



1963

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Recommended Citation

Lester B. Orfield, *Proof of Perjury and the Two Witnesses Requirement in Federal Criminal Cases*, 17 Sw L.J. 227 (1963)
<https://scholar.smu.edu/smulr/vol17/iss2/2>

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PROOF OF PERJURY AND THE "TWO WITNESSES" REQUIREMENT IN FEDERAL CRIMINAL CASES

Lester B. Orfield*

THE purpose of this Article is to examine in detail the "two witnesses" or "corroborating evidence" rule in federal perjury cases. The review is undertaken at this time for two reasons: (1) because there is a continuing flow of cases which deal with this important area of criminal law; and (2) since recent drafts of penal codes have proposed an important change in the law. The subject matter is presented as follows: first, the rule, its exceptions, and the underlying policy are discussed; second, there is a brief note on the type of proof required in a perjury case, followed by a study of the actual application of the "two witnesses" rule; and finally, the proposed changes are mentioned.

I. THE "TWO WITNESSES" OR "CORROBORATING EVIDENCE" RULE AND ITS EXCEPTIONS

In 1840, Mr. Justice Thompson of the Supreme Court, in a dissenting opinion in *United States v. Wood*, summarized the law concerning the number of witnesses required to prove perjury:

The rule, as we find it laid down in the elementary books on this subject, is, that to convict a party of the crime of perjury, two witnesses are necessary to contradict him as to the fact upon which the perjury is assigned; and the reason assigned for the rule is, that if one witness only is produced, there will only be one oath against another. This rule, however, in the early adjudged cases, was so modified as to require but one living witness, corroborated by circumstances, to contradict the oath of the defendant; and with this modification the rule has remained until the present day.¹

However, in that case the Supreme Court held that written testimony alone might be enough. The Court stated:

Or in what cases may a living witness to the *corpus delicti* of a defendant be dispensed with, and documentary or written testimony be relied upon to convict? We answer, to all such where a person is charged with a perjury, directly disproved by documentary or written

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¹ *United States v. Wood*, 39 U.S. (14 Pet.) 430, 444 (1840).

testimony springing from himself, with circumstances showing the corrupt intent. In cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath; the oath only being proved to have been taken. In cases where a party is charged with taking an oath contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters, relating to the fact sworn to, or by other written testimony existing and being found in the possession of a defendant, and which has been treated by him as containing the evidence of the fact recited in it.³

The decision sets out what is now known as the "documents exception" to the rule requiring two witnesses or one witness and corroborating evidence to convict a person of perjury. When this exception is applied, it permits the complete substitution of documents for testimony by the witnesses. As one court stated: "In the federal cases in which documents have been used to establish perjury, the documents have, for practical purposes, directly established the falsity of the statement under oath."³

Recent cases continue to apply the exception. For example, in a prosecution for perjury committed during his trial for mail fraud, the defendant had testified that he cut five stencils and prepared a document from the stencils on the same day. The government proved that the fifth and incriminating stencil was in fact not part of the original document in issue, and the evidence was clear that the first four stencils had been cut some time prior to the fifth. It was held that such a document, written by the defendant, was direct proof of the crime and that no direct testimony from a living witness was necessary.⁴

In a case involving the prosecution of a physician for perjury while testifying in a robbery prosecution against his patient, a medication card and appointment book record showing appointments and treatments were held to constitute documentary or written testimony springing from the defendant.⁵ The physician was convicted for swearing under oath in a criminal proceeding against his patient

² *Id.* at 441. In this case the defendant's letters and invoice books were held to be sufficient to sustain a conviction for perjury. The case was approved and followed in *Hammer v. United States*, 271 U.S. 620 (1926); *United States v. Goldberg*, 290 F.2d 729 (2d Cir.), *cert. denied*, 368 U.S. 899 (1961); *United States v. Collins*, 272 F.2d 650 (2d Cir. 1959); *United States v. Lester*, 248 F.2d 329 (2d Cir. 1957); *United States v. Buckner*, 118 F.2d 468 (2d Cir. 1941); *Jacobs v. United States*, 31 F.2d 568 (6th Cir.), *cert. denied*, 279 U.S. 869 (1929); *United States v. Baer*, 6 Fed. 42 (S.D.N.Y. 1880); *United States v. Mayer*, 26 Fed. Cas. 1225 (No. 15753) (D. Ore. 1865).

³ *Radomsky v. United States*, 180 F.2d 781, 783 (9th Cir. 1950).

⁴ *Barker v. United States*, 198 F.2d 932 (9th Cir. 1952).

⁵ See *United States v. Spaeth*, 152 F. Supp. 216 (N.D. Ohio 1952), *aff'd*, 254 F.2d (6th Cir.), *cert. denied*, 358 U.S. 831 (1958).

that he had treated the patient on the date of the offense in issue. The government proved that the date in the record book from which he testified had been altered. It was held that this was direct documentary proof of the guilt of the physician.

