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# Perjury Under Federal Law: A Brief Overview

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## Summary

Although it now covers more than court proceedings, the definition of perjury has not changed a great deal otherwise since the framing of the Constitution. Blackstone described it as “a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *wilfully, absolutely and falsely*, in a matter *material* to the issue or point in question.”

There are three general federal perjury laws. One, 18 U.S.C. 1621, outlaws presenting material false statements under oath in federal official proceedings. A second, 18 U.S.C. 1623, bars presenting material false statements under oath before or ancillary to federal court or grand jury proceedings. A third, 18 U.S.C. 1622 (subornation of perjury), prohibits inducing or procuring another to commit perjury in violation of either Section 1621 or Section 1623.

In most cases, the courts abbreviate their description of the elements and state that to prove perjury in a judicial context under Section 1623 the government must establish that the defendant “(1) knowingly made a (2) false (3) material declaration (4) under oath (5) in a proceeding before or ancillary to any court or grand jury of the United States.”

In a similar manner, the courts generally favor the encapsulation from *United States v. Dunnigan* to describe the elements of perjury in other contexts under Section 1621: “A witness testifying under oath or affirmation violates this section if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.”

Section 1622 outlaws procuring or inducing another to commit perjury: “Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned for not more than five years, or both,” 18 U.S.C. 1622.

The false statement statute, 18 U.S.C. 1001, is closely akin to the perjury statutes. It outlaws false statements in any matter within the jurisdiction of a federal agency or department, a kind of perjury not under oath.

Moreover, regardless of the offense for which an individual is convicted, the federal sentencing guidelines may call for his sentence to be enhanced as a consequence of any obstruction of justice in the form of perjury or false statements for which he is responsible, if committed during the course of the investigation, prosecution, or sentencing for the offense of his conviction. The enhancement may result in an increase in his term of imprisonment by as much as four years.

This report is available in abbreviated form—without footnotes, quotations, or citations—as CRS Report 98-807, *Perjury Under Federal Law: A Sketch of the Elements*. Both versions have been largely excerpted from CRS Report RL34303, *Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities*. Excerpted portions of RL34303 are also available as follows. CRS Report RS22783, *Obstruction of Justice: An Abridged Overview of Related Federal Criminal Laws*; CRS Report RL34304, *Obstruction of Congress: A Brief Overview of Federal Law Relating to Interference with Congressional Activities*; and CRS Report RS22784, *Obstruction of Congress: An Abridged Overview of Federal Criminal Laws Relating to Interference with Congressional Activities*. All are by Charles Doyle.

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# Introduction

Although it now covers more than court proceedings, the definition of perjury has not changed a great deal otherwise since the framing of the Constitution. Blackstone described it as “a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *wilfully, absolutely and falsely*, in a matter *material* to the issue or point in question.”<sup>1</sup>

Federal perjury laws are found principally in chapter 79 of title 18 of the United States Code.<sup>2</sup> The chapter consists of three sections: Section 1623, under which perjury involving judicial proceedings is most often prosecuted today; the historic perjury provision, Section 1621, now used primarily for cases where Section 1623 is unavailable and in sentencing enhancement cases; and Section 1622 that outlaws subornation of perjury. Section 1001 of title 18—a statute much like the perjury laws but without the requirement that the offender have taken an oath—outlaws material false statements in any matter within the jurisdiction of any federal agency or department, and to a limited extent within the jurisdiction of any federal court or congressional entity.

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<sup>1</sup> IV BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 136-37 (1769) (italics in the original; transliteration added). Blackstone actually borrowed from Coke and noted the various penalties to which it was subject: “The next offense against public justice is when the suit is past its commencement, and come to trial. And that is the crime of wilful and corrupt *perjury*; which is defined by sire Edward Coke [3 Inst. 164], to be a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *wilfully, absolutely and falsely*, in a matter *material* to the issue or point in question. The law takes no notice of any perjury but such as is committed in some court of justice, having power to administer an oath; or before some magistrate or proper officer, invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution: for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. For which reason it is much to be questioned how far any magistrate is justifiable in taking a voluntary *affidavit* in any extrajudicial matter, as it now too frequent upon every petty occasion: since it is more than possible, that by such idle oaths a man may frequently *in soro conscientiae* incur the guilt, and at the same time evade the temporal penalties, of perjury. The perjury must also be wilful, positive, and absolute; not upon surprize, or the like: it also must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid, it is not more penal than in the voluntary extrajudicial oaths before-mentioned. *Subornation* of perjury is the offence of procuring another to take such a false oath, as constitutes perjury in the principal. The punishment of perjury and subornation, as common law, has been various. It was antiently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony. But the statute 5 Eliz. c.9. (if the offender be prosecuted thereon) inflicts the penalty of perpetual infamy, and fine of 40*l.* on the suborner; and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory. Perjury itself is thereby punished with six months imprisonment, perpetual infamy, and fine of 20*l.* or to have both ears nailed to the pillory. But the prosecution is usually carried on for the offence at common law; especially as, to the penalties before inflicted, the statute 2 Geo.II. c.25 superadds a power, for the court to order the offender to be sent to the house of correction for seven years, or to be transported for the same period; and makes it a felony without benefit of clergy to return or escape within the time,” *Id.*

<sup>2</sup> Prohibitions against misconduct very much like perjury are scattered throughout the United States Code. The most widely prosecuted is probably 18 U.S.C. 1001, discussed *infra* that outlaws material false statements made with respect to a matter within the jurisdiction of a department or agency of the United States. See generally, *Twenty-Eighth Annual Survey of White Collar Crime: False Statements and False Claims*, 50 AMERICAN CRIMINAL LAW REVIEW 953 (2013); *Twenty-Eighth Annual Survey of White Collar Crime: Perjury*, 50 AMERICAN CRIMINAL LAW REVIEW 1343 (2013). For a discussion of 18 U.S.C. 1503 and 1505 which outlaw corrupt endeavors to impede the due administration of justice before the courts and executive tribunal and the due exercise of the power of congressional inquiry see CRS Report RL34303, *Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities*.

None of the four are RICO predicate offenses or money laundering predicate offenses.<sup>3</sup> The laws relating to aiding and abetting, accessories after the fact, misprision, and conspiracy,<sup>4</sup> however, apply to all four.<sup>5</sup> Sections 1621 and 1623 state that their prohibitions apply regardless of whether the perjurious conduct occurs overseas or within this country.<sup>6</sup> Section 1001 has no such explicit declaration, but has been held to have extraterritorial application nonetheless.<sup>7</sup>

## Perjury in a Judicial Context (18 U.S.C. 1623)

Congress enacted Section 1623 to avoid in relation to judicial proceedings some of the common law technicalities embodied in the more comprehensive perjury provisions found in Section 1621 and thus “to facilitate perjury prosecutions and thereby enhance the reliability of testimony before federal courts and grand juries.”<sup>8</sup> Unlike Section 1621, Section 1623 permits a conviction in the case of two mutually inconsistent declarations without requiring proof that one of them is false.<sup>9</sup> It recognizes a limited recantation defense.<sup>10</sup> It dispenses with the so-called two-witness rule.<sup>11</sup> And, it employs a “knowing” mens rea standard rather than the more demanding “willfully” standard used in Section 1621.<sup>12</sup>

Parsed into elements, Section 1623 declares that

- I. Whoever
- II. a. under oath or
  - b. in any
    - i. declaration,
    - ii. certificate,
    - iii. verification, or
    - iv. statement

under penalty of perjury as permitted under [Section] 1746 of title 28, United States Code<sup>13</sup>

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<sup>3</sup> 18 U.S.C. 1961(1), 1956(c)(7).

<sup>4</sup> 18 U.S.C. 2, 3, 4, 371.

<sup>5</sup> E.g., *United States v. Atalig*, 502 F.3d 1063, 1065 (9<sup>th</sup> Cir. 2007)(conspiracy to violate 18 U.S.C. 1001); cf., *United States v. Dunne*, 324 F.3d 1158, 1162-163 (10<sup>th</sup> Cir. 2003).

<sup>6</sup> 18 U.S.C. 1621 (“This section is applicable whether the statement or subscription is made within or without the United States”); 18 U.S.C. 1623(b) (“This section is applicable whether the conduct occurred within or without the United States”).

<sup>7</sup> *United States v. Walczak*, 783 F.2d 852, 854-55 (9<sup>th</sup> Cir. 1986).

<sup>8</sup> *Dunn v. United States*, 442 U.S. 100, 107 (1979), citing, S.REP.NO. 91-617, at 58-9 (1969)(internal citations omitted).

