the accomplice witnesses who implicated D'Angelo gave perjured testimony about how the murder was conceived and carried out."

These brief quotes do not begin to do justice to the decision, which I commend to the reader.

In *United States v. Big Apple Bag Company* (a case in which the author was cocounsel) agents entered a warehouse in Queens, N.Y. to arrest a fugitive. During a security sweep of the warehouse agents supposedly observed what they thought were items of drug paraphernalia, including millions of plastic bags and a handful of glass vials with mesh filters. They then sought a warrant with the assistance of an Eastern District prosecutor. The warrant application, drafted by the assistant and signed by the agent, contained materially false statements of fact and law, and these falsities were exacerbated by the agent's false testimony at the ensuing *Franks* hearing. The false statements in the affidavit concerned the three principal bases for the warrant:

- the plastic bags were drug paraphernalia. (They are not – see *United States v. Lin*, 962 F.2d 251 (2d Cir. 1992)).
- the agent/affiant observed "thousands of 'bullets'" (i.e. small containers used to deliver cocaine to the nose) on the premises (he saw, at most, two or three bullets)
- the affiant observed "hundreds of crack pipes" (the court found he did not).

Compounding these false statements the assistant elicited testimony from the affiant at the *Franks* hearing that his admittedly erroneous claim to have seen "thousands of bullets" was based on a telephone conversation he had with a fellow agent who was waiting at the warehouse while the warrant was being secured. The assistant elicited this testimony even though she knew (but had not revealed) that the agent at the warehouse denied having made such a statement to the affiant (and even though this explanation, false as it was, did not address the agent's sworn claim that *he* had made this observation).

The district court found that the agent had given knowingly false testimony. He "was not a credible witness," "his answers were frequently vague or evasive, his memory was poor, and his testimony was often inconsistent with the testimony of the other two agents in crucial respects." With respect to the "bullets" the Court found that the agent's sworn statement "was so grossly false" and his testimony "so confused, I cannot conclude that Quinones understood what a 'bullet' is, or that he personally observed any 'bullets' in the warehouse." Regarding the "crack pipes," the agent's testimony was so incredible – he could not differentiate between an open-ended tube and a closed vial – that the Court concluded "I do not believe that he personally saw any crack pipes in the warehouse" and that if he did, it was pursuant to an unlawful search of the premises prior to the issuance of the warrant.

Based on these findings Judge Garaufis granted the *Franks* motion and suppressed all evidence seized from the warehouse other than that which was seen in plain view during the security sweep.

Neither Judge Gleeson nor Judge Garaufis is known as a "liberal" judge. Judge Gleeson, of course, is the storied prosecutor of John Gotti and other high-profile defendants. He can venture into the land of government misconduct with the same credibility as Nixon venturing into China, or Reagan finally embracing the Evil Empire. Judge Garaufis, for his part, has a background in aviation law and has little in his past that suggests he was sensitized to issues of prosecutorial misconduct.

The misconduct addressed in *D'Angelo* and *Big Apple Bag* was striking, which makes all the more disconcerting the government's reaction; presented with unassailable evidence of flagrant wrongdoing, in each case the government was more concerned about protecting their cases than doing justice.

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In *D'Angelo*, the government insisted that its trial success should not be disturbed, a claim which Judge Gleeson treated with appropriate disdain:

> Yet despite this rampant perjury, the government clings to the jury's verdict like it is the only conviction it ever obtained, citing one main reason: Maggiore and R. Alvarado did not fail a single-question polygraph test in which they were asked only whether D'Angelo had been the shooter. A polygraph, the sort of information which, if offered by a defendant in defense or even in mitigation of a charge, quickly gets the back of the government's hand, now justifies, according to the government, the denial of a new trial even in the face of blatant, critical perjury by all of the key witnesses against D'Angelo.

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Judge Gleeson described other of the government's efforts to salvage the conviction as "frivolous" and "ridiculous," to identify but two of his many disparaging modifiers.

Likewise, in *Big Apple Bag* the government filed a motion to reconsider that failed to acknowledge its blatant wrongdoing, blamed the agent's testimonial machinations on the short hearing schedule (on which the government had insisted), and launched an ad hominem attack on defense counsel, citing to positions taken by counsel 16 years previous.

The decisions *in D'Angelo* and *Big Apple Bag* are refreshing, but it is well to recognize the misconduct exposed in each case was egregious. The willingness of courts to identify and sanction perjury by government witnesses should not be limited to only the worst of the worst cases. Far more common are the subtle, less flagrant versions of misconduct, that will only be exposed if judges are willing to make tough credibility findings where called for and not reflexively find government witnesses to be truthful in the face of compelling contrary evidence.

For our part, defense lawyers must forcefully advocate for their clients where credible evidence suggests the government is presenting false testimony. The decision to do so, however, is not always easy, as there is often the unspoken concern that such advocacy will meet an aggressive response that can harm the client, the lawyer or both. At some point, however, we must decide to be part of the problem or part of the solution.

Let us hope that these decisions are harbingers of a greater willingness of courts to frankly identify, address and condemn instances of prosecutorial misconduct involving trial perjury in federal prosecutions. A climate of tolerance for government perjury in the service of convicting those believed to be guilty is simply part and parcel of a general "ends justifies the means" mentality that is prevalent in other areas of life and government as well, but which can have dire long-term consequences. We recently read the conclusions of the 9/11 commission, which placed substantial blame on Congress for failing in its responsibility to oversee our security agencies. No doubt the responsible legislators believed they were doing the country a service by not intruding into the business of those charged with catching the "bad guys." The results were disastrous. The courts should not make the same mistake.