Fall 2006

Recantation: Illusion or Reality?

Linda F. Harrison

RECANTATION: ILLUSION OR REALITY?

linda f. harrison[*]

2006 MICH. ST. L. REV. 637

TABLE OF CONTENTS

INTRODUCTION

On August 2, 2002, the following statements were given under oath to a federal grand jury:

Q. Did you ever receive any clothing from Eddie Martin?

A. Eddie Martin?

Q. When you were in college?

---

* Associate Dean and Professor of Law, Nova Southeastern University, Shepard Broad Law Center. J.D., American University, 1982. I would like to thank my research assistant, Christopher E. Everett, for his excellent assistance to me during the past two years. The capitalization choice in the author's name is her own.

A. College?

Q. Yes.

A. I don't believe so, no.[1]

Assume that soon after the speaker made these statements to the grand jury, the speaker approached his attorney, worried about a possible perjury charge. He wanted to know if he could clarify his answers to the grand jury. What would it take to recant his testimony under 18 U.S.C. § 1623? This Article is an overview of the recantation provision of 18 U.S.C. § 1623 and makes a pessimistic assessment of its current usefulness; although Congress intended § 1623(d) to be an inducement to correct false testimony, it is nearly impossible for a witness to recant.[2]

---

1. Superseding Indictment at 12, United States v. Webber, No. 02-80813, 2003 WL 22173079, at *1 (E.D. Mich. Sept. 19, 2003) (emphasis omitted). The statements recited are those attributed to basketball superstar Chris Webber. The statements cited are his actual statements made to the grand jury; the subsequent use of his statements throughout the remainder of the article is fictional and is used to illustrate the author's points.

2. The statute provides that:

§ 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if -

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

Under 18 U.S.C. § 1623, a witness's ability to successfully recant his testimony depends on whether his or her testimony has "substantially affected the proceeding" and whether it is "manifest that [the] falsity has been or will be exposed."[3] In spite of the conjunctive use of "or" between the two prongs of this test, the use of a recantation defense is challenging because of the inconsistent application of this and other key aspects of the statute. Congress enacted § 1623(d) to serve as an "inducement to the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk [of] prosecution by doing so."[4]

Yet courts disagree as to when the witness can correct the false statement.[5] The various United States Courts of Appeals issued conflicting interpretations of the provision, and they typically set an unreasonably high bar that deters the provision's use. This Article discusses how the legislative history and the courts have added to the confusion surrounding the recantation provision of § 1623 and argues for a replacement that furthers the congressional intent which led to its enactment.

Part I examines the legislative history of § 1623(d) to discern Congress's legislative intent, as well as the genesis of the current confusion regarding the provision's meaning.[6] This part also covers the legislative history and the New York recantation statute upon which Congress based the recantation provision of § 1623.[7] Part II reviews the federal cases that have applied the recantation provision.[8] In particular, this part covers material testimony,[9] the two-prong test,[10] and the conflict between prosecuting under 18 U.S.C. § 1621 rather than § 1623.[11] Finally, Part III provides a rationale for rewording § 1623 to fulfill congressional intent.[12] In addition, this article proposes a modification of § 1623(d) that would eliminate the bar that

---

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

18 U.S.C. § 1623 (2000).

3. *Id.* § 1623(d).

4. H.R. REP. NO. 91-1549, at 48 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4007, 4024.

5. The timing of the recantation is limited by whether both prongs of § 1623(d) have to be satisfied or just one of the prongs. *See infra* Part II.C.

6. *See infra* Part I.A.

7. *See infra* Part I.B.

8. *See infra* Part II.

9. *See infra* Part II.A.

10. *See infra* Part II.C.

11. *See infra* Part II.D. While this Article will mainly focus on § 1623, it will also cover § 1621 regarding the possible constitutional issues for a perjurer who recanted pursuant to § 1623(d) but is being charged under § 1621 so that the government can avoid the affirmative defense provided by § 1623(d).

12. *See infra* Part III.

makes recantation under § 1623 unattainable and the possible constitutional issues that arise when a perjurer is charged under § 1621 instead of § 1623.[13]

I. HISTORY

A. History of the Federal Recantation Statute

The short legislative history of the recantation provision in 18 U.S.C. § 1623 has created an ambiguity as to Congress's intent. The legislative history clearly states that § 1623 is modeled after New York Penal Law section 210.25.[14] This statute has the word "and" between the first and second prong of the two-prong test and requires both prongs to be satisfied for a successful recantation defense.[15] However, Congress enacted § 1623(d) with the word "or" between the prongs.[16] A court interpreting the recantation statute faces a dilemma: it must either follow the meaning of § 1623(d) as it appeared in the New York statute, or instead follow the plain meaning of the text of § 1623(d). This issue manifests itself in the two-prong test that allows recantation only when "the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed."[17]

On one hand, it is assumed that Congress was aware of the ramifications of changing the terminology in the federal statute from that used in the New York statute. On the other hand, since the congressional intent behind § 1623 was to "induce[] . . . the witness . . . to correct a false statement,"[18] it is unlikely that Congress would have heightened the recantation bar by changing the meaning of "or" to "and," thus making it more difficult to use. The First, Second, Third, Fifth, and District of Columbia Circuits have all construed the congressional intent in enacting § 1623(d) to be to "balance[]

---

13. *See infra* Part III.

14. *See* H.R. REP. NO. 91-1549, at 47-48 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4007, 4023-24. House Report 1549 provides:

> Section 1623(d), as amended, provides that when in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits that it is false, the admission will bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that the falsity will be exposed. This recantation or retraction provision is modeled upon a New York penal statute. (N.Y. Penal Law 210.25.) It serves as an inducement to the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk [of] prosecution by doing so.

Id.

15. *See infra* note 30.

16. *See* 18 U.S.C. § 1623(d) (2000).

17. *Id.* (emphasis added).

18. *See* H.R. Rep No. 91-1549, *supra* note 14.

the need to encourage a witness to correct his testimony against the need to prevent his perjury at the outset."[19] Using this reasoning, these circuits held that both prongs of the test must be satisfied for a witness to recant his testimony.[20] In contrast, the Eighth Circuit, using the same reasoning, held that the plain meaning of the statute is the proper interpretation of § 1623(d).[21] The plain meaning of § 1623(d) only requires one of the prongs to be satisfied.[22]

The House Report,[23] the Senate Report,[24] and the testimony of Senator John L. McClellan[25] each employ "or" between the prongs of § 1623(d). However, the Department of Justice's comments used "and" between "substantially affect" and "manifest," which is the only place where the legislative history deviates from the understanding that the law is modeled upon the more witness-friendly New York statute.[26] Therefore, the question is

---

19. United States v. Denison, 663 F.2d 611, 617 (5th Cir. 1981); *accord, e.g.*, United States v. Moore, 613 F.2d 1029, 1042-43 (D.C. Cir. 1979); United States v. Scrimgeour, 636 F.2d 1019, 1024 (5th Cir. 1981); United States v. Scivola, 766 F.2d 37, 45 (1st Cir. 1985); United States v. Fornaro, 894 F.2d 508, 511 (2d Cir. 1990); United States v. Sherman, 150 F.3d 306, 316-18 (3d Cir. 1998).

20. *See, e.g.*, *Moore*, 613 F.2d at 1043-45; *Scrimgeour*, 636 F.2d at 1024; *Scivola*, 766 F.2d at 45; *Fornaro*, 894 F.2d at 511; *Sherman*, 150 F.3d at 317-18.