<sup>9</sup> 18 U.S.C. 1623(c).

<sup>10</sup> 18 U.S.C. 1623(d).

<sup>11</sup> 18 U.S.C. 1623(e).

<sup>12</sup> 18 U.S.C. 1623(a).

<sup>13</sup> “Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(continued...)

III. in any proceeding before or ancillary to

- a. any court or
- b. grand jury of the United States

IV. knowingly

V. a. makes any false material declaration or

- b. makes or uses any other information, including any
  - i. book,
  - ii. paper,
  - iii. document,
  - iv. record,
  - v. recording, or
  - vi. 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.<sup>14</sup>

In most cases, the courts abbreviate their description of the elements and state in one form or another that to prove perjury the government must establish that the defendant (1) knowingly made a (2) false (3) material declaration (4) under oath (5) in a proceeding before or ancillary to any court or grand jury of the United States.<sup>15</sup>

The allegedly perjurious declaration must be presented in a “proceeding before or ancillary to any court or grand jury of the United States.” An interview in an attorney’s office in preparation for a judicial hearing cannot be considered such an ancillary proceeding,<sup>16</sup> but the phrase “proceedings ancillary to” court or grand jury proceedings does cover proceedings to take depositions in connection with civil litigation,<sup>17</sup> as well as a variety of pretrial proceedings in criminal cases,<sup>18</sup> including habeas proceedings,<sup>19</sup> bail hearings,<sup>20</sup> venue hearings,<sup>21</sup> or suppression hearings.<sup>22</sup>

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(...continued)

“(1) If executed without the United States: ‘I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature).’.

“(2) If executed within the United States, its territories, possessions, or commonwealths: ‘I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature).’.”

<sup>14</sup> 18 U.S.C. 1623(a).

<sup>15</sup> *United States v. Strohm*, 671 F.3d 1173, 1178 (10<sup>th</sup> Cir. 2011)(brackets in the original)(“To prove perjury under §1623(a), the government must demonstrate (1) the defendant made a declaration under oath before a [court]; (2) such declaration was false; (3) the defendant knew the declaration was false and (4) the false declaration was material to the [court’s] inquiry”); *United States v. Ramirez*, 635 F.3d 249, 260 (6<sup>th</sup> Cir. 2011)(“A conviction under §1623(a) requires proof that the defendant (1) knowingly made, (2) a materially false declaration (3) under oath (4) before a federal grand jury”); *United States v. Gorman*, 613 F.3d 711, 715-16 (7<sup>th</sup> Cir. 2010)(“To support a conviction for perjury beyond a reasonable doubt, the government had the burden of proving that (1) the defendant, while under oath, testified falsely before the grand jury; (2) his testimony related to some material matter; and (3) he knew that testimony was false”); see also, *United States v. Wu*, 716 F.3d 159, 173 (5<sup>th</sup> Cir. 2013)(“To obtain a perjury conviction, the Government must prove (1) that the defendant’s statements were material; (2) false; and (3) at the time the statements were made the defendant did not believe them to be true”).

<sup>16</sup> *Dunn v. United States*, 442 U.S. 100, 111-12 (1979).

<sup>17</sup> *Id.*; *United States v. Wu*, 716 F.3d 159, 173 (5<sup>th</sup> Cir. 2013); *United States v. Wilkinson*, 137 F.3d 214, 225 (4<sup>th</sup> Cir. 1998); *United States v. Holland*, 22 F.3d 1040, 1047-48 (11<sup>th</sup> Cir. 1994); *United States v. McAfee*, 8 F.3d 1010, 1013-(continued...)

The Supreme Court's observation that a statement that is misleading but literally true cannot support a conviction under Section 1621 because it is not false<sup>23</sup> applies with equal force to perjury under Section 1623.<sup>24</sup> Similarly, perjury cannot be the product of confusion, mistake, or faulty memory, but must be a statement that the defendant knows is false,<sup>25</sup> although this requirement may be satisfied with evidence that the defendant was deliberately ignorant or willfully blind to the fact that the statement was false.<sup>26</sup> On the other hand, “[a] question that is truly ambiguous or which affirmatively misleads the testifier can never provide a basis for a finding of perjury, as it could never be said that one intended to answer such a question untruthfully.”<sup>27</sup> Yet ambiguity will be of no avail if the defendant understands the question and answers falsely nevertheless.<sup>28</sup>

Materiality is perhaps the most nettlesome of perjury's elements. It is usually said that a statement is material “if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to whom it is addressed.”<sup>29</sup> This definition is not easily applied when the precise nature of the underlying inquiry remains somewhat undefined such as in grand jury

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(...continued)

14 (5<sup>th</sup> Cir. 1993).

<sup>18</sup> *United States v. Farmer*, 137 F.3d 1265 (11<sup>th</sup> Cir. 1998).

<sup>19</sup> *United States v. Johnson*, 325 F.3d 205, 209 (4<sup>th</sup> Cir. 2003).

<sup>20</sup> *United States v. Greene*, 591 F.2d 471 (8<sup>th</sup> Cir. 1979).

<sup>21</sup> *United States v. Durham*, 139 F.3d 1325 (10<sup>th</sup> Cir. 1998).

<sup>22</sup> *United States v. Renteria*, 138 F.3d 1328 (10<sup>th</sup> Cir. 1998).

<sup>23</sup> *Bronston v. United States*, 409 U.S. 352, 358-59 (1973).

<sup>24</sup> *United States v. Gorman*, 613 F.3d 711, 716 (7<sup>th</sup> Cir. 2010); *United States v. Thomas*, 612 F.3d 1107, 1114-115 (9<sup>th</sup> Cir. 2010); *United States v. Richardson*, 421 F.3d 17, 32-3 (1<sup>st</sup> Cir. 2005); *United States v. Shotts*, 145 F.3d 1289, 1297 (11<sup>th</sup> Cir. 1998); *United States v. Hairston*, 46 F.3d 361, 375 (4<sup>th</sup> Cir. 1996).

<sup>25</sup> *United States v. Fawley*, 137 F.3d 458, 466 (7<sup>th</sup> Cir. 1998); *United States v. Reveron Martinez*, 836 F.2d 684, 689 (1<sup>st</sup> Cir. 1988); *cf.*, *United States v. Dunnigan*, 507 U.S. 87, 94 (1993).

<sup>26</sup> *United States v. Fawley*, 137 F.3d 458, 466-67 (7<sup>th</sup> Cir. 1998).

<sup>27</sup> *United States v. Richardson*, 421 F.3d 17, 33 (1<sup>st</sup> Cir. 2005); see also, *United States v. Strohm*, 671 F.3d 1173, 1179-1181 (10<sup>th</sup> Cir. 2011) (“An answer is not a knowing false statement if the witness responds to an ambiguous question with what he or she believes to be a truthful answer.... The case law has divided linguistic ambiguity into one of two flavors—fundamental or arguable.... A question is fundamentally ambiguous in narrow circumstances. To qualify,... the question itself is excessively vague, making it impossible to know—without guessing—the meaning of the question and whether a witness intended to make a false response ... But fundamental ambiguity is the exception, not the rule.... A question is arguably ambiguous where more than one reasonable interpretation of a question exists”); *United States v. DeZarn*, 157 F.3d 1042, 1049 (6<sup>th</sup> Cir. 1998); see also *United States v. Turner*, 500 F.3d 685, 689 (8<sup>th</sup> Cir. 2007) (“If, however, a question is fundamentally vague or ambiguous, then an answer to that question cannot sustain a perjury conviction”).

<sup>28</sup> *United States v. Strohm*, 671 F.3d 1173, 1178 (10<sup>th</sup> Cir. 2011) (“Simply plumbing a question for *post hoc* ambiguity will not defeat a perjury conviction where the evidence demonstrates the defendant understood the question in context and gave a knowingly false answer”); *United States v. McKenna*, 327 F.3d 830, 841 (9<sup>th</sup> Cir. 2003) (“A question leading to a statement supporting a perjury conviction is not fundamentally ambiguous where the jury could conclude beyond a reasonable doubt that the defendant understood the question as did the government and that so understood, the defendant's answer was false”); *United States v. Brown*, 459 F.3d 509, 529 (5<sup>th</sup> Cir. 2006); *United States v. Turner*, 500 F.3d 685, 690 (8<sup>th</sup> Cir. 2007); *United States v. Gorman*, 613 F.3d 711, 716 (7<sup>th</sup> Cir. 2010).

