

Debunking the Perjury-Trap Myth*

I. Introduction

Criminal defense attorneys occasionally seek to have an indictment for perjury dismissed by raising the defense of “perjury trap.”¹ A perjury trap is set when a prosecutor brings a defendant before the grand jury in order to secure a perjury indictment, rather than to indict the defendant for a previously committed crime.² There are numerous cases in which the perjury-trap defense has been asserted.³ But there are no federal cases granting a motion to dismiss because of a perjury trap.⁴ Defense counsel should never raise the perjury-trap defense. This Note will explain why.

Part II of this Note lays out the perjury-trap defense as defined by courts and commentators. Parts III and IV analyze the two general arguments that underlie the perjury-trap defense: a violation of the Due Process Clause of the Fifth Amendment and entrapment.⁵ Part V shows that immaterial testimony is a necessary element of the perjury trap. It also shows that immaterial testimony does not constitute perjury, making the perjury-trap defense superfluous. Part VI explains that federal courts construe the scope of materiality so broadly that defendants rarely succeed when arguing that grand-jury testimony is immaterial.

II. Perjury Trap

If a defendant believes that the prosecutor’s primary purpose for bringing him before the grand jury was to procure a perjury indictment, he

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1. See Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 25–28 (1999) (explaining the basics of perjury traps and the reasons they are considered invalid).

2. See Bennet L. Gershman, *The “Perjury Trap,”* 129 U. PA. L. REV. 624, 665 (1981) (providing an example of a typical perjury trap).

3. See, e.g., *United States v. Regan*, 103 F.3d 1072, 1079 (2d Cir. 1997) (holding that the defendant did not establish the applicability of the perjury-trap defense); *United States v. Chen*, 933 F.2d 793, 797 (9th Cir. 1991) (affirming a conviction despite the defendant’s perjury-trap defense); *United States v. Awadallah*, 202 F. Supp. 2d 82, 107–08 (S.D.N.Y. 2002) (holding that the government did not violate the defendant’s right to due process by setting a perjury trap).

4. See Henning, *supra* note 1, at 26–27 (“The perjury trap claim has occasionally been raised, but it has never been asserted successfully.”).

5. See *id.* at 27 (“There are two aspects of [perjury-trap] analysis: the entrapment defense and a due process claim based on outrageous government conduct.”).

may raise a perjury-trap defense.⁶ The crux of the perjury-trap defense is that the prosecutor asked questions that were not material to the investigation,⁷ leading to the conclusion that the grand jury was used as a “ruse to manufacture a crime where none previously existed.”⁸ In his article *The “Perjury Trap,”* Bennett L. Gershman states that in such instances, “the government’s conduct in baiting the witness into perjury is a perversion of the grand jury’s function and should not be permitted.”⁹

To demonstrate the typical perjury-trap defense, it is instructive to recount the facts of a federal case involving an alleged perjury trap. In *United States v. Chen*,¹⁰ the federal government was investigating corruption within the Public Utility Agency of Guam (the Agency).¹¹ During this investigation, two Agency employees revealed that they had received kickbacks from the defendant, Chen.¹² The prosecutor eventually brought Chen before the grand jury, where Chen testified that he never made any payoffs to Agency employees.¹³ Chen was charged with giving false testimony before the grand jury under 18 U.S.C. § 1623.¹⁴

On appeal, Chen argued that the testimony that formed the basis of his perjury indictment concerned alleged bribes on which the statute of limitations had already run.¹⁵ And, as a result, he contended the questions asked by the prosecutor in connection with the alleged bribes were not material to the Agency investigation.¹⁶ The court also responded to Chen’s assertion that the prosecutor asked immaterial questions before the grand jury

6. See *United States v. Caputo*, 633 F. Supp. 1479, 1485–87 (E.D. Pa. 1986) (stating that the government may not call a witness before the grand jury for the sole purpose of securing a perjury indictment).

7. See, e.g., *Regan*, 103 F.3d at 1079 (holding that a legitimate basis for particular questions precludes any application of the perjury-trap defense); see also, e.g., *Chen*, 933 F.2d at 797; *United States v. Peterson*, No. 7:07-CR-22-HL, 2008 WL 2323782, at *1 (M.D. Ga. June 2, 2008); *United States v. Thomas*, 545 F. Supp. 2d 1018, 1022–23 (N.D. Cal. 2008) (all explaining that perjury traps involve perjury indictments on matters that are not material to legitimate ongoing investigations and holding that the perjury-trap doctrine is inapplicable when testimony is elicited to obtain useful information in the furtherance of an investigation). But see *United States v. Simone*, 627 F. Supp. 1264, 1266 n.1, 1268–69 (D.N.J. 1986) (addressing the issue of materiality in a separate opinion and analyzing the perjury trap in terms of “fairness” under the Due Process Clause).

