

## **Tab J**

# Legal Reference

## LEGAL REFERENCE

I.	Perjury -- 18 U.S.C. §§ 1621 & 1623 . . . . .	2
	A. Elements of § 1621 . . . . .	3
	B. Elements of § 1623 . . . . .	4
	C. Essential Elements Further Defined . . . . .	5
	1. Oath . . . . .	5
	2. Civil Proceedings and Criminal Charges . . . . .	5
	3. Falsity . . . . .	9
	4. State of Mind . . . . .	9
	5. Materiality . . . . .	10
	a. General Definition . . . . .	11
	b. Causation in Investigations . . . . .	12
	c. Interpretation in Civil Proceedings . . . . .	16
	d. Legal Rulings Relating to <u>Jones v. Clinton</u> . . . . .	23
	i. Rulings by Judge Wright in <u>Jones v. Clinton</u> . . . . .	24
	ii. Ruling by the D.C. Circuit . . . . .	29
	D. Literal Truth Defense to Perjury . . . . .	31
	E. Perjury in Cases of Feigned Forgetfulness . . . . .	40
	1. Proof of Knowledge . . . . .	41
	2. Cases in Brief . . . . .	42
	3. Summary . . . . .	48
	F. Inconsistent Statements Under § 1623(c) . . . . .	49
	G. Perjury Trap Defense . . . . .	51
II.	Obstruction of Justice -- 18 U.S.C. § 1503 . . . . .	53
	A. Elements of § 1503 Further Defined . . . . .	56
	1. Pending Judicial Proceeding . . . . .	56
	2. Knowledge of Pending Judicial Proceeding . . . . .	56
	3. Specific Intent . . . . .	57
	B. False and Evasive Testimony as Obstruction of Justice . . . . .	59
	1. Generally . . . . .	59
	2. Civil Proceedings . . . . .	61
	3. Legal Rulings Relating to <u>Jones v. Clinton</u> . . . . .	64
	D. Other Obstructive Behavior . . . . .	65
	1. Generally . . . . .	66
	2. Civil Proceedings . . . . .	72
III.	Witness and Evidence Tampering -- 18 U.S.C. § 1512 . . . . .	75
	A. Elements . . . . .	76
	B. Pending and Civil Proceedings . . . . .	78
	C. Intent . . . . .	80
	1. "Misleading Conduct" . . . . .	80
	2. "Corruptly Persuades" . . . . .	81

IV.	Conspiracy -- 18 U.S.C. § 371 . . . . .	84
	A. Generally . . . . .	84
	B. Elements of § 371 . . . . .	87
	1. Existence of an Agreement . . . . .	87
	2. Membership in the Conspiracy . . . . .	90
	3. Overt Act . . . . .	92
	C. Withdrawal Defense . . . . .	93
V.	Aiding and Abetting -- 18 U.S.C. § 2(a) . . . . .	95
	A. Generally . . . . .	95
	B. Elements of § 2(a) . . . . .	97
	1. Act . . . . .	98
	2. Crime Committed . . . . .	99
	3. Intent . . . . .	99
	C. Defenses and Limitations . . . . .	100
VI.	Use of an Intermediary -- 18 U.S.C. § 2(b) . . . . .	101
	A. Generally . . . . .	101
	B. Intent . . . . .	102
	C. Particular Cases . . . . .	103
VII.	Evidentiary Issues . . . . .	104
	A. Circumstantial Evidence . . . . .	104
	B. Inferences from False Exculpatory Testimony . . . . .	107
	C. Willful Blindness . . . . .	108
	D. Testimony of a Cooperating Witness . . . . .	109
	E. Testimony of the Accused . . . . .	112

**LEGAL REFERENCE**

This section contains a brief summary of the statutes and legal precepts that, in the context of a criminal proceeding, would be germane to a determination of the criminality of the conduct described in the Referral. The Office of Independent Counsel recognizes that Congress, in assessing whether the information presented constitutes "substantial and credible" information that "may constitute grounds for an impeachment" need not consider the elements of analogous criminal offenses. In other words, a showing of criminality is neither necessary nor sufficient to an impeachment; Congress may impeach for conduct that is less than criminal or decline to impeach for conduct that, nonetheless, constitutes a crime.

However, as an Office which exercises the investigative and prosecutorial function of the Department of Justice, see 28 U.S.C. § 594(a), our assessment of what constitutes "substantial and credible" information that "may constitute grounds for an impeachment" is necessarily informed by our understanding of criminal law. Hence, we deem it appropriate to set forth our understanding of the law that would be applicable to the conduct described in the Referral if that conduct were to be judged in a criminal proceeding. We do not attempt to be comprehensive, but merely set forth principles of law that might reasonably be deemed applicable.

Briefly, we highlight the following legal conclusions of

general applicability:

- Perjury in connection with a pending civil proceeding may be, and has been, charged as a violation of 18 U.S.C. §§ 1621, 1623, see infra § I.C.2.b ;
- False statements made during the course of civil discovery can be material to perjury charged as a violation of 18 U.S.C. §§ 1621, 1623, see infra §§ I.C.5.c, I.C.5.d;
- The Court of Appeals for the District of Columbia Circuit has determined that Monica Lewinsky's affidavit was material to the Jones v. Clinton matter and was legally sufficient to support a charge of perjury in violation of 18 U.S.C. § 1623 and a charge of obstruction of justice in violation of 18 U.S.C. § 1503, see infra §§ I.C.5.d.ii, II.B.3;
- Feigned forgetfulness and other evasive conduct may form the basis for a charge of perjury in violation of 18 U.S.C. §§ 1621, 1623, see infra § I.E;
- Obstruction of justice in connection with a pending civil proceeding may be, and has been, charged as a violation of 18 U.S.C. § 1503, see infra §§ II.B.2, II.D.2;
- Concealment of documents and other materials called for by a subpoena may form the basis for a charge of obstruction of justice in violation of 18 U.S.C. §§ 1503, 1512, see infra §§ II.D, III;
- Seeking to influence the testimony of a potential witness may form the basis for a charge of obstruction of justice in violation of 18 U.S.C. § 1503, see infra § II.D, or a charge of witness tampering in violation of 18 U.S.C. § 1512, see infra § III.

#### I. Perjury -- 18 U.S.C. §§ 1621 & 1623

Two separate statutes address the crime of perjury. 18 U.S.C. § 1621<sup>1</sup> covers perjury "generally," while 18 U.S.C. §

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<sup>1</sup> 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

1623<sup>2</sup> specifically addresses false declarations before a grand jury or court.<sup>3</sup> The elements of perjury under § 1621 and § 1623 are virtually the same but, as discussed below, with § 1623 Congress eased some of the prosecution's burden imposed by the common law.

**A. Elements of § 1621**

"The essential elements of the crime of perjury as defined

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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 . . . .

<sup>2</sup> Section 1623 provides:

(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.

18 U.S.C. § 1623 (1996 Supp.).

<sup>3</sup> Both provisions note that where 28 U.S.C. § 1746 permits the use of an unsworn declaration "under penalty of perjury" in place of an oath, then it is also a crime to make a false statement in such a declaration. See United States v. Gomez-Vigil, 929 F.2d 254, 258 (6th Cir. 1991).

in 18 U.S.C. § 1621 . . . are (1) an oath authorized by a law of the United States, (2) taken before a competent tribunal, officer or person, and (3) a false statement wilfully made as to facts material to the hearing."<sup>4</sup> Because perjury has a specific intent element, "[t]estimony resulting from confusion, mistake or faulty memory cannot support a perjury conviction."<sup>5</sup>

#### B. Elements of § 1623

The government's burden for establishing false declarations before a court under 18 U.S.C. § 1623 is largely the same as its burden under 18 U.S.C. § 1621.<sup>6</sup> The prosecution must

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<sup>4</sup> United States v. Hvass, 355 U.S. 570, 574 (1958) (internal quotation marks omitted). The Model Jury Instructions for Perjury under D.C. Code § 22-2511 provide:

[t]he essential elements of perjury, each of which the government must prove beyond a reasonable doubt, are:

1. That the defendant testified under oath or affirmation;
2. That the oath or affirmation were taken before a competent [tribunal] [officer] [person] in a case in which the law authorized that oath or affirmation;
3. That in his/her testimony the defendant made the statements detailed in the indictment;
4. That the statements were false; and
5. That the defendant knew or believed that the statements were false when s/he made them.

Criminal Jury Instructions for the District of Columbia (4th ed. 1993) 4.87.

<sup>5</sup> United States v. Dean, 55 F.3d 640, 659 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 1288 (1996) (citing United States v. Dunnigan, 507 U.S. 87, 94 (1993)).

<sup>6</sup> Section 1623 differs from § 1621 in five minor respects. First, § 1623 applies only to false statements made during or ancillary to grand jury or court proceedings, whereas § 1621 applies also to false statements made under oath in other proceedings. Second, Congress expressly exempted § 1623 prosecutions from the two-witness rule; the government need only

demonstrate: "1. that the defendant testified under oath before [or in a proceeding ancillary to a court or] grand jury; 2. that the testimony so given was false in one or more respects charged; 3. that the false testimony concerned matters that were material to the [court proceedings]; and, 4. that the false testimony was knowingly given as charged."<sup>7</sup>

### C. Essential Elements Further Defined

#### 1. Oath

The taking of an oath before giving allegedly false testimony is an essential element of the crime of perjury.<sup>8</sup>

#### 2. Civil Proceedings and Criminal Charges

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prove beyond a reasonable doubt that the defendant make a knowing false declaration. See 18 U.S.C. § 1623(e). Third, "[i]n contrast to § 1621, the Government need not prove the falsity of [inconsistent] declarations under § 1623(c); rather, the Government [need only] prove that 'the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false.'" United States v. McAfee, 8 F.3d 1010, 1014 (5th Cir. 1993) (quoting 18 U.S.C. § 1623(c)). Fourth, under § 1623, retraction of a false statement is a defense to prosecution "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); see United States v. Moore, 613 F.2d 1029, 1039 (D.C. Cir.), cert. denied, 446 U.S. 954 (1980); cf. United States v. Norris, 300 U.S. 564, 573 (1937) (under [the predecessor to 18 U.S.C. § 1621] witnesses who testified falsely cannot purge themselves by later recanting). Finally, while § 1621 requires proof that a false statement was made "willfully," § 1623 requires proof that the false statement was made "knowingly."

<sup>7</sup> United States v. Bridges, 717 F.2d 1444, 1449 n.30 (D.C. Cir. 1983) (citations omitted), cert. denied, 465 U.S. 1036 (1984).

<sup>8</sup> United States v. Debrow, 346 U.S. 374, 377 (1953).

Section 1623 applies only to "proceedings before or ancillary to any court or grand jury of the United States."

Courts uniformly agree that civil depositions taken pursuant to Fed. R. Civ. P. 30 are ancillary proceedings under § 1623.<sup>9</sup> Even though civil depositions, unlike their criminal counterparts, do not require a court order, courts faced with the issue have rejected the argument that § 1623 is thereby limited to criminal proceedings.<sup>10</sup>

The Department of Justice often prosecutes for perjury that occurs during the course of civil proceedings. This section details some of the recent cases<sup>11</sup> in which the Department has

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<sup>9</sup> See, e.g., United States v. Wilkinson, 137 F.3d 214 (4th Cir. 1998) (deposition is ancillary proceeding for purposes of § 1632); United States v. McAfee, 8 F.3d 1010, 1014 (5th Cir. 1993) (affirming conviction in prosecution under § 1623(c) for inconsistent statements made in two deposition testimonies); United States v. Scott, 682 F.2d 695, 698 (8th Cir. 1982) (terms "deposition" and "ancillary proceeding" are synonymous); United States v. Krogh, 366 F. Supp. 1255-56 (D.D.C. 1973) (sworn deposition taken at Office of the United States Attorney found to be "ancillary" to Watergate grand jury proceedings). In Dunn v. United States, 442 U.S. 100, 113 (1979), the Supreme Court held that § 1623 does not encompass statements made in contexts less formal than a deposition -- implying that it does cover deposition testimony.

<sup>10</sup> See McAfee, 8 F.3d at 1014.

<sup>11</sup> Several other cases involving criminal perjury charges for actions in civil cases are described in the discussions of materiality in civil cases (Kross; Holley; Naddeo; Edmonson; Clark; Adams; Hale; Hendrickson; Allen), feigned forgetfulness as perjury (Chaplin; Moreno Morales) and obstruction of justice charges for actions in civil cases (Roberts), *infra*. This is, of course, a list of only some of the cases which have been reported. By definition, an unknown number of similar unreported cases may also exist.

brought criminal charges for civil perjury.<sup>12</sup>

A partner at a New York law firm was charged under § 1623, convicted, and sentenced to 15 months imprisonment for declaring under oath in a civil bankruptcy proceeding that he was "unaware of any other current representation by Milbank [Tweed] of any equity security holder or institutional creditor" of Bucyrus-Erie when he was, in fact, aware that Milbank Tweed was representing certain creditors of Bucyrus-Erie in a legal dispute against Bucyrus-Erie.<sup>13</sup> The partner had been retained to represent Bucyrus-Erie in filing for bankruptcy, and had made the false statement during a hearing relating to Milbank Tweed's approximately \$2 million in legal fees.<sup>14</sup>

Another corporate defendant was charged with perjury for falsely denying -- during his civil deposition in a civil suit based on a corporate failure to satisfy an outstanding loan -- that he knew about the use of a fictitious name in the accounting books of the company. He was convicted, and his conviction was affirmed by the Fourth Circuit.<sup>15</sup>

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<sup>12</sup> On occasion civil perjury is charged as obstruction of justice. A summary of recent instances of such charges is included in the obstruction of justice section infra.