21. United States v. Smith, 35 F.3d 344, 346-47 (8th Cir. 1994).

22. *See id.*

23. H.R. REP. NO. 91-1549, at 33, 47-48, *as reprinted in* 1970 U.S.C.C.A.N. 4007, 4008, 4023-24. House Report 1549 provides:

> TITLE IV – FALSE DECLARATIONS
>
> This title is intended to facilitate Federal perjury prosecutions and establishes a new false declaration provision applicable in Federal grand jury and court proceedings. It abandons the so-called two-witness and direct evidence rule in such prosecutions and authorizes a conviction based on irreconcilably inconsistent declarations under oath. As amended, title IV also permits recantation to be a bar to prosecution if the declaration has not substantially affected the proceedings or it has not become manifest that the declaration's falsity has been or will be exposed.

Id. at 33.

24. S. REP. NO. 91-617, at 150 (1969). Senate Report 617 provides:

> Recantation may be a bar to a prosecution under this provision if at the time the admission is made, the false declaration had not substantially affected the proceeding or it had not become manifest that such falsity has been or would be exposed. See N.Y. Penal Law § 210.25. This provision codifies dictum in present case law under 18 U.S.C. § 1621. See *United States v. Norris*, 300 U.S. 564, 573, 574 (1937).

Id.

25. *Organized Crime Control: Hearing on S. 30 and Related Bills Before H.R. Subcomm. No. 5 of the Comm. on the Judiciary*, 91st Cong. 83 (1970) (statement of Sen. John L. McClellan) ("Provision is made for recantation before a proceeding has been substantially affected or the falsity has become manifest.").

26. *Organized Crime Control: Hearing on S. 30 and Related Bills Before H.R. Subcomm. No. 5 of the Comm. on the Judiciary*, 91st Cong. 164 (1970) (comments of the Department of Justice). The relevant portion of the Department of Justice's comments reads:

which interpretation of the statute follows the congressional intent that the recantation provision is "an inducement to the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk [of] prosecution by doing so?"[27]

The legislative history does not explicitly indicate whether Congress recognized the ambiguity created in § 1623 by replacing "and" with "or." Courts note this lack of recognition when analyzing the recantation provision.[28] The only clear part of the legislative history is that Congress intended perjurers to have *some* opportunity to retract the false statement without the risk of prosecution. Thus, any changes to § 1623 that would ease the burden on defendants to utilize the recantation provision would be in accordance with the congressional intent of inducing truthful testimony.[29]

B. History of the New York Perjury Statute

The recantation provision of 18 U.S.C. § 1623 is based on New York Penal Law section 210.25,[30] which itself is based[31] on the 1957 Court of Appeals of New York case *People v. Ezaugi*.[32] Since Congress specifically stated that § 1623(d) was modeled after section 210.25,[33] an analysis of the New York statute enhances an understanding of the congressional intent behind § 1623(d). The New York recantation statute requires both prongs to be satisfied before a witness can successfully recant his false testimony: the recantation must occur "before such false statement substantially af-

---

> If a witness recants in the course of the same continuous court or grand jury proceeding, a prosecution for false statements will be barred, provided that the repudiation is made before it has substantially affected the proceeding, and before it is evident that the witness' false testimony will be exposed. This provides an incentive to the witness who testifies falsely upon his first appearance to retract his testimony and avoid prosecution by thereafter testifying truthfully.

Id. (emphasis added).

27. *See* H.R. Rep No. 91-1549, *supra* note 14.

28. *See, e.g., Moore*, 613 F.2d at 1042 ("At no time did anyone dispute an intended identity between [the New York statute and § 1623(d)] in this regard, or reflect a conscious comprehension of a significant difference. Instead, the matter received very little attention, and references on the point – invariably passing – were woefully inconclusive.").

29. *See supra* note 14 and accompanying text.

30. Section 210.25 of the New York Penal Law reads: "In any prosecution for perjury, it is an affirmative defense that the defendant retracted his false statement in the course of the proceeding in which it was made before such false statement substantially affected the proceeding and before it became manifest that its falsity was or would be exposed."
N.Y. PENAL LAW § 210.25 (McKinney 1999).

31. N.Y. PENAL LAW § 210.25, William C. Donnino, Practice Commentary, 351 (McKinney 1999).

32. 141 N.E.2d 580 (N.Y. 1957).

33. *See supra* notes 14, 24 and accompanying text.

fected the proceeding *and* before it became manifest that its falsity was or would be exposed."[34]

In *Ezaugi*, the defendant, a police officer, gave false testimony about whether money was discussed in a meeting with a drug dealer.[35] The police had tape recorded the conversation and therefore knew at the time of the false testimony that the defendant had perjured himself.[36] After discussing the testimony with his partner, the defendant reappeared two days later in front of the grand jury and corrected his false statements.[37] The court held that the recantation defense is only designed to be used when "done promptly before the body conducting the inquiry has been deceived or misled to the harm and prejudice of its investigation, and when no reasonable likelihood exists that the witness has learned that his perjury is known or may become known to the authorities."[38] The court held that Ezaugi did not recant until after he concluded that his false testimony was not deceiving anyone and therefore could not utilize the recantation defense.[39] Thus, viewing the New York recantation statute in light of the holding of the court in *Ezaugi*, the requirements of the statute directly mirror the requirements in *Ezaugi*.

People v. Gillette[40] is also important to the analysis of *Ezaugi*. In *Gillette*, the defendant stated that a certain bank account was his personal account and the funds deposited in the account were his own.[41] Immediately following this questioning, the defendant stated that the money he had received was from officers of the insurance company and thus the money belonged to the insurance company.[42] The court held that the defendant was not guilty of perjury because "he fully and frankly testified as to the funds in question and the source from which it came."[43] Furthermore, the court held that "[a] judicial . . . trial has for its sole object the ascertainment of the truth."[44] Therefore, "every inducement to a witness to tell the truth" should be given and "[t]his inducement would be destroyed if a witness could not correct a false statement except by running the risk of being indicted and convicted for perjury."[45]

---

34. N.Y. PENAL LAW § 210.25 (emphasis added).
35. *Ezaugi*, 141 N.E.2d at 581-82.
36. *Id.*
37. *Id.* at 582.
38. *Id.* at 583.
39. *See id.*
40. 111 N.Y.S. 133 (App. Div. 1908).
41. *Id.* at 134.
42. *Id.*
43. *Id.* at 138.
44. *Id.* at 139.
45. *Id.*

The New York recantation statute makes the analysis of the congressional intent even more challenging. Viewing the legislative history in light of the New York recantation statute, it is unclear which wording Congress intended when it enacted § 1623(d). Regardless of the congressional intent, however, the issue for anyone wishing to recant is that it is difficult to know which standard the court will use. The inconsistent application of the recantation test among the different circuits makes the burden to sustain a successful recantation defense fortuitous based upon venue.

II. RECANTATION UNDER § 1623

Whether a speaker can recant his testimony depends on the answers to the following questions:

(A) Was the testimony material?[46]
(B) What would the speaker have to say to recant?[47]
(C) Does it matter where in the U.S. the client testified?[48]
(D) Has the testimony substantially affected the proceedings?[49]
(E) Is it manifest that the falsity has been or will be exposed?[50]
(F) Is there reason to worry about 18 U.S.C. § 1621?[51]

These questions lead to a determination of whether § 1623(d) allows a witness to correct false testimony. As illustrated below, the burden on a witness who recants is so high that the United States District Court for the Southern District of New York has commented that "[t]he recantation defense appears to be an illusion—often asserted but never found."[52] The inability of a witness to assert a recantation defense frustrates the congressional intent behind the enactment of § 1623(d).