Thus, in effect no witnesses may be required in perjury cases involving the documents exception "save as to the identity of physical objects having circumstantial relevancy."⁶ In contrast, in treason cases two witnesses are always required to prove overt acts. Even in a recent misdemeanor case concerning the statutory offense of verbal invitation to commit sodomy, the Court of Appeals for the District of Columbia held that the testimony of a single witness should be received and considered only with great caution.⁷

There are several other exceptions to the "corroborating evidence" rule. First, no contradicting witness is required if direct observation was not feasible. This type of case arises when a defendant is charged with perjury as to his own mental state, as for example, when he states, "I don't remember." In such a situation, as in *Behrle v. United States*, the prosecution can proceed wholly on circumstantial evidence.⁸ In the *Behrle* case the defendant had made a written statement in July describing the shooting of another person. Later, in November, he made the same statement on oath to the grand jury. However, three weeks later at the trial of the person charged with crime he denied all recollection of having made any part of the statement, although he admitted his signature. Circumstantial evidence that he must have remembered was enough to overcome the presumption of innocence and to leave no reasonable doubt of the defendant's perjury.

Another exception is that an authenticated record of convictions is sufficient to demonstrate the falsity of a defendant's sworn denial that he had ever been convicted of crime.⁹ In the case enunciating this rule there was testimony by one witness supported by documentary evidence.

A third exception exists when a defendant admits prior false testimony. In one case the defendant testified at the trial of two

⁶ *United States v. Goldberg*, 290 F.2d 729, 733 (2d Cir.), *cert. denied*, 368 U.S. 899 (1961). In England it is not certain whether proof without any witness would be sufficient. See Kenny, *Outlines of Criminal Law* § 598, at 482 n.2 (17th ed. Turner 1958).

⁷ *Kelly v. United States*, 194 F.2d 150 (D.C. Cir. 1952). Special weight was given to evidence of the accused's good character, and his conviction was reversed.

⁸ *Behrle v. United States*, 100 F.2d 714 (D.C. Cir. 1938). The court cited *People v. Doody*, 172 N.Y. 165, 64 N.E. 807 (1902). See also *United States v. Nicoletti*, 310 F.2d 359 (7th Cir. 1962); 51 *Colum. L. Rev.* 1056 (1951); 28 *Geo. Wash. L. Rev.* 786 (1960).

⁹ *United States v. Flores-Rodriguez*, 237 F.2d 405 (2d Cir. 1956). See also *Holy v. United States*, 278 Fed. 521 (7th Cir. 1921).

police officers that her sworn testimony at the grand jury hearing prior to the trial was untrue and was given to save her husband. She was indicted for perjury. At her trial she asserted under oath the falsity of her testimony before the grand jury and was convicted. On appeal it was held that further proof of perjury was unnecessary, since the defendant's testimony was the practical equivalent of a plea of guilty.¹⁰ A previous case had held that when a defendant at the perjury trial expressly admitted that previous testimony was false, the evidence was sufficient.¹¹ In 1952, the Fifth Circuit held that although subsequent inconsistent testimony was accompanied by an admission that the previous testimony was false, corroboration was still required.¹² In that case the defendant did not testify and formally recant. She simply admitted before the grand jury that a prior statement made by her before a United States Commissioner was false. Probably the fact that the defendant did not testify at the perjury trial distinguishes this case from the apparently conflicting cases which do excuse the absence of corroborating testimony when the defendant himself testifies concerning his false statements.

II. APPLICATION OF THE RULE

A. *Attitude Of The Courts*

The lower federal courts have generally adhered to the rule requiring corroborating evidence. In 1907 the Ninth Circuit approved an instruction that the government must prove the guilt of one charged with perjury by the testimony of two witnesses or by the testimony of one witness and corroborating circumstances.¹³ In 1909 the Eighth Circuit stated that the old "strictness [the absolute requirement of two witnesses] has long since been relaxed, and we find many cases in the books where convictions have been sustained upon the testimony of a single witness, corroborated by circumstances proved by independent evidence sufficient to warrant the jury in saying that they believe one rather than the other."¹⁴ The Second

¹⁰ *United States v. Buckner*, 118 F.2d 468 (2d Cir. 1941), noted, 28 Va. L. Rev. 102 (1941).

¹¹ *Pawley v. United States*, 47 F.2d 1024 (9th Cir. 1931); see 7 Wigmore, Evidence § 2042, at 282 (3d ed. 1940).

¹² *McWhorter v. United States*, 193 F.2d 982 (5th Cir. 1952); see 9 *Austl. L.J.* 151 (1935); 53 *Mich. L. Rev.* 1165 (1955).

¹³ *Holmgren v. United States*, 156 Fed. 439 (9th Cir. 1907). The Supreme Court affirmed without express consideration of the point, 217 U.S. 509 (1910). See also *Arena v. United States*, 226 F.2d 227 (9th Cir. 1955), *cert. denied*, 350 U.S. 954 (1956); *Pawley v. United States*, 47 F.2d 1024 (9th Cir. 1931).

¹⁴ *Hashagen v. United States*, 169 Fed. 396, 399 (8th Cir. 1909). See also *Gordon v. United States*, 5 F.2d 943 (8th Cir. 1925).

Circuit subscribed to this view in 1914.¹⁵ In 1912¹⁶ and 1922¹⁷ the Fourth Circuit followed suit, stating that "there is no suggestion that the rule as laid down in . . . *United States v. Wood* . . . is not in substance still binding on the courts."¹⁸ However, in a 1938 case the Fourth Circuit struck a discordant note by expressing doubt that the old perjury rule should be continued and by denying the need for an instruction on the subject to the jury, particularly when the error was harmless.¹⁹

The other circuits followed the majority rule. In 1921 the Seventh Circuit²⁰ and in 1932 the Third Circuit adopted the corroboration rule, the latter stating: "This is an inflexible rule of the common law applicable to every charge of perjury and must be enforced by the court until changed by statute."²¹ Finally, in 1944 the Sixth Circuit²² and in 1954 the District of Columbia Circuit²³ joined the others in requiring corroboration.