<sup>13</sup> See United States v. Gellene, (No. 97-Cr-221, E.D. Wisc., Dec. 9, 1997) (Indictment, Count Three).

<sup>14</sup> Gellene was also charged with, and convicted of, two violations of 18 U.S.C. § 152, which proscribes the making of a false declaration in relation to a bankruptcy proceeding.

<sup>15</sup> See United States v. Wilkinson, 137 F.3d 214, 225 (4th Cir. 1998).

Another defendant in a civil suit filed an affidavit (in response to plaintiff's motion for summary judgment) in which he falsely denied any knowledge of the fraudulent scheme<sup>16</sup> that was the subject of the suit. For filing this false affidavit, he was charged and convicted of perjury; his conviction was affirmed on appeal.<sup>17</sup>

Another defendant was charged with, and convicted of, perjury under 18 U.S.C. § 1621 after he made a false declaration about his financial status (so that he would be able to prosecute an appeal from a civil judgment in forma pauperis) and repeated that declaration in a post-judgment deposition.<sup>18</sup> The district court, citing the civil nature of Holland's perjury, declined to apply the Sentencing Guidelines (which called for a sentence of 87 to 108 months) and instead sentenced Holland to home detention. On appeal, however, the Eleventh Circuit vacated the sentence and remanded for application of the Sentencing Guidelines. The court held that the perjury statute applies "without distinction both to perjury committed in a civil proceeding and to perjury in a criminal prosecution."<sup>19</sup> In so holding,

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<sup>16</sup> The plaintiff had alleged that Sassanelli had fraudulently inflated construction bills and created fictitious invoices.

<sup>17</sup> See United States v. Sassanelli, 118 F.3d 495 (6th Cir. 1997).

<sup>18</sup> See United States v. Holland, 22 F.3d 1040 (11th Cir.), cert. denied, 513 U.S. 1109 (1994).

<sup>19</sup> Id. at 1047.

the court:

categorically reject[ed] any suggestion, implicit or otherwise, that perjury is somehow less serious when made in a civil proceeding. Perjury, regardless of the setting, is a serious offense that results in incalculable harm to the functioning and integrity of the legal system as well as to private individuals. In the instant case, Holland's perjury inexcusably wasted valuable and scarce public resources. His actions needlessly consumed court time, forced the Federal Bureau of Investigation and the United States Attorney's Office to engage in prolonged investigations, and attempted to prevent private citizens . . . from satisfying their judgment.<sup>20</sup>

### 3. Falsity

Under both § 1621 and § 1623, the government must prove the falsity of the statement that is the basis for the perjury accusation. As discussed in detail *infra*, "the falsity of an 'I don't recall' answer must be proven by circumstantial evidence."<sup>21</sup> Furthermore, under the less burdensome § 1623(c), the government may prove that a statement is false merely by proving that the defendant made two "irreconcilably contradictory declarations."<sup>22</sup>

### 4. State of Mind

While § 1621's "wilfulness" requirement appears on its face to demand a more burdensome showing than § 1623's knowledge

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<sup>20</sup> *Id.* at 1047-48.

<sup>21</sup> *United States v. Chapin*, 515 F.2d 1274, 1284 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975).

<sup>22</sup> For example, *United States v. McAfee*, 8 F.3d 1010 (5th Cir. 1993), affirmed the conviction of a defendant under § 1623(c) based upon two contradictory statements he gave in two civil depositions.

element, the cases make little, if anything, of the distinction.<sup>23</sup> Indeed, the D.C. Circuit has held that "in the perjury statute [willfully] means 'knowingly' or 'intentionally.'"<sup>24</sup> In order to prove that a defendant's false testimony was provided "knowingly" or "wilfully," the government must prove beyond a reasonable doubt that the defendant did not believe his testimony to be true at the time he testified.<sup>25</sup> Often, the government may do so merely by proving that the testimony was in fact false.<sup>26</sup>

### 5. Materiality

Under both § 1621 and § 1623, the government must prove that the misrepresentation was "material." In 1995, the Supreme Court held that whether the misrepresentation was material is a question of fact that must go to the jury.<sup>27</sup> The jury may be

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<sup>23</sup> See United States v. Endo, 635 F.2d 321, 323 (4th Cir. 1980) ("The substantive difference (whether the accused acted 'knowingly' or 'willfully') . . . has no pertinence for our purposes.").

<sup>24</sup> Maragon v. United States, 187 F.2d 79, 80 (D.C. Cir. 1950) (sustaining perjury conviction under D.C. Code § 22-2501), cert. denied, 341 U.S. 932 (1951).

<sup>25</sup> Young v. United States, 212 F.2d 236, 240 (D.C. Cir.), cert. denied, 347 U.S. 1015 (1954).

<sup>26</sup> See id. at 241 ("Generally, a belief as to the falsity of testimony may be inferred by the jury from proof of the falsity itself.").

<sup>27</sup> See United States v. Gaudin, 115 S. Ct. 2310 (1995) (in construing 18 U.S.C. § 1001 Court holds materiality is a question of fact); see also United States v. Levine, 72 F.3d 920 (D.C. Cir. 1995) (extending Gaudin to § 1621).. Prior to the Supreme Court's decision, most courts had treated materiality as a question of law for the judge to decide.

guided by the precepts explained in the following discussion.

**a. General Definition**

A misrepresentation or concealment is material if it "was predictably capable of affecting, i.e., had a natural tendency to affect, the official decision;"<sup>28</sup> or if it concerns "'a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction;'"<sup>29</sup> or if "a truthful answer would have aided the inquiry."<sup>30</sup> "[T]he effect necessary to meet the materiality test is relatively slight, and certainly not substantial."<sup>31</sup>

In addition, in proving that a statement was material, the government need not prove that the false statement actually was

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<sup>28</sup> Kungys v. United States, 485 U.S. 759, 771 (1988). Although Kungys construes a denaturalization statute rather than § 1001 or a perjury statute, the Court indicated that "material" bears the same meaning in all three spheres. See Kungys, 485 U.S. at 769-72. Kungys also might be distinguished on the ground that it treats materiality as a question of law, see id. at 772, a doctrine that Gaudin overturned. But Gaudin did not modify the materiality standard; in fact it cites Kungys for the applicable standard. 115 S. Ct. at 2313.

<sup>29</sup> United States v. Winstead, 74 F.3d 1313, 1320 (D.C. Cir. 1996) (quoting and approving language in jury instructions); see also United States v. Allen, 131 F. Supp. 323, 325 (E.D. Mich. 1955) (citations omitted) ("A material matter does not necessarily mean a matter that directly affects the ultimate issue of the trial. . . . It is sufficient if the false testimony gives weight and force to or detracts from testimony as to matters that are material.").

<sup>30</sup> United States v. Cunningham, 723 F.2d 217, 226 (2d Cir. 1983), cert. denied, 466 U.S. 951 (1984).

<sup>31</sup> United States v. Moore, 613 F.2d 1029, 1038 (D.C. Cir. 1979) (distinguishing materiality from "substantial effect" standard of perjury recantation provision), cert. denied, 446 U.S. 954 (1980)

relied upon, but rather need show only that the statement was capable of influencing the outcome -- or of adding or detracting to facts that themselves could influence the outcome -- if it had been relied upon.<sup>32</sup> For example, the Eighth Circuit affirmed the perjury conviction of an individual whose false testimony (that he had not visited Florida during 1983) had been contradicted by the testimony of other witnesses, despite the defendant's argument that his statements before the grand jury were not material. The court found that "Moeckly's denials, regardless of the availability to the grand jury of accurate information through other witnesses, tended to obscure Moeckly's whereabouts at critical times during the conspiracies."<sup>33</sup>

#### b. Causation in Investigations

In cases involving investigations or other inquiries,<sup>34</sup> the

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<sup>32</sup> See United States v. Dale, 991 F.2d 819, 834 n.27 (D.C. Cir.), cert. denied, 114 S. Ct. 286 (1993); United States v. Jones, 464 F.2d 1118, 1122 (8th Cir. 1972), cert. denied, 409 U.S. 1111 (1973); United States v. Hendrickson, 200 F.2d 137 (7th Cir. 1952). The causation aspect of false statements in civil actions has been infrequently addressed by the courts. When they do address it, however, courts have interpreted causation broadly. For example, when a defendant argued that his false testimony was immaterial because the topic concerning which he had testified falsely was not directly relevant to the question before the court in which he testified, the Seventh Circuit held that: "[W]here the false testimony is capable of influencing the tribunal, then the actual effect of the false testimony is not the determining factor, but its capacity to affect or influence the trial judge in his judicial action and the issue before him." Hendrickson, 200 F.2d at 139.

<sup>33</sup> United States v. Moeckly, 769 F.2d 453, 465 (8th Cir. 1985), cert. denied, 475 U.S. 1015 (1986).

<sup>34</sup> When assessing materiality, courts do not distinguish between the various contexts -- civil, administrative, or

test for materiality has been stated as "whether a truthful answer would have aided the inquiry."<sup>35</sup> This question seems to call for speculation as to the likelihood that a truthful answer would have changed the course of official actions, such as by provoking or re-channeling an investigation that in turn might have altered the final outcome. The Supreme Court has suggested that a fact can be material even if there was a less than 50% chance of changing the official decision: "It has never been the test of materiality that the misrepresentation or concealment would more likely than not have produced an erroneous decision, or even that it would more likely than not have triggered an investigation."<sup>36</sup>

Other courts agree that the government need not show such a consequence to have been likelier than not. The D.C. Circuit, for example, has held in connection with the false statements statute, 18 U.S.C. § 1001, that "[a]pplication of § 1001 does not require judges to function as amateur sleuths, inquiring whether

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criminal -- in which an investigation can arise.

<sup>35</sup> United States v. Cunningham, 723 F.2d 217, 226 (2d Cir. 1983), cert. denied, 466 U.S. 951 (1984). One court in the Southern District of New York applied a similar test in a case charging false statements to prosecutors as well as courtroom perjury: "[M]ateriality is the flimsiest of obstacles to a perjury conviction. 'Materiality is . . . demonstrated if the question posed is such that a truthful answer could help the inquiry, or a false response hinder it, and these effects are weighed in terms of potentiality rather than probability.'" United States v. Guariglia, 757 F. Supp. 259, 266 (S.D.N.Y. 1991) (quoting United States v. Berardi, 629 F.2d 723, 728 (2d Cir.), cert. denied, 449 U.S. 995 (1980)).

<sup>36</sup> Kungys, 485 U.S. at 771.

information specifically requested and unquestionably relevant to the department's or agency's charge would really be enough to alert a reasonably clever investigator that wrongdoing was afoot."<sup>37</sup>

Another Circuit opinion, in a different formulation, has said that a statement is material if it would have caused investigators to make additional inquiries, even if it would not have affected the agency's ultimate decision. The court found a defendant's false answers in a security clearance application to be material because truthful responses would have prompted investigators to make further inquiries. Whether the clearance would still have been granted was irrelevant, the court said, because "[m]ateriality . . . is not concerned with whether the alleged omission would have affected the ultimate agency determination."<sup>38</sup> The court appeared to reason that a statement's materiality is judged by its effect on an ongoing investigation, rather than its effect on the ultimate decision. In other words, materiality exists if a statement would have had a 100 percent likelihood of affecting an investigation, even if it that effect on the investigation would in turn have had a zero percent likelihood of changing the agency outcome.<sup>39</sup>

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<sup>37</sup> United States v. Hansen, 772 F.2d 940, 950 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986).

<sup>38</sup> United States v. Dale, 782 F. Supp. 615, 625-26 (D.D.C. 1991).

<sup>39</sup> Cf. United States v. Di Fonzo, 603 F.2d 1260, 1266 (7th Cir. 1979) (a statement is material if it influences the agency's decision to investigate or the agency's conclusion as to whether

"[W]hether a truthful answer would have aided the inquiry" depends to some degree upon the type of investigation occurring. "[I]n a grand jury setting," the D.C. Circuit has said, "the false testimony must have the natural effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation."<sup>40</sup> Because a grand jury investigation is usually wide-reaching, information can be material to a grand jury even if it might not be material to a more tightly focused inquiry.<sup>41</sup> For example, information is material if it would help investigators locate other witnesses whose testimony would be directly pertinent to the grand jury. The Second Circuit affirmed the conviction of a defendant whose false statements impeded investigation because "they covered up the fact that additional witnesses . . . should also have been interviewed."<sup>42</sup> Similarly, in an Prohibition-era case, a grand jury witness was

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it has jurisdiction), cert. denied, 444 U.S. 1018 (1980); United States v. Rose, 570 F.2d 1358, 1364 (9th Cir. 1978) (false statement to a customs inspector was material because a truthful answer would have led to a more rigorous inspection).

<sup>40</sup> United States v. Moore, 613 F.2d 1029, 1038 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980) (internal quotation marks and citation omitted).

<sup>41</sup> See United States v. Paxson, 861 F.2d 730, 733 (D.C. Cir. 1988) (finding false statements before grand jury material and noting that "[m]any cases have recognized that hindsight is not the proper perspective for discerning the limits of a grand jury's investigative power. It must pursue its leads before it can know its final decisions."); LaRocca v. United States, 337 F.2d 39, 43 (8th Cir. 1964) ("the grand jury is imbued with broad inquisitorial powers").