A. Was the Testimony Material?

Let us return to the grand jury testimony given at the beginning of the article. Suppose the speaker was subpoenaed to appear in front of the grand jury to answer questions, because the grand jury was investigating a gambling ring that Eddie Martin was suspected of running.[53] The testimony was:

---

46. *See infra* Part II.A.
47. *See infra* Part II.B.
48. *See infra* Part II.C.
49. *See infra* Part II.C.1.
50. *See infra* Part II.C.2.
51. *See infra* Part II.D.
52. United States v. Awadallah, 202 F. Supp. 2d 17, 38 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003); *see also infra* note 96 and accompanying text.
53. *See* Indictment at 3, United States v. Webber, No. 02-80813, 2003 WL 22173079, at *1 (E.D. Mich. Sept. 19, 2003).

Q. Did you ever receive any clothing from Eddie Martin?

A. Eddie Martin?

Q. When you were in college?

A. College?

Q. Yes.

A. I don't believe so, no.[54]

One defense to a perjury charge is that the testimony was not material and, therefore, no perjury was committed. This defense is separate and distinct from a recantation defense because there is no perjury under § 1623 if the false testimony was not material.[55] The burden on the witness is high because "the test for materiality is a broad one"[56] and "is a legal question to be decided by the trial court."[57] Under this test, a statement is material "if it is 'capable of influencing the tribunal on the issue before it.'"[58] The test also includes any statement that "has 'a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation.'"[59] In addition, "[t]he statement need not be material to any particular issue in the case, but rather may be material to any proper matter of the jury's inquiry, including the issue of credibility."[60] In application, almost anything asked in a grand jury or court proceeding is material, because, even if the testimony is not about any particular issue, the testimony can affect the credibility of the witness.[61]

To return to our question: whether the witness's statement that he did not believe he ever received clothing from Eddie Martin while he was in college is material? If the grand jury was investigating a gambling opera-

---

54. Superseding Indictment, *supra* note 1, at 12 (emphasis omitted).

55. *See* 18 U.S.C. § 1623(a) (2000).

56. United States v. Scivola, 766 F.2d 37, 44 (1st Cir. 1985) (citing United States v. Byrnes, 644 F.2d 107, 111 (2d Cir. 1981); United States v. Giarratano, 622 F.2d 153, 156 (5th Cir. 1980)).

57. *Id.* (citing United States v. Kehoe, 562 F.2d 65, 68 (1st Cir. 1977); United States v. Romanow, 509 F.2d 26, 28 (1st Cir. 1975)).

58. *Id.* (quoting *Giarratano*, 622 F.2d at 156).

59. United States v. Demauro, 581 F.2d 50, 53 (2d Cir. 1978) (citing Carroll v. United States, 16 F.2d 951, 953 (2d Cir. 1927)).

60. *Scivola*, 766 F.2d at 44 (citing *Giarratano*, 622 F.2d at 156; United States v. Allen, 409 F. Supp. 562, 565 (E.D. Va. 1975), *aff'd*, 541 F.2d 278 (4th Cir. 1976)).

61. *See, e.g.*, United States v. Phillips, 914 F.2d 835, 845-46 (7th Cir. 1990); United States v. Vap, 852 F.2d 1249, 1253 (10th Cir. 1988); United States v. Corbin, 734 F.2d 643, 654 (11th Cir. 1984); United States v. Dudley, 581 F.2d 1193, 1196 (5th Cir. 1978); United States v. Beitling, 545 F.2d 1106, 1109-10 (8th Cir. 1976). This materiality determination extends to civil depositions that are under the jurisdiction of § 1623. *See* United States v. Kross, 14 F.3d 751, 754 (2d Cir. 1994). False testimony is material if "a truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit." *Id.*

tion by Eddie Martin, the testimony would not necessarily influence, impede, or dissuade any aspect of the grand jury investigation. However, even if the testimony did not directly affect the grand jury investigation, almost any testimony would influence the issue of credibility. Therefore, almost all testimony has been deemed to be material in the context of § 1623(d).

Furthermore, if the grand jury was investigating whether Eddie Martin had given money and other items to student athletes as part of the overall investigation of Mr. Martin's suspected gambling ring, and if the speaker had falsely testified about receiving clothing, then the testimony would have impeded the grand jury's investigation.[62] Accordingly, regardless of the scope of the grand jury investigation, the testimony is usually going to be material to the proceeding because, at the very least, the false testimony affects the issue of credibility.

However, before § 1623 was enacted, the defendant in *Beckanstin v. United States*[63] had his sentence overturned by the Fifth Circuit because his false testimony was not material and the defendant did not intend to deceive the court.[64] In *Beckanstin*, the defendant stated that he had graduated from the Massachusetts Institute of Technology and then was interrupted by the court for a series of questions.[65] At dinner that night Beckanstin's wife brought up the mistake, pointing out that Beckanstin had not graduated from MIT, but had merely attended the school.[66] Beckanstin's lawyer advised him that it was a minor mistake and not to worry.[67] In later testimony, Beckanstin was confronted with his false testimony and promptly corrected the mistake.[68] The court ruled that the testimony was not material because "[w]hether or not Beckanstin had graduated from the school was of no consequence in resolving the issues involved in that suit."[69] In addition, the court found that Beckanstin's "[w]illingness to correct the misstatement . . . is potent to negative a willful intent to swear falsely."[70] Accordingly, Beckanstin was able to avoid a perjury prosecution. This outcome is not likely to repeat itself under § 1623 because the question of materiality has since been extended to the credibility of the witness, which would have been affected by his statement that he graduated from MIT when he did not.

---

62. *See* Indictment, *supra* note 53, at 3.
63. 232 F.2d 1 (5th Cir. 1956).
64. *Id.* at 3-5.
65. *Id.* at 2-3.
66. *Id.* at 3.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 4.

B. What Would the Speaker Have to Say to Recant?

Again, assume that the testimony was the following:

Q. Did you ever receive any clothing from Eddie Martin?

A. Eddie Martin?

Q. When you were in college?

A. College?

Q. Yes.

A. I don't believe so, no.[71]

What are the requirements if the speaker wants to recant his testimony because it was false? What does the speaker have to do or say?

One important aspect of 18 U.S.C. § 1623(d) is that the "person making the declaration admits such declaration to be false."[72] Courts have found that a witness must make "[a]n outright retraction and repudiation of his false testimony" to satisfy this aspect of the statute.[73] So, if the witness just alludes to the fact that he may have falsely testified, then the outright admission requirement of § 1623(d) is not satisfied.[74] In addition, simply asking the prosecutor to allow the witness to clarify or elaborate some of his testimony will not satisfy § 1623(d).[75] Similarly, a witness's explanation of his false testimony and what he thought certain words meant will also not satisfy § 1623(d).[76] Lastly, changing one's plea from not guilty to guilty will not satisfy § 1623(d).[77] Thus, the perjurer must make an outright admission to meet this requirement; trying to skirt around the issue of falsity will not suffice.

What constitutes "[a]n outright retraction and repudiation of . . . false testimony"?[78] Would the following answer constitute a retraction by the speaker if it occurred in the same grand jury proceeding?

Q: Okay. So you lied, is that correct?

A: To one question.[79]

---

71. Superseding Indictment, *supra* note 1, at 12 (emphasis omitted).

72. 18 U.S.C. § 1623(d) (2000).

73. United States v. D'Auria, 672 F.2d 1085, 1092 (2d Cir. 1982); *accord, e.g.*, United States v. Tobias, 863 F.2d 685, 689 (9th Cir. 1988); United States v. Scivola, 766 F.2d 37, 45 (1st Cir. 1985).

74. *See* United States v. Goguen, 723 F.2d 1012, 1017-18 (1st Cir. 1983).

75. *See D'Auria*, 672 F.2d at 1090-91; United States v. Mitchell, 397 F. Supp. 166, 176-77 (D.D.C. 1974).

76. *See Tobias*, 863 F.2d at 689.

77. *See, e.g., Scivola*, 766 F.2d at 45.

78. *D'Auria*, 672 F.2d at 1092.