<sup>29</sup> *United States v. Brown*, 459 F.3d 509, 529 (5<sup>th</sup> Cir. 2006), citing, *United States v. Gaudin*, 515 U.S. 506, 509 (1995), and *Kungys v. United States*, 485 U.S. 759, 770 (1988); see also, *United States v. Strohm*, 671 F.3d 1173, 1186 (10<sup>th</sup> Cir. 2011); *United States v. Benkahla*, 530 F.3d 300, 310 (4<sup>th</sup> Cir. 2008); *United States v. McKenna*, 327 F.3d 830, 839 (9<sup>th</sup> Cir. 2003); *United States v. Lee*, 359 F.3d 412, 417 (6<sup>th</sup> Cir. 2003); *United States v. Durham*, 139 F.3d 1325, 1329 (10<sup>th</sup> Cir. 1998).

proceedings or in depositions at the discovery stage of a civil suit. On the civil side, the lower federal courts appear divided between the view (1) that a statement in a deposition 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” and (2) that a statement is material “if the topic of the statement is discoverable and the false statement itself had a tendency to affect the outcome of the underlying civil suit for which the deposition was taken.”<sup>30</sup>

In the case of perjury before the grand jury, rather than articulate a single standard the courts have described several circumstances under which false testimony may be considered material.<sup>31</sup> In any event, a statement is no less material because it did not or could not divert the decisionmaker.<sup>32</sup>

The courts seem to have had less difficulty dealing with a materiality issue characterized as the perjury trap doctrine. The doctrine arises where a witness is called for the sole purpose of eliciting perjurious testimony from him.<sup>33</sup> Under such circumstances it is said the tribunal has no valid purpose to which a perjurious statement could be considered material. The doctrine poses no bar to prosecution in most cases, however, since the government is usually able to identify some valid reason for the grand jury’s inquiries.<sup>34</sup>

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<sup>30</sup> *United States v. Wilkinson*, 137 F.3d 214, 225 (4<sup>th</sup> Cir. 1998), comparing, *United States v. Kross*, 14 F.3d 751, 754 (2d Cir. 1994), and *United States v. Holley*, 942 F.2d 916, 924 (5<sup>th</sup> Cir. 1991), with, *United States v. Adams*, 870 F.2d 1140, 1146-148 (6<sup>th</sup> Cir. 1989) and *United States v. Clark*, 918 F.2d 843, 846 (9<sup>th</sup> Cir. 1990), overruled on other grounds, *United States v. Keys*, 133 F.3d 1282, 1286 (9<sup>th</sup> Cir., 1998); see also *United States v. McKenna*, 327 F.3d 830, 839-40 (9<sup>th</sup> Cir. 2003)(acknowledging the division and continuing to adhere to the view expressed in *Clark*).

<sup>31</sup> E.g., *United States v. Brown*, 459 F.3d 509, 530 n.18 (5<sup>th</sup> Cir. 2006)(“The materiality requirement of §1623 has been satisfied in cases where the false testimony was relevant to any subsidiary issue or was capable of supplying a link to the main issue under consideration”); *United States v. Silveira*, 426 F.3d 514, 518 (1<sup>st</sup> Cir. 2005)(“A statement of witness to a grand jury is material if the statement is capable of influencing the grand jury as to any proper matter pertaining to its inquiry or which might have influenced the grand jury or impeded its inquiry. To be material, the statement need not directly concern an element of the crime being investigated, nor need it actually influence the jury”); *United States v. Burke*, 425 F.3d 400, 414 (7<sup>th</sup> Cir. 2005)(“Even potential interference with a line of inquiry can establish materiality”); *United States v. Blanton*, 281 F.3d 771, 775 (8<sup>th</sup> Cir. 2002)(“The statements need not be material to any particular issue, but may be material to any proper matter of inquiry”); *United States v. Plumley*, 207 F.3d 1086, 1095-96 (8<sup>th</sup> Cir. 2000)(“Although it is true that this particular question did not address the ultimate issue. . at the time . . it is not thereby rendered immaterial” (citing cases in which a statement before the grand jury was found to be material when a “truthful answer would have raised questions about the role of others . . when [the] witness obscures [his] whereabouts or involvement in offense . . [and] about peripheral matters [that] can become material when considered in context”).

<sup>32</sup> *United States v. Strohm*, 671 F.3d 1173, 1186 (10<sup>th</sup> Cir. 2011); *United States v. Silveira*, 426 F.3d 514, 518 (1<sup>st</sup> Cir. 2005); *United States v. Lee*, 359 F.3d 412, 416 (6<sup>th</sup> Cir. 2004); *United States v. McKenna*, 327 F.3d 830, 839 (9<sup>th</sup> Cir. 2003).

<sup>33</sup> *Brown v. United States*, 245 F.2d 549, 555 (8<sup>th</sup> Cir. 1957), quoting, *United States v. Icardi*, 140 F.Supp. 383, 384-88 (D.D.C. 1956); but see *United States v. Burke*, 425 F.3d 400, 408 (7<sup>th</sup> Cir. 2005)(“We have not embraced this doctrine, however, and do not see any reason to adopt it now”)(internal citations omitted).

<sup>34</sup> *United States v. McKenna*, 327 F.3d 830, 837 (9<sup>th</sup> Cir. 2003)(“Here, the government did not use its investigatory powers to question McKenna before a grand jury. Rather, it merely questioned McKenna in its role as a defendant during the pendency of a civil action in which she was the plaintiff. The perjury trap doctrine is inapplicable to McKenna’s case for this reason”); *United States v. Regan*, 103 F.3d 1073, 1079 (2d Cir. 1997)(“[w]e have noted that the existence of a legitimate basis for an investigation and for particular questions answered falsely precludes any application of the perjury trap doctrine”); *United States v. Chen*, 933 F.2d 793, 797 (9<sup>th</sup> Cir. 1991)(“[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 within its jurisdiction, the perjury trap doctrine is, by definition, inapplicable”), quoting, *United States v. Devitt*, 499 F.2d 135, 140 (7<sup>th</sup> Cir. 1974) and *United States v. Chevoor*, 526 F.2d 178, 185 (1<sup>st</sup> Cir. 1975).

Subsection 1623(c) permits a perjury conviction simply on the basis of two necessarily inconsistent material declarations rather than a showing that one of the two statements is false.<sup>35</sup> Conviction does require a showing, however, that the two statements were made under oath; it is not enough to show that one was made under oath and the other was made in the form of an affidavit signed under penalty of perjury.<sup>36</sup> Moreover, the statements must be so inherently contradictory that one of them of necessity must be false.<sup>37</sup>

Some years ago, the Supreme Court declined to reverse an earlier ruling that “[t]he general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment.”<sup>38</sup> Since the two witness rule rests on the common law rather than on a constitutional foundation, it may can be abrogated by statute without offending constitutional principles.<sup>39</sup> Subsection 1623(e) permits a perjury conviction without compliance with this traditional two witness rule.<sup>40</sup>

Most of the other subsections of Section 1623 are designed to overcome obstacles which the common law placed in the path of a successful perjury prosecution. Subsection 1623(d), in contrast, offers a defense unrecognized at common law. The defense is stated in fairly straightforward terms, “[w]here 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.”<sup>41</sup> Although phrased in different terms, the courts seem to

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<sup>35</sup> 18 U.S.C. 1623(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”); *United States v. Dunn*, 442 U.S. 100, 108 (1979)(“By relieving the government of the burden of proving which of two or more inconsistent declarations was false, see §1623(c), Congress sought to afford greater assurance that testimony obtained in grand jury and court proceedings will aid the cause of truth”).

<sup>36</sup> *United States v. Jaramillo*, 69 F.3d 388, 390 (9<sup>th</sup> Cir. 1995).

<sup>37</sup> *United States v. McAfee*, 8 F.3d 1010, 1014-15 (5<sup>th</sup> Cir. 1993)(“The Government must show that the statements are so irreconcilable that one of the statements is ‘necessarily false.’ We find the Fourth Circuit’s explanation of §1623(c) instructive and adopt the standard set forth in *United States v. Flowers*, 813 F.2d 1320 (4<sup>th</sup> Cir. 1987). In *Flowers*, the court concluded that subsection 1623(c) ‘requires a variance in testimony that extends beyond mere vagueness, uncertainty, or equivocality. Even though two declarations may differ from one another, the §1623(c) standard is not met unless taking them into context, they are so different that if one is true there is no way the other can also be true.’” *Id.* at 1324; see also *United States v. Porter*, 994 F.2d 470 (8<sup>th</sup> Cir. 1993)).

<sup>38</sup> *Weiler v. United States*, 323 U.S. 606, 607 (1945).