<sup>42</sup> United States v. Gribben, 984 F.2d 47, 52 (2d Cir. 1993).

convicted for falsely denying that a particular woman had been present at a party where liquor allegedly had been served: "A false statement as to the woman tended to mislead the grand jury, and to deprive them of knowledge as to who she was, so that she might not be obtained as a witness."<sup>43</sup>

**c. Interpretation in Civil Proceedings**

Courts act similarly in deciding the materiality of false statements made in the context of civil discovery -- i.e., false affidavits, false deposition testimony, or false responses to discovery requests. As the Supreme Court has explained, in deciding whether a statement is material a court must

determin[e] at least two subsidiary questions of purely historical fact: (a) "what statement was made?"; and (b) "what decision was the [decisionmaker] trying to make?" The ultimate question: (c) "whether the statement was material to the decision," requires applying the legal standard of materiality [as defined in Kungys] to these historical facts.<sup>44</sup>

The third of these issues -- application of the legal standard to the facts -- is characterized as a mixed question of law and fact which requires "delicate assessments of the inferences a 'reasonable [decision maker]' would draw from a given set of facts and the significance of those inferences to him."<sup>45</sup>

In deciding "what decision is being made" in the context of

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<sup>43</sup> Carroll v. United States, 16 F.2d 951, 954 (2d Cir.), cert. denied, 273 U.S. 763 (1927).

<sup>44</sup> United States v. Gaudin, 515 U.S. 506, 512 (1995).

<sup>45</sup> Id. (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 450 (1976)).

a discovery deposition, courts have generally concluded that the decision being made is not, "does this prove the case?" but rather "does this inquiry lead to potentially relevant evidence?" This is because, as when analyzing materiality in other investigative contexts, the courts look at what decision is "being made" in response to the (false) information provided in the deposition or discovery answer, rather than at the ultimate issue for decision in the case.

The definition of "materiality" in the context of a deposition or discovery response, therefore, is tied to the purposes of civil discovery. Discovery is intended to allow a party to uncover any information that "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Discoverable information need not itself be admissible -- to the contrary it encompasses many matters that are manifestly inadmissible in a civil trial. Thus, as the Second Circuit has explained, a false statement in a civil deposition is material when "a truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit."<sup>46</sup> In other words, as one court has said, the broad scope of civil discovery means that the test for materiality in a civil context is "broader than that used to determine materiality during trial."<sup>47</sup>

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<sup>46</sup> United States v. Kross, 14 F.3d 751, 754 (2d Cir.), cert. denied, 513 U.S. 828 (1994).

<sup>47</sup> United States v. Naddeo, 336 F. Supp. 238, 240 (N.D. Ohio 1972).

Such a broader definition of materiality in the discovery context is appropriate and even necessary. Otherwise, the oath to testify truthfully would become a contingent one. A person could knowingly tell a falsehood in the hope or expectation that if the "information elicited . . . ultimately turn[s] out not to [meet the higher standards of admissibility] at a subsequent trial,"<sup>48</sup> then the person would suffer no penalty for the lie.

In determining materiality in the context of civil discovery, then, some courts have treated the question categorically, so that if the question falsely answered was itself permissible under the rules of discovery, then the false answer is deemed material. For example, while convicting a defendant of perjury for his false civil deposition in a civil forfeiture case pendent to a criminal investigation, the Second Circuit reasoned that there was "no persuasive reason not to apply [to the defendant's statements] the broad standard of materiality of whether a truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at trial."<sup>49</sup>

Other courts have engaged in a inquiry -- albeit a very limited one -- to ensure that the questions and answers at issue in the perjury charge bore some general relationship to the underlying civil litigation. For example, the chairman of a bank

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<sup>48</sup> United States v. Holley, 942 F.2d 916, 925 (5th Cir. 1991), cert. denied 510 U.S. 821 (1993).

<sup>49</sup> Kross, 14 F. 3d at 754.

was charged with and convicted of perjury for lying in a deposition -- taken in the course of civil bankruptcy proceedings initiated by the bank -- about his actions at the bank. On appeal he argued that the materiality of his statements had to be measured against the issues specifically raised in the bank's bankruptcy filings and, thus, that the court should ask whether his false statements were about those transactions that had caused a loss to the bank. The Fifth Circuit rejected this narrow reading of materiality and found that so long as the false statements were related to the allegations of the underlying civil complaint in a general way, they would be material to the ongoing discovery.<sup>50</sup>

One reason that the standard is not quite settled is that the proximate relation between the false statements supporting the perjury charge, and the underlying civil case, can be quite attenuated and still satisfy the materiality requirement. For example, the plaintiffs in a civil rights lawsuit charging a police department with racial bias falsely claimed in a deposition that they had not violated the department's sick leave policy. The Ninth Circuit began with the premise of Kungys -- that a statement is material if it has a "natural tendency to influence" the decision maker -- and read this broadly to define a material false statement as "one which 'is relevant to any

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<sup>50</sup> See Holley, 942 F.2d at 924-25; accord United States v. Edmondson, 410 F.2d 670, 673 (5th Cir. 1969) (false letters used at a bankruptcy creditors' meeting were material).

subsidiary issue under consideration.'"<sup>51</sup> Because the plaintiffs' violation of a sick leave policy was, to some degree, relevant to their underlying complaint of racial bias, the court concluded that false statements about the violation were material to the underlying civil litigation and were a sufficient basis for a perjury charge. This attenuated standard makes the difference more one of theory than of practice, and seems to have made it unnecessary for most courts to resolve the issue.<sup>52</sup>

Despite the attenuated nature of the materiality standard, it does sometimes operate to preclude prosecution. At least one reported case has overturned a perjury conviction based upon a civil deposition because it found that the misrepresentation was not material. In this case the defendant had been asked in a civil deposition for the source of the prior earnings figures she had provided to her employer, she had replied that it was a "Schedule C worksheet [used] in preparation for doing the income taxes,"<sup>53</sup> and she had been convicted of perjury because she had,

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<sup>51</sup> United States v. Clark, 918 F.2d 843, 846 (9th Cir. 1990) (quoting United States v. Lococo, 450 F.2d, 1196, 1199 (9th Cir. 1971)), overruled on other grounds, United States v. Keys, 95 F.3d 874 (9th Cir. 1996).

<sup>52</sup> For example, in a recent case the Fourth Circuit recognized these somewhat diverging treatments of civil materiality but found it unnecessary to resolve the question in disposing of the case because the matters were material under any standard of materiality adopted. See Wilkinson, 137 F.3d at 224-25.

<sup>53</sup> United States v. Adams, 870 F.2d 1140, 1147 (6th Cir. 1989) (involving a sex discrimination law suit against the Equal Employment Opportunity Commission).

in fact, taken the figures from a prepared Schedule C rather than a Schedule C worksheet.<sup>54</sup> The Sixth Circuit overturned the conviction. While agreeing generally that the "test of whether a false declaration satisfies the materiality requirement is whether a truthful answer might have assisted or influenced the tribunal in its inquiry,"<sup>55</sup> and recognizing the contingent nature of the materiality inquiry, the court concluded that there was no adequate explanation for why the difference between a prepared Schedule C and a Schedule C worksheet mattered to any decisionmaker.<sup>56</sup>

Another method of assessing materiality considers the timing of the false statement. Under this method of analysis, the question is not whether the false statements are material to some issue at the underlying civil trial, but rather whether the statements were "at the time made, material to the proceeding in which [the] deposition was taken."<sup>57</sup>

Such an analysis makes clear that statements do not lose

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<sup>54</sup> Id. at 1147.

<sup>55</sup> Id. (citing United States v. Swift, 809 F.2d 320, 324 (6th Cir. 1987)).

<sup>56</sup> Adams, 879 F.2d at 1147. The Court appeared to be animated in part by its concern that the perjury prosecution was vindictive retaliation for Adams' discrimination suit. Id. at 1145-46 (noting the "thinness of the [criminal] charges" and holding that "there is enough smoke here, in our view, to warrant the unusual step of letting defendants find out how this unusual prosecution came about")

<sup>57</sup> Holley, 942 F.2d at 923 (citing United States v. Gremillion, 464 F.2d 901, 904-05 (5th Cir.), cert. denied, 409 U.S. 1085 (1972)).

their materiality because of subsequent developments. Indeed, courts generally do not hold that settlement of a case renders a false statement immaterial; nor do they accept the argument that a decision to exclude a statement at trial (based upon the stricter standards for trial admissibility) reaches backward, to make immaterial, statements that were material during a deposition. For example, one defendant convicted of perjury in connection with a civil deposition argued on appeal that his deposition was immaterial because it had not been used at trial.<sup>58</sup> The Tenth Circuit rejected those arguments: "When the oath was administered to Hale and he thereafter willfully gave false testimony as to material facts in the case, all of the elements of the offense were present and the crime of perjury had been committed."<sup>59</sup>

The Second Circuit has made this point strongly, albeit in a criminal context.<sup>60</sup> A defendant's conviction under the Wagering Tax Act<sup>61</sup> was reversed on appeal because the underlying statutes were deemed unconstitutional violations of the Fifth Amendment privilege against self-incrimination; the United States then

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<sup>58</sup> See Hale v. United States, 406 F.2d 476 (10th Cir.) (rejecting the defendant's argument that he could not be charged with perjury because he had not read or signed the deposition after it was transcribed), cert. denied, 395 U.S. 977 (1969).

<sup>59</sup> Id. at 480 (citing United States v. Norris, 300 U.S. 564 (1957)).

<sup>60</sup> See United States v. Manfredonia, 414 F.2d 760 (2nd Cir. 1969).

<sup>61</sup> 26 U.S.C. §§ 4401, 4411, 7203 and 7262 (1968).

charged him with perjury because he had lied in his original criminal trial when he denied accepting wagers. After his perjury conviction, the defendant argued on appeal that the lies were not "material" because his underlying wagering conviction had been vacated on constitutional grounds, effectively rendering the perjury prosecution legally "untenable." The Second Circuit rejected this argument as follows:

In advancing this argument appellant completely ignores the purpose of the perjury statute which is to keep the process of justice free from the contamination of false testimony. It is for the wrong done the courts and the administration of justice that punishment is given, not for the effect that any particular testimony might have on the outcome of any given trial. . . .

Indeed, it has long been established that an acquittal of the defendant in a trial where false testimony was given does not bar a prosecution for perjury. . . . It has likewise been held that the reversal of a conviction because of an improper indictment will not prevent a prosecution for perjury committed at the former trial. . . . In all of these cases the questioned testimony was material at the time it was given and subsequent events do not eliminate that materiality. To sustain a conviction of perjury ' \* \* \* materiality must be established only as of the time the answers were given.<sup>62</sup>

**d. Legal Rulings Relating to Jones v. Clinton**

This Referral concerns, in part, allegedly false statements made in connection with Jones v. Clinton No. LR-C-94-290 (E.D. Ark.), a civil rights case filed in the Eastern District of Arkansas. The materiality of some of those statements has already been the subject of court rulings, as detailed below.

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<sup>62</sup> Manfredonia, 414 F.2d at 764-65 (citations and footnotes omitted) (asterisks in original).

i. Rulings by Judge Wright in Jones v. Clinton

During discovery in the Jones case, the plaintiff, Paula Jones, repeatedly sought discovery as to whether President Clinton had sexual encounters with women other than his wife during the time that he was Governor and then President.<sup>63</sup> The district court judge, Judge Susan Webber Wright, rejected most of the President's arguments against such discovery. Her discovery orders reflect her conclusion that the evidence about "other women" known as "Jane Does" -- including evidence related to Ms. Lewinsky -- was relevant and material to the discovery process in Jones (and potentially relevant or material to summary judgment or trial, though, as discussed above, admissibility at trial is typically not a part of a materiality inquiry).

Judge Wright twice held that Ms. Jones was entitled to the testimony of the Jane Does. First, on November 24, 1997 Judge Wright held that Ms. Jones could question the Jane Does if Ms. Jones first established a factual predicate for doing so. In the words of the Clerk's minutes:

Plaintiff is entitled to ask questions that are calculated to lead to admissible evidence;. . . In response to [President Clinton's counsel, Robert] Bennett's concerns that pleadings will become public and do damage to institution of presidency, Court states questions have to be related to this cause of action and believes the Rules of Evidence and rules governing sexual harassment require Court to permit the

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<sup>63</sup> Ms. Jones's attorneys intended to use evidence of any such encounters to establish that the President was engaged in a pattern and practice of sexual advances in the workplace.

questions [about sexual activity with the President].<sup>64</sup>

Second, on December 18, 1997 Judge Wright issued an order discussing the materiality and relevance of testimony about "other women." She indicated that it was likely that not all of the discoverable evidence would be admissible, and stated that if the case went to trial, then she "anticipate[d] limiting the amount of time and number of witnesses that will be spent on issues of alleged sexual activity of both the President and the plaintiff (should such matters be deemed admissible)."<sup>65</sup> Judge Wright then held, however, that the "other women" questions were proper questions to ask during discovery. As she explained, "the issue [before the Court was] one of discovery, not admissibility of evidence at trial. Discovery, as all counsel know, by its very nature takes unforeseen twists and turns and goes down numerous paths, and whether those paths lead to the discovery of admissible evidence often simply cannot be predetermined."<sup>66</sup> For this reason, Judge Wright ordered the Jane Does to answer certain deposition questions regarding whether they had engaged in sexual activity with Mr. Clinton.