79. United States v. Fornaro, 894 F.2d 508, 510 (2d Cir. 1990).

This testimony would be an outright retraction, since the speaker unequivocally stated that he had lied. Returning to the grand jury testimony given at the beginning of this article, would the following statement constitute a retraction if it occurred after a thirty-eight minute break in the grand jury testimony?

> Q: Is there anything you need to say?
>
> A: Yes, I reviewed my records during the break, and I did receive clothing from Mr. Eddie Martin while I was in college.

This testimony would also be an outright retraction due to the speaker unequivocally stating that he had lied.[80] Accordingly, as can be extracted from the above examples of outright retractions, the key to ensuring that a retraction will be "[a]n outright retraction and repudiation of . . . false testimony"[81] is to ensure that the recantation involves unequivocally stating that one's answer was false and then telling the truth.

The speaker could not simply call the prosecutor the week following his grand jury testimony and tell the prosecutor that he might have made a mistake in his testimony and would like to reappear and correct any problems. In addition, if the speaker asked the prosecutor to stop investigating him because he has had enough of the harassment and will correct any problems with his testimony, that would also not satisfy the requirement to make an outright admission.[82] In these situations, the speaker again did not make "'[a]n outright retraction and repudiation of his false testimony [which] is essential to a 'recantation' within the meaning of the statute.'"[83]

Additionally, the speaker cannot call the prosecutor the day following his grand jury testimony and tell the prosecutor that he would like to clarify some of his testimony and come forward with additional information.[84] To fall within § 1623(d), a recantation must be "[a]n outright retraction and repudiation of his false testimony."[85] For example, in *United States v. D'Auria*, the speaker's request to be recalled, the speaker did not explicitly state that parts of the prior testimony were false, and thus his request does not meet the requirements of § 1623(d).[86]

Could the following statements made by the speaker the day after testifying be used as a retraction of his testimony?

> Q: You testified yesterday that you did not receive any clothing from Mr. Eddie Martin while you were in college, correct?

---

80. *See* United States v. Smith, 35 F.3d 344, 345 (8th Cir. 1994).
81. United States v. D'Auria, 672 F.2d 1085, 1092 (2d Cir. 1982).
82. *See* United States v. Goguen, 723 F.2d 1012, 1015-18 (1st Cir. 1983).
83. *Id.* at 1017 (quoting *D'Auria*, 672 F.2d at 1092).
84. *See D'Auria*, 672 F.2d at 1088, 1092-93.
85. *Id.* at 1092.
86. *See id.*

A: Yes

Q: We have a tape recording of you thanking Mr. Martin for sneakers while you were in college. Is that your voice on the tape?

A: Yes, but I do not consider sneakers to be included in the definition of clothing.

The speaker's personal definition of clothing would not act as a repudiation because "a defendant must unequivocally repudiate his prior testimony to satisfy § 1623(d)."[87] Thus, in *United States v. Tobias*, for example, the defendant did not satisfy this requirement by simply trying to give his "contorted definition" of a word.[88]

What would happen if the speaker was charged with a crime and was testifying as to that crime to the grand jury? Would the speaker be able simply to switch his plea from not guilty to guilty to avoid a perjury charge from his testimony to the grand jury? The change in plea is not an admission of falsity that satisfies "the requirements of an effective recantation under [§] 1623(d)," because "[the witness] did not specifically state that any parts of his testimony were false."[89] "A witness must make an outright retraction and repudiation of prior false testimony."[90] In addition, "'the accused must come forward and explain unambiguously and specifically which of his answers'" is false.[91] Thus, a recantation must involve an outright admission of the exact false statements and is not satisfied by simply a change in pleas.

There are no conflicts between the circuits that an admission to making the false testimony is required to recant under § 1623(d).[92] Thus, the ability to use the recantation defense is not affected by the requirement to give an admission of the false testimony because meeting the requirement is not impossible or challenging; the witness is only required to state that his or her testimony was false. Although human nature may be to avoid admitting lies, for a witness to avail himself of § 1623(d) the first step is to admit the lie, and this step does not create an undue burden on a defendant in attempting to recant false testimony.

C. Does It Matter Where in the U.S. the Speaker Testified?

One aspect of the interpretation of 18 U.S.C. § 1623 that helps to elevate the recantation defense out of reach is the meaning of "or" in the statute's text. The "or" is vital to whether the perjurer has to meet one or both

87. United States v. Tobias, 863 F.2d 685, 689 (9th Cir. 1988).
88. *Id.*
89. United States v. Scivola, 766 F.2d 37, 45 (1st Cir. 1985).
90. *Id.* (citing United States v. D'Auria, 672 F.2d 1085, 1092 (2d Cir. 1982)).
91. *Id.* (quoting United States v. Goguen, 723 F.2d 1012, 1018 (1st Cir. 1983)).
92. *See supra* note 73 and accompanying text.

prongs of the test: if "the declaration has not substantially affected the proceeding, *or* it has not become manifest that such falsity has been or will be exposed."[93] The first prong of the test is whether the false declaration has "substantially affected the proceeding."[94] The second prong of the test is whether it is manifest that the false declaration "has been or will be exposed."[95] The emphasis of this section is on whether one or both parts of the test have to be satisfied in order to utilize the recantation defense.

The court cases regarding what "or" means are important, because the burden on finding out the truth is significantly different depending on what must occur to recant. If both parts of the test must be satisfied, then it will be more difficult to utilize the recantation defense under § 1623. If only one part of the test must be satisfied, then the burden on the perjurer to recant is much lower. Regardless of the test, the burden seems high enough that even the United States District Court for the Southern District of New York has commented that "[t]he recantation defense appears to be an illusion—often asserted but never found."[96] This seemingly is in conflict with the legislative history stating that § 1623(d) was "an inducement to the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk [of] prosecution by doing so."[97] Accordingly, the interpretation of § 1623 by the courts is at such a level that it essentially bars witnesses from utilizing the recantation defense.[98]

The First, Second, Third, Fifth, and the District of Columbia Circuits have all construed "or" to have the same meaning as "and."[99] These decisions were based on the congressional intent to follow New York Penal Law section 210.25, which requires both prongs of the test to be satisfied.[100] In addition, these decisions sought to ensure that perjurers could not utilize the recantation provision even after the false testimony is exposed but before it substantially affects the proceedings, or vice-versa.

Using the same reasoning, but reaching the opposite result, the Eighth Circuit construed "or" to mean "or."[101] The Eighth Circuit took the view that since "the wording of § 1623(d) 'is plain, simple, and straightforward,

93. 18 U.S.C. § 1623(d) (2000) (emphasis added).

94. *Id.*

95. *Id.*

96. United States v. Awadallah, 202 F. Supp. 2d 17, 38 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003).

97. H.R. REP. NO. 91-1549, *supra* note 4, at 48.

98. *See infra* Part II.E.

99. *See* United States v. Sherman, 150 F.3d 306, 317 (3d Cir. 1998); United States v. Fornaro, 894 F.2d 508, 511 (2d Cir. 1990); United States v. Scivola, 766 F.2d 37, 45 (1st Cir. 1985); United States v. Scrimgeour, 636 F.2d 1019, 1024 (5th Cir. 1981); United States v. Moore, 613 F.2d 1029, 1040 (D.C. Cir. 1979).

100. *See Sherman*, 150 F.3d at 313-18; *Fornaro*, 894 F.2d at 510-11; *Scivola*, 766 F.2d at 45 & n.10; *Scrimgeour*, 636 F.2d at 1021-24; *Moore*, 613 F.2d at 1039-43.

101. *See* United States v. Smith, 35 F.3d 344, 346 (8th Cir. 1994).

the words must be accorded their normal meanings.'"[102] Congress used "or" and, therefore, Congress's plain language should be used.[103] Even using the plain language of § 1623, the difficulty of utilizing the recantation defense is still high, but not impossible.