8. Henning, *supra* note 1, at 26.

9. Gershman, *supra* note 2, at 664. Gershman also noted that when the prosecutor uses grand jury proceedings to trap a witness into committing perjury, she is soliciting a present crime rather than investigating crimes already committed—an abuse of both “the perjury sanction and the grand jury.” *Id.* at 683.

10. 933 F.2d 793 (9th Cir. 1991).

11. *Id.* at 794.

12. *Id.*

13. *Id.* at 795.

14. See *id.* (applying 18 U.S.C. § 1623 (1982), which prohibits false declarations before the grand jury).

15. See *id.* at 797 (dispensing with the statute-of-limitations objection).

16. See *id.* (concluding that the questions the prosecution asked Chen before the grand jury were “relevant to the grand jury’s investigation”).

with the primary purpose of obtaining false testimony to be used in a perjury indictment.¹⁷ According to the court, such conduct would constitute a perjury trap, which might be a violation of the Fifth Amendment Due Process Clause as well as an abuse of the grand jury proceedings.¹⁸

The court of appeals held that while a perjury trap was theoretically possible, its elements were not satisfied in Chen's case.¹⁹ Before the grand jury, Chen denied committing bribery, and the statute of limitations on that bribery charge had run.²⁰ But the scope of the prosecutor's investigation was much broader than just the activities of Chen.²¹ The court reasoned that an inference could have easily been made that Chen's payment of bribes extended beyond the two individuals who testified against him and that his testimony affected their credibility.²² Chen's lack of cooperation thwarted the grand jury's goal of flushing out all the possible corruption in the Agency, not just corruption directly involving Chen.²³ Thus, the questions asked before the grand jury were material to the investigation, and a perjury-trap defense was not permitted.²⁴

Like most perjury-trap defendants,²⁵ Chen argued that the perjury trap set by the prosecution in his case was a violation of the Due Process Clause of the Fifth Amendment.²⁶ In addition to a due process violation, it has been suggested that an entrapment defense may be another avenue through which to argue that a prosecutor's setting a perjury trap warrants dismissal of the

17. *See id.* at 796 (discussing Chen's assertion that the government set out to ensnare him in a perjury trap and citing case law to define a perjury trap as a scenario where the government's primary purpose for obtaining testimony is to seek a perjury indictment on matters that are immaterial to an ongoing investigation).

18. *Id.* at 796–97.

19. *See id.* at 797 (concluding that Chen's testimony was relevant to a broader investigation of bribery and ongoing criminal activity within the Agency).

20. *Id.* at 796.

21. *Id.* at 797.

22. *Id.*

23. *See id.* (explaining that truthful answers from Chen might have led to a more fruitful investigation of the true parameters of the bribery scandal).

24. *See id.* (holding that Chen's testimony was relevant—not immaterial—to the grand jury's investigation). *Chen* is a classic example of a defendant construing what is material to the grand jury investigation much more narrowly than federal courts.

25. *E.g.*, *United States v. Regan*, 103 F.3d 1072, 1079 (2d Cir. 1997) (claiming that the government violated the Fifth Amendment by calling the defendant before a grand jury for the sole purpose of obtaining a perjury indictment); *Wheel v. Robinson*, 34 F.3d 60, 67 (2d Cir. 1994) (contending that the government violated the Fifth Amendment by not allowing the defendant to have her attorney present during her testimony in an inquest); *see also United States v. Awadallah*, 202 F. Supp. 2d 82, 107 (S.D.N.Y. 2002) (dismissing the argument that “the government violated [the] defendant's Fifth Amendment right to due process by setting a perjury trap”); *United States v. Phillips*, 674 F. Supp. 1144, 1146 (E.D. Pa. 1987) (characterizing the perjury-trap defense raised by the defendant as a defense based on prosecutorial misconduct so severe that it constitutes a due process violation).

26. *Chen*, 933 F.2d at 796–97.

perjury charge.²⁷ These contentions will be elaborated upon below in order to demonstrate their futility.

III. Due Process

For a court to find that a prosecutor has set a perjury trap, the conduct of the prosecutor must be egregious:

The “perjury trap” theory asserts that prosecutorial conduct designed to trap a witness into perjuring himself before a grand jury is misconduct so severe as to constitute a violation of the witness’[s] due process rights. This theory has received some judicial support. However, an indictment will be dismissed only in the most egregious circumstances.²⁸

Several courts have recognized the possibility that prosecutorial conduct may violate the Due Process Clause of the Fifth Amendment when the government uses the grand jury to secure an indictment on a matter that is not material to a legitimate ongoing investigation.²⁹ Eliciting false testimony by asking immaterial questions may lead a court to infer that the primary purpose of obtaining testimony before the grand jury was to secure a perjury indictment.³⁰