Judge Wright also several times held that the President was obliged to answer written or oral questions about whether he had engaged in sexual activity with other women. First, on December

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<sup>64</sup> See 921-DC-00000268-69 (Clerk's Minutes of In-Camera Hearing, Nov. 24, 1997).

<sup>65</sup> 1414-DC-00001012-13 (Dec. 18 Order, at 7).

<sup>66</sup> 1414-DC-00001012-13 (Dec. 18 Order at 7-8).

11, 1997, Judge Wright held that "the plaintiff is entitled to information regarding any individuals with whom the President had sexual relations or proposed or sought to have sexual relations and who were during the relevant time frame state or federal employees." <sup>67</sup>

Second, on January 8, 1998, Judge Wright reiterated that:

[she] ha[d] already ruled that questions regarding whether the President, as Governor of Arkansas, had sexual relations with certain women (other than his wife) in meetings that were arranged, facilitated, concealed, and/or assisted by at least one member of the Arkansas State Police and whether some of these women were or became employees of the State of Arkansas (or an agency thereof) are within the scope of the issues in the case. To the extent the President denies these allegations, he can so state without any undue burden. To the extent answers to the questions require something other than an outright denial, the Court finds that such answers may not necessarily be redundant to any previous answers the President has given to such questions and, further, that such answers may be relevant to the issues in this case and may lead to the discovery of admissible evidence.<sup>68</sup>

Third, at a January 12, 1998 hearing, Judge Wright ruled that Ms. Jones would be permitted to ask questions about "other women" during the President's deposition. During the same hearing, Judge Wright also required the plaintiffs to describe all the evidence they planned to introduce at trial, and then made several comments about the potential admissibility of that evidence at trial:

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<sup>67</sup> 921-DC-0000461 (Dec. 11 Order, at 3) (emphasis supplied). Judge Wright did establish a limited time frame for such discovery, and also required that any women questioned have been federal or state employees during the time of their encounter with the President.

<sup>68</sup> 921-DC-00000734 (Jan. 8 Order, at 4) (emphasis supplied).

[T]he Rules of Evidence in harassment cases -- and I'm not citing any authority right now for it, but I know in harassment cases, frequently, court's [sic] permit other bad acts, other volatile acts, that kind of thing. And I'm also aware that in sexual assault cases, the Rules of Evidence promulgated by the Violence Against Women Act has certainly opened it up. So I can't say that you can't call any of the witnesses in group B [the pattern and practice issue witnesses].<sup>69</sup>

Judge Wright concluded that for purposes of discovery and depositions, she would permit Ms. Jones's attorneys to ask the President "about people whose -- you know, whose names have been given you or people whom you have, you know, a reasonable basis for asking about."<sup>70</sup> This list included Monica Lewinsky.

Fourth, just before Ms. Jones' attorneys deposed President Clinton on Saturday, January 17, 1998, Judge Wright rejected the President's counsel's attempt to place limits on the scope of deposition questioning. In so ruling, she commented about the nature of the questions that President Clinton would be asked: "Unfortunately, the nature of this case is such that people will be embarrassed. I have never had a sexual harassment case where there was not some embarrassment."<sup>71</sup> President Clinton's counsel also attempted to stop the questioning about Ms. Lewinsky during the deposition, by citing Ms. Lewinsky's affidavit. Judge

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<sup>69</sup> 1414-DC-00001327-32 (Transcript of Jan. 12, 1998 Hearing, at 37-42).

<sup>70</sup> 1414-DC-00001336 (Transcript of Jan. 12, 1998 Hearing, at 46).

<sup>71</sup> Clinton 1/17/98 Depo. at 9.

Wright refused to limit the questioning.<sup>72</sup>

Finally, on January 29, 1998, after the OIC moved to suspend discovery relating to Ms. Lewinsky because she was the subject of a pending criminal investigation, Judge Wright concluded that Lewinsky-related evidence might be capable of influencing the ultimate decision in the lawsuit,<sup>73</sup> but determined pursuant to Fed. R. Evid. 403<sup>74</sup> that the probative value of the evidence was outweighed by the prejudice that would result from delaying the trial to allow the evidence to be obtained without conflicting with the OIC's criminal investigation. Judge Wright's order also held that other evidence of improper conduct occurring in the White House would not be precluded by the Court's ruling.

Judge Wright amplified this holding in an Order entered March 9, 1998. She first "readily acknowledg[ed] that evidence of the Lewinsky matter might have been relevant to the plaintiff's case,"<sup>75</sup> but then reiterated her decision to exclude

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<sup>72</sup> Id. at 53-56.

<sup>73</sup> Jones v. Clinton, Jan. 29 Order, at 2 ("The Court acknowledges that evidence concerning Monica Lewinsky might be relevant to the issues in this case.").

<sup>74</sup> Federal Rule of Evidence 403, entitled "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time" provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

<sup>75</sup> Jones v. Clinton, March 9 Order, at 9 (footnote omitted).

the evidence under Fed. R. Evid. 403 on the ground that it was not "essential to the core issues" of the case (namely, whether "plaintiff herself was the victim of quid pro quo sexual harassment.")<sup>76</sup>

**ii. Ruling by the D.C. Circuit**

The materiality of the allegedly false statements made in Jones v. Clinton has also been litigated by the OIC. Chief Judge Norma Holloway Johnson of the District Court for the District of Columbia ordered Francis Carter (Ms. Lewinsky's first lawyer) to testify as to matters relating to his representation of Ms. Lewinsky. In ordering the testimony, the court invoked the crime-fraud exception to the attorney-client privilege, based on the OIC's prima facie showing that Ms. Lewinsky had used Mr. Carter to prepare a false affidavit "for the purpose of committing perjury and obstructing justice."<sup>77</sup> On appeal to the United States Court of Appeals for the District of Columbia Circuit, Ms. Lewinsky argued that her affidavit related to matters later excluded from the Jones case and hence, as a matter of law, was not "material."<sup>78</sup> The appellate court rejected this argument:

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<sup>76</sup> Id. (emphasis in original)

<sup>77</sup> In re Grand Jury Proceedings, slip op. at 5 (D.D.C., Misc. No. 98-68, March 31, 1998).

<sup>78</sup> Being immaterial, she argued, the affidavit could not form the basis for a criminal charge and thus the crime-fraud exception could not be applied to vitiate her attorney-client privilege.

Lewinsky tells us she could not have committed [the] crime: the government could not establish perjury because her denial of having had a "sexual relationship" with President Clinton was not "material" to the Arkansas proceedings within the meaning of 18 U.S.C. § 1623(a). . . . Lewinsky's proposition[] rel[ies] on the Arkansas district court's ruling on January 30 [sic], 1998, after Lewinsky had filed her affidavit, that although evidence concerning Lewinsky might be relevant, it would be excluded from the civil case under Fed. R. Evid. 403 as unduly prejudicial, "not essential to the core issues in th[e] case" and to prevent undue delay resulting from the Independent Counsel's Investigation.

A statement is "material" if it "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a [particular] determination." United States v. Barrett, 111 F.3d 947, 953 (D.C. Cir.), cert. denied, 118 S.Ct. 176 (1997). The "central object" of any materiality inquiry is "whether the misrepresentation or concealment was predictably capable of affecting, i.e., had a natural tendency to affect, the official decision." Kungys v. United States, 485 U.S. 759, 771 (1988). Lewinsky used the statement in her affidavit, quoted above, to support her motion to quash the subpoena issued in the discovery phase of the Arkansas litigation. District courts faced with such motions must decide whether the testimony or material sought is reasonably calculated to lead to admissible evidence and, if so, whether the need for the testimony, its probative value, the nature and importance of the litigation, and similar factors outweigh any burden enforcement of the subpoena might impose. See Fed. R. Civ. P. 26(b)(a), . 45(c)(3)(A)(iv); Linder v. Department of Defense, 133 F.3d 17, 24 (D.C. Cir. 1998); see generally 9A Charles Allan Wright & Arthur R. Miller, Federal Practice and Procedure § 2459 (2d ed. 1995). There can be no doubt that Lewinsky's statements in her affidavit were -- in the words of Kungys v. United States -- predictably capable of affecting this decision. She executed and filed her affidavit for this very purpose.<sup>79</sup>

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<sup>79</sup> In re Sealed Case, slip op. at 4-6 (D.C. Cir., Nos. 98-3052, 98-3053, 98-3059, May 26, 1998) (brackets and ellipsis in original).

#### D. Literal Truth Defense to Perjury

Where a witness's answers are literally true -- even if they are unresponsive, misleading, or false by negative implication -- a perjury conviction cannot be maintained.<sup>80</sup> This is because, as the Supreme Court held in Bronston, "If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination."<sup>81</sup>

In Bronston, the defendant was convicted of perjury for testimony given at a bankruptcy hearing relating to a corporation of which he was the sole owner. In pertinent part, the following colloquy gave rise to the conviction:

Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

A. No, sir.

Q. Have you ever?

A. The company had an account there for about six months, in Zurich.

Mr. Bronston had in fact had a personal bank account in Geneva for five years, but his answers were literally truthful: he did not have a Swiss bank account at the time of the questioning and his company did have the account described. The prosecution's theory in the lower court was "that in order to mislead his questioner, petitioner answered the second question with literal

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<sup>80</sup> Bronston v. United States, 409 U.S. 352, 360 (1973).

<sup>81</sup> Id. at 358-59.

truthfulness but unresponsively addressed his answer to the company's assets and not to his own -- thereby implying that he had no personal Swiss bank account at the relevant time."<sup>82</sup>

The Supreme Court, however, found it irrelevant that Bronston may have intended to mislead the questioner and reversed the perjury conviction. The Court explained that though in casual conversation one might interpret the responses to mean that there was never a personal bank account, "the statute does not make it a criminal act for a witness to willfully state any material matter that implies any material matter that he does not believe to be true."<sup>83</sup> Following Bronston, courts have repeatedly found literal truth a complete defense to perjury where the witness's answer was literally true but misleading or unresponsive.<sup>84</sup>

Bronston made clear, however, that in order for a statement

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<sup>82</sup> 409 U.S. at 354.

<sup>83</sup> Id. at 357-58.

<sup>84</sup> See, e.g., United States v. Chaplin, 25 F.3d 1373, 1380 (7th Cir. 1994) (defense applies where witness denied giving \$8,000 on October 23 and government only showed that transaction took place sometime in October); United States v. Earp, 812 F.2d 917, 919 (4th Cir. 1987) ("[I]n questioning [defendant], the questioner simply did not probe deep enough to recognize any potential evasion."); United States v. Tedder, 801 F.2d 1437, 1447-48 (4th Cir. 1986) (defense applicable where government failed to ask defendant if he knew of prior bank accounts held by named individual and defendant truthfully answered question posed in the present tense), cert. denied, 480 U.S. 938 (1987); cf. United States v. Rymer, No. 91-5585, 1992 WL 86528, at \*3 (6th Cir. April 27, 1992) (defense not applicable to defendant's testimony that he could not recall statements he made to FBI a year earlier, as his answers were not non-responsive) (unpublished disposition).

to be considered literally true, it must be true in the context of the question. The Court analyzed a hypothetical example in which a witness, when asked how many times she entered a store on a given day, responds "five" when she actually visited the store 50 times. The district court had considered the response in this hypothetical to be literally true, but had instructed the jury that a defendant could be convicted of perjury if the answer was "'not literally false but when considered in the context in which it was given, nevertheless constitute[d] a false statement.'"<sup>85</sup> The Supreme Court agreed that a perjury conviction would be proper in such a case, noting that "the answer 'five times' is responsive to the hypothetical question and contains nothing to alert the questioner that he may be sidetracked."<sup>86</sup> The Court also expressed doubt that the answer in the hypothetical was literally true in any event, explaining: "Whether an answer is true must be determined with reference to the question it purports to answer, not in isolation. An unresponsive answer is unique in this respect because its unresponsiveness by definition prevents its truthfulness from being tested in the context of the question."<sup>87</sup>

In light of Bronston, a witness who gives a responsive answer that is false when viewed in the context of the question

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<sup>85</sup> 409 U.S. at 354.

<sup>86</sup> Id. at 354 n.3.

<sup>87</sup> Id.

may not benefit from the literal truth defense.<sup>88</sup> Indeed, most courts (including the D.C. Circuit) have held that the literal truth defense does not bar perjury convictions where the defendant and the government interpret the relevant question differently. In other words, most circuits hold that Bronston's literal truth defense is inapposite where "the answer is true only if one of two asserted interpretations of the question is accepted."<sup>89</sup> The Bell court, for example, said:

In Bronston, the answer was a full, explanatory sentence, the truthfulness of which could be determined without reference to the question. Here, the answer simply was "no"; the truthfulness of that answer can be determined only by first looking to the question. Bronston simply did not deal with a yes or no answer given to a question susceptible to more than one interpretation.<sup>90</sup>

Under these circumstances, when the defendant claims that he understood the question differently from the questioner "the

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<sup>88</sup> See United States v. Schafrick, 871 F.2d 300, 303 (2d Cir. 1989) ("In Bronston, the crucial factor was that the answer Bronston gave was not responsive to the question he was asked. . . . If an answer is responsive to the question, then there is no notice to the examiner and no basis for applying Bronston."); United States v. Kehoe, 562 F.2d 65, 68-69 (1st Cir. 1977) ("An answer that is responsive and false on its face does not come within Bronston's literal truth analysis simply because the defendant can postulate unstated premises of the question that would make his answer literally true."); United States v. Crippen, 570 F.2d 535, 537 (5th Cir. 1978) ("The words used were to be understood in their common sense, not as they might be warped by sophistry or twisted"), cert. denied, 439 U.S. 1069 (1979). .