The issue then becomes how the courts should interpret the "or" in § 1623(d), especially since penal statutes are generally interpreted using the rule of lenity.[104] "Normally, of course, 'or' is to be accepted for its disjunctive connotation, and not as a word interchangeable with 'and.' But this canon is not inexorable, for sometimes a strict grammatical construction will frustrate legislative intent."[105] As such, unless the legislative intent is overwhelming against an interpretation of a statute, then the statute should be interpreted consistent with the rule of lenity to ensure that criminal conduct is clearly described in the statute.[106]

The District of Columbia Circuit, in *United States v. Moore*,[107] stated that reading "or" in the disjunctive would "frustrate legislative intent."[108] The court further stated that Congress specifically modeled § 1623(d) after the New York statute, so if Congress intended to "switch from combinational to alternative satisfaction of its carefully developed preconditions," then "Congress would have said so."[109] Additionally, the court stated that sometimes it is permissible to not use "[t]he strict-construction rule governing interpretation of criminal statutes."[110] These exceptions occur when the intention of the legislature would be defeated by the strict construction.[111] Thus, the court ruled that the will of Congress must prevail, and § 1623(d) should be read in the conjunctive, requiring both aspects to be satisfied.[112]

This is the complete opposite of the Eighth Circuit's conclusion in *United States v. Smith*,[113] where the court ruled that § 1623(d) should be

---

102. *Id.* (quoting United States v. Jones, 811 F.2d 444, 447 (8th Cir. 1987)).

103. *See id.*

104. *See id.* (citing Dunn v. United States, 442 U.S. 100, 112 (1979)). The rule of lenity "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn*, 442 U.S. at 112. In addition, "to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed." *Id.* at 112-13 (quoting United States v. Gradwell, 243 U.S. 476, 485 (1917)).

105. United States v. Moore, 613 F.2d 1029, 1040 (D.C. Cir. 1979). (citations omitted).

106. *See supra* note 104.

107. 613 F.2d 1029 (D.C. Cir. 1979).

108. *Id.* at 1040.

109. *Id.* at 1042.

110. *Id.* at 1044.

111. *See id.*

112. *Id.* at 1043.

113. 35 F.3d 344 (8th Cir. 1994).

interpreted to read as it was written—with the disjunctive "or."[114] The court began by examining the statutory language, which states that the two conditions are disjunctive.[115] The court reasoned, since "the wording of § 1623(d) 'is plain, simple, and straightforward, the words must be accorded their normal meanings.'"[116] Thus, "the plain language of § 1623(d) [is] controlling."[117] The court then looked to determine if using "or" in the disjunctive would defeat the legislative intent behind § 1623(d).[118] Nothing in the legislative history indicated to the Eighth Circuit that Congress intended to make the recantation defense unreachable, yet that is the result if the statute was read in the conjunctive.[119] Thus, since there were no indications that the statute should be read in the conjunctive, it applied the rule of lenity.[120] Accordingly, the *Smith* court ruled that the meaning of "or" should not be read as "and"; otherwise, "'[the Supreme] Court's long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity'" would be contravened.[121]

The next two sub-sections discuss the two-part test and the importance of defining what "or" means to in order to determine whether the recantation defense is attainable.

1. *Has the Testimony Substantially Affected the Proceedings?*

The speaker testified to the following:

Q. Did you ever receive any clothing from Eddie Martin?

A. Eddie Martin?

Q. When you were in college?

A. College?

Q. Yes.

A. I don't believe so, no.[122]

The first prong of the two-part test ensures that "the [false] declaration has not substantially affected the proceeding."[123] How much time after the testimony would the speaker have to recant his testimony? What if the speaker recants his testimony three weeks after the false testimony, but be-

114. *See id.* at 346.
115. *See id.*
116. *Id.* (quoting United States v. Jones, 811 F.2d 444, 447 (8th Cir. 1987)).
117. *Id.*
118. *See id.*
119. *See* United States v. Smith, 35 F.3d 344, 346-47 (8th Cir. 1994).
120. *See id.* at 346.
121. *Id.* (quoting Dunn v. United States, 442 U.S. 100, 112 (1979)).
122. Superseding Indictment, *supra* note 1, at 12 (emphasis omitted).
123. 18 U.S.C. § 1623(d) (2000).

fore the jury begins deliberations? In that case, the false testimony would have substantially affected the proceedings due to the false testimony's role in the proceedings, where the jury "had to process the evidence submitted during the intervening three weeks against the backdrop of [the] false statements."[124]

What happens if the false testimony causes the grand jury to not indict? If the government can prove that the grand jury "was unable to indict . . . when it otherwise could have because of defendant's alleged false statements," then the proceedings were substantially affected by the false statements.[125]

What happens if the speaker attempts to recant after the grand jury has acted? "As a matter of law such a [false] statement must be presumed to have been considered by the Grand Jury and to have substantially affected the proceedings where the Grand Jury has subsequently acted."[126] Thus, a defendant's use of the recantation provision in § 1623 is time limited to the point that the false testimony has been considered by the receiver and acted upon.

What happens if the witness in this Article's running example recants his false testimony about the clothing before the end of his testimony, but only after being confronted by the truth? While the answer to this question has not been fully examined by the courts, if the testimony has not had a chance to influence the grand jury or jury, it is more likely that the testimony would not have substantially affected the proceedings at the time of recantation.[127]

As such, any significant delay between the false testimony and the subsequent recantation that could provide time for the jury or grand jury to be misled will substantially affect the proceeding.[128] Similarly, when a grand jury is unable to indict because of the false testimony, then the false testimony substantially affected the proceeding.[129] That means any recantation after the grand jury or jury acts will have already substantially affected

---

124. United States v. Lewis, 876 F. Supp. 308, 311 (D. Mass. 1994).

125. United States v. Tucker, 495 F. Supp. 607, 613 (E.D.N.Y. 1980).

126. United States v. Krogh, 366 F. Supp. 1255, 1256 (D.D.C. 1973).

127. *See* United States v. Sherman, 150 F.3d 306, 308-10, 313, 317 (3d Cir. 1998). However, the speaker may have a problem with the second prong of the recantation test on whether it was manifest that the falsity has been exposed when he was confronted with the truth. *See, e.g.*, United States v. Fornaro, 894 F.2d 508, 510-11 (2d Cir. 1990).

128. *See, e.g.*, *Lewis*, 876 F. Supp. at 311 (holding that a thirteen-month delay after grand jury appearance and three-week delay after court appearance substantially affected proceedings); *Tucker*, 495 F. Supp. at 611, 613 (holding that a four-week delay after grand jury appearance substantially affected proceedings); United States v. Crandall, 363 F. Supp. 648, 654-55 (W.D. Pa. 1973) (holding that a two-month delay after grand jury appearance substantially affected proceedings).

129. *See Krogh*, 366 F. Supp. at 1256.

the proceeding.[130] Thus, the window to recant is short lived, as the recantation must occur before the jury has time to utilize the false testimony in the proceeding.

Accordingly, the way to keep the false testimony from substantially affecting the proceeding is either to recant during the same testimony in which the lie is given or within a short time period after the false testimony. There does seem to be a way to satisfy this prong of the test to reach the goal of the recantation defense, but there is no evidence that a perjurer has had the opportunity to recant at such an early opportunity when the false testimony has not already been exposed. Thus, the issue of whether both prongs of the test have to be satisfied becomes important when viewed alongside the requirements for each prong.