The Supreme Court has approved the same approach. For example, in 1941 the Court stated in dictum: "An uncorroborated confession or evidence of perjury, given by one witness only, does not as a matter of law establish beyond a reasonable doubt the commission of a crime. . . ."²⁴ That position was reaffirmed in 1954 when the Supreme Court upheld the old rule. Justice Black, speaking for the Court, stated the policy considerations in favor of the orthodox view:

¹⁵ *Kahn v. United States*, 214 Fed. 54 (2d Cir.), *cert. denied*, 234 U.S. 763 (1914); see *United States v. Goldstein*, 168 F.2d 666 (2d Cir. 1948); *Schonfeld v. United States*, 277 Fed. 934 (2d Cir.), *cert. denied*, 258 U.S. 623 (1921).

¹⁶ *Allen v. United States*, 194 Fed. 664 (4th Cir. 1912).

¹⁷ *Clayton v. United States*, 284 Fed. 537 (4th Cir. 1922).

¹⁸ *Allen v. United States*, 194 Fed. 664, 668 (4th Cir. 1912). The court cited 3 Wigmore, Evidence § 2040 (1st ed. 1904).

¹⁹ *Goins v. United States*, 99 F.2d 147 (4th Cir. 1938), *petition for cert. dismiss.*, 306 U.S. 622 (1939); see McClintock, *What Happens to Perjurors*, 24 Minn. L. Rev. 727 (1940); 28 Geo. Wash. L. Rev. 786 (1960); 40 J. Crim. L., C. & P.S. 344 (1949); 44 Mich. L. Rev. 483 (1945); 35 So. Calif. L. Rev. 86 (1961); 91 U. Pa. L. Rev. 79 (1942); 28 Va. L. Rev. 102 (1941).

²⁰ *Holy v. United States*, 278 Fed. 521 (7th Cir. 1921).

²¹ *Phair v. United States*, 60 F.2d 953, 954 (3d Cir. 1932). See also *United States v. Laurelli*, 293 F.2d 830 (3d Cir. 1961), *cert. denied*, 368 U.S. 961 (1962); *United States v. Rose*, 215 F.2d 617 (3d Cir. 1954); *United States v. Neff*, 212 F.2d 297 (3d Cir. 1954).

²² *Fraser v. United States*, 145 F.2d 145 (6th Cir. 1944), *cert. denied*, 324 U.S. 842 (1945). See also *May v. United States*, 280 F.2d 555 (6th Cir. 1960); *Spaeth v. United States*, 218 F.2d 361 (6th Cir. 1955). In 1962 the Fifth Circuit took the same view. *Paternosto v. United States*, 311 F.2d 298, 307 (5th Cir. 1962).

²³ *Young v. United States*, 212 F.2d 236 (D.C. Cir.), *cert. denied*, 347 U.S. 1015 (1954). See also *Cook v. United States*, 20 App. D.C. 427, 6 Ann. Cas. 810 (D.C. Cir. 1906).

²⁴ *Warszower v. United States*, 312 U.S. 342, 347 (1941). This holding was followed in *Weiler v. United States*, 323 U.S. 606 (1945); *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951); *Catrino v. United States*, 176 F.2d 884 (9th Cir. 1949); *Fraser v. United States*, 145 F.2d 145 (6th Cir. 1944), *cert. denied*, 324 U.S. 842 (1945).

The special rule which bars conviction of perjury solely upon the evidence of a single witness is deeply rooted in past centuries. That it renders successful perjury prosecutions more difficult than it otherwise would be is obvious, and most criticism of the rule has stemmed from this result. It is argued that since effective administration of justice is largely dependent upon truthful testimony, society is ill-served by an "anachronistic" rule which tends to burden and discourage prosecutions for perjury. Proponents of the rule, on the other hand, contend that society is well-served by such consequences. Lawsuits frequently engender in defeated litigants sharp resentments and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions.

The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less-stringent rule were adopted.

Whether it logically fits into one testimonial pattern or not, the government has not advanced sufficiently cogent reasons to cause us to reject the rule.²⁵

A recent Second Circuit case has cast some doubts on the old attitudes and seems to have taken a step towards the rejection of a quantitative rule. In *United States v. Collins*²⁶ the defendant appeared before a grand jury with respect to minutes he had prepared as the secretary of a Teamster's local under the direction of James Hoffa, the union president. The defendant admitted signing the minutes in 1953 and stated under oath that they had not been later changed. The defendant was prosecuted for perjury, and the government introduced into evidence expert testimony that the machine upon which the minutes were typed had not been put on the market by the manufacturer until 1955. Thereafter, a second expert witness, employed by the F.B.I. as a document examiner, testified that the minutes were typed on a machine which the union local had purchased from the manufacturer in 1956. A conviction was affirmed on the basis of this evidence and in the absence of any direct testimonial evidence establishing the falsity of the statement alleged to have been made by the defendant. Thus, it would seem that the holding was not based on the documentary exception, nor, obviously, on an application of the "two witnesses" rule. The court apparently held (1) that the test was not whether the evidence was direct or circum-

²⁵ *Weiler v. United States*, 323 U.S. 606, 608-09 (1945).