<sup>89</sup> United States v. Bell, 623 F.2d 1132, 1136 (5th Cir. 1980). As discussed below, only the First Circuit's Glantz decision may be at odds with this line of cases.

<sup>90</sup> Id. at 1136.

defendant's understanding of the question is a matter for the jury to decide."<sup>91</sup> (The First Circuit has, however, applied the literal truth defense to "bar perjury convictions for arguably untrue answers to vague or ambiguous questions when there is insufficient evidence of how they were understood by the witness."<sup>92</sup> )

In a Watergate-related case, for example, the defendant was convicted of falsely stating that he was not "'familiar with'" the distribution of negative campaign literature by a Nixon staffer he had hired, and that he did not recall "'express[ing] any interest . . . or giv[ing him] any directions or instructions with respect to any single or particular candidate.'"<sup>93</sup> The government had charged that the defendant did know of the literature distribution and that he did give specific instructions regarding a particular Senator, Senator Muskie, a

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<sup>91</sup> Id. (collecting cases). Bell itself held "that [because] 'a reasonably minded jury must have a reasonable doubt as to the existence of the essential elements of the crime charged,' the conviction may not stand." Id. (quoting United States v. Reynolds, 511 F.2d 603, 606 (5th Cir. 1975)); cf. Kehoe, 562 F.2d at 69 (finding no evidence to support defendant's claim that the context of the questions was unclear); United States v. Cash, 522 F.2d 1025, 1029-30 (9th Cir. 1975) (affirming perjury conviction where jury chose to disbelieve defendant's purported understanding of question); cf. United States v. Thompson, 637 F.2d 267, 270 (5th Cir. 1981) (Bronston "does not mean . . . that question and answer must be aligned in categorical and digital order.").

<sup>92</sup> United States v. Glantz, 847 F.2d 1, 6 (1st Cir. 1988). Glantz might be viewed as premised on an insufficiency of the evidence analysis, however the court characterized it as a literal truth defense.

<sup>93</sup> See United States v. Chapin, 515 F.2d 1274, 1277 (D.C. Cir. 1975), cert. denied, 423 U.S. 1015 (1975).

potential political opponent of President Nixon. The defendant argued on appeal that because the questions were vague, his answers were truthful: he did not know whether the staffer actually passed out literature, and he never gave directions about one candidate to the exclusion of others. The D.C. Circuit rejected this argument, explaining:

As another court stated when faced with the charge that "met with" and "regular" were too vague, "mere vagueness or ambiguity in the questions is not enough to establish a defense to perjury. Almost any question or answer can be interpreted in several ways when subjected to ingenious scrutiny after the fact." When the questions involved here are considered in the context of both the purpose of the grand jury investigation, which was known to Chapin, and the series of questions actually asked, we cannot say that the words involved could not be "subject to a reasonable and definite interpretation by the jury."<sup>94</sup>

The court distinguished Bronston, in which the answer was unresponsive, because there "[t]he [Supreme] Court explicitly considered only the problem posed by a declarative statement which was true no matter what the question might have meant, and did not consider the effect of any possible vagueness of the question." The court then explained that "Bronston does not deal with the situation where a defendant has given a 'yes or no' answer, the truth of which can be ascertained only in the context of the question posed."<sup>95</sup>

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<sup>94</sup> Id. at 1279-80 (quoting United States v. Ceccerelli, 350 F. Supp. 475, 478 (W.D. Penn. 1972) and United States v. Marchisio, 344 F.2d 653, 662 (2d Cir. 1965), respectively); see also Chapin, 515 F.2d at 1280 n.3 (collecting cases in which questions challenged as ambiguous were upheld as sufficient to support an indictment or a conviction).

<sup>95</sup> Chapin, 515 F.2d at 1279-80.

The court was also unpersuaded by the defendant's argument that the lack of follow-up questions meant "that the prosecutors were not successfully misled by Chapin."<sup>96</sup> Instead, the court observed that "neither the court nor the jury must accept as conclusive the meaning the defendant, after the fact, puts on a question." The court found the jury's interpretation of the question, as evidenced by the verdict, the "only reasonable [one]."<sup>97</sup>

One D.C. district court has recently relied upon Chapin to reject an Iran-Contra defendant's motion to dismiss perjury counts based on his having "dissect[ed] each of the alleged perjuries to demonstrate that they are true, albeit unresponsive."<sup>98</sup> The court explained:

Such stretching of the language would be unnecessary were the contested statements literally true. Nor does Bronston give a defendant latitude to insulate himself from prosecution by reinterpreting his statements in order to give them a meaning which is literally true. . . . Bronston requires the court to dismiss the indictment only when it is plain that the government cannot prove that the defendant's statement was false. In situations, as here, where there may be one or more arguable constructions of the defendant's statements under which those statements might be true, and the

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<sup>96</sup> Id. at 1283.

<sup>97</sup> Id. In Chapin, the district court had charged the jury that it could not convict if any reasonable interpretation of the question rendered the answer true. The D.C. Circuit therefore did not need to decide "whether a conviction would be upheld if the government proved that the defendant was truthfully answering some possible-and-reasonable interpretation of the question but falsely answering the question as he himself interpreted it." Id. at 1280.

<sup>98</sup> See United States v. Clarridge, 811 F. Supp. 697, 712 (D.D.C. 1992).

other constructions that the statements were, the question is left for the jury.<sup>99</sup>

The difference between perjury and literal truth is well illustrated by another high-profile case, in which the D.C. Circuit affirmed a perjury count involving conflicting interpretations of questions and answers but reversed another count because the statement was literally true.<sup>100</sup> The defendant, a HUD official, had been convicted of four counts of perjury and four § 1001 violations for statements made during congressional hearings investigating favoritism in the administration of funding for substandard housing. A Senator had asked the defendant, in pertinent part:

[I]t is suggested that informal solicitations and unawarded applications from the past are guarded by you, and that you personally go through the selections, excluding review by the appropriate staff experts.

Furthermore, it is suggested that developers have personally come to you asking for awards. Now, as you know, the proper procedure is for the HUD Washington office to deal with housing authorities and for them to deal with developers. In some cases, the housing authorities have subsequently alerted HUD that these funds aren't even needed. How do you respond to that?<sup>101</sup>

In response, the defendant had explained the procedure for reviewing funding applications, including review by a panel. The statement found perjurious was that "[t]hat panel goes solely on

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<sup>99</sup> Id.

<sup>100</sup> United States v. Dean, 55 F.3d 640, 659 (D.C. Cir. 1995), cert. denied, 516 U.S. 1184 (1996) (citing United States v. Dunnigan, 507 U.S. 87, 94 (1993)).

<sup>101</sup> Id. at 659.

information provided by the Assistant Secretary for Housing."<sup>102</sup> Challenging her perjury conviction on appeal, the defendant claimed that she had answered the question asked, to wit, whether she made funding decisions alone. The court rejected the argument, saying that "[t]he thrust of the Senator's inquiry was whether Dean played a part in any moderate rehabilitation funding decision in which Departmental regulations were not followed," and that "[i]n essence, Dean denied [the Senator's] intimations."<sup>103</sup> The court concluded from the government's evidence that "the jury was entitled to find that the panel did not base its decisions solely on information provided by the Assistant Secretary for Housing."<sup>104</sup> Thus, notwithstanding the wordiness and complexity of the question and the defendant's explanation of how she understood it, the court affirmed the conviction on this count.

Dean reversed the defendant's conviction on a separate perjury count, however. The defendant had been convicted for stating that "no moderate rehabilitation [funds] have ever gone to my home State of Maryland, simply for that reason -- that I sat on the panel [which made allocation decisions]".<sup>105</sup> The D.C.

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<sup>102</sup> Id.

<sup>103</sup> Id. at 660 (emphasis added); cf. Schafrick, 871 F.2d at 304 ("The questions as well as the answers, and the answers understood as a whole, are crucial to the determination of whether [defendant]'s statements were perjury.").

<sup>104</sup> Dean, 55 F.3d at 660.

<sup>105</sup> Id. at 661.

Circuit rejected the government's claim that the statement represented the defendant's denial of ever having participated in a moderate rehabilitation funding decision for a Maryland project, because "that is not literally what she said." The court wrote:

While Dean had participated in decisions for Maryland projects, her testimony indicated that those projects did not receive special consideration "simply" because Dean sat on the panel. Dean's statement could have been true, and, in any event, the government never proved at trial that she showed particular favoritism to Maryland projects. Although it may be, as Mark Twain said, that "[o]ften, the surest way to convey misinformation is to tell the strict truth," a statement that is literally true cannot support a perjury conviction.<sup>106</sup>

In addition, the prosecution provided no evidence to support the alleged falsity of the defendant's statement, and the defendant made the statement gratuitously -- it was not in response to a pending question. Thus, unlike the perjury count discussed above, the court could not view the answer in the context of the question to determine the defendant's understanding. As a result, it concluded that the conviction could not stand as it might be literally true.

#### **E. Perjury in Cases of Feigned Forgetfulness**

Perjury cases can be and have been charged when a witness feigns forgetfulness about the events in question. When this type of charge is brought, the government must prove that the witness in fact had knowledge about the events as to which he claims

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<sup>106</sup> Id. at 662 (citing Bronston, 409 U.S. at 360).

memory loss.

### 1. Proof of Knowledge

Because proving feigned forgetfulness requires proving the state of mind of the witness, the key issue is "whether th[e] circumstantial evidence meets the test of proof beyond a reasonable doubt."<sup>107</sup> In rare instances, direct proof of feigned forgetfulness -- an inconsistent statement of recollection, for example -- might be available, and such proof would constitute "direct evidence that the defendant did know or recall the fact that he denied knowing or recalling under oath."<sup>108</sup>

Such direct proof is unlikely and courts have generally concluded that the government can also meet its burden (to prove

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<sup>107</sup> Id; see also United States v. Mathern, 329 F. Supp. 536, 538 (E.D. Pa. 1971); Chapin, 515 F.2d at 1284 ("Of course . . . the falsity of an 'I don't recall' answer must be proven by circumstantial evidence."); Fotie v. United States, 137 F.2d 831, 842 (8th Cir. 1943) ("Necessarily the recollection of a witness must be shown by circumstantial evidence.").

<sup>108</sup> Gebhard v. United States, 422 F.2d 281, 287-88 (9th Cir. 1970); see also United States v. Forrest, 623 F.2d 1107, 1111-12 (5th Cir. 1980) (admission recounted by another witness is direct evidence of falsity), cert. denied, 449 U.S. 924 (1980); United States v. Chapin, 515 F.2d 1274, 1284 (D.C. Cir.) (implying that only possible direct evidence tending to prove falsity of claimed inability to recall would be statement of defendant), cert. denied, 423 U.S. 1015 (1975); United States v. Sweig, 441 F.2d 114, 116 (2d Cir.) (same), cert. denied, 403 U.S. 932 (1971); United States v. Beach, 296 F.2d 153, 157 (4th Cir. 1961) (direct evidence of defendant, and others, that he knew certain men, supported perjury conviction for defendant's grand jury testimony that he did not know identity of men); United States v. Bergman, 354 F.2d 931, 934 (2d Cir. 1966) (upholding conviction for false of grand jury testimony denying recollection of receipt of kickbacks and income from unlawful sources when such income was proven by extrajudicial admissions and circumstantial evidence that defendant possessed additional funds).

beyond a reasonable doubt that claimed forgetfulness was feigned) when it presents enough circumstantial evidence that a defendant must have remembered.<sup>109</sup> A broad range of circumstantial evidence can support a perjury conviction on the theory that purported inability to remember was a lie. In general, just as with any other attempt to prove a defendant's state of mind,

[t]he jury must infer the state of a man's mind from the things he says and does. Such an inference may come from proof of the objective falsity itself, from proof of a motive to lie, and from other facts tending to show that the defendant really knew the things he claimed not to know.<sup>110</sup>

Thus, in order to prove the claimed forgetfulness was feigned, "the witness must testify to some overt act from which the jury may infer the accused's actual belief."<sup>111</sup> As the D.C. Circuit has said, in a different formulation of the same principle, "a belief as to the falsity of testimony may be inferred by the jury from proof of the falsity itself."<sup>112</sup>

## 2. Cases in Brief

The following subsection briefly reviews some representative

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<sup>109</sup> See Behrle v. United States, 100 F.2d 714, 716 (D.C. Cir. 1938) (prosecution may use circumstantial evidence to prove that a witness charged with perjury must have remembered facts about which he testified that "he 'remembered nothing'").

<sup>110</sup> Sweig, 441 F.2d at 117.

<sup>111</sup> Beach, 296 F.2d at 155 (internal quotation marks omitted).