As mentioned above, no federal court has ever dismissed a perjury indictment in response to the argument that a perjury trap violated due process.³¹ It is highly unlikely that a perjury-trap defense will ever provide a sufficient basis for a court to hold that the prosecutor’s conduct violated the Due Process Clause of the Fifth Amendment, primarily because the Supreme Court has narrowly construed the type of conduct that violates substantive due process.³²

A violation of substantive due process³³ was first noted in regard to the Fourteenth Amendment in *Rochin v. People of California*.³⁴ In *Rochin*, police entered the petitioner’s bedroom and asked about two pills sitting on

27. See Henning, *supra* note 1, at 25–36 (reviewing the Supreme Court’s entrapment-defense jurisprudence).

28. *Phillips*, 674 F. Supp. at 1146 (citations omitted). The court in *Phillips* noted that the backbone of the defendant’s argument was that his perjurious testimony was immaterial to the matter properly under consideration by the grand jury. *Id.* at 1148.

29. *E.g.*, *Robinson*, 34 F.3d at 67; *Chen*, 933 F.2d at 797; *United States v. Thomas*, 545 F. Supp. 2d 1018, 1022 (N.D. Cal. 2008); *Phillips*, 674 F. Supp. at 1146.

30. See *Chen*, 933 F.2d at 796 (“A perjury trap is created when the government calls a witness before the grand jury for the primary purpose of obtaining testimony from him in order to prosecute him later for perjury.”); see also *Regan*, 103 F.3d at 1079; *Robinson*, 34 F.3d at 67; *Thomas*, 545 F. Supp. 2d at 1022 (all citing *Chen* for the proposition that asking immaterial questions may lead the court to infer that a perjury trap is being set).

31. See *supra* note 4 and accompanying text.

32. See *infra* notes 35–47 and accompanying text.

33. For the purposes of this Note, the term “due process” refers only to substantive due process.

34. 342 U.S. 165 (1952).

the nightstand.³⁵ The petitioner swallowed the pills, and the police tried unsuccessfully to extract the pills with violent force.³⁶ The police then took him to a hospital and had a doctor force emetic solution into the petitioner's stomach in order to retrieve the pills.³⁷ The prosecution used the extracted pills to charge the defendant with possession of narcotics.³⁸

The Supreme Court held that this was "conduct that shocks the conscience . . . offend[ing] even hardened sensibilities."³⁹ This kind of government conduct was sufficiently egregious to constitute a violation of the Due Process Clause of the Fourteenth Amendment and merit the exclusion of the pills from the criminal prosecution.⁴⁰

As written, the Fourteenth Amendment applies only to the states. But *Rochin*'s discussion of the Fourteenth Amendment was cited in *United States v. Russell*,⁴¹ where, in dicta, the Supreme Court raised the possibility that government conduct could be so outrageous as to be a violation of the Due Process Clause of the Fifth Amendment, and thus bar the use of certain evidence.⁴² Following *Russell*, the Justices' concurring and dissenting opinions in *Hampton v. United States*⁴³ reiterated the possibility of sufficiently egregious government conduct barring criminal conviction.⁴⁴ The Court then seemed to qualify the statements made in *Russell* and *Hampton*, when in *United States v. Payner*⁴⁵ it noted that outrageous government conduct only violates Fifth Amendment due process when an enumerated right has been violated.⁴⁶

With these Supreme Court decisions in mind, a defendant arguing that a perjury trap constitutes outrageous government conduct is bound to fail for at least three reasons. First, government conduct violating Due Process under the Fifth Amendment has never been directly addressed by the Supreme Court. Rather, it has only appeared in dicta, where the Court has raised and

35. *Id.* at 166.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 172.

40. *Id.* at 172–73.

41. 411 U.S. 423 (1973).

42. *Id.* at 431; *see also* Henning, *supra* note 1, at 34 ("[U]nlike the application of *Rochin*'s 'shock the conscience' test to the forced extraction of evidence, *Russell*'s assertion regarding a conceivable state of affairs was wholly unnecessary to the resolution of the case.").

43. 425 U.S. 484 (1976).

44. *See id.* at 495 (Powell, J., concurring) (acknowledging that, in some circumstances, egregious law-enforcement conduct may require that criminal conviction be barred); *id.* at 497 (Brennan, J., dissenting) (agreeing that sufficiently offensive law-enforcement conduct could require that a criminal conviction be overturned); *see also* Henning, *supra* note 1, at 34 (discussing *Hampton* and noting that the Justices' discussions of due process violations were dicta).

45. 447 U.S. 727 (1980).

46. *Id.* at 737 n.9. For an especially clear description of these cases, *see* Henning, *supra* note 1, at 32–38.

then recanted the possibility that outrageous government conduct can give rise to a violation of the Due Process Clause of the Fifth Amendment.⁴⁷

Second, when deciding whether the outrageous government conduct in *Russell* violated the Due Process Clause of the Fifth Amendment, the Supreme Court cited *Rochin*—a case decided under the Fourteenth Amendment—as an example of conduct sufficiently outrageous to violate due process.⁴⁸ No published federal court opinion has recognized a violation of the Due Process Clause of the Fourteenth Amendment due to outrageous government conduct since *Rochin*. Likewise, no published federal court opinion has held that the Due Process Clause of the Fifth Amendment has been violated by outrageous government conduct.