²⁶ *United States v. Collins*, 272 F.2d 650 (2d Cir.), *cert. denied*, 362 U.S. 911 (1959), noted, 28 Geo. Wash. L. Rev. 786 (1960), 35 So. Calif. L. Rev. 86 (1961).

stantial and (2) that the evidence must be of such a *quality* that it will assure that the defendant's guilt is solidly founded. Nevertheless, the court was cautious and stated that the situation was "akin to the use of documents signed by the witness. . . ."²⁷

B. Proof Required For A Perjury Conviction

The general rule appears to be that to convict a person of perjury, positive and direct evidence is necessary; circumstantial evidence standing alone is never sufficient.²⁸ Also, even though the evidence offered is documentary, this does not dispense with the requirement that it be direct and positive.²⁹ In 1959 the Second Circuit took a position contradictory to the direct evidence requirement. That court held that testimony "in a sense circumstantial" may be sufficient to support a perjury conviction if it is "absolutely inconsistent" with the defendant's innocence.³⁰ A few prior decisions had likewise criticized the direct evidence rule.³¹

One court created an exception to the rule by holding that circumstantial evidence was admissible only when the nature of the false testimony was such that no direct testimony of its falsity could be obtained, such as testimony about the witness's knowledge or belief.³² In a somewhat similar vein, the Second Circuit has stated:

Since the crime of perjury consists in the contradiction between the accused's oath and his belief, the only "direct" evidence of his guilt would seem to be his own declarations of his belief. But the law is

²⁷ *Id.* at 652.

²⁸ *Spaeth v. United States*, 218 F.2d 361 (6th Cir. 1955); *Radomsky v. United States*, 180 F.2d 781 (9th Cir. 1950); *Clark v. United States*, 61 F.2d 695 (8th Cir. 1932), *aff'd*, 289 U.S. 1 (1933); *United States v. Otto*, 54 F.2d 277 (2d Cir. 1931), noted, 80 U. Pa. L. Rev. 1026 (1932); *Clayton v. United States*, 284 Fed. 537 (4th Cir. 1922); *Allen v. United States*, 194 Fed. 664 (4th Cir. 1912).

This is the view of the majority of state court decisions. See *Annotts.*, 44 L.R.A. (n.s.) 513 (1913); 15 A.L.R. 634 (1921); 27 A.L.R. 857 (1923); 42 A.L.R. 1063 (1926); 111 A.L.R. 825 (1937); 38 Va. L. Rev. 104 (1952). For criticism of this view, see 3 *Wigmore, Evidence* § 2042, at 281 (3d ed. 1940); *McClintock*, *supra* note 19, at 745; 21 *Ill. L. Rev.* 46 (1926); 44 *Mich. L. Rev.* 483 (1945); 5 *Minn. L. Rev.* 553 (1921); 35 *So. Calif. L. Rev.* 86 (1961); 10 *U. Fla. L. Rev.* 77 (1957); 80 *U. Pa. L. Rev.* 1026 (1932).

²⁹ *Radomsky v. United States*, 180 F.2d 781 (9th Cir. 1950); *Allen v. United States*, 194 Fed. 664 (4th Cir. 1912).

³⁰ *United States v. Collins*, 272 F.2d 650, 652 (2d Cir. 1959), *cert. denied*, 362 U.S. 911 (1960); see *Jacobs v. United States*, 31 F.2d 568 (6th Cir.), *cert. denied*, 279 U.S. 869 (1929).

³¹ *Goins v. United States*, 99 F.2d 147 (4th Cir. 1938), *petition for cert. dismissed*, 306 U.S. 622 (1939); *Cohen v. United States*, 27 F.2d 713 (2d Cir. 1928). Compare *Annot.*, 111 A.L.R. 826 (1937), citing other federal cases.

³² *Behrle v. United States*, 69 App. D.C. 304, 100 F.2d 714 (D.C. Cir. 1938). Circumstantial evidence was held sufficient to prove the falsity of defendant's denial of recollection of the facts. See *United States v. Nicoletti*, 310 F.2d 359 (7th Cir. 1962); 51 *Colum. L. Rev.* 1056, 1057 (1951); 70 *Harv. L. Rev.* 383, 384 (1956).

well settled that his declarations, if oral, will not satisfy the rule, although they will if written and corroborated.³³

The court reserved opinion on another possible exception, that of contradicting oral declarations by the accused under oath, since the issue did not properly present itself in the case.³⁴

It has been held that an unsworn contradictory statement of a defendant is not proof of perjury.³⁵ Hence, what the defendant may tell two witnesses in private conversation prior to a grand jury meeting may not be used to contradict his testimony to the grand jury. More credence should be given to statements of a defendant made under oath. Moreover, it has even been held that conflicting statements under oath, without further corroboration of the defendant's belief, were not sufficient to convict.³⁶

Must a trial judge on request of a defendant instruct a jury that the government must prove the charge of perjury by two witnesses or by one witness and corroborative evidence? Two lower federal court cases have answered in the affirmative,³⁷ but in 1944 the Third Circuit held to the contrary.³⁸ The court felt that the instruction would confuse the jury, and since that group must make an independent decision as to the credibility of each government witness before determining guilt, improper acquittals might result. However, the Supreme Court reversed the court of appeals.³⁹ The Court reasoned that innocent witnesses might be unduly harassed or convicted of perjury if a less stringent rule were adopted and the instruction refused. The Court noted that in 1911 an English parliamentary committee had favored the older rule and that Parliament had subsequently enacted it into statute.