<sup>39</sup> *United States v. Ruggiero*, 472 F.2d 599, 606 (2d Cir. 1973); *United States v. Diggs*, 560 F.2d 266, 269 (7<sup>th</sup> Cir. 1977)(citing cases in accord).

<sup>40</sup> 18 U.S.C. 1623(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”). See also, *United States v. Kemp*, 500 F.3d 257, 294 (3d Cir. 2007); *United States v. Hasan*, 609 F.3d 1121, 1139 (10<sup>th</sup> Cir. 2010).

<sup>41</sup> 18 U.S.C. 1623(d); cf., *United States v. DeLeon*, 603 F.3d 397, 404-405 (7<sup>th</sup> Cir. 2010).

agree that repudiation of the false testimony must be specific and thorough.<sup>42</sup> There is some disagreement whether a recanting defendant must be denied the defense if both the substantial impact and manifest exposure conditions have been met or if the defense must be denied if either condition exists. Most courts have concluded that the presence of either condition dooms the defense.<sup>43</sup>

Early construction required that a defendant establish both that his false statement had not substantially affected the proceeding before his recantation *and* that it had not become manifest that his false statement would be exposed.<sup>44</sup> One more recent appellate case, however, decided that the defense should be available to a witness who could show a want of *either* an intervening adverse impact *or* of likely exposure of his false statement.<sup>45</sup> Even without the operation of subsection 1623(d), relatively contemporaneous corrections of earlier statements may negate any inference that the witness is knowingly presenting false testimony and thus preclude conviction for perjury.<sup>46</sup>

## Perjury Generally (18 U.S.C. 1621)

When Congress passed Section 1623, it did not repeal Section 1621 either explicitly or by implication; where its proscriptions overlap with those of Section 1623, the government is free to choose under which it will prosecute.<sup>47</sup> Since Section 1623 frees prosecutors from many of the common law requirements of Section 1621, it is perhaps not surprising that they ordinarily elect to prosecute under Section 1623. Section 1623 does outlaw perjury under a wider range of circumstances than Section 621; it prohibits perjury before official proceedings generally—both judicial and nonjudicial. Separated into its elements, the section provides that

(1)

- I. Whoever having taken an oath
- II. before a competent tribunal, officer, or person,

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<sup>42</sup> *United States v. Wiggan*, 700 F.3d 1204, 1216 (9<sup>th</sup> Cir. 2012)(internal citations and quotation marks omitted) (“Recantation requires a defendant to renounce and withdraw the prior statement. And the defendant must unequivocally repudiate his prior testimony to satisfy § 1623(d). It is not enough if the defendant merely attempted to explain his inconsistent statements, but never really admitted to the facts in question”); *United States v. Tobias*, 863 F.2d 685, 689 (9<sup>th</sup> Cir. 1988)(unequivocal repudiation); *United States v. Scivola*, 766 F.2d 37, 45 (1<sup>st</sup> Cir. 1985)(implicit recantation is insufficient); *United States v. Goguen*, 723 F.2d 1012, 1017 (1<sup>st</sup> Cir. 1983)(outright retraction and repudiation).

<sup>43</sup> *United States v. Sherman*, 150 F.3d 306, 313-18 (3d Cir. 1998); *United States v. Fornaro*, 894 F.2d 508, 510-11 (2d Cir. 1990); *United States v. Scivola*, 766 F.2d 37, 45 (1<sup>st</sup> Cir. 1985); *United States v. Denison*, 663 F.2d 611, 615 (5<sup>th</sup> Cir. 1981); *United States v. Moore*, 613 F.2d 1029, 1043 (D.C.Cir. 1979); *contra, United States v. Smith*, 35 F.3d 344, 345-47 (8<sup>th</sup> Cir. 1994).

<sup>44</sup> *United States v. Moore*, 613 F.2d 1029, 1043-44 (D.C. Cir. 1979); *United States v. Srimgeour*, 636 F.2d 1019, 1021 (5<sup>th</sup> Cir. 1980); *United States v. Scivola*, 766 F.2d 37, 45 (1<sup>st</sup> Cir. 1985); *United States v. Formaro*, 894 F.2d 508, 510-11 (2d Cir. 1990).

<sup>45</sup> *United States v. Smith*, 35 F.3d 344, 345 (8<sup>th</sup> Cir. 1994).

<sup>46</sup> *United States v. McAfee*, 8 F.3d 1010, 1014 (5<sup>th</sup> Cir. 1993).

<sup>47</sup> *United States v. Sherman*, 150 F.3d 306, 312-13 (3d Cir. 1998); *United States v. Ruggiero*, 472 F.2d 599, 606 (2d Cir. 1973).

III. in any case in which a law of the United States authorizes an oath to be administered,

IV. a. that he will

- i. testify,
- ii. declare,
- iii. depose, or
- iv. certify truly, or

b. that any written

- i. testimony,
- ii. declaration,
- iii. deposition, or
- iv. certificate

by him subscribed, is true,

V. willfully and contrary to such oath

VI. a. states or

b. subscribes

any material matter which he does not believe to be true; or

(2)

I. Whoever in any

- a. declaration,
- b. certificate,
- c. verification, or
- d. statement

under penalty of perjury as permitted under [Section ]1746 of title 28, United States Code,

II. willfully subscribes as true

III. any material matter

IV. 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.<sup>48</sup>

The courts generally favor an abbreviated encapsulation such as the one found in *United States v. Dunnigan*: “A witness testifying under oath or affirmation violates this section if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.”<sup>49</sup>

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<sup>48</sup> 18 U.S.C. 1621.

<sup>49</sup> *United States v. Dunnigan*, 507 U.S. 87, 94 (1993); *United States v. McKenna*, 327 F.3d 830, 838 (9<sup>th</sup> Cir. 2003); *United States v. Singh*, 291 F.3d 756, 763 n.4 (11<sup>th</sup> Cir. 2002); *United States v. Nash*, 175 F.3d 429, 438 (6<sup>th</sup> Cir. 1999); see also *United States v. Dumeisi*, 424 F.3d 566, 582 (7<sup>th</sup> Cir. 2005) (“the elements of perjury are (1) testimony under oath before a competent tribunal, (2) in a case in which United States law authorizes the administration of an oath, (3) false testimony, (4) concerning a material matter, (5) with the willful intent to provide false testimony”).

Perjury is only that testimony which is false. Thus, testimony that is literally true, even if deceptively so, cannot be considered perjury for purposes of a prosecution under Section 1621.<sup>50</sup> Moreover, Section 1621 requires compliance with “the two witness rule” to establish that a statement is false. Under the rule, “the uncorroborated oath of one witness is not sufficient to establish the falsity of the testimony of the accused as set forth in the indictment as perjury.”<sup>51</sup> Thus, conviction under Section 1621 requires that the government “establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances.”<sup>52</sup> If the rule is to be satisfied with corroborative evidence, the evidence must be trustworthy and support the account of the single witness upon which the perjury prosecution is based.<sup>53</sup>

The test for materiality under Section 1621 is whether the false statement “has a natural tendency to influence or [is] capable of influencing the decision-making body to which it [is] addressed.”<sup>54</sup>

Conviction under Section 1621 requires not only that the defendant knew his statement was false (“which he does not believe to be true”), but that his false statement is “willfully” presented. There is but scant authority on precisely what “willful” means in this context. The Supreme Court in dicta has indicated that willful perjury consists of “*deliberate* material falsification under oath.”<sup>55</sup> Other courts have referred to it as acting with an “intent to deceive”<sup>56</sup> or as acting “intentionally.”<sup>57</sup>

Although a contemporaneous correction of a false statement may demonstrate the absence of the necessary willful intent to commit perjury, the crime is completed when the false statement is presented to the tribunal; without a statute such as that found in Section 1623, recantation is no defense nor does it bar prosecution.<sup>58</sup>

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<sup>50</sup> *Bronston v. United States*, 409 U.S. 352, 362 (1972) (“It may well be that petitioner’s answers were not guileless but were shrewdly calculated to evade. Nevertheless ... any special problems arising from the literally true but unresponsive answer are to be remedied through the questioner’s acuity and not by a federal perjury prosecution”); see also *United States v. McKenna*, 327 F.3d 830, 841 (9<sup>th</sup> Cir. 2003); *United States v. Roberts*, 308 F.3d 1147, 1152 (11<sup>th</sup> Cir. 2002); *United States v. DeZarn*, 157 F.3d 1042, 1047-48 (6<sup>th</sup> Cir. 1998).

<sup>51</sup> *Hammer v. United States*, 271 U.S. 620, 626 (1926).