2. *Is It Manifest That the Falsity Has Been or Will Be Exposed?*

The second prong of the two-part test is to ensure that "it has not become manifest that such falsity has been or will be exposed."[131] The test usually hinges on what information the witness or the witness's attorney objectively knew about,[132] but depending on the court, the test can also include what the prosecutor or grand jury objectively knew about.[133]

To return to our example, the speaker testified to the following:

Q. Did you ever receive any clothing from Eddie Martin?

A. Eddie Martin?

Q. When you were in college?

A. College?

Q. Yes.

A. I don't believe so, no.[134]

---

130. *See id.*

131. 18 U.S.C. § 1623(d) (2000).

132. *See, e.g.*, United States v. Smith, 35 F.3d 344, 347 (8th Cir. 1994) (placing the burden on the defendant about what she knows about the exposure of the false testimony); United States v. Denison, 663 F.2d 611, 613-16 (5th Cir. 1981) (holding that it was manifest to the defendant that false testimony was exposed when the government confronted him with the evidence of his false testimony); United States v. Tucker, 495 F. Supp. 607, 614 (E.D.N.Y. 1980) (holding that when the defendant's attorney was told before the recantation that the government knows about the perjury, then the defendant knows).

133. *See, e.g.*, United States v. Mitchell, 397 F. Supp. 166, 176-77 (D.D.C. 1974) (noting that three witnesses testified to the grand jury contradicting the defendant's testimony). *But see Smith*, 35 F.3d at 347 (holding that the court must only look at what is objectively manifest to the defendant).

134. Superseding Indictment, *supra* note 1, at 12.

Has it become manifest that the speaker's testimony is false if the government tells him after his testimony that another witness gave contradictory testimony? What happens if the government has a tape recording that contradicts the speaker's testimony?[135] "Once it becomes manifest to a witness that his false testimony has been or will be exposed, he may no longer take advantage of the recantation defense . . . ."[136] As such, in both of these situations it would have become manifest to the speaker that his false testimony had been exposed.

Does it become manifest if on re-cross the speaker makes the following statements?

> Q: Didn't you tell your girlfriend that you received clothes from Mr. Martin while you were in college?
>
> A: Yes.

It became manifest to the speaker that his false testimony was exposed because he corrected his statements "[o]n re-cross examination by the Government" and admitted that he had lied only after being confronted with his statements to a third party.[137]

Has it become manifest when the speaker is confronted with photographs that reveal his false testimony? The rule is that "when it is manifest to a witness that his false testimony has been or will be exposed, he may no longer come under the shelter of the recantation provision."[138] Accordingly, the photograph that contradicts the speaker's testimony squarely makes it manifest to the speaker that his false testimony was exposed.

Has it become manifest if the speaker's attorney is told before his recantation that the recantation is too late? Since it was manifest to the speaker's attorney before the speaker recanted that the government knew that he gave false testimony, then it is apparent to the speaker that his false testimony had been exposed.[139] What if the speaker had been shown documents indicating that the government knows that he had given false testimony? If the documents "made perfectly clear to all concerned that the falsity of [the] testimony had been exposed," then it would have been manifest to the speaker that his false testimony was exposed.[140]

Overall, it becomes manifest to the witness that the falsity is exposed when the witness becomes aware of any type of evidence that reveals the

---

135. *See* United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979).

136. United States v. Scivola, 766 F.2d 37, 46 (1st Cir. 1985) (citing *Denison*, 663 F.2d at 617; United States v. Swainson, 548 F.2d 657, 663 (6th Cir. 1977)).

137. United States v. Fornaro, 894 F.2d 508, 510 (2d Cir. 1990).

138. United States v. Denison, 663 F.2d 611, 616 (5th Cir. 1981).

139. *See* United States v. Tucker, 495 F. Supp. 607, 614 (E.D.N.Y. 1980).

140. United States v. Crandall, 363 F. Supp. 648, 655 (W.D. Pa. 1973), *aff'd*, 493 F.2d 1401 (3d Cir. 1974).

falsity.[141] The type of evidence that will make a witness aware of the exposure of their false testimony includes a tape recording,[142] confrontation with witness's statements to third parties,[143] photographs,[144] and documents (e.g., an indictment).[145] In addition, the government can also simply tell the witness or the witness's attorney that the falsity is exposed.[146] Additionally, indictments of individuals that can expose the falsity of a speaker's testimony will expose the falsity.[147] Accordingly, it seems that any type of information that could lead a person to believe that his false testimony has been exposed is sufficient for this prong of the test not to be met.

There are no known examples of cases with enough information to formulate what type of situation would have to occur for a defendant's false statements *not* to become manifest that exposure had or was going to occur.[148] Based on the boundaries of the cases, though, situations in which the falsity was not manifest to the witness may be possible (assuming a circuit that only examines what the witness objectively knew).[149] Examples of such situations include where the witness recants the falsity while still on the witness stand without any warning from the prosecutor[150] or after leaving the stand but before the prosecutor or third party gives the witness any sort of warning, here the witness recants the falsity.[151] Given these parameters, it is possible that a witness could satisfy this requirement of the two prong test.

On the other hand, if a circuit examines what the witness, prosecutor, and grand jury objectively knew, then the above two situations would not be

---

141. *See Scivola*, 766 F.2d at 45-46; *Fornaro*, 894 F.2d at 511; *Denison*, 663 F.2d at 616-17; *Tucker*, 495 F. Supp. at 614; *Crandall*, 363 F. Supp. at 655.

142. *See, e.g.*, *Scivola*, 766 F.2d at 46 (holding that when a witness is informed about a tape recording that contradicted witness's testimony, the false testimony is manifest to the witness).

143. *See, e.g.*, *Fornaro*, 894 F.2d at 510 (noting that a witness can be confronted with statements that he told third parties).

144. *See, e.g.*, *Denison*, 663 F.2d at 614 (noting that a witness can be confronted with photographs that contradict his testimony).

145. *See, e.g.*, *Crandall*, 363 F. Supp. at 655 (noting that a defendant can be shown an indictment exposing false testimony).

146. *See, e.g.*, *Tucker*, 495 F. Supp. at 614 (noting that the government can tell defendant's attorney that it is too late to recant); United States v. Lewis, 876 F. Supp. 308, 311 (D. Mass. 1994) (noting that a prosecutor can tell defendant's attorney that the testimony is in doubt before the recantation).

147. *See Lewis*, 876 F. Supp. at 311 (noting that the indictment of two people who could expose false testimony can constitute exposure of false testimony).

148. *See* Richard H. Underwood, *Perjury! The Charges and the Defenses*, 36 DUQ. L. REV. 715, 747 (1998).

149. *See, e.g.*, United States v. Smith, 35 F.3d 344, 347 (8th Cir. 1994); *Denison*, 663 F.2d at 616.

150. *See* Bitler v. State, 429 S.W.2d 497 (Tex. Crim. App. 1968).

151. *See Smith*, 35 F.3d at 344.

possible, and the challenge of satisfying this requirement would be extremely difficult, if not impossible. In both of the aforementioned examples, if the prosecutor or the grand jury had information that contradicted the testimony, then at the moment the false testimony is given, there is no possibility for the witness to satisfy this prong of the recantation defense. Accordingly, the limitations of the recantation defense under § 1623 are readily apparent—in fact, it is nearly impossible for an individual to calculate how to successfully utilize the recantation provision of § 1623.

D. Is There Reason to Worry About 18 U.S.C. § 1621?

Another distinct but related issue to the use of the recantation defense in § 1623 is whether any constitutional rights are being violated when a defendant is charged under 18 U.S.C. § 1621[152] instead of § 1623, and that witness has the ability to use the recantation defense under § 1623. This issue is distinct from the recantation defense, because it relates to what criminal statute the government can charge a defendant with when more than one criminal statute is violated. Courts have held that "'[w]hen an act violates more than one criminal statute, the government may prosecute under either statute so long as it does not discriminate against any class of defendants.'"[153] Under this rule, "a prosecutor's charging decision cannot be 'motivated solely by a desire to [achieve] a tactical advantage by impairing the ability of a defendant to mount an effective defense, [in such a case] a due process violation might be shown.'"[154] A prosecutor's apparently tactical choice to charge a defendant under § 1621 instead of § 1623 would apparently run afoul of this rule.