³³ United States v. Remington, 191 F.2d 246, 249 (2d Cir.), *cert. denied*, 342 U.S. 895 (1951). Compare *Paternosto v. United States*, 311 F.2d 298, 306 (5th Cir. 1962).

³⁴ The court cited 7 Wigmore, *op. cit. supra* note 28, at § 2043.

³⁵ Clayton v. United States, 284 Fed. 537 (4th Cir. 1922). *But see* United States v. Wood, 39 U.S. (14 Pet.) 430 (1840); 7 Wigmore, *op. cit. supra* note 18, at § 2043.

³⁶ United States v. Golan, 24 F. Supp. 523 (E.D. Pa. 1938); see 53 Mich. L. Rev. 1165 (1955); 21 Mich. L. Rev. 218 (1922); 91 U. Pa. L. Rev. 79 (1942).

The English law is similar. See Kenny, *Outlines of Criminal Law*, § 598, at 482 (17 ed. Turner 1958). Concerning proposed changes in Canada, see 31 Can. B. Rev. 200 (1953). As to proposed federal statutes, see 53 Mich. L. Rev. 1165, 1175 (1955); 35 So. Calif. L. Rev. 86, 98 (1961). Illinois and New York have adopted provisions regarding contradictory statements under oath. Ill. Rev. Stat. c. 38, §§ 475, 475a (1959); N.Y. Pen. Law § 1627.

³⁷ See *Pawley v. United States*, 47 F.2d 1024 (9th Cir. 1931); *Allen v. United States*, 194 Fed. 664 (4th Cir. 1912).

³⁸ United States v. Weiler, 143 F.2d 204 (3d Cir. 1944), noted, 23 Texas L. Rev. 404 (1945). The court cited 7 Wigmore, *op. cit. supra* note 28, at §§ 2040-43.

³⁹ United States v. Weiler, 323 U.S. 606 (1945), noted, 44 Mich. L. Rev. 483 (1945). The case was discussed in *Smith v. United States*, 169 F.2d 118, 122, 126 (6th Cir. 1948), and was followed in *Spaeth v. United States*, 218 F.2d 361 (6th Cir. 1955).

C. Nature Of The Corroborating Evidence

Dean Wigmore has concluded that as to the "nature of corroboration, no detailed rule seems to have been laid down, nor ought to be laid down. The jury should be instructed not to convict unless the testimony of the principal witness has been so corroborated that they believe it to be true beyond a reasonable doubt."⁴⁰ There are federal decisions quoting this language favorably,⁴¹ and the Third Circuit, Judge Kalodner writing, has pointed out: "The corroborative evidence must directly substantiate the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement and must be equally strong and convincing as the direct testimony which would be regarded as sufficient proof."⁴² Thus, at a minimum, the corroborative proof must be clear and so convincing that, coupled with the evidence of the witness who testifies directly to the falsity, it satisfies the jury of guilt beyond a reasonable doubt.⁴³

Since the rule of corroborating proof—which prohibits a perjury conviction on the unsupported testimony of a single witness—does not "relate to the kind or amount of *other* evidence required . . .,"⁴⁴ it follows that admissions of the defendant may sometimes be used to corroborate. One court has stated: "We do not believe an extrajudicial admission made by an accused is insufficient as corroboration simply because it is such."⁴⁵ These corroborating admissions by the defendant may be presented in evidence by another witness. Thus, when one witness is supported by the testimony of a second witness, this is held to be sufficient evidence even though the testimony of the second witness concerns a statement emanating from the defendant himself.⁴⁶ However, in one case a defendant's errors of memory on examination were held not to be sufficient corroboration.⁴⁷

D. Issues Requiring Corroboration

The rule requiring corroboration applies only to the issue of falsity.⁴⁸ As one judge stated: "It is not necessary . . . that every fact which goes to make up the assignment of perjury should be dis-

⁴⁰ 7 Wigmore, *op. cit. supra* note 28, § 2042, at 278-79.

⁴¹ *Doan v. United States*, 202 F.2d 674, 680 (9th Cir. 1953); *United States v. Rose*, 113 F. Supp. 775, 779 (M.D. Pa. 1953), *rev'd on other grounds*, 215 F.2d 617 (3d Cir. 1954).

⁴² *United States v. Neff*, 212 F.2d 297, 308 (3d Cir. 1954); see *Cook v. United States*, 26 App. D.C. 427, 6 Ann. Cas. 810 (D.C. Cir. 1906).

⁴³ *United States v. Wood*, 39 U.S. (14 Pet.) 576 (1840).

⁴⁴ *Hammer v. United States*, 271 U.S. 620, 627 (1926).

⁴⁵ *Vetterli v. United States*, 198 F.2d 291, 293 (9th Cir.), *vacated*, 344 U.S. 872 (1952).

⁴⁶ *United States v. Goldberg*, 290 F.2d 729 (2d Cir.), *cert. denied*, 368 U.S. 899 (1961).

⁴⁷ *United States v. Isaacson*, 59 F.2d 966 (2d Cir. 1932).