<sup>52</sup> *Weiler v. United States*, 323 U.S. 606, 607 (1945); *United States v. Stewart*, 433 F.3d 273, 315 (2d Cir. 2006); *United States v. Chaplin*, 25 F.3d 1373, 1377 (7<sup>th</sup> Cir. 1994).

<sup>53</sup> *Weiler v. United States*, 323 U.S. 606, 610 (1945); *United States v. Stewart*, 433 F.3d 273, 315 (2d Cir. 2006)(“The rule is satisfied by the direct testimony of a second witness or by other evidence of independent probative value, circumstantial or direct, which is of a quality to assure that a guilty verdict is solidly founded. The independent evidence must, by itself, be inconsistent with the innocence of the defendant. However, the corroborative evidence need not, it itself, be sufficient, if believed to support a conviction”).

<sup>54</sup> *United States v. McKenna*, 327 F.3d 830, 839 (9<sup>th</sup> Cir. 2003); *United States v. Roberts*, 308 F.3d 1147, 1155 (11<sup>th</sup> Cir. 2002); *United States v. Allen*, 892 F.2d 66, 67 (10<sup>th</sup> Cir. 1989); *United States v. Moreno Morales*, 815 F.2d 725, 747 (1<sup>st</sup> Cir. 1987); see also *United States v. Wallace*, 597 F.3d 794, 801 (6<sup>th</sup> Cir. 2010)(“A false declaration satisfies the materiality requirement if a truthful statement might have assisted or influenced the jury in its investigation”).

<sup>55</sup> *United States v. Norris*, 300 U.S. 564, 574 (1937)(emphasis added).

<sup>56</sup> *United States v. Rose*, 215 F.2d 617, 622-23 (3d Cir. 1954).

<sup>57</sup> *United States v. Friedman*, 854 F.2d 535, 560 (2d Cir. 1988); *United States v. Mounts*, 35 F.3d 1208, 1219 (7<sup>th</sup> Cir. 1994).

<sup>58</sup> *United States v. Norris*, 300 U.S. 564, 574 (1934); *United States v. McAfee*, 8 F.3d 1010, 1017 (5<sup>th</sup> Cir. 1993).

## **Subornation of Perjury (18 U.S.C. 1622)**

Section 1622 outlaws procuring or inducing another to commit perjury: “Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned for not more than five years, or both,” 18 U.S.C. 1622. The crime consists of two elements—(1) an act of perjury committed by another (2) induced or procured by the defendant. Perjury under either Section 1621 or Section 1623 will support a conviction for subornation under Section 1622,<sup>59</sup> but proof of the commission of an act of perjury is a necessary element of subornation.<sup>60</sup> Although the authorities are exceptionally sparse, it appears that to suborn one must know that the induced statement is false and that at least to suborn under Section 1621 one must also knowingly and willfully induce.<sup>61</sup> Subornation is only infrequently prosecuted as such perhaps because of the ease with which it can now be prosecuted as an obstruction of justice under either 18 U.S.C. 1503 or 1512<sup>62</sup> which unlike Section 1622 do not insist upon suborner success as a prerequisite to prosecution.<sup>63</sup>

## **False Statements (18 U.S.C. 1001)**

The general false statement statute, 18 U.S.C. 1001, outlaws false statements, concealment, or false documentation in any matter within the jurisdiction of any of the three branches of the federal government, although it limits application in the case of Congress and the courts.<sup>64</sup> More specifically it states:

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<sup>59</sup> *United States v. Endo*, 635 F.2d 321, 322 (4<sup>th</sup> Cir. 1980).

<sup>60</sup> *United States v. Hairston*, 46 F.3d 361, 376 (4<sup>th</sup> Cir. 1995)(if the underlying perjury conviction is reversed for insufficient evidence, the subornation conviction must likewise be reversed); see also *United States v. Silverman*, 745 F.2d 1386, 1394 (11<sup>th</sup> Cir. 1984).

<sup>61</sup> *Rosen v. N.L.R.B.*, 735 F.2d 564, 575 n.19 (4<sup>th</sup> Cir. 1980)(“it is true that a necessary predicate of the charge of subornation of perjury is the suborner’s belief that the testimony sought is in fact false”); *Petite v. United States*, 262 F.2d 788, 794 (4<sup>th</sup> Cir. 1959)(“[i]t is essential to subornation of perjury that the suborner should have known or believed or have had good reason to believe that the testimony given would be false, that he should have known or believed that the witness would testify willfully and corruptly, and with knowledge of the falsity; and that he should have knowingly and willfully induced or procured the witness to give such false testimony”)(*Petite* only refers to Section 1621 since it was decided prior to the enactment of Section 1623).

<sup>62</sup> *United States v. Miller*, 161 F.3d 977, 982-84 (6<sup>th</sup> Cir. 1998).

<sup>63</sup> 18U.S.C. 1503 (emphasis added) (“Whoever … *endeavors* to influence, obstruct, or impede the due administration of justice … ”); 1512 (b) (emphasis added) (“Whoever … corruptly persuades another person, or attempts to do so … with intent to influence … the testimony of any person in an official proceeding … ”).

<sup>64</sup> There are scores of more limited false statement statutes that relate to particular agencies or activities and include 8 U.S.C. 1160(b)(7)(A) (applications for immigration status); 15 U.S.C. 158 (China Trade Act corporate personnel); 15 U.S.C. 645 (Small Business Administration); 15 U.S.C. 714m (Commodity Credit Corporation); 16 U.S.C. 831t (TVA); 18 U.S.C. 152 (bankruptcy); 18 U.S.C. 287 (false or fraudulent claims against the United States); 18 U.S.C. 288 (postal losses); 18 U.S.C. 289 (pensions); 18 U.S.C. 541 (entry of goods falsely classified); 18 U.S.C. 542 (entry of goods by means of false statements); 18 U.S.C. 550 (refund of duties); 18 U.S.C. 1003 (fraudulent claims against the United States); 18 U.S.C. 1007 (FDIC transactions); 18 U.S.C. 1011 (federal land bank mortgage transactions); 18 U.S.C. 1014 (loan or credit applications in which the United States has an interest); 18 U.S.C. 1015 (naturalization, citizenship or alien registry); 18 U.S.C. 1019 (false certification by consular officer); 18 U.S.C. 1020 (highway projects); 18 U.S.C. 1022 (false certification concerning material for the military); 18 U.S.C. 1027 (ERISA); 18 U.S.C. 1542 (passport applications); 18 U.S.C. 1546 (fraud in connection with visas, permits and other documents); 22 U.S.C. 1980 (compensation for loss of commercial fishing vessel or gear); 22 U.S.C. 4221 (American diplomatic personnel); 22 U.S.C. 4222 (presentation of forged documents to United States foreign service personnel); 42 U.S.C. 408 (old age (continued...))

- I. Except as otherwise provided in this section,
- II. whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States,
- III. knowingly and willfully—
- IV. a. falsifies, conceals, or covers up by any trick, scheme, or device a material fact;  
b. makes any materially false, fictitious, or fraudulent statement or representation; or  
c. makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A [sexual abuse], 109B [sex offender registration], 110 [sexual exploitation], or 117 [transportation for illicit sexual purposes], or section 1591 [sex trafficking], then the term of imprisonment imposed under this section shall be not more than 8 years.<sup>65</sup>

The courts' description of the elements will sometimes be couched in terms of the form of deception at hand—false statement,<sup>66</sup> concealment,<sup>67</sup> or false documentation.<sup>68</sup> On other occasions the courts will simply treat concealment or false documentation as a form of false statement.<sup>69</sup>

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(...continued)

claims); 42 U.S.C. 1320a-7b (Medicare).

<sup>65</sup> 18 U.S.C. 1001(a).

<sup>66</sup> *United States v. Castro*, 704 F.3d 125, 139 (3d Cir. 2013) (“To establish a violation of §1001, the government is required to prove each of the following five elements: (1) that the accused made a statement or representation; (2) that the statement or representation was false; (3) that the false statement was made knowingly and willfully; (4) that the statement or representation was material; and (5) that the statement or representation was made in a matter within the jurisdiction of the federal government”); *United States v. Hamilton*, 699 F.3d 356, 362 (4<sup>th</sup> Cir. 2012); *United States v. Abrahem*, 678 F.3d 370, 373 (5<sup>th</sup> Cir. 2012); *United States v. Geisen*, 612 F.3d 471, 489 (6<sup>th</sup> Cir. 2010); *United States v. Dinga*, 609 F.3d 904, 907 (7<sup>th</sup> Cir. 2010).