<sup>112</sup> Young v. United States, 212 F.2d 236, 241 (D.C. Cir.), cert. denied, 347 U.S. 1015 (1954).

reported cases involving feigned forgetfulness and perjury charges. The next subsection summarizes principles gleaned from a larger number of such cases.<sup>113</sup>

- A witness to a shooting, who had made a written statement to the police and testified before the grand jury, was convicted of perjury when -- after being called to testify at the trial of the men charged with the shooting -- he first denied having seen anything happen; then, when shown his signed statement, admitted his signature but said he did not know the contents; and finally, when the statement was read to him, said he did not remember whether any of the events described in it happened or not.<sup>114</sup> The D.C. Circuit affirmed the conviction, stating: While "[d]irect proof that [the defendant] did remember was impossible, [t]he circumstantial evidence that he must have remembered was, if believed, enough to overcome the presumption of innocence

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<sup>113</sup> Claims of inability to remember past events have arisen in obstruction of justice cases as well. See, e.g., United States v. Alo, 439 F.2d 751, 754 (2d Cir. 1971) (affirming obstruction of justice conviction for professed memory loss in connection with SEC Investigation), cert. denied, 404 U.S. 850 (1971); Avionic Co. v. General Dynamics Corp., 957 F.2d 555, 557 (8th Cir. 1992) (affirming sanction for obstruction of discovery where defendant avoided having to disclose information he later claimed not to recall); United States v. Murray, 65 F.3d 1161, 1165 (4th Cir. 1995) (district court properly enhanced sentence on perjury conviction for obstruction of justice where defendant signed statement implicating another individual but testified that she could not remember making statement about other's involvement). Typically, however, feigned forgetfulness is charged as a perjury violation.

<sup>114</sup> See Behrle v. United States, 100 F.2d 714, 715-16 (D.C. Cir. 1938).

and leave no reasonable doubt of guilt."<sup>115</sup>

- Another defendant was convicted of perjury under § 1623 for testifying before a grand jury investigating a drug conspiracy that "he did not recall being in Florida during 1983."<sup>116</sup> But "[t]here was other grand jury testimony, however, that Moeckly had been in Florida, and had stayed with [a co-conspirator] and studied Spanish there."<sup>117</sup> The Eighth Circuit affirmed the conviction.
- A justice of the Michigan Supreme Court was convicted under § 1621 when he testified before a grand jury that "he had no recollection of two conversations with" a co-defendant, but then two days later (after he became aware that some of his activities had been the subject of FBI surveillance) told the grand jury that the conversations had taken place.<sup>118</sup> The Sixth Circuit affirmed the conviction. The court first noted that,

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<sup>115</sup> Id. at 716. Citing Behrle, the Eight Circuit reversed a perjury conviction because the defendant recanted his allegedly false statement. Fotie v. United States, 137 F.2d 831, 842 (8th Cir. 1943). The defendant had claimed no recollection of ever having filed for naturalization papers or having sworn that he was born in Italy. When shown the original and duplicate of his declaration of intention to become a citizen, which was made 24 years before he made the allegedly perjurious statement, "he promptly admitted it." Id. The court distinguished the case from instances where witnesses recant statements once their perjury is exposed. Id. at 843.

<sup>116</sup> United States v. Moeckly, 769 F.2d 453, 459-65 (8th Cir. 1985), cert. denied, 475 U.S. 1015 (1986).

<sup>117</sup> Id. at 459.

<sup>118</sup> See United States v. Swainson, 548 F.2d 657, 662 (6th Cir.), cert. denied, 431 U.S. 937 (1977).

[w]hen the alleged perjury relates to the state of mind of the accused, as in the present case ('I have no recollection'), proof of perjury must necessarily consist of proof of facts from which the jury could infer that the defendant must have known or remembered that which he denied knowing or remembering while under oath.<sup>119</sup>

The court found that in this case there was enough evidence that the jury could infer that the defendant "had wilfully failed to answer the questions concerning these conversations truthfully at his first appearance."<sup>120</sup>

- Another defendant had been convicted under § 1621 for 15 counts of perjury before a grand jury investigating illegal card games at a club.<sup>121</sup> Gebhard had been questioned (under a grant of immunity) about his role in the installation and operation of electronic devices placed in the club to enable gamblers to fleece fellow members. In pertinent part, Gebhard's "responses to the questions involved in [certain] counts of the indictment were invariably, 'I don't recall' or 'I don't know' or 'I don't remember.'"<sup>122</sup> The appeals court noted that "[g]iven answers of this nature, it would be difficult to find two witnesses to testify that the defendant did in fact know or believe or recall a matter

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<sup>119</sup> Id. at 662.

<sup>120</sup> Id.

<sup>121</sup> See Gebhard v. United States, 422 F.2d 281, 283-88 (9th Cir. 1970).

<sup>122</sup> Id. at 287.

which he said he did not."<sup>123</sup> The court therefore concluded that circumstantial evidence could be used to prove the case for perjury: "[i]f the government can build up a strong enough set of facts to show what the truth of the matter was and what the defendant must have known, this should be enough to go to the jury."<sup>124</sup>

- In the Watergate-era case mentioned earlier, the defendant (Nixon's Appointment Secretary, Chapin) was convicted under § 1623 for stating "Not that I recall" in answer to a question about whether he had hired a particular aide (Donald Segretti) to play pranks on the contenders for the Democratic nomination, or had given Segretti "any instructions with respect to any single or particular candidate."<sup>125</sup> The D.C. Circuit affirmed the conviction, noting that the "the falsity of an 'I don't recall' answer must be proven by circumstantial evidence," that in this case the evidence showed that Chapin had given the aide "a large number of instructions about Senator Muskie over a six-month period," and that Chapin's "obvious desire before

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<sup>123</sup> Id. The court also suggested that a contrary admission by the defendant would constitute direct evidence of his state of mind. Id.

<sup>124</sup> Id. at 288.

<sup>125</sup> United States v. Chapin, 515 F.2d 1274, 1274-90 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975). Chapin had in 1971 hired Segretti to play "political pranks" on the contenders for the Democratic presidential nomination. The actual question in full was: "Did you ever express any interest to [Segretti], or give him any instructions with respect to any single or particular candidate?" Chapin responded, "Not that I recall."

the grand jury and the court to put himself as far as possible from the specifics of Segretti's campaign provided sufficient evidence of his motive to conveniently omit recollection of any specific instructions."<sup>126</sup> Even though Chapin argued on appeal that he had believed the question was asking whether he had given any instructions to "zero in" on a particular candidate to the exclusion of others, and that he had not done so, the court rejected the argument, finding that if that had been Chapin's true understanding, "he would not have responded so unequivocally as he did, 'Not that I recall' . . . but would probably have given a flat and emphatic negative," and that "[t]his was too central a matter not to be clear in his mind."<sup>127</sup>

- Another defendant, was convicted of perjury under § 1623 for testifying to a grand jury first that he had been in Florida during a major fire in Lynn, Massachusetts, and later that he could not remember the exact date that he had returned to Lynn.<sup>128</sup> At trial, the government had introduced evidence to show that Goguen had been in Lynn and that, because of the fire's magnitude, it was more than likely that when Goguen appeared before the grand jury he did remember that he had been in Lynn during the fire. The First Circuit affirmed

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<sup>126</sup> Id. at 1284.

<sup>127</sup> Id. at 1283.

<sup>128</sup> See United States v. Goguen, 723 F.2d 1012, 1014-15 (1st Cir. 1983).

the conviction, noting that "while the average person may not remember where he was the day before President Kennedy was assassinated, he surely would remember if he was at the Texas Book Depository in Dallas the day before the assassination."<sup>129</sup>

### 3. Summary

A review of the case law reveals that perjury convictions for false claims of memory loss are likely where there is either strong circumstantial evidence or other factors tending to show that the witness must have remembered, such as a motive to lie (Behrle; Seltzer, Nicoletti, Ponticelli, Chapin);<sup>130</sup> a reason to remember (Ponticelli, Chapin); a selectively spotty memory (Nicoletti); a suddenly revived memory upon learning of the government's evidence (Swainson);<sup>131</sup> testimony or other evidence confirming the occurrence of an event and the likelihood that the defendant would not have forgotten it (Moeckly, Camporeale,

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<sup>129</sup> Id. at 1021 n.11.

<sup>130</sup> Behrle v. United States, 100 F.2d 714 (D.C. Cir. 1938); United States v. Seltzer, 794 F.2d 1114 (7th Cir. 1986), cert. denied, 479 U.S. 1054 (1987); United States v. Nicoletti, 310 F.2d 359 (7th Cir. 1962), cert. denied, 372 U.S. 942 (1963); United States v. Ponticelli, 622 F.2d 985 (9th Cir.), cert. denied, 449 U.S. 1016 (1980), overruled on other grounds, United States v. Debright, 730 F.2d 1255, 1259 (9th Cir. 1984); United States v. Chapin, 515 F.2d 1274 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975)

<sup>131</sup> United States v. Swainson, 548 F.2d 657 (6th Cir.), cert. denied, 431 U.S. 937 (1977).

Ponticelli, Devitt, Chapin; but see Clizer);<sup>132</sup> or statements by the defendant contradicting the claim (Behrle, Nicoletti). Courts have also considered the chronology of a defendant's statements or inconsistent claims of forgetfulness (Behrle), or proximity in time between the testimony and the event at issue (Nicoletti, Mathern; cf. Fotie, Devitt).<sup>133</sup> Moreover, courts have adverted to the "enormity of the events" as an indication that purported failure to recollect was a lie (Seltzer, Moreno Morales, Ponticelli, Goguen),<sup>134</sup> or have highlighted the repetitiveness of some witnesses' claims of inability to remember (Gebhard).<sup>135</sup> The defendant's uncooperative attitude in testifying before a grand jury is also relevant (Seltzer).

**F. Inconsistent Statements Under § 1623(c)**

As noted above, under § 1623(c) the government may prosecute a perjury charge based solely upon inconsistent statements (if both of the statements in question were made under oath, before

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<sup>132</sup> United States v. Moeckly, 769 F.2d 453 (8th Cir. 1985), cert. denied, 475 U.S. 1015 (1986); United States v. Camporeale, 515 F.2d 184 (2d Cir. 1975); United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975); United States v. Clizer, 464 F.2d 121 (9th Cir.), cert. denied, 409 U.S. 1086 (1972).

<sup>133</sup> United States v. Mathern, 329 F. Supp. 536 (E.D. Pa. 1971); Fotie v. United States, 137 F.2d 831 (8th Cir. 1943).

<sup>134</sup> United States v. Moreno Morales, 815 F.2d 725 (1st Cir.), cert. denied, 484 U.S. 966 (1987); United States v. Goguen, 723 F.2d 1012 (1st Cir. 1983).

<sup>135</sup> Gebhard v. United States, 422 F.2d 281 (9th Cir. 1970).

or ancillary to a court or grand jury).<sup>136</sup> The prosecution need not prove which statement is false, but need only prove beyond a

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<sup>136</sup> Section 1623(c) of Title 18 provides:

Any 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 is 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 the 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.

This provision is the result of a 1970 amendment to § 1623 that was intended to "provide[] specifically for the prosecution of a false declaration in the case of irreconcilable contradictory statements without the necessity of specifying which of the declarations is false." H.R. Rep. No. 1549, 91st Cong., 2nd Sess., reprinted in 1970 U.S.C.C.A.N. 4007 (emphasis added). Of course, both statements must be made under oath before or ancillary to a court or grand jury. See United States v. Jaramillo, 69 F.3d 388, 390 (9th Cir. 1995) ("To take advantage of § 1623(c)'s lesser requirement of proof, the government must demonstrate, inter alia, that both contradictory declarations are within the scope of 18 U.S.C. § 1623(c)."); cf. United States v. Harvey, 657 F. Supp. 111, 113-14 (E.D. Tenn. 1987) (including as an element of crime under § 1623(c) that the statements "were made before or ancillary to a federal court or grand jury proceeding").

Section 1623(c) also provides that "[i]t 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." 18 U.S.C. § 1623(c)(2).

reasonable doubt that the statements are irreconcilably contradictory (and material to the case).<sup>137</sup>

### G. Perjury Trap Defense

The so-called "perjury trap defense" has been discussed by many courts, but adopted by few.<sup>138</sup> In theory, "[a] perjury trap is created when the government calls a witness before the grand jury for the primary purpose of obtaining testimony from him in order to prosecute him later for perjury."<sup>139</sup> The essence of this theory is that by using its power to compel testimony toward this end, particularly when the perjured information is neither material nor germane to the legitimate ongoing investigation of the grand jury,<sup>140</sup> the government violates the Due Process clause of the Fifth Amendment and that this conduct requires dismissal of the indictment.<sup>141</sup> Criminal defendants often argue that their indictments should be dismissed for improprieties surrounding the requirement that they give grand jury testimony.

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<sup>137</sup> See United States v. Porter, 994 F.2d 470, 473 n.4 (8th Cir. 1993). Thus, in order to sustain a conviction under § 1623(c), based upon inconsistent statements the government must prove the following elements beyond a reasonable doubt: (1) a defendant, under oath; (2) made two or more declarations; (3) which were irreconcilably inconsistent; (4) each of which was material to the point in question, and (5) each of which was made within the statute of limitations.

<sup>138</sup> See Wheel v. Robinson, 34 F.3d 60, 67-68 (2d Cir.1994).

<sup>139</sup> United States v. Chen, 933 F.2d 793, 796 (9th Cir. 1991).

<sup>140</sup> See United States v. Crisconi, 520 F. Supp. 915, 920 (D.Del.1981).

<sup>141</sup> Id. at 67 (quoting Chen, 933 F.2d at 796-97).