⁴⁸ *McClintock*, *supra* note 19, at 747.

proved by two witnesses, for the testimony of a single witness is sufficient to prove that the defendant swore as is alleged in the indictment"⁴⁹ He continued, "Every material allegation in the indictment may be shown by a single witness, except the allegation that the evidence of the prisoner in question was false and that he did not believe it to be true."⁵⁰

Many cases have held that the government must corroborate only the falsity of the oath.⁵¹ The reasoning of this view is that only the *falsity* of that statement requires the additional proof, and that other particular circumstances indicating falsity need no special corroboration.⁵²

With respect to the issue of the defendant's belief that he made a false statement, it is generally felt that belief as to the falsity of the former testimony may be inferred by the jury from the falsity itself.⁵³ Thus, corroboration of the issue of belief is usually not required. For example, in a leading case the defendant was convicted of perjury for denying under oath that he had been a member of the Communist Party. On appeal, he alleged that the trial court erred in failing to specify what evidence satisfied the "two witnesses" rule. It was held that since the offense consisted of misrepresenting a belief and there was no direct evidence of the belief, the corroboration rule required that the charge point out appropriate evidence which would justify a jury's inference that the defendant believed that he had been a member.⁵⁴ In some cases, however, there can be no inference or belief from the fact of falsity, as for example, when the false testimony concerns a triviality or an ancient occurrence.⁵⁵ Possibly in these relatively rare cases, corroboration of testimony relating to belief may be required.

⁴⁹ *United States v. Hall*, 44 Fed. 864, 868 (S.D. Ga. 1890).

⁵⁰ *Id.* at 869-70.

⁵¹ See *United States v. Flores-Rodriguez*, 237 F.2d 405 (2d Cir. 1956); *United States v. Moran*, 194 F.2d 623 (2d Cir.), *cert. denied*, 343 U.S. 965 (1952); *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1951), *cert. denied*, 340 U.S. 948 (1951); *United States v. Seavey*, 180 F.2d 837 (3d Cir.), *cert. denied*, 339 U.S. 979 (1950); *United States v. Palese*, 133 F.2d 600 (3d Cir. 1943); *United States v. Rose*, 113 F. Supp. 775 (M.D. Pa. 1953), *rev'd on other grounds*, 215 F.2d 617 (3d Cir. 1954). See also 7 Wigmore, *op. cit. supra* note 28, § 2042, at 280; McClintock, *supra* note 19, at 767.

⁵² *United States v. Margolis*, 138 F.2d 1002 (3d Cir. 1943); *United States v. Rose*, *supra* note 51.

⁵³ See *Young v. United States*, 212 F.2d 236 (D.C. Cir.), *cert. denied*, 347 U.S. 1015 (1954); *United States v. Remington*, 191 F.2d 246 (2d Cir.), *cert. denied*, 342 U.S. 895 (1951); *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951).

⁵⁴ *United States v. Remington*, *supra* note 53, noted, 51 Colum. L. Rev. 1056 (1951); 65 Harv. L. Rev. 520 (1952); 38 Va. L. Rev. 104 (1952).

⁵⁵ *Young v. United States*, 212 F.2d 236 (D.C. Cir.), *cert. denied*, 347 U.S. 1015 (1954); *Fotie v. United States*, 137 F.2d 831 (8th Cir. 1943).

One older case aptly illustrates the courts' refusal to require two witnesses or corroborating circumstances to prove the belief in falsity. There, the corroboration rule did not apply when the only facts averred related solely to intent and the only issue was whether the defendant testified intentionally or through mistake.⁵⁶ In that particular case, the fact of the false testimony was already established.⁵⁷

With respect to the issue of falsity, it is important that the testimony of the several witnesses asserting the falsity agree. Otherwise, a conviction for falsely denying certain statements will probably not stand if the witnesses disagree as to the statements made.⁵⁸

A different aspect of the problem of deciding which issues require corroboration is that of determining whether the corroborating evidence must relate precisely to the transaction showing falsity that is the subject of the witness's testimony. If a statement of an alleged perjurer contains a single fact and that fact is contradicted (1) by a witness and (2) by corroborating evidence which relates to the same transaction that was the subject of the testimony of that witness, the perjury rule as to corroborative proof has unquestionably been satisfied.⁵⁹ Suppose, however, that the corroboration relates to a transaction different from that testified to by the witness who has directly contradicted the accused's statement of a single fact. For example, the statement is that *X* did not pay anyone to vote, the evidence is that *A* said he was paid to vote, and *B*'s testimony tends to show that he was paid to vote.⁶⁰ Or suppose the statement charged to be false contains several facts and there is adduced direct testimony of a particular fact plus evidence corroborating that fact but relating to a different, though similar transaction. For example, the statement is that *X* never paid *A* or *B*, the evidence is that *A* said he was paid on one occasion, and another witness said *A* was paid on a different occasion.⁶¹

Some state courts without adverting to these factual distinctions have held such indirect corroboration sufficient, because the indictment is construed to contain only one "assignment" of perjury.⁶² However, if the indictment is interpreted as including more than

⁵⁶ *O'Leary v. United States*, 158 Fed. 796 (1st Cir. 1907).

⁵⁷ *Id.* at 799.

⁵⁸ *Phair v. United States*, 60 F.2d 953 (3d Cir. 1932).

⁵⁹ See *Arena v. United States*, 226 F.2d 227 (9th Cir. 1955), *cert. denied*, 350 U.S. 954 (1956); *United States v. Neff*, 212 F.2d 297 (3d Cir. 1954); *United States v. Remington*, 191 F.2d 246 (2d Cir.), *cert. denied*, 342 U.S. 895 (1951).

⁶⁰ See *United States v. Palese*, 133 F.2d 600 (3d Cir. 1943).