<sup>67</sup> *United States v. White Eagle*, 721 F.3d 1108, 1116 (9<sup>th</sup> Cir. 2013) (“[A] conviction under 18 U.S.C. §1001(a)(2) requires that (1) the defendant had a duty to disclose material information, (2) the defendant falsified, concealed, or covered up such a fact by trick, scheme, or fraud, (3) the falsified, concealed, or covered up fact was material, (4) the falsification and/or concealment was knowing and willful, and (5) the material fact was within the jurisdiction of the Executive Branch”); *United States v. Moore*, 446 F.3d 671, 677 (7<sup>th</sup> Cir. 2006).

<sup>68</sup> *United States v. McGauley*, 279 F.3d 62, 69 (1<sup>st</sup> Cir. 2002) (“To establish a violation of 18 U.S.C. 1001, the government must prove that the defendant knowingly and willfully made or used a false writing or document, in relation to a matter with the jurisdiction of the United States government with knowledge of its falsity”); *United States v. Blankenship*, 382 F.3d 1110, 1131-132 (11<sup>th</sup> Cir. 2004).

<sup>69</sup> *United States v. Boffil-Rivera*, 607 F.3d 736, 740 (11<sup>th</sup> Cir. 2010) (“To sustain a conviction for violation of 18 U.S.C. section 1001, the government must prove (1) that a statement was made; (2) that it was false; (3) that it was material; (4) that it was made with specific intent; and (5) that it was within the jurisdiction of an agency of the United States.... Falsity under section 1001 can be established by a false representation or by concealment of a material fact”); *United States v. White*, 492 F.3d 380, 396 (6<sup>th</sup> Cir. 2007) (“Sufficient evidence also supports Defendant White’s conviction for use of a false document. Title 18 U.S.C. §1001(a)(3) prohibits ‘knowingly and willfully mak[ing] or us[ing] any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.’ 18 U.S.C. §1003(a)(3). Here, the government must prove (1) the defendant made a statement; (2) the statement is false or fraudulent; (3) the statement is material; (4) the defendant made the statement knowingly and willfully; and (5) the statement pertained to an activity within the jurisdiction of a federal agency”).

Section 1001 also imposes a limitation upon an offense that involves matters within the jurisdiction of either the judicial or legislative branch:

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or (2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate. 18 U.S.C. 1001(b),(c).

The defendant must establish his right to the benefits of Section 1001(b)'s judicial limitation exception.<sup>70</sup> Section 1001(c) establishes additional elements for a false statement offense in a legislative context,<sup>71</sup> which the government must establish.

A matter is within the jurisdiction of a federal entity when it involves a matter “confided to the authority of a federal agency or department ... A department or agency has jurisdiction, in this sense, when it has power to exercise authority in a particular situation. Understood in this way, the phrase ‘within the jurisdiction’ merely differentiates the official, authorized functions of a agency or department from matters peripheral to the business of that body.”<sup>72</sup> Several courts have held that the phrase contemplates coverage of false statements made to state, local, or private entities but relating to matters that involve federal funds or regulations.<sup>73</sup> Subsection 1001(b)

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<sup>70</sup> *United States v. Vreeland*, 684 F.3d 653, 662 (6<sup>th</sup> Cir. 2012)(“This judicial function exception has three requirements: ‘[The defendant] must show that (1) he was a party to a judicial proceeding, (2) his statements were submitted to a judge or magistrate, and (3) his statements were made in that proceeding’”), quoting, *United States v. McNeil*, 362 F.3d 570, 572 (9<sup>th</sup> Cir. 2004).

<sup>71</sup> *United States v. Horvath*, 492 F.3d 1075, 1077 (9<sup>th</sup> Cir. 2007); *United States v. Pickett*, 353 F.3d 62, 66-69 (D.C. Cir. 2004).

<sup>72</sup> *United States v. Rodgers*, 466 U.S. 475, 479 (1984); *United States v. King*, 660 F.3d 1071, 1081 (9<sup>th</sup> Cir. 2011); *United States v. Jackson*, 608 F.3d 193, 197 (4<sup>th</sup> Cir. 2010); *United States v. Atalig*, 502 F.3d 1063, 1068 (9<sup>th</sup> Cir. 2007); *United States v. Blankenship*, 382 F.3d 1110, 1136 (11<sup>th</sup> Cir. 2004); *United States v. White*, 270 F.3d 356, 363 (6<sup>th</sup> Cir. 2001).

<sup>73</sup> *United States v. Ford*, 639 F.3d 718, 720 (6<sup>th</sup> Cir. 2011)(“Jurisdiction may exist when false statements were made to state or local government agencies receiving federal support or subject to federal regulation”); *United States v. Starnes*, 583 F.3d 196, 208 (3d Cir. 2009)(“Indeed, it is enough that the statement or representation pertain to a matter in which the executive branch has the power to exercise authority.... HUD, an agency within the executive branch, provided the funding for the Donoe project to VIHA and had the power to exercise authority over the project, had it chosen to do so”); *United States v. Taylor*, 582 F.3d 558, 563 (5<sup>th</sup> Cir. 2009)(“The term ‘jurisdiction’ merely incorporates Congress’s intent that the statute apply whenever false statements would result in the perversion of the authorized functions of a federal department or agency”); *United States v. White*, 270 F.3d 356, 363 (6<sup>th</sup> Cir. 2001)(“We have in the past looked to whether the entity to which the statements were made received federal support and/or was subject to federal regulation”); *United States v. Davis*, 8 F.3d 923, 929 (2d Cir. 1993)(“In situations in which a federal agency is overseeing a state agency, it is the mere existence of the federal agency’s supervisory authority that is important to determining jurisdiction”), *contra*, *United States v. Blankenship*, 382 F.3d 1110, 1139, 1141 (11<sup>th</sup> Cir. 2004)(emphasis in the original) (“The clear, indisputable holding of *Lowe* is that a misrepresentation made to a private company concerning a project that is the subject of a contract between that company and the federal government does *not* constitute a misrepresentation about a matter within the jurisdiction of the federal government.... Because neither *Lowe* nor its central holding has ever been overruled ... it remains good law”).

precludes application of prohibitions in Section 1001(a) to the statements, omissions, or documentation presented to the court by a party in judicial proceedings. This includes statements of indigency filed by a defendant seeking the appointment of counsel,<sup>74</sup> or by a defendant for a probation officer's presentence report,<sup>75</sup> but not statements made by one on supervised release to a parole officer.<sup>76</sup>

Although the offense can only be committed "knowingly and willfully," the prosecution need not prove that the defendant knew that his conduct involved a "matter within the jurisdiction" of a federal entity<sup>77</sup> nor that he intended to defraud a federal entity.<sup>78</sup> It does, however, require the government to show the defendant knew or elected not to know that the statement, omission, or documentation was false and that the defendant presented it with the intent to deceive.<sup>79</sup> The phrase "knowingly and willfully" refers to the circumstances under which the defendant made his statement, omitted a fact he was obliged to disclose, or included with his false documentation, that is, "that the defendant knew that his statement was false when he made it or—which amounts in law to the same thing—consciously disregarded or averted his eyes from the likely falsity."<sup>80</sup>

Prosecution for a violation of Section 1001 requires proof of materiality, as does conviction for perjury, and the standard is the same: the statement must have a "natural tendency to influence, or be capable of influencing the decisionmaking body to which it is addressed."<sup>81</sup> There is no need to show that the decision maker was in fact diverted or influenced.<sup>82</sup>

Conviction for false statements or false documentation under Section 1001 also requires that the statements or documentation be false, that they not be true.<sup>83</sup> And the same can be said of the

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<sup>74</sup> *United States v. McNeil*, 362 F.3d 570, 573 (9<sup>th</sup> Cir. 2004)(but observing that "[s]ubmitting a false CJA-23 form may subject a defendant to criminal liability under other statutes, for example, under 18 U.S.C. 1621, the general statute on perjury, or 18 U.S.C. 1623, which punishes the making of a false material declaration in any proceeding, before, or ancillary to, any court").

<sup>75</sup> *United States v. Horvath*, 492 F.3d 1075, 1078-1081 (9<sup>th</sup> Cir. 2007).

<sup>76</sup> *United States v. Curtis*, 237 F.3d 598, 605 (6<sup>th</sup> Cir. 2001).

<sup>77</sup> *United States v. Yermian*, 468 U.S. 63, 75 (1984); *United States v. Gonzales*, 435 F.3d 64, 72 (1<sup>st</sup> Cir. 2006).