Insofar as the doctrine exists, "any application of the 'perjury trap' doctrine" is precluded if there is a "legitimate basis" for an investigation and for the particular questions answered falsely.<sup>142</sup> When testimony is elicited before a grand jury that is "attempting to obtain useful information in furtherance of its investigation"<sup>143</sup> or "conducting a legitimate investigation into crimes which had in fact taken place within its jurisdiction,"<sup>144</sup> the perjury trap defense cannot succeed.

Furthermore, no perjury trap defense is available simply because the government anticipated that the defendant would commit perjury in testifying before the grand jury. Even if the government anticipates that a defendant would give false testimony, the government is entitled to hope "that [the defendant] ... might provide information about the pending investigation"<sup>145</sup> and to anticipate that a witness will testify truthfully once placed in the solemn atmosphere of the grand jury room. "[F]or many witnesses the grand jury room engenders an atmosphere conducive to truth-telling, for it is likely that upon

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<sup>142</sup> Wheel, 34 F.3d at 68; see also United States v. Regan, 103 F.3d 1072 (2nd Cir.1997), cert. denied, 117 S.Ct. 2484 (1997).

<sup>143</sup> United States v. Devitt, 499 F.2d 135, 140 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975).

<sup>144</sup> United States v. Chevoor, 526 F.2d 178, 185 (1st Cir.1975), cert. denied, 425 U.S. (1976). See United States v. Chen, 933 F.2d 793, 797 (9th Cir. 1991); see also United States v. Brown, 49 F.3d 1162, 1168 (6th Cir. 1995).

<sup>145</sup> United States v. Caputo, 633 F. Supp. 1479, 1487 (E.D.Pa.1986), rev'd on other grounds, 823 F.2d 754 (3d Cir. 1987).

being brought before such a body of neighbors and fellow citizens, and having been placed under a solemn oath to tell the truth, many witnesses feel obliged to do just that."<sup>146</sup>

## II. Obstruction of Justice -- 18 U.S.C. § 1503

The obstruction of justice statute applicable to cases involving a defendant's false swearing or obstructive conduct is 18 U.S.C. § 1503.<sup>147</sup> Section 1503 provides:

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate,

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<sup>146</sup> United States v. Washington, 431 U.S. 181, 187-88 (1977).

<sup>147</sup> Section 1505 of Title 18 applies to pending "department or agency" proceedings, not to pending judicial or grand jury proceedings. While "mere 'police investigation[s]'" do not constitute proceedings for purposes of the statute, "agency investigative activities are proceedings within the scope of § 1505 [where they] involve[] agencies with some adjudicative power, or with the power to enhance their investigations through the issuance of subpoenas or warrants." United States v. Kelley, 36 F.3d 1118, 1127 (D.C. Cir. 1994) (citation omitted).

In the D.C. Circuit, § 1505 applies only where the defendant influenced another person to violate the law. In United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991), cert. denied, 506 U.S. 1021 (1992), the court applied a "transitive" reading to § 1505 and held that, "[a]s used in § 1505 . . . the term 'corruptly' is too vague to provide constitutionally adequate notice that it prohibits lying to the Congress." Id. at 379. The court thus narrowed § 1505 "to include only 'corrupting' another person by influencing him to violate his legal duty." Id. (emphasis added). The court observed, however, that the "language of § 1505 is materially different from that of § 1503." Id. at 385. The transitive Poindexter reading of § 1505 does not apply to § 1503. United States v. Russo, 104 F.3d 431, 435-47 (D.C. Cir. 1997); United States v. Watt, 911 F. Supp. 538, 545-47 (D.D.C. 1995).

in the discharge of his duty, . . . or corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).<sup>148</sup>

The underlined "'Omnibus Clause' serves as a catchall, prohibiting persons from endeavoring to influence, obstruct, or impede the due administration of justice. The latter clause, it can be seen, is far more general in scope than the earlier clauses of the statute."<sup>149</sup> Put differently, the omnibus clause "prohibits acts that are similar in result, rather than manner, to the conduct described in the first part of the statute."<sup>150</sup>

The Court of Appeals for the District of Columbia Circuit has characterized the offense of § 1503 obstruction of justice as having three main elements: (1) the government must prove that the defendant engaged in conduct or behavior or endeavored to engage in conduct or behavior; (2) that the defendant engaged in such behavior corruptly and with specific intent; and (3) that the defendant's intent was to impede the due administration of justice.<sup>151</sup> In order for § 1503 to apply, there must be judicial proceedings pending at the time of the defendant's conduct, such

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<sup>148</sup> 18 U.S.C. § 1503 (emphasis added).

<sup>149</sup> United States v. Aguilar, 515 U.S. 593, 598 (1995).

<sup>150</sup> United States v. Howard, 569 F.2d 1331, 1333 (5th Cir.), cert. denied, 439 U.S. 834 (1978).

<sup>151</sup> United States v. Bridges, 717 F.2d 1444, 1449 n.30 (D.C. Cir. 1983), cert. denied, 465 U.S. 1036 (1984); see also Pyramid Securities Ltd. v. IB Resolution Inc., 924 F.2d 1114, 1119 (D.C. Cir.), cert. denied, 502 U.S. 822 (1991).

as a grand jury investigation.<sup>152</sup> Finally, knowledge of the pending judicial proceedings is required.<sup>153</sup> Other courts have combined these elements as follows:

[T]he elements of obstruction of justice, pursuant to the omnibus clause of section 1503, are (1) a pending judicial proceeding; (2) the defendant must have knowledge or notice of the pending proceeding; and (3) the defendant must have acted corruptly, that is with the intent to influence, obstruct, or impede that proceeding in its due administration of justice.<sup>154</sup>

#### A. Elements of § 1503 Further Defined

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<sup>152</sup> Pyramid Securities Ltd., 924 F.2d at 1119.

<sup>153</sup> Aguilar, 515 U.S. at 599. It bears noting that materiality is not an element of the offense under § 1503. E.g. United States v. Rankin, 1 F.Supp.2d 445, 454 (E.D. Pa. 1998) (citing United States v. Rankin, 870 F.2d 109, 112 (3d Cir. 1989)).

<sup>154</sup> United States v. Grubb, 11 F.3d 426, 437 (4th Cir. 1993); see also United States v. Wood, 6 F.3d 692, 695 (10th Cir. 1993); United States v. Williams, 874 F.2d 968, 977 (5th Cir. 1989). The Model Jury Instructions for "Obstructing the Due Administration of Justice" under D.C. Code § 22-722(a) are:

1. That the defendant acted corruptly, by means of threat or force, [obstructed or impeded] [endeavored to obstruct or impede] the due administration of justice in the \_\_\_\_ Court of the District of Columbia; and

2. That the defendant acted with specific intent to obstruct or impede the due administration of justice.

You are instructed that the term 'corruptly' means with an improper motive. The term 'endeavor' means any effort, whether successful or not. The term 'threats' means any words or actions having a reasonable tendency to intimidate the ordinary person.

Criminal Jury Instructions for the District of Columbia (4th ed. 1993) 4.81(B). The Comment provides that pendency of formal court proceedings and a showing of knowledge are also required.

### 1. Pending Judicial Proceeding

A pending investigation by a grand jury is a judicial proceeding for purposes of § 1503.<sup>155</sup> Similarly, a civil proceeding is a pending judicial proceeding for purposes of § 1503.<sup>156</sup>

### 2. Knowledge of Pending Judicial Proceeding

"[A] defendant may be convicted under section 1503 only when he knew or had notice of [the] pending proceeding."<sup>157</sup> In Aguilar, the Supreme Court held that a judge's utterance of false statements to an FBI agent "who might or might not testify before a grand jury is [not] sufficient to make out a violation of the catchall provision of § 1503."<sup>158</sup> The Court indicated that the government must show the defendant "knew that his false statement would be provided to the grand jury"; evidence that the defendant

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<sup>155</sup> Wood, 6 F.3d at 696. The Third Circuit has held that a grand jury proceeding is pending once a "subpoena [has been] issued in furtherance of an actual grand jury investigation, i.e., to secure a presently contemplated presentation of evidence before [a regularly sitting] grand jury." United States v. Walasek, 527 F.2d 676, 678 (3d Cir. 1975).

<sup>156</sup> United States v. Lundwall, 1 F.Supp.2d 249, 251 (S.D.N.Y. 1998). Section 1503 has been applied in a wide variety of civil matters. United States v. Muhammad, 120 F.3d 688 (7th Cir. 1997) (civil juror solicits bribe from litigant); United States v. London, 714 F.2d 1558 (11th Cir. 1983) (lawyer presents fraudulent civil judgment to client); Roberts v. United States, 239 F.2d 467, 470 (9th Cir. 1956) ("obstruction of justice statute is broad enough to cover attempted corruption of a prospective witness in a civil action").

<sup>157</sup> United States v. Frankhauser, 80 F.3d 641, 650 (1st Cir. 1996).

<sup>158</sup> 515 U.S. at 600.

was aware of the proceeding is usually not sufficient.<sup>159</sup> "[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct."<sup>160</sup>

### 3. Specific Intent

The term "corruptly" in the omnibus clause connotes specific intent.<sup>161</sup> Courts have, however, defined the term "corruptly" in somewhat differing terms.<sup>162</sup> "[S]uch intent may be inferred from proof that the defendant knew that his corrupt actions would obstruct justice then actually being administered."<sup>163</sup>

In Haldeman, the D.C. Circuit approved a jury instruction for obstruction of justice which charged that the jury "must find, in addition to the other elements, that [the defendant] had the specific intent to obstruct, impair, or impede the due

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<sup>159</sup> Id. at 601.

<sup>160</sup> Id. at 599; cf. Grubb, 11 F.3d at 437 (false statement to FBI agent supported obstruction of justice conviction where defendant "was well aware of the existence of the grand jury investigation when interviewed").

<sup>161</sup> See United States v. Haldeman, 559 F.2d 31, 114 (D.C. Cir. 1976) (per curiam), cert. denied, 431 U.S. 933 (1977).

<sup>162</sup> See, e.g., United States v. Partin, 552 F.2d 621, 641-42 (5th Cir.) (improper motive or with evil or wicked purpose), cert. denied, 434 U.S. 903 (1977); United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981) (with purpose of obstructing justice), cert. denied, 454 U.S. 1157 (1982); United States v. Barfield, 999 F.2d 1520, 1524 (11th Cir. 1993) (knowingly and intentionally undertaking act from which obstruction was reasonably foreseeable result).

<sup>163</sup> United States v. Buffalino, 727 F.2d 50, 54 (2d Cir. 1984).

administration of justice and that his endeavor was not accidental or inadvertent."<sup>164</sup> The district court defined the term "corruptly" as used in § 1503 as "having an evil or improper purpose or intent."<sup>165</sup>

In Aguilar, the Supreme Court stated that, under the "very broad language of the catchall provision" of the omnibus clause, "[t]he action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the Court's or grand jury's authority."<sup>166</sup> The Court further observed that "[s]ome courts have phrased this showing as a 'nexus' requirement -- that the act must have a relationship in time, causation or logic with the judicial proceedings. . . . In other words, the endeavor must have the natural and probable effect of interfering with the due administration of justice."<sup>167</sup>

Even if one is acting from a seemingly benign motive, a jury may nonetheless conclude that the acts were done corruptly. For example, one court reviewed the conviction of a defendant who had altered and defaced certain corporate records relating to an

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<sup>164</sup> Haldeman, 559 F.2d at 114; see also Caldwell v. United States, 218 F.2d 370, 372 (D.C. Cir. 1954) ("The only intent involved in the crime is the intent to do the forbidden act."), cert. denied, 349 U.S. 930 (1955).

<sup>165</sup> Haldeman, 559 F.2d at 115 n.229;.

<sup>166</sup> Aguilar, 515 U.S. at 599.

<sup>167</sup> Id. (quotations omitted).

ongoing grand jury investigation of Medicare fraud. Faudman argued that he lacked the requisite intent because he intended by his acts only to "protect his brother and the company he had spent his life building."<sup>168</sup> The jury rejected this defense and the court affirmed his conviction, concluding that his conduct was "corrupt" conduct covered by the omnibus clause of § 1503.<sup>169</sup>

## **B. False and Evasive Testimony as Obstruction of Justice**

### **1. Generally**

"[S]tatements . . . made directly to the grand jury itself, in the form of false testimony or false documents," may provide a basis for § 1503 liability.<sup>170</sup> For false statements to form the basis of obstruction, however, the government must prove the person making the statements had the intent to impede or effect of impeding the due administration of justice.<sup>171</sup> Likewise the D.C. Circuit recently concluded that "anyone who intentionally lies to a grand jury is on notice that he may be corruptly

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<sup>168</sup> United States v. Faudman, 640 F.2d 20, 21 (6th Cir. 1981).

<sup>169</sup> Id. at 23.

<sup>170</sup> Aguilar, 515 U.S. at 600 & n.2 (collecting cases); see also United States v. Norris, 300 U.S. 564, 574 (1937) ("Perjury is an obstruction of justice; its perpetration may well affect the dearest concerns of the parties before a tribunal.").