⁶¹ See *United States v. Seavey*, 180 F.2d 837 (3d Cir.), *cert. denied*, 339 U.S. 979 (1950).

⁶² See 7 Wigmore, *op. cit. supra* note 28, § 2042, at 280. See also 61 Colum. L. Rev. 98 (1961).

one "assignment," the falsity of each factual component of the statement or statements must be independently established. Federal decisions have not employed the "assignment" theory and have concluded that the evidence in the cases mentioned above is sufficiently probative of the proposition that the defendant swore falsely to allow the issue to go to the jury. These cases held that the falsity of each component fact constituting the alleged perjury need not be independently established to prove the defendant's testimony false.⁶³ For example, in one case the defendant had made an allegedly false statement that he had visited the homes of nine women to induce them to join his union. At his trial for perjury eight of the women testified that he had never visited their homes. The testimony of the eight witnesses was held sufficient corroboration for conviction.⁶⁴ It may be objected that in reality the defendant made nine statements, and that none of the eight women could swear that he had not visited the others.⁶⁵ However, the decision may be defended on the ground that the defendant's statement related to a common denominator.⁶⁶ In effect, then, both state and federal courts do permit this indirect type of corroborative evidence to suffice for a perjury conviction.

E. Application Of The Rule In Subornation Of Perjury Cases

In 1925 the Court of Appeals for the Second Circuit enunciated a liberal rule as to proof of subornation of perjury. At the trial of the case, the judge had charged that the law did not require any corroboration of the testimony of the suborned to convict the suborner.⁶⁷ On appeal, a conviction was upheld by the Second Circuit.⁶⁸ However, the Supreme Court reversed, holding that the falsity of the testimony alleged to be perjurious could not be proved by the unsupported testimony of the subornee-perjurer.⁶⁹ Since Congress had not legislated, the Court felt that the old rule requiring corroboration was sound and should stand. However, the Court did not state that the same rule applied to proof of the act

⁶³ *United States v. Seavey*, 180 F.2d 837 (3d Cir.), *cert. denied*, 339 U.S. 979 (1950); *United States v. Palese*, 133 F.2d 600 (3d Cir. 1943).

⁶⁴ *May v. United States*, 280 F.2d 555 (6th Cir. 1960), noted, 61 Colum. L. Rev. 98 (1961); 10 U. Kan. L. Rev. 475 (1962).

⁶⁵ See 10 U. Kan. L. Rev. 475 (1962).

⁶⁶ See 61 Colum. L. Rev. 98 (1961).

⁶⁷ *United States v. Hammer*, 299 Fed. 1011 (S.D.N.Y. 1924), *rev'd*, 271 U.S. 620 (1926).

⁶⁸ *Hammer v. United States*, 6 F.2d 786 (2d Cir. 1925), noted, 10 Minn. L. Rev. 167 (1926). The court cited 4 Wigmore, Evidence § 2042, at 323 (2d ed. 1923). In *Boren v. United States*, 144 Fed. 801 (9th Cir. 1906), doubt was expressed that corroboration was necessary; however, corroboration was determined to be present.

⁶⁹ *Hammer v. United States*, 271 U.S. 620 (1926).

of suborning, which is the second element of the crime.⁷⁰ Apparently, then, as to the falsity, both parties in a subornation case are accomplices; as to the act of subornation, they are not.⁷¹ Thus, with respect to both perjury and subornation of perjury, the same rule of corroborating evidence must be applied to the issue of falsity of the matter alleged to be perjurious, for falsity is the *corpus delecti* in both.⁷²

In a subsequent case, Judge Learned Hand made the distinction clear. He stated that in a prosecution for subornation of perjury, the subornation element of the offense, unlike the perjury element, did not need to be proved by two witnesses or even by one witness with corroborating evidence.⁷³ The Ninth Circuit also adopted this view,⁷⁴ as did the Fifth,⁷⁵ the Eighth,⁷⁶ and the Third.⁷⁷

F. Other Types Of Cases In Which The Rule Is Applied

Lower federal courts have applied the perjury corroboration requirement in prosecutions under 18 U.S.C. § 1621 for offenses which under the common law would be perjury⁷⁸ and false swearing.⁷⁹ However, the rule is not applied to prosecutions under the false claims statute⁸⁰ or under the statute making obstruction of justice an offense.⁸¹ Also, there is uncertainty concerning its application to false statements in naturalization proceedings.⁸² In the cases involving the filing of false non-Communist affidavits, the rule has not been invoked.⁸³

⁷⁰ For cases holding that on this element the evidence of the suborned alone is sufficient, see *Boren v. United States*, 144 Fed. 801 (9th Cir. 1906); *United States v. Thompson*, 31 Fed. 331 (C.C.D. Ore. 1887).

⁷¹ *United States v. Thompson*, *supra* note 70.

⁷² See 10 Minn. L. Rev. 167 (1926).

⁷³ *Cohen v. United States*, 27 F.2d 713 (2d Cir. 1928); see 10 Minn. L. Rev. 167 (1926); 10 U. Fla. L. Rev. 77 (1957). See also *United States v. Giddens*, 273 F.2d 843 (2d Cir.), *cert. denied*, 362 U.S. 971 (1960).

⁷⁴ *Catrino v. United States*, 176 F.2d 884 (9th Cir. 1949). The court cited *McClintock, What Happens to Perjurors*, 24 Minn. L. Rev. 727, 750 (1940), and 56 A.L.R. 408-14 (1928). See also *Doan v. United States*, 202 F.2d 674 (9th Cir. 1953).