<sup>78</sup> *United States v. Gonzales*, 435 F.3d 64, 72 (1<sup>st</sup> Cir. 2006); *United States v. Starnes*, 583 F.3d 196, 212 n. 8 (3d Cir. 2009).

<sup>79</sup> *United States v. Boffil-Rivera*, 607 F.3d 736, 741 (11<sup>th</sup> Cir. 2010)(“For purposes of the statute, the word ‘false’ requires an intent to deceive or mislead”); *United States v. Starnes*, 583 F.3d 196, 210 (3d Cir. 2009)(“In general, ‘knowingly’ requires the government to prove that a criminal defendant had ‘knowledge of the facts that constitute the offense ... willfully ... usually requires the government to prove that the defendant acted not merely voluntarily, but with a bad purpose, that is, with knowledge that his conduct was, in some general sense, unlawful’”).

<sup>80</sup> *United States v. Wu*, 711 F.3d 1, 28 (1<sup>st</sup> Cir. 2013); see also, *United States v. Hsia*, 176 F.3d 716, 721-22 (D.C. Cir. 1999); *United States v. Hoover*, 175 F.3d 564, 571 (7<sup>th</sup> Cir. 1999).

<sup>81</sup> *United States v. King*, 735 F.3d 1098, 1107-108 (9<sup>th</sup> Cir. 2013); *United States v. Mehanna*, 735 F.3d 32, 54 (1<sup>st</sup> Cir. 2013); *United States v. Gordon*, 710 F.3d 1124, 1144-145 (10<sup>th</sup> Cir. 2013); *United States v. Moore*, 708 F.3d 639, 649 (2013); *United States v. Hamilton*, 699 F.3d 356, 362 (4<sup>th</sup> Cir. 2012); *United States v. Abrahem*, 678 F.3d 370, 374-76 (5<sup>th</sup> Cir. 2012).

<sup>82</sup> *United States v. Mehanna*, 735 F.3d at 54 (“Where a defendant’s statements are intended to misdirect government investigators, they may satisfy the materiality requirement of [§]1001 even if they stand no chance of accomplishing their objective. This principle makes eminently good sense: it would stand reason on its head to excuse a defendant’s deliberate prevarication merely because his interrogators were a step ahead of him”); *United States v. King*, 735 F.3d at 1108; ); *United States v. Moore*, 708 F.3d at 649; *United States v. Hamilton*, 699 F.3d at 362; *United States v. McBane*, 433 F.3d 344, 350 (3d Cir. 2005), quoting, *United States v. Gaudin*, 515 U.S. 506, 512 (1995).

<sup>83</sup> *United States v. Good*, 326 F.3d 589, 592 (4<sup>th</sup> Cir. 2003)(“The principle articulated in *Bronston* holds true for convictions under Section 1001 ... We cannot uphold a conviction ... where the alleged statement forming the basis of a (continued...)”)

response to a question that is so fundamentally ambiguous that the defendant's answer cannot be said to be knowingly false.<sup>84</sup> On the other hand, unlike the perjury provision of Section 1623, "there is no safe harbor for recantation or correction of a prior false statement that violates [Section] 1001."<sup>85</sup>

Prosecutions under subsection 1001(a)(1) for concealment, rather than false statement or false documentation, must also prove the existence of duty or legal obligation not to conceal.<sup>86</sup>

## Perjury as a Sentencing Factor (U.S.S.G. §3C1.1)

Regardless of the offense for which an individual is convicted, his sentence may be enhanced as a consequence of any obstruction of justice for which he is responsible, if committed during the course of the investigation, prosecution, or sentencing for the offense of his conviction.<sup>87</sup> The enhancement may result in an increase in his term of imprisonment by as much as four years. The enhancement is the product of the influence of Section 3C1.1 of the United States Sentencing Guidelines.

Federal sentencing begins with, and is greatly influenced by, the calculation of the applicable sentencing range under the Sentencing Guidelines.<sup>88</sup> The Guidelines assign every federal crime a

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(...continued)

violation of Section 1001 is true on its face"); see also, *United States v. Mehanna*, 735 F.3d 32, 54 (1<sup>st</sup> Cir. 2013); *United States v. Castro*, 704 F.3d 125, 139 (3d Cir. 2013).

<sup>84</sup> *United States v. Culliton*, 328 F.3d 1074, 1078 (9<sup>th</sup> Cir. 2003); *United States v. Good*, 326 F.3d 589, 592 (4<sup>th</sup> Cir. 2003); cf., *United States v. Martin*, 369 F.3d 1046, 1060 (8<sup>th</sup> Cir. 2004); *United States v. Hatch*, 434 U.S. 1, 4-5 (1<sup>st</sup> Cir. 2006).

<sup>85</sup> *United States v. Dooley*, 578 F.3d 582, 592 (7<sup>th</sup> Cir. 2009); *United States v. Stewart*, 433 F.3d 273, 318 (2d Cir. 2006), citing, *United States v. Sebaggala*, 256 F.3d 59, 64 (1<sup>st</sup> Cir. 2001); *United States v. Meuli*, 8 F.3d 1481, 1486-487 (10<sup>th</sup> Cir. 1993); and *United States v. Fern*, 696 F.2d 1269, 1275 (11<sup>th</sup> Cir. 1983).

<sup>86</sup> *United States v. Safavian*, 528 F.3d 957, 964 (D.C. Cir. 2008) ("As Safavian argues and as the government agrees, there must be a legal duty in order for there to be a concealment offense in violation of §1001(a)(1)"); *United States v. Stewart*, 433 F.3d 273, 318-19 (2d Cir. 2006) ("Defendant's legal duty [as a broker] to be truthful under Section 1001 included a duty to disclose the information regarding the circumstances of Stewart's December 27<sup>th</sup> trade.... Trial testimony indicated that the SEC had specifically inquired about [his] knowledge of Stewart's trades. As a result, it was plausible for the jury to conclude that the SEC's questioning and triggered [his] duty to disclose and that ample evidence existed that his concealment was material to the investigation "); *United States v. Moore*, 446 F.3d 671, 678-79 (7<sup>th</sup> Cir. 2006) (regulatory obligation); *United States v. Gibson*, 409 F.3d 325, 333 (6<sup>th</sup> Cir. 2005) ("Conviction on a 18 U.S.C. 1001 concealment charge requires a showing that the 'defendant had a legal duty to disclose the facts at the time he was alleged to have concealed them'"), quoting, *United States v. Curran*, 20 F.3d 560, 566 (3d Cir. 1994).

<sup>87</sup> U.S.S.G. §3C1.1; *United States v. Sanchez*, 725 F.3d 1243, 1252 (10<sup>th</sup> Cir. 2013); *United States v. Quirion*, 714 F.3d 77, 79 (1<sup>st</sup> Cir. 2013); *United States v. Williams*, 709 F.3d 1183, 1185 (6<sup>th</sup> Cir. 2013). If the defendant is convicted of an obstruction of justice offense, the enhancement only applies "if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., if the defendant threatened a witness during the course of the prosecution for the obstruction offense)," U.S.S.G. §3C1.1, cmt., app. n. 7. The enhancement may not be imposed for conduct which pre-dates the "investigation, prosecution, or sentencing of the instant offense of conviction," *United States v. Greco*, 734 F.3d 441, 449-50 (6<sup>th</sup> Cir. 2013).

<sup>88</sup> *Gall v. United States*, 552 U.S. 38, 49-51 (2007) ("[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.... [A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the [18 U.S.C.] §3553(a) factors to determine whether they support the sentence requested by a party.... If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more (continued...)")

base offense level to which they add levels for various aggravating factors. Obstruction of justice is one of those factors. Each of the final 43 offense levels is assigned to one of six sentencing ranges, depending on the extent of the defendant's past crime history. For example, a final offense level of 15 means a sentencing range of from 18 to 24 months in prison for a first time offender (criminal history category I) and from 41 to 51 months for a defendant with a very extensive criminal record (criminal history category VI).<sup>89</sup> Two levels higher, at a final offense level of 17, the range for first time offenders is 24 to 30 months; and 51 to 63 months for the defendant with a very extensive prior record.<sup>90</sup> Depending on the final offense level otherwise applicable to a particular crime, the impact of a 2-level increase spans from no impact at the lowest final offense levels to a difference of an additional 68 months at the highest levels.<sup>91</sup>

Section 3C1.1 instructs sentencing courts to add 2 offense levels in the case of an obstruction of justice:

If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels. U.S.S.G. §3C1.1.