---

[152] Section 1621 provides:

> Whoever-
>
> (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or
>
> (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;
>
> is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 U.S.C. § 1621 (2000).

153. United States v. Sherman, 150 F.3d 306, 312 (3d Cir. 1998) (quoting United States v. Batchelder, 442 U.S. 114, 123-24 (1979)).

154. *Id.* at 313 (alteration in original) (quoting United States v. Ciampaglia, 628 F.2d 632, 639 (1st Cir. 1980)).

The previous cases on this issue avoided making any constitutional decisions, finding instead that the defendants did not meet the requirements of the recantation defense.[155] However it is "a little disturbing the prospect of the government employing § 1621 whenever a recantation exists, and § 1623 when one does not, simply to place perjury defendants in the most disadvantageous trial position."[156] Accordingly, the issue of which perjury statute the defendant is charged under can be construed as a potential constitutional issue that could be avoided if the recantation defense was easier to obtain.

E. Is Recantation Possible?

The recantation defense in 18 U.S.C. § 1623 appears to be a reachable goal upon first review, but the simple wording of the statute is misleading. The wording of § 1623(d),[157] at least in plain language, tells a person to admit they lied before the lie causes problems with the court or grand jury, or before the lie is exposed. The requirements themselves appear achievable; but after reviewing the requirements as interpreted by the courts, only the most careful or lucky perjurer can avail himself of the defense.[158]

The law is uncertain as to whether the defendant or the prosecutor has the burden of proof when the defendant raises a recantation defense. The Ninth Circuit held that "'the prosecution must prove the inapplicability of this [recantation] defense beyond a reasonable doubt.'"[159] On the other hand, the Fifth and D.C. Circuits have held that "'the defendant must show that he is within an exception.'"[160] This issue is a small portion of the hurdle, as cases on recantation indicate that the prosecutor tries to show that the

---

155. *See id.* at 317 (holding that § 1623(d) should be read in conjunctive form, and that defendant did not satisfy both requirements); United States v. Kahn, 472 F.2d 272, 283 (2d Cir. 1973) (holding that it had become manifest that the falsity was exposed by the time defendant recanted); United States v. Swainson, 548 F.2d 657, 663 (6th Cir. 1977) (holding that defendant only recanted after hearing tape recordings that contradicted his testimony).

156. *Kahn*, 472 F.2d at 283.

157. Section 1623(d) provides:

> Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

18 U.S.C. § 1623(d) (2000).

158. *See supra* Parts II.A-D.

159. United States v. Tobias, 863 F.2d 685, 688 (9th Cir. 1988) (quoting United States v. Guess, 629 F.2d 573, 577 n.4 (9th Cir. 1980)).

160. linda f. harrison, *The Law of Lying: The Difficulty of Pursuing Perjury Under the Federal Perjury Statutes*, 35 U. TOL. L. REV. 397, 414 (2003) (quoting United States v. Scrimgeour, 636 F.2d 1019, 1024 (5th Cir. 1981); United States v. Moore, 613 F.2d 1029, 1044-45 (D.C. Cir. 1979)).

witness did not recant while the witness tries to show that he or she did recant.

One case indicates that the recantation defense under § 1623 may be possible. In *United States v. Del Toro*,[161] three counts of perjury "had been dismissed by the court before trial on the ground that [co-defendant] Kaufman had effectively recanted his false testimony within the terms of 18 U.S.C. § 1623(d) during his testimony before the Grand Jury."[162] These three dismissed counts were based "on Kaufman's initial denials of having any knowledge of corruption in Model Cities and of having been asked for or having discussed money with Morales."[163] The recantation occurred directly following his false testimony—but only after the Assistant United States Attorney "warned [Kaufman] that [Kaufman] might be subject to a perjury prosecution" and "conspicuously put some boxes of tape recordings on the table."[164] Accordingly, the dicta in *Del Toro* would indicate that the recantation defense was successfully used by Kaufman, but the court unfortunately did not discuss whether it was manifest that the false testimony would be exposed or if it had substantially affected the proceedings.[165]

Thus, the recantation provision of § 1623 can seemingly be reached, but how Kaufman's recantation differs from some of the other cases is only slightly apparent. In addition, it should be noted that Kaufman's other three perjury convictions were affirmed by the Second Circuit.[166] Thus, the possibility exists that the government allowed the three counts to be dismissed since there was a stronger case for conspiracy, bribery, and other perjury charges.[167] Accordingly, *Del Toro* is not an example of a successful use of the recantation provision of § 1623.

In *United States v. Smith*,[168] the Eighth Circuit remanded a case where the defendant testified that she had paid for part of a car from her savings and denied that the money came from her boyfriend.[169] "After a thirty-eight-minute break in the proceeding, during which Smith reviewed her bank records, she resumed her testimony and recanted her previous statements."[170] The question then arose whether Smith had satisfied either one of the prongs of the recantation defense.[171] This determination was remanded

161. 513 F.2d 656 (2d Cir. 1975).
162. *Id.* at 658.
163. *Id.* at 665 n.7.
164. *Id.* at 665.
165. *See id.* at 665-66.
166. *See id.* at 667.
167. *See id.* at 658.
168. 35 F.3d 344 (8th Cir. 1994).
169. *See id.* at 345.
170. *Id.*
171. *See id.* at 347.

to the trial court.[172] Accordingly, *Smith* is not an example of the successful use of § 1623(d).

The previous sections covered how a perjurer must make an outright admission of the falsity of the statements before the false statement substantially affects the proceeding and/or is manifest to the perjurer that it has been or will be exposed.[173] If the recantation defense is achievable, it is a question of law for the trial judge.[174] The dilemma is that there are no cases where a witness has successfully asserted a recantation defense. If the intent of Congress was for § 1623(d) to be an inducement to correct a false statement, then why has the inducement not been successful in any case?[175]

III. PROPOSED CHANGES TO § 1623

The foregoing analysis leads to the conclusion that the recantation defense under § 1623(d) is nearly impossible to achieve because of the contradicting interpretations of the statute. If a witness has to satisfy both prongs,

---

172. *See id.* at 347-48.

173. *See supra* Parts II.B-C.

174. *See* United States v. Denison, 663 F.2d 611, 618 (5th Cir. 1981); United States v. Tucker, 495 F. Supp. 607, 613 (E.D.N.Y. 1980).

175. The data relating to 18 U.S.C. § 1623 prosecutions tell an interesting story about why there are not any confirmed cases where the defendant successfully asserted the recantation defense. There were only ninety-two terminated § 1623 cases in 2002. Federal Justice Statistics Research Center, http://fjsrc.urban.org/analysis/t_sec/ stat.cfm?year=2002&stat=2 (select "Select by chapter and section within U.S.C. Title 18;" then select "79—Perjury;" then select "18 1623") (last visited Oct. 6, 2006). Sixty-six of those cases terminated in guilty pleas. Federal Justice Statistics Research Center, http://fjsrc.urban.org/analysis/t_sec/stat.cfm?stat=3&year=2002 (select "Select by chapter and section within U.S.C. Title 18;" then select "79—Perjury;" then select "18 1623") (last visited Oct. 6, 2006). Therefore, only twenty-six out of the ninety-two cases were not plea bargained and fourteen of those were dismissed or *nolle prosequi*. *Id.* This shows that out of the ninety-two terminated § 1623 prosecutions in 2002, only twelve actually went to trial. Thus, the number of cases filed each year is low, and the number of cases that end up in court is even lower. *See also infra* Table 1.