Third, the defendant lied under oath—even in a perjury trap. The defendant's culpability is apparent regardless of how clear it is that the prosecutor abused the grand jury process. This reasoning is clearly stated by Professor Peter J. Henning:

In almost all cases, the defendant will have a choice whether to lie, testify truthfully, or assert her Fifth Amendment privilege before the grand jury. However, as the Supreme Court noted in *United States v. Mandujano*, while a witness called to testify before a grand jury is “free at every stage to interpose his constitutional privilege against self-incrimination . . . perjury was not a permissible option.”⁴⁹

In other words, no matter how outrageous a prosecutor's conduct, courts are not likely to look favorably upon someone who lied under oath to the grand jury and who is now trying to put the blame on the prosecutor for “trapping” him into committing perjury.⁵⁰

Based on the case law and reasoning discussed above, the chances of a federal court ruling that a perjury trap amounts to outrageous government conduct under the Due Process Clause of the Fifth Amendment are essentially nil.

47. See *supra* notes 41–46 and accompanying text.

48. See *supra* notes 41–42 and accompanying text.

49. Henning, *supra* note 1, at 40 (quoting *United States v. Mandujano*, 425 U.S. 564, 584 (1976)).

50. One could argue that a prosecutor's repetitious and extremely vague questions tricked the defendant into making contradictory statements that resulted in a perjury indictment—in other words, the defendant did not “knowingly” commit perjury. See, e.g., 18 U.S.C. § 1623(a) (2006) (including a knowledge element in the federal perjury statute). Since an element of perjury is that a person must knowingly give false testimony, this argument is sufficient in and of itself to defeat a perjury charge; the due process claim adds nothing to it. An analysis of this argument is outside the scope of this Note.

IV. Entrapment

Criminal defense counsel occasionally raise entrapment in their attempts to derail prosecutors' perjury traps.⁵¹ Entrapment defenses typically arise in the context of law enforcement infiltrating and participating in complex criminal conspiracies in order to secure sufficient evidence for a successful criminal prosecution.⁵² The basic entrapment argument is that the government, through its participation in the criminal scheme, lured an otherwise innocent person into committing criminal conduct that he was not predisposed to commit.⁵³

In *Sorrells v. United States*,⁵⁴ a case decided in 1932, the Supreme Court applied the "subjective" approach to entrapment.⁵⁵ Fifty-six years and three additional decisions later, the Supreme Court in *Mathews v. United States*⁵⁶ indicated that it had consistently adhered to the subjective approach to entrapment.⁵⁷ Based on the Supreme Court's case history, the federal approach to entrapment is unequivocally the subjective approach.⁵⁸

51. See, e.g., *United States v. Lazaros*, 480 F.2d 174, 178 (6th Cir. 1973) (providing an example of a case where the defense counsel defended against perjury charges by arguing that the prosecutor's conduct that gave rise to the charges constituted entrapment); see also Gershman, *supra* note 2, at 638–46 (discussing courts' responses to the difficulty of using entrapment as a defense for perjury); Henning, *supra* note 1, at 27–33 (discussing the perjury trap as a branch of the broader entrapment defense).

52. See Gershman, *supra* note 2, at 645 n.83 (noting that entrapment allegations most often arise in the context of law enforcement infiltrating criminal organizations and that "[s]uch tactics are most necessary in preventing covert, consensual crimes, such as organized crime or loansharking, which often involve a fairly complex underground organization").

53. See *United States v. Russell*, 411 U.S. 423, 440 (1973) (Stewart, J., dissenting) (citing *Sherman v. United States*, 356 U.S. 374, 372–73 (1958); *United States v. Sorrells*, 287 U.S. 435, 448 (1932)) (describing the approach of the Court in earlier cases as defining entrapment as luring an "otherwise innocent" person into criminal activity).

54. 287 U.S. 435 (1932).

55. See *id.* at 451 (requiring the defendant to establish that she is "otherwise innocent" to claim the entrapment defense); see also Henning, *supra* note 1, at 28–29 (noting that the *Sorrells* majority adopted a subjective test). The subjective approach is an approach that examines the disposition of the defendant to commit the crime. See *id.* (equating the Court's approach in *Sorrells* with the need to examine the disposition of the defendant).

56. 485 U.S. 58 (1988).

57. See *id.* at 63 (indicating that predisposition is an element of entrapment (citing *Hampton v. United States*, 425 U.S. 484, 489 (1976); *Russell*, 411 U.S. at 435–36; and *Sherman*, 356 U.S. at 376–78)).