The accompanying commentary explains that the section "is not intended to punish a defendant for the exercise of a constitutional right."<sup>92</sup> More specifically, a "defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision."<sup>93</sup> Early on, the Supreme Court made it clear that an individual's sentence might be enhanced under U.S.S.G Section 3C1.1, if he committed perjury during the course of his trial.<sup>94</sup> Moreover, the examples provided elsewhere in the section's commentary and the cases applying the section confirm that it reaches perjurious statements in a number of judicial contexts

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(...continued)

significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.... Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the §3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the §3553(a) factors, on a whole, justify the extent of the variance").

<sup>89</sup> U.S.S.G. ch. 5 Sentencing Table.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> U.S.S.G. §3C1.1, cmt., app. n. 2.

<sup>93</sup> *Id.*

<sup>94</sup> *United States v. Dunnigan*, 507 U.S. 87, 98 (1993); *United States v. McKinley*, 732 F.3d 1291, 1297-298 (11<sup>th</sup> Cir. 2013).

and to false statements in a number of others. The examples in the section's commentary cover conduct:

- (B) committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction;
- (F) providing materially false information to a judge or magistrate;
- (G) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;
- (H) providing materially false information to a probation officer in respect to a presentence or other investigation for the court; [and]
- (I) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§1510, 1511).<sup>95</sup>

The courts have concluded that an enhancement under the section is appropriate, for instance, when a defendant has (1) given preposterous, perjurious testimony during his own trial;<sup>96</sup> (2) given perjurious testimony at his suppression hearing;<sup>97</sup> (3) given perjurious, exculpatory testimony at the separate trial of his girl friend;<sup>98</sup> (4) made false statements in connection with a probation officer's bail report;<sup>99</sup> (5) made false statements to the court in an attempt to change his guilty plea;<sup>100</sup> (6) made false statements to federal investigators;<sup>101</sup> (7) encouraged a witness to lie to the police;<sup>102</sup> and (8) made false statements to state investigators relating to conduct for which the defendant was ultimately convicted.<sup>102</sup>

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<sup>95</sup> U.S.S.G. §3C1.1, cmt., app. n. 4(a).

<sup>96</sup> *United States v. Dinga*, 609 F.3d 904, 909 (7<sup>th</sup> Cir. 2010); see also, *United States v. Sanchez*, 725 F.3d 1243, 1252 (10<sup>th</sup> Cir. 2013) (“An automatic finding of untruthfulness, based on the [jury’s] verdict alone, would impinge upon the constitutional right to testify on one’s own behalf. The district court must make a specific finding that independent of the jury verdict, defendant committed perjury”); *United States v. Kennedy*, 714 F.3d 951, 961-62 (6<sup>th</sup> Cir. 2013) (“The court must 1) identify those particular portions of defendant’s testimony that it considers to be perjurious; and 2) either make a specific finding for each element of perjury or, at least, make a finding that encompasses all of the factual predicates for a finding of perjury”).

<sup>97</sup> *United States v. Quintero*, 618 F.3d 746, 752-53 (7<sup>th</sup> Cir. 2010).

<sup>98</sup> *United States v. Bedolla-Zavala*, 611 F.3d 392, 395 (7<sup>th</sup> Cir. 2010); *United States v. Greig*, 717 F.3d 212, 222 (1<sup>st</sup> Cir. 2013).

<sup>99</sup> *United States v. Alvarado*, 615 F.3d 916, 922-23 (8<sup>th</sup> Cir. 2010).

<sup>100</sup> *United States v. Jones*, 612 F.3d 1040, 1046-47 (8<sup>th</sup> Cir. 2010); *United States v. Quirion*, 714 F.3d 77, 79 (1<sup>st</sup> Cir. 2013) (“Making false statements, not under oath, to law enforcement officers, without more, will not trigger the enhancement. The enhancement is triggered, however, if a defendant provided a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense”).

<sup>101</sup> *United States v. Batchu*, 724 F.3d 1, 12 (1<sup>st</sup> Cir. 2013).

<sup>102</sup> *United States v. Alexander*, 602 F.3d 639, 642-43 & n.4 (5<sup>th</sup> Cir. 2010) (“The First, Second, Third, Fourth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have all held that obstruction of a state investigation based on the same facts as the eventual federal conviction qualifies for enhancement under U.S.S.G. §3C1.1.... Only the Seventh Circuit has held the obstruction of a state proceeding does not qualify ... ”).

When perjury provides the basis for an enhancement under the section, the court must find that the defendant willfully testified falsely with respect to a material matter.<sup>103</sup> Thus, it must find that “the defendant consciously act[ed] with the purpose of obstructing justice.”<sup>104</sup> When based upon a false statement not under oath, the statement must still be material, that is, it must “tend to influence or affect the issue under determination.”<sup>105</sup> Even then, false identification at the time of arrest only warrants a sentencing enhancement under the section when the deception significantly hinders the investigation or prosecution.<sup>106</sup>

The commentary accompanying the section also states that the enhancement may be warranted when the defendant threatens a victim, witness, or juror;<sup>107</sup> submits false documentations;<sup>108</sup> destroys evidence;<sup>109</sup> flees (in some cases);<sup>110</sup> or engages in any other conduct that constitutes an obstruction of justice under criminal law provisions of title 18 of the United States Code.<sup>111</sup>

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<sup>103</sup> *United States v. McKinley*, 732 F.3d 1291, 1297-298 (11<sup>th</sup> Cir. 2013), citing *United States v. Dunnigan*, 507 U.S. 87, 95 (1993); see also *United States v. Parker*, 716 F.3d 999, 1011 (7<sup>th</sup> Cir. 2013); *United States v. Perez-Solis*, 709 F.3d 453, 469 (5<sup>th</sup> Cir. 2013).

<sup>104</sup> *United States v. Manning*, 704 F.3d 584, 585 (9<sup>th</sup> Cir. 2012).

<sup>105</sup> U.S.S.G. §3C1.1, cmt., app. n. 6; *United States v. Greig*, 717 F.3d 212, 222 (1<sup>st</sup> Cir. 2013); *United States v. Manning*, 704 F.3d 584, 586 (9<sup>th</sup> Cir. 2012).

<sup>106</sup> U.S.S.G. §3C1.1, cmt., app. n. 5(a); *United States v. Williams*, 709 F.3d 1183, 1186 (6<sup>th</sup> Cir. 2013)(enhancement could not be imposed when the defendant’s use of an alias had no impact on the decision to appoint counsel on his behalf (he was indigent under either name) or to find probable cause of his misconduct (the evidence was same under either name)); *United States v. Perez-Solis*, 709 F.3d 453, 469 (5<sup>th</sup> Cir. 2013).

<sup>107</sup> U.S.S.G. §3C1.1, cmt., app. n. 4(A), (K)(“Examples of Covered Conduct.”—The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies: (A) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so; ... (K) threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction”); see *United States v. Snipes*, 611 F.3d 855, 871 (11<sup>th</sup> Cir. 2010)(enhancement appropriate for threats to induce failure to comply with grand jury subpoena); *United States v. Green*, 617 F.3d 233, 239 n. 3 (3d Cir. 2010)(enhancement appropriate for threats against a potential witness).

<sup>108</sup> U.S.S.G. §3C1.1, cmt., app. n. 4(C)(“Examples of Covered Conduct.”—The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies: ... (C) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding”).

<sup>109</sup> U.S.S.G. §3C1.1, cmt., app. n. 4(D)(“Examples of Covered Conduct.”—The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies: ... (D) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it results in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender”); *United States v. King*, 604 F.3d 125, 141 (3d Cir. 2010)(destruction of evidence-containing computer hard drives).

<sup>110</sup> U.S.S.G. §3C1.1, cmt., app. n. 4(E)(“Examples of Covered Conduct.”—The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies: ... (E) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding”); but see U.S.S.G. §3C1.1, cmt., app. n. 5(D)(“Examples of Conduct Not Covered.... The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies: ... (D) avoiding or fleeing from arrest”); see *United States v. Gonzalez*, 608 F.3d 1001, 1006-1007 (7<sup>th</sup> Cir. 2010), citing cases endeavoring to distinguish the two statements in the commentary.

<sup>111</sup> U.S.S.G. §3C1.1, cmt., app. n. 4(I)(“Examples of Covered Conduct.”—The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies: ... (E) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§1510, 1511”); see *United States v. Wahlstrom*, 588 F.3d 538, (8<sup>th</sup> Cir. 2009)(enhancement appropriate for efforts to arrange the murder of the prosecutor’s wife); *United States v. Jones*, 612 F.3d 1040, 1046-47 (8<sup>th</sup> Cir. 2010)(enhancement appropriate for efforts induce a witness to (continued...)

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testify falsely before the grand jury).