⁷⁵ *Culwell v. United States*, 194 F.2d 808 (5th Cir. 1952); *Outlaw v. United States*, 81 F.2d 805 (5th Cir.), *cert. denied*, 298 U.S. 665 (1936).

⁷⁶ *Segal v. United States*, 246 F.2d 814 (8th Cir.), *cert. denied*, 355 U.S. 894 (1957).

⁷⁷ *United States v. Silverman*, 106 F.2d 750 (3d Cir. 1939).

⁷⁸ *Arena v. United States*, 226 F.2d 227 (9th Cir. 1955), *cert. denied*, 350 U.S. 954 (1956).

⁷⁹ *United States v. Moran*, 194 F.2d 623 (2d Cir.), *cert. denied*, 343 U.S. 965 (1952).

⁸⁰ *United States v. McCue*, 301 F.2d 452 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962); *Todorow v. United States*, 173 F.2d 439 (9th Cir.), *cert. denied*, 337 U.S. 925 (1949).

⁸¹ *Catrino v. United States*, 176 F.2d 884 (9th Cir. 1949).

⁸² *Bridges v. United States*, 199 F.2d 811 (9th Cir. 1952), *rev'd per curiam*, 345 U.S. 979 (1953).

⁸³ *Travis v. United States*, 269 F.2d 928 (10th Cir. 1959); *United States v. Killian*, 246 F.2d 77 (7th Cir. 1957); *Gold v. United States*, 237 F.2d 764 (D.C. Cir. 1956), *rev'd per curiam*, 352 U.S. 985 (1957); *Fisher v. United States*, 231 F.2d 99 (9th Cir. 1956).

According to some cases, making a false oath in a bankruptcy proceeding is not the same as perjury; hence the "two witnesses" rule is inapplicable.⁸⁴ However, uncertainty in this area resulted from a 1926 Supreme Court holding that false testimony before a referee in bankruptcy *may* constitute perjury as may the intentional making of a false oath in a formal bankruptcy proceeding. The Court did not state, however, that every false oath in bankruptcy matters was perjury.⁸⁵

III. RECENT PROPOSALS

The Model Act on Perjury, approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in 1952, provides: "Proof of guilt beyond a reasonable doubt is sufficient for conviction under this Act, and it shall not be necessary also that proof be by a particular number of witnesses or by documentary or other type of evidence."⁸⁶ The act represents the view advocated by Dean Wigmore—that the "two witnesses" rule be abolished.⁸⁷ A few states have adopted this approach by judicial decision,⁸⁸ but only one state, Arizona, has adopted the Model Act.⁸⁹

The Tentative Draft No. 6 of the American Law Institute's Model Penal Code, dated May 6, 1957, provided in section 208.20 on perjury as follows:

(6) *Corroboration.* Proof of guilt beyond a reasonable doubt shall suffice for conviction under this section as in other criminal cases, without special requirement of two witnesses or corroborating circumstances. [*Alternate, rejected by the Council: No person shall be convicted of an offense under this Section where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant.*]⁹⁰

Interestingly enough, the majority view reflected in the Tentative Draft of the Model Penal Code was rejected in the Proposed Official Draft dated May 4, 1962. In section 241.1 on perjury, this latest draft incorporates the bracketed language above.⁹¹ The Model Penal

⁸⁴ *Schonfeld v. United States*, 277 Fed. 934 (2d Cir. 1921), *cert. denied*, 258 U.S. 623 (1922); *Kahn v. United States*, 214 Fed. 54 (2d Cir.), *cert. denied*, 234 U.S. 765 (1914).

⁸⁵ *Hammer v. United States*, 271 U.S. 620 (1926).

⁸⁶ Model Act on Perjury § 4 (1952) (National Conference of Commissioners on Uniform State Laws).

⁸⁷ 7 Wigmore, *op. cit. supra* note 28, § 2041.

⁸⁸ See Comment, *Proof of Perjury: The Two Witness Requirement*, 35 So. Calif. L. Rev. 86, 94-96 (1961).

⁸⁹ Ariz. Rev. Stat. §§ 13-561 to -572 (1956).

⁹⁰ Model Penal Code § 208.20 (Tent. Draft No. 6, 1957).

⁹¹ Model Penal Code Proposed Official Draft § 241.1 (May 4, 1962).

Code Advisory Committee had recommended elimination of the role requiring corroboration, as did the Council.⁹² However, the Reporter favored greater protection of the defendant and urged acceptance of the "Alternate" provision. He argued that a defendant was entitled to more protection in a perjury prosecution for two reasons. First, a perjury trial often will be the second time that the credibility of the defendant's oath has been tried, as when an acquitted defendant is tried for perjury committed in his own defense. Second, a perjury prosecution based on facts long past is always a distinct possibility.

IV. CONCLUSION

The Reporter's analysis is sound. The rights of a defendant have traditionally and rightfully been guarded in perjury trials by the "two witnesses" rule. Although the present Model Code provision may possibly lead to some weakening of the orthodox corroboration requirement, it certainly will not permit a conviction of the serious offense of perjury to result from the testimony of a single witness uncorroborated by any other evidence—an important protection against "grudge" prosecutions and unjustified convictions. Accordingly, this writer recommends the adoption of the Model Penal Code provision in the Proposed Official Draft.

⁹² See Model Penal Code 137, comment (Tent. Draft No. 6, 1957).