58. The minority approach to entrapment is the "objective" approach. Laura G. Webster, *Building a Better Mousetrap: Reconstructing Federal Entrapment Theory from Sorrells to Mathews*, 32 ARIZ. L. REV. 605, 607 (1990). The objective approach to entrapment focuses on the degree to which the government was involved in soliciting the crime. *Id.* at 607. Some commentators have argued that the objective approach is more amenable to perjury trap and should be adopted. See, e.g., *Russell*, 411 U.S. at 441 (Stewart, J., dissenting) ("[The] objective approach to entrapment . . . is the only one truly consistent with the underlying rationale of the defense."); Gershman, *supra* note 2, at 644 (arguing that an objective test focusing on the prosecutor's premeditated design to trap the witness into perjury, rather than the subjective test of the defendant's predisposition to lie, would be "meaningful and viable"); Henning, *supra* note 1, at 29–30 n.136 ("The objective approach is favored by a majority of the commentators' . . ." (quoting

Federal entrapment has “two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct.”⁵⁹ Although courts do analyze government conduct, they focus principally on the predisposition of the defendant to commit the crime.⁶⁰

When applied to perjury, federal courts have made clear that the entrapment defense does not work.⁶¹ The facts of *Sorrells*, a case in which the Supreme Court held that there was sufficient evidence on which a jury could find entrapment, illustrate why the entrapment argument does not work.⁶²

In *Sorrells*, a prohibition agent who posed as a tourist was introduced to the defendant, a war veteran, by three of the defendant’s friends.⁶³ After befriending the defendant, the agent twice asked for liquor, and the defendant refused.⁶⁴ The agent then proceeded to exchange war stories with the defendant, and when the agent asked for liquor a third time, the defendant sought out and obtained liquor for the agent.⁶⁵ The defendant was arrested and charged with possession and sale of intoxicating liquor.⁶⁶

The Supreme Court reversed the defendant’s conviction, holding that there was sufficient evidence to raise the entrapment issue for a jury; the Court remanded the case to the lower courts for trial on the issue.⁶⁷ The Court reasoned that evidence was sufficient to support a finding that the defendant had no previous disposition to commit the crime and that the agent had lured the otherwise innocent defendant into committing a crime by repeated solicitation and taking advantage of veteran camaraderie.⁶⁸

WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 14.2(d) (2d ed. 1992)). But based on the Supreme Court’s case law, a shift to the objective approach is unlikely to happen. See Gershman, *supra* note 2, at 640 (“The Supreme Court . . . has consistently embraced the subjective position.”); see also *supra* note 57 and accompanying text.

59. *Mathews*, 485 U.S. at 63; see also Gershman, *supra* note 2, at 639 (indicating that the generally accepted view is that the entrapment defense is available when law enforcement originates the idea of a crime and induces a defendant not otherwise predisposed to commit the crime).

60. See *Russell*, 411 U.S. at 440 (Stewart, J., dissenting) (reviewing the majority opinion’s adoption of the subjective approach, which focuses on the propensities of the particular defendant).

61. See *United States v. Lazaros*, 480 F.2d 174, 179 (6th Cir. 1973) (holding that entrapment was not established because law enforcement only compelled the defendant to tell them what he knew, rather than make a false statement); *United States v. Simone*, 627 F. Supp. 1264, 1268 (D.N.J. 1986) (stating that the entrapment defense is not applicable to the crime of perjury); Gershman, *supra* note 2, at 644 (discussing the difficulties in using the entrapment defense against perjury charges).

62. *Sorrells v. United States*, 287 U.S. 435, 452 (1932).

63. *Id.* at 439.

64. *Id.*

65. *Id.*

66. *Id.* at 438.

67. *Id.* at 452.

68. *Id.* at 441.

Based on the facts of *Sorrells*, and the Court's reasoning, it is clear the entrapment defense is not applicable to perjury. While it is reasonable to conclude that a prosecutor might elicit false testimony from a witness by repeated entreaties or temptations, it is a "giant leap"⁶⁹ to conclude the prosecutor's conduct "actually implants the criminal design [to lie before the grand jury] in the mind of the defendant."⁷⁰

In other words, unlike *Sorrells*, where the agent coaxed the defendant into obtaining liquor,⁷¹ a prosecutor's conduct does not similarly coax a person sitting before the grand jury to lie. A prosecutor may ask questions that are immaterial to the grand jury's investigation with the sole purpose of securing false testimony, but that merely gives the defendant the opportunity to lie; it does not *lure* an otherwise innocent person into lying.⁷²

V. Materiality and the Perjury Trap: A Redundancy

As shown previously in this Note, perjury-trap arguments come in two varieties: those in which a defendant asserts that the perjury trap violated the Due Process Clause of the Fifth Amendment and those in which the defendant argues that the perjury trap constituted entrapment.⁷³ A commonality between both perjury-trap defenses is that the prosecutor elicited false testimony that was immaterial to the investigation.⁷⁴ With this in mind, the following argument is presented.