In addition, considering that the number of total terminated cases for 2002 is 80,424, Federal Justice Statistics Research Center, http://fjsrc.urban.org/index.cfm (follow "Defendants in criminal cases closed" hyperlink; then select "2002;" then select "terminating offense;" then select "all values") (last visited Oct. 6, 2006), and the number of § 1623 terminated cases is only ninety-two, then § 1623 cases only accounted for 0.11% of the terminated cases in 2002 and only 0.18% of the terminated cases in 1994. Thus, the low number of § 1623 perjury cases indicates that they are probably a low priority for the court system and that is probably why the circuits are still split about several key aspects of the recantation defense of § 1623. The low number of § 1623 prosecutions and terminations also indicates why neither the United States Supreme Court nor Congress has acted to alleviate the high burden on the defendant to successfully utilize the recantation defense. (Please note that data contained in this table is only from when the most serious offense charged/terminated is 18 U.S.C. § 1623. No data is available for prosecutions where the above referenced statute is not the most serious offense charged/terminated.)

which require that the false testimony has not substantially affected the proceeding and it has not become manifest that such falsity has been or will be exposed, then based on the case law for each prong it is highly unlikely that the witness would be able to successfully recant his false testimony. While Congress's legislative intent was overwhelmingly against the interpretation that both prongs have to be satisfied,[176] the case law construing the provision frustrates its intent by requiring that both prongs of the recantation provision be satisfied.

The inconsistent application of the law by the circuit courts creates problems, because the division causes individuals to speculate about what conduct is prohibited.[177] Congress should amend 18 U.S.C. § 1623. This amendment need only slightly modify the statutory text of § 1623, but it would fulfill the original legislative intent for the recantation provision: to be an inducement for witnesses to correct their false statements. Accordingly, the modifications proposed below would lower the bar of recantation to the point where it could be attainable by a witness.

The first modification would fix the two-prong test so that only one of the two prongs need be satisfied for a successful recantation. As discussed in Part II.E, the ability of a person to satisfy both prongs is next to impossible and has not yet been successful. The second modification is to narrow the manifestation of exposure to only the person who gave the false testimony. Although the case law indicates that any type of knowledge by the person would make the falsity manifest, the burden is too high when the knowledge of the jury and prosecution is included in this prong. The last modification would take away the government's tactical advantage of charging a defendant under both § 1621 and § 1623 for the same statements made under oath. Accordingly, the amendments to § 1623 below are the proper steps to realize the legislative intent for recantation to be an inducement to truthful testimony.

> 18 U.S.C. § 1623 (**additions in bold**)
>
> (d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, **either** the declaration has not substantially affected the proceeding, or it has not become manifest **to the person** that such falsity has been or will be exposed.
>
> * * *
>
> **(f) Prosecution under this statute shall bar prosecution under 18 U.S.C. § 1621 for the same declarations.**

176. *See supra* Part I.A.
177. *See supra* Part II.C.

CONCLUSION

Declarants have very little hope of recanting under current interpretations. Courts have consistently given materiality a broad application, meaning almost any false statement is going to have an impact on the grand jury or jury, even if it is just on the issue of credibility.[178] Likewise, courts have consistently found that once a speaker utters a lie, the window to recant is infinitesimally small, reserved only for immediate recantation in virtually the same breath.[179] Even if a speaker were to recant at that moment, the defense would still be lost if the government can prove that it has become manifest that such falsity has been or will be exposed.[180] They can prove manifestation if they had knowledge already of the lie, the jury heard contradictory testimony which exposed the lie, or the government informed the attorney for the speaker that they were aware of the lie, even where there has been no opportunity for the attorney to have told the speaker of the government's knowledge of the statement's falsity.[181] This effectively precludes any use of recantation as a defense. Clearly, this is not the intent of Congress in enacting § 1623.

The additional hardship facing the speaker is that if recantation were to be available, the government has the choice to charge under § 1621 in any instance where the false statement meets those requirements.[182] These charges can be made instead of § 1623 or in addition to it, creating a catch-22 for the speaker. In order to remove this advantage, the government should have to choose which statute to charge, thus allowing the speaker to use the defense of recantation under § 1623, if it is charged.

One last look at the testimony using the proposed statute establishes that the recommended changes accomplish Congress's intent in enacting § 1623:

> Q. Did you ever receive any clothing from Eddie Martin?
>
> A. Eddie Martin?
>
> Q. When you were in college?
>
> A. College?
>
> Q. Yes.
>
> A. I don't believe so, no.[183]

---

178. *See supra* Part II.A.
179. *See supra* Part II.C.1.
180. *See supra* Part II.C.2.
181. *See supra* Part II.C.2.
182. *See supra* Part II.D.
183. Superseding Indictment, *supra* note 1, at 12 (emphasis omitted).

Applying the proposed statute, the speaker could recant successfully if he immediately (or within a short time after making the statement) admits that he received clothing from Eddie Martin while in college. This would be true even if (1) the government knew he had received clothing when he denied it; (2) the jury knew he had received clothing when he denied it; or (3) the government told the speaker's attorney that the testimony was in doubt. He could also recant even though the testimony was found to be material, because it would not be manifest to the speaker that the testimony was exposed. This opportunity to recant fulfills Congress's intent for § 1623 to serve as an "inducement to the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk of prosecution by doing so."[184] Without change, the finding of the court in *United States v. Awadallah* is foretelling—recantation as a defense is an illusion.[185]

TABLES

Table 1. 18 U.S.C. § 1623 Filed Cases[186]

Year	Filed Cases
2002	88
2001	69
2000	81
1999	65
1998	106
1997	76
1996	115
1995	99
1994	102

184. *See supra* note 14 and accompanying text.

185. *See supra* note 96 and accompanying text.

186. Data from the Federal Justice Statistics Resource Center, http://fjsrc.urban.org/index.cfm (last visited Oct. 6, 2006) (Please note that data contained in this table is only from when the most serious offense charged/terminated is 18 U.S.C. § 1623. No data is available for prosecutions where the above referenced statute is not the most serious offense charged/terminated.)

Table 2. 18 U.S.C. § 1623 Terminated Cases[187]

Year	Terminated Cases	Total for Year	Percentage
2002	92	80,424	0.11%
2001	73	77,145	0.09%
2000	77	76,952	0.10%
1999	89	75,723	0.12%
1998	85	69,769	0.12%
1997	127	64,956	0.20%
1996	90	61,434	0.15%
1995	87	56,480	0.15%
1994	110	61,404	0.18%

187. *Id.*

Table 3. 18 U.S.C. § 1623 Prosecution Outcomes[188]

Year	Convicted - plea guilty	Convicted - plea is nolo	Convicted by jury or guilty but insane	Convicted by court or guilty but insane	Dismissal or nolle prosequi	Acquittal by jury; mistrial; not guilty by insanity	Acquitted by court
2002	66		8	4	14		
2001	58		6		6	2	1
2000	54		10		11	1	1
1999	61		10		13	5	
1998	57		12	2	8	5	1
1997	82		23	4	14	3	1
1996	52	1	15	3	12	6	1
1995	55	1	12		13	6	
1994	68		14		18	10	

188. *Id.*

Table 4. 18 U.S.C. § 1623 Sentences[189]

Year	Not Guilty	Split Sentence	Prison Only	Probation Only	Fine Only	Suspended	Unknown or Unexpected
2002	14	1	50	25		2	
2001	9	0	37	25		2	
2000	13	1	38	24	1	0	
1999	18	1	51	17		2	
1998	14		41	28	1	1	
1997	18	1	82	23		3	
1996	19		53	16		1	1
1995	19		48	20			
1994	28	3	47	32			

189. *Id.*