A perjury trap occurs when a prosecutor brings a witness before the grand jury and elicits testimony that is *not material* in order to prosecute a witness for perjury.⁷⁵ This sort of activity is alleged to be either entrapment or outrageous government conduct that violates the Due Process Clause of the Fifth Amendment.⁷⁶

Keep in mind that to be guilty of a crime, all the essential elements of that crime must be proven.⁷⁷ Now, analyze the above description of the immateriality element side by side with the quotation below:

69. Gershman, *supra* note 2, at 644.

70. *United States v. Russell*, 411 U.S. 423, 436 (1973).

71. 287 U.S. at 441.

72. *See United States v. Lazaros*, 480 F.2d 174, 179 (6th Cir. 1973) (holding that the witness was compelled only to state what they knew, not testify falsely); *United States v. Simone*, 627 F. Supp. 1264, 1269 n.3 (D.N.J. 1986) (citing *United States v. Nickels*, 502 F.2d 1173, 1176 (7th Cir. 1974)) ("[E]ven if the questions were asked with the expectation of perjured answers, the government did not solicit or encourage perjury; at most it created a situation in which perjury appeared expedient.").

73. *See supra* Parts III and IV.

74. *See supra* note 7 and accompanying text.

75. *See supra* note 7.

76. *See supra* Parts III and IV.

77. *See In re Winship*, 397 U.S. 358, 361 (1970) (holding that the prosecution must prove "all the essential elements of guilt").

The essential elements of perjury are that (1) the declarant must be under oath, (2) the testimony must have been given in a proceeding before a court of the United States, (3) the declarant must have knowingly made a false statement and (4) *the statement must be material* to the proceeding before the court.⁷⁸

A close analysis of the perjury-trap defense and the criminal elements of perjury reveal an inherent inconsistency: perjury and perjury trap share two sides of the element of materiality. Any time false testimony is immaterial, making the defenses of entrapment or outrageous government conduct available, the materiality requirement of perjury is not met.⁷⁹ Pursuing a perjury-trap defense only adds the additional elements associated with a due process violation or entrapment on top of the immateriality issue. The better course is to confront the perjury charges directly by arguing immateriality, making a due process violation or entrapment argument unnecessary.

In other words, the perjury-trap defense requires the defendant to prove that the false testimony elicited by the prosecutor was immaterial.⁸⁰ It also requires the defense to prove that the prosecutor's conduct violated the defendant's substantive due process rights or constituted entrapment.⁸¹ Perjury requires false testimony to be material.⁸² Successfully arguing that testimony is immaterial will defeat a perjury indictment. Thus, arguing that the prosecutor set a perjury trap adds an extra element that needs to be proven in order to accomplish the same goal of defeating the indictment. The perjury trap is superfluous.⁸³

VI. The Scope of Materiality

Presumably, it is good news for perjury defendants that proving one element of a perjury trap—immateriality of the false testimony—is all that is necessary to prevail against a charge of perjury. Unfortunately for perjury defendants, federal courts have construed what is material in relation to a grand jury investigation so broadly that prevailing against a perjury indictment for lack of materiality is exceedingly rare.⁸⁴

78. *United States v. Simone*, 627 F. Supp. 1264, 1267–68 (D.N.J. 1986) (emphasis added) (citing 18 U.S.C. § 1623(a) (1982)) (prohibiting making false declarations before the grand jury).

79. *See supra* note 7, Parts III and IV.

80. *See supra* note 7 and accompanying text.

81. *See Henning, supra* note 1, at 25–36 (describing the perjury-trap claim as “an offshoot of a broader analysis adopted by the Supreme Court to control the tactics of investigators operating undercover”—the entrapment defense and claims based on outrageous government conduct).

82. *See supra* notes 78–80 and accompanying text.

83. *United States v. Peterson*, No. 7:07-CR-22-HL, 2008 WL 2323782, at *1 n.1 (M.D. Ga. June 2, 2008).

84. *See United States v. Vap*, 852 F.2d 1249, 1253 (10th Cir. 1988) (“Testimony is material if it had a tendency to influence, mislead or hamper the grand jury in a matter which it had the authority to investigate. The testimony need not have an actual effect; it merely must be capable of influencing the grand jury.” (citations omitted)); *United States v. LaRocca*, 337 F.2d 39, 43 (8th Cir. 1964) (stating that the governing criterion for materiality of false testimony “to the purpose of the

The legal standard for materiality of testimony before the grand jury has been articulated by numerous courts, all of them naming the same standard with slightly different language.⁸⁵ The Second Circuit Court of Appeals in *United States v. Regan*⁸⁶ articulated the standard in an especially clear manner:

[A] false declaration before a grand jury is material if it has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation. Courts have broadly construed materiality. A statement in grand jury proceedings is material if a truthful answer *could* conceivably *have aided* the grand jury investigation.⁸⁷

The following discussion of a successful and an unsuccessful immateriality argument will clarify the materiality standard. *United States v. Vap*,⁸⁸ discussed below, demonstrates a common theme in materiality arguments: the scope of the investigation is broader than just the criminal actions of the defendant.⁸⁹

In *United States v. Vap*, the defendant, a highway commissioner, was charged with committing perjury before a grand jury during its investigation into kickbacks that a highway contractor, Evans, had paid to government officials.⁹⁰ The defendant contended that the statute of limitations had run on the prosecution for the kickbacks about which the prosecutor asked him questions.⁹¹ Additionally, the contractors about whom the defendant gave false testimony were unconnected to the defendant and Evans.⁹² The contractors also could not be indicted because they had already been convicted for the activities about which the defendant had lied.⁹³ Based on

grand jury's investigation is whether or not the perjurious statements impede [or] hamper the course of the investigation in the sense that it has a tendency to affect the ultimate action of the grand jury" (internal quotation marks omitted); *United States v. Thomas*, 545 F. Supp. 2d 1018, 1023 (N.D. Cal. 2008) ("The perjury trap doctrine is inapplicable . . . [w]hen testimony is elicited before a grand jury that is attempting to obtain useful information in furtherance of its investigation, or conducting a legitimate investigation into crimes which had in fact taken place in its jurisdiction." (internal quotation marks omitted) (second alteration in original)).

85. See *supra* note 84 and accompanying text.

86. 103 F.3d 1072 (2d Cir. 1997).

87. *Id.* at 1084 (internal quotation marks omitted); see also *United States v. Lardieri*, 497 F.2d 317, 319 (3d Cir. 1974) (noting that the scope of the grand jury's investigative reach includes questions that could lead to additional facts that could be used in the indictment, even if they do not directly reflect the ultimate issue being investigated).

88. 852 F.2d 1249 (10th Cir. 1988).

89. See *United States v. Chen*, 933 F.2d 793, 797 (9th Cir. 1991) (explaining that the grand jury's investigation was much broader than the defendant's one year of criminal activity); *Vap*, 852 F.2d at 1253 (agreeing with the district court that the "scope of the investigation was considerably wider than [the] defendant admits"); *Thomas*, 545 F. Supp. 2d at 1023 (asserting that grand jury investigations are legitimate if the crimes take place in the grand jury's jurisdiction).

90. *Vap*, 852 F.2d at 1251.

91. *Id.*

92. *Id.* at 1253.

93. *Id.*

these contentions, the defendant argued that even if his statements before the grand jury were false, they were immaterial and thus did not constitute perjury.⁹⁴

The court held that the defendant's false testimony was material.⁹⁵ In its reasoning the court stated that "the scope of the investigation was considerably wider than defendant admits."⁹⁶ At the time of the defendant's testimony, the scope of the grand jury investigation had expanded to include all instances of kickbacks paid by companies or persons in the business of selling highway equipment to commissioners in the county where the defendant operated.⁹⁷

The court reasoned that the defendant's denial of ever receiving kickbacks from any contractor could have led the grand jury to refrain from further investigation.⁹⁸ Additionally, several vendors under suspicion of giving kickbacks testified before the grand jury, and truthful testimony by the defendant about kickbacks received from those vendors could have affected their credibility.⁹⁹ Since the defendant's testimony could possibly have influenced the grand jury's decision regarding matters properly before it, the defendant's testimony was material.¹⁰⁰

In contrast to *Vap, Brown v. United States*¹⁰¹ appears to be the only published federal case in which a perjury charge has been dismissed because the false testimony was not material to the grand jury's investigation.¹⁰² In *Brown*, the defendant was an agent for the Internal Revenue Service (IRS).¹⁰³ He was assigned to investigate a collector for the IRS in St. Louis, Missouri.¹⁰⁴ Approximately three years later, an assistant attorney general brought the defendant before a Nebraska grand jury in order to inquire about the prior investigation of the collector, which took place entirely in St. Louis, Missouri.¹⁰⁵ The defendant was brought before the Nebraska grand jury

94. *Id.* at 1252.

95. *Id.* at 1253.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. 245 F.2d 549 (8th Cir. 1957).

102. *See id.* at 554–55 (dismissing the perjury charge against the defendant on the grounds that the alleged false testimony was not material to an offense over which the grand jury had proper jurisdiction). It is not entirely clear that the court in *Brown* was correct in holding that the testimony was not material to the grand jury's investigation, since the prosecutor asked questions concerning the matter being investigated. *See id.* at 551–52 (transcribing questions and the defendant's corresponding answers concerning his investigation). It just so happened that the matter being investigated was outside of the grand jury's jurisdiction. *Id.* Because the grand jury was investigating a crime that occurred entirely outside of its jurisdiction, the court held that no questions regarding the matter being investigated were material. *Id.*

103. *Id.* at 550.

104. *Id.*

105. *Id.* at 551.

under suspicion of obstructing the earlier investigation.¹⁰⁶ He was charged with perjury for seven of his statements.¹⁰⁷

The assistant attorney general argued that the case was within the Nebraska grand jury's jurisdiction because one of the defendant's co-investigators was transferred from St. Louis, Missouri, to Omaha, Nebraska, during the Missouri investigation.¹⁰⁸ While in Nebraska, the co-investigator made notations on an unsent letter concerning the investigation of the St. Louis collector.¹⁰⁹ The letter was not included in the record of the case against Brown.¹¹⁰

The court held that since no part of the crime being investigated took place in Nebraska, no questions regarding the crime were material to the grand jury investigation because the alleged crime occurred outside of the Nebraska grand jury's jurisdiction.¹¹¹ The court further noted that because extracting the testimony from the defendant could not support any possible action within the grand jury's jurisdiction,¹¹² the assistant attorney general's purpose in bringing the defendant before the grand jury must have been to have him indicted for perjury.¹¹³ While the court noted the improper purpose of the assistant attorney general, there was no mention of perjury trap in the case.¹¹⁴ Rather, the court dismissed the perjury charges directly on immateriality grounds.¹¹⁵

Since materiality is so broadly construed by federal courts,¹¹⁶ it is not surprising that the immateriality of the false testimony in *Brown* was found on somewhat of a technicality—the crime investigated was not within the

106. *Id.*

107. *Id.*

108. *Id.* at 552.

109. *Id.*

110. *Id.*

111. *See id.* (“If the grand jury of Nebraska was without authority to inquire into offenses committed in Missouri, then the answers of defendant, even if false, would not amount to perjury.”); *see also* *United States v. Lardieri*, 497 F.2d 317, 319 (1974) (holding that the standard for materiality under 18 U.S.C. § 1621 (1970) is the same under § 1623).

112. The court did recognize that the investigatory power of a grand jury can extend into other jurisdictions provided that the matter investigated is material to a crime that allegedly took place within the grand jury's jurisdiction—conspiracy is an example. *Brown*, 245 F.2d at 554; *see also* *United States v. LaRocca*, 337 F.2d 39, 43 (8th Cir. 1964) (“There is no question that when the grand jury is investigating a possible federal offense within its jurisdiction, it is authorized to receive evidence as to any acts related to the offense even though they occurred outside of its jurisdiction.”).

113. *See Brown*, 245 F.2d at 555 (“Extracting the testimony from defendant had no tendency to support any possible action of the grand jury within its competency. The purpose to get him indicted for perjury and nothing else is manifest beyond all reasonable doubt.”).

114. *Id.*

115. *Id.* at 554–56.

116. *See supra* notes 84–100 and accompanying text.

grand jury's jurisdiction.¹¹⁷ *Brown* shows that not all false testimony is necessarily material to the grand jury's investigation. However, *Brown* appears to be the sole example of immateriality in published federal case law. Given this fact, the likelihood of other examples arising in federal courts is exceedingly low.

Should the rare circumstance arise where a prosecutor elicits immaterial testimony and charges the defendant with perjury, *Brown* beautifully illustrates the futility of the perjury-trap defense. If the defendant in *Brown* asserted the perjury-trap defense, not only would he have had to show that the false testimony was immaterial, but he also would have had to prove that the prosecutor's misuse of the grand jury amounted to either entrapment or outrageous government conduct that violated his due process rights.¹¹⁸ As shown in *Brown*, there is no reason to argue that a perjury trap was set because that course only adds extra elements to the defense.¹¹⁹ The better course of defense is to seize upon the immateriality issue alone and attack the perjury charge directly.¹²⁰

VII. Conclusion

A perjury-trap defense should not be asserted for one reason: the same result can be achieved if a defendant attacks the perjury charge directly by successfully arguing that the false testimony was immaterial. Unfortunately for perjury defendants, false testimony before the grand jury will almost always be considered material and therefore meet all of the elements of the perjury offense.¹²¹ Thus, despite all of the noise surrounding the perjury trap, it is nothing more than "an illusion often asserted but never found."¹²²

—*Billy Joe McLain*

117. See 245 F.2d at 555 (reasoning that, because the tribunal was not functioning as a competent tribunal, the false answers the defendant was charged with having given did not relate to a material matter).

118. See *supra* notes 7, 76–89 and accompanying text.

119. See *supra* note 115 and accompanying text.

120. See *supra* notes 73–83 and accompanying text.

121. See *supra* notes 84–120 and accompanying text.

122. *United States v. Awadallah*, 202 F. Supp. 2d 82, 108 (S.D.N.Y. 2002) (internal quotation marks omitted).