<sup>171</sup> United States v. Russo, 104 F.3d 431, 435-36 (D.C. Cir. 1997); see also United States v. Perkins, 748 F.2d 1519, 1528 (11th Cir. 1984) (false statement impeding justice); United States v. Watt, 911 F. Supp. 538, 547 (D.D.C. 1995) (while the government must plead and prove that the false testimony impeded the due administration of justice, "no additional act need be alleged in the indictment").

obstructing the grand jury's investigation . . . . Whatever the outer limits of 'corruptly' in § 1503 . . . acts of perjury [are] near its center."<sup>172</sup> Similarly, the district court reasoned that false testimony obstructs justice because it "could cause undue delay, import unnecessary confusion into the grand jury process, and potentially lead to an erroneous indictment."<sup>173</sup>

Even evasive testimony which is literally true may form the basis for an obstruction charge, though this is an unusual occurrence.<sup>174</sup> One district court examined an indictment containing multiple perjury charges and an obstruction charge. The court dismissed a number of the perjury charges as being literally true, given a "precise grammatical reading of the challenged question and answer."<sup>175</sup> Notwithstanding her conclusion that certain of the perjury charges were legally insufficient, Judge Rymer concluded that a § 1503 charge based

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<sup>172</sup> Russo, 104 F.3d at 436 (citations omitted); see also United States v. Watt, 911 F. Supp. 538, 547 (D.D.C. 1995) ("the government may charge a defendant under the omnibus clause for making false statements before a grand jury while under oath if the making of such statements obstructs the due administration of justice"). Both Russo, 104 F.3d at 436, and Watt, 911 F. Supp. at 546-47, rejected application of Poindexter's "transitive" reading of § 1505 to § 1503, as, indeed, Poindexter itself foretold, 951 F.2d at 385.

<sup>173</sup> Watt, 911 F. Supp. at 547; see also United States v. Paxson, 861 F.2d 730 (D.C. Cir. 1988) (affirming conviction for making false declarations before a grand jury in violation of 18 U.S.C. §§ 1503, 1623).

<sup>174</sup> United States v. Spalliero, 602 F. Supp. 417 (C.D. Cal. 1984) (Rymer, J.).

<sup>175</sup> Id. at 422 (quoting United States v. Cook, 489 F.2d 286, 287(9th Cir. 1972)); see also Spalliero, 602 F. Supp. at 424 (literal truth in response to double negative question).

upon misleading, but true, statements should not be dismissed.

Summarizing her own reservations, she wrote:

[T]o the extent that defendant's testimony is not perjurious but rather evasive, or misleading, I think that interpreting § 1503 to obtain a result unobtainable under the perjury statute is ill-advised. . . . Although conviction under § 1503 may require proof of intention to impede justice thereby excluding the misleading or non-responsive statement, innocently made, the fear of possible prosecution for evasive or misleading testimony under § 1503 will burden every witness before a grand jury.<sup>176</sup>

Nonetheless, the court concluded that giving evasive answers to a grand jury could violate § 1503 and denied the motion to dismiss.<sup>177</sup>

## 2. Civil Proceedings

False statements in connection with a pending civil proceeding can also form the basis an obstruction of justice charge under § 1503. We provide two examples:

One defendant was alleged to have given false testimony in a civil forfeiture proceeding relating to the proceeds of narcotics transactions. Thomas denied that he knew a co-defendant, one Ronald Calhoun, by the alias Robert Johnson. The Eleventh Circuit reaffirmed its view that "false testimony can provide the basis for a conviction under section 1503."<sup>178</sup> It emphasized, however, the need

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<sup>176</sup> Id. at 426.

<sup>177</sup> Id. (relying on United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981)).

<sup>178</sup> United States v. Thomas, 916 F.2d 647, 652 (11th Cir. 1990) (citing United States v. Perkins, 748 F.2d 1519, 1527-28

for a "nexus between the false statements and the obstruction of the administration of justice."<sup>179</sup> Thus, the court concluded that it was "incumbent on the government to prove the statements had the natural and probable effect of impeding justice."<sup>180</sup>

Barbara Battalino was a psychiatrist at a Veterans Administration hospital in Boise, Idaho.<sup>181</sup> While working at the hospital she provided psychiatric treatment to a U.S. Army veteran, Edward Arthur. On at least one occasion, on June 27, 1991, while treating Mr. Arthur, Battalino performed oral sex on him. Thereafter, Battalino and Arthur began an intimate affair. Battalino resigned when her supervisor learned of the affair.

Later Arthur filed a complaint against Battalino and the United States alleging that Battalino's sexual conduct with him constituted medical malpractice. Battalino requested that the United States Attorney for the District of Idaho "certify" her under the Federal Tort Claims Act,

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(11th Cir. 1984)).

<sup>179</sup> Thomas, 916 F.2d at 652 (citing In re Michael, 326 U.S. 224, 228 (1945)).

<sup>180</sup> Thomas, 916 F.2d at 652 (citing United States v. Fields, 835 F.2d 1571, 1573 (11th Cir. 1988); United States v. Silverman, 745 F.2d 1386, 1393 (11th Cir. 1984)). Because the district court's jury instructions did not enunciate this requirement and because the government's proof was insufficient, the court reversed Thomas's conviction. Thomas, 916 F.2d at 654.

<sup>181</sup> United States v. Battalino, Crim. No. 98-38-S-EJC (D. Idaho April 14, 1998).

("FTCA").<sup>182</sup> Battalino was interviewed by attorneys for the United States and denied that she had engaged in sexual relations with Arthur in her office on June 27, 1991. Based in part on that denial, she was certified for coverage under the FTCA as to her conduct occurring on or before June 27, 1991.

Battalino appealed the United States Attorney's decision denying certification as within the scope of her employment for her conduct after June 27, 1991. At a hearing held before a United States Magistrate on July 13-14, 1995, while Arthur's civil claim remained pending, Battalino was examined as follows:

Q. Did anything of a sexual nature take place in your office on June 27, 1991?

A. No, sir.<sup>183</sup>

In April 1998, Battalino was charged with a single count information alleging that she had violated 18 U.S.C. § 1503 by "corruptly endeavor[ing] to influence; obstruct and impede the due administration of justice in connection with a pending proceeding before a court of the United States" by making the false and misleading statements quoted

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<sup>182</sup> 28 U.S.C. § 1346 et seq. Under the FTCA, if a federal employee is sued and it is certified that the employee's allegedly tortious conduct occurred "within the scope" of the employee's federal employment, the United States is substituted as a defendant and the employee cannot be held personally liable for damages.

<sup>183</sup> Plea Agreement at 9-12, United States v. Battalino, Crim. No. 98-38-S-EJC (D. Idaho April 14, 1998).

## 1. Generally

Obstructive behavior can comprise behavior other than the false testimony of a defendant. One who proposes to a witness that the witness lie in a judicial proceeding is guilty of obstructing justice.<sup>189</sup> A conviction for such conduct will be sustained where the evidence shows that the conduct had a "reasonable tendency to impede the witness in the discharge of her duties."<sup>190</sup> The endeavor to influence the witness need not be successful to be criminal.<sup>191</sup>

Several cases are instructive examples of the type of fact pattern that will support a criminal obstruction charge:

One defendant was convicted of obstructing a grand jury investigation in violation of § 1503, by attempting to influence a witness to lie to the grand jury.<sup>192</sup> He challenged his conviction on the ground that it was not supported by sufficient evidence. The witness, Roeske, admitted to hiding income in a bank under a fictitious name. In Tranakos's obstruction trial Roeske testified:

Q. What did Mr. Tranakos tell you?

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<sup>189</sup> United States v. Davis, 752 F.2d 963, 973 n.11 (5th Cir. 1985).

<sup>190</sup> United States v. Harris, 558 F.2d 366, 369 (7th Cir. 1977) (citation omitted).

<sup>191</sup> United States v. Barfield, 999 F.2d 1520, 1523 (11th Cir. 1993); see also Osborn v. United States, 385 U.S. 323, 332-33 (1966).

<sup>192</sup> United States v. Tranakos. 911 F.2d 1422 (10th Cir. 1990).

A. He said that -- he looked at me and he smiled and he said, 'Well you don't own any trusts, do you?' And then he said -- he said, 'You don't have any bank accounts in Montana, do you?' And I took that to mean that all of this flow of paper, this complexity of paper meant that the things legally were not under my control and that was the whole reason for setting up this vast matrix of trusts and that I didn't have control over these things or I didn't own the bank accounts. It was a matter of semantics as far as I understood it at the time.

. . . . .

Q. What happened when you appeared before the grand jury then?

A. They . . . asked me if I had any bank accounts in Montana and I said no. Or they might have said, 'Do you know of any bank accounts in Montana?' And I said, 'No.'

. . . . .

Q. You used the word 'semantics' a while ago. It was not what he said, it was the way he said it to you, the smile [you] said he had on his face?

A. Yes.<sup>193</sup>

The court readily concluded that this conduct constituted obstruction of justice, inasmuch as the "statute prohibits elliptical suggestions as much as it does direct commands."<sup>194</sup> It therefore held that a reasonable finder of fact could have concluded from this evidence that Tranakos

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<sup>193</sup> Id. at 1431-32 (ellipsis and brackets in original).

<sup>194</sup> Id. at 1432 (citing United States v. Russell, 255 U.S. 138, 141-43 (1921); United States v. Arnold, 773 F.2d 823, 834 (7th Cir. 1985); United States v. O'Keefe, 722 F.2d 1175, 1181 (5th Cir. 1983)).

had suggested to Roeske that he testify falsely to the grand jury.

Former Congressman Mario Biaggi appealed his conviction for (among other charges) obstructing a grand jury investigation, in violation of § 1503, by attempting to influence the testimony of a co-defendant, Meade Esposito.<sup>195</sup> At issue were Esposito's allegedly illegal payment of Biaggi' expenses for trips Biaggi took to St. Maarten and a Florida health spa. As the court recounted the evidence, after Biaggi became aware of a grand jury investigation, he called Esposito:

There can be no doubt that Biaggi sought to have Esposito impede the investigation. For example, having coached Esposito to characterize the Florida spa trips as emanating simply from an old and dear friend's concern for Biaggi's health (Biaggi: "You knew I had, you knew I had some trouble with my heart?" Esposito: "When?"), Biaggi urged concealment of the St. Maarten trip:

MB [Biaggi]: . . . Uh, don't mention St. Maartens [sic] . . . cause I . . .

ME [Esposito]: Oh, I thought you mentioned it.

MB: No, they just, I didn't mention it.

ME: Okay.

MB: Uh, we just mentioned the two times at the spa.

ME: No problem.

Returning to the matter of the spa vacations, defendants agreed:

ME: This is not a gift. It's uh, it's a, uh,

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<sup>195</sup> United States v. Biaggi, 853 F.2d 89 (2d Cir. 1988), cert. denied, 489 U.S. 1989).

manifestation of my love for you.

MB: You didn't give it to me because I'm a member, member of Congress.

ME: Nah. Never, no bull. No way.

MB: Have you ever done, have you ever done anything for me?

ME: Have I ever done anything for you?

MB: I, I told them, "No." We say you haven't done anything form me and I haven't done anything for you. . . .

ME: That's right.

MB: And that's the way we're gonna keep it.

On this evidence the court saw "no basis for overturning Biaggi's conviction for obstruction of justice."<sup>196</sup>

While an indictment of one Robert Gulino was pending, a potential witness in that trial, Robert Perry, approached the defendant, Jeremiah Buckley and asked his assistance in making "arrangements for a job outside of the United States so that he, Perry, could not be subpoenaed in" the Gulino case.<sup>197</sup> Perry testified that he told Buckley he would "tell all" at the Gulino trial. Buckley found Perry a job in Mexico and Perry avoided the subpoena. On appeal, Buckley argued that he was not guilty of obstruction in violation of § 1503 because he did not improperly induce the witness to testify, but only responded to Perry's request

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<sup>196</sup> Id. 105 (ellipsis in original).

<sup>197</sup> United States v. Washington Water Power Co., 793 F.2d 1079, 1084 (9th Cir. 1986).

for assistance. The court rejected the argument, applying § 1503 to this form of witness tampering.<sup>198</sup>

Another defendant attempted to subtly influence a potential witness to "hold back" on his grand jury testimony.

Defendant suggested to witness that a third party (and common friend) "could do a lot for him," but never explicitly asked the witness to lie.<sup>199</sup> The court held that this was enough to convict under the omnibus clause of § 1503. "[T]he fact that the effort to influence was subtle or circuitous made no difference. 'If reasonable jurors could conclude, from circumstances of the conversation, that the defendant had sought, however cleverly and with whatever cloaking of purpose, to influence improperly [a witness], the offense was complete.'"<sup>200</sup>

One defendant was also convicted of obstruction of justice for attempting to convince a witness to testify falsely. After trying to convince the witness that the \$900,000 payment in question was, instead, a loan, O'Keefe said "[i]f you don't explain this thing right, I'm in jail."<sup>201</sup> The court affirmed the conviction.

Another defendant was convicted under the omnibus clause of

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<sup>198</sup> Id. at 1084-85.

<sup>199</sup> United States v. Tedesco, 635 F.2d 902, 903-04 (1st Cir. 1980), cert. denied, 452 U.S. 962 (1981).

<sup>200</sup> Id. at 907 (citation omitted).

<sup>201</sup> United States v. O'Keefe, 722 F.2d 1175, 1181 (5th Cir. 1983) (brackets in original).

§ 1503 for "urg[ing] or persuad[ing] a prospective witness to give false testimony."<sup>202</sup> Defendant approached the witness, a bank teller, and advised her that it would be "in her best interest" to forget about any large currency transactions which she may have processed for him.

Misleading conduct or false statements towards an attorney can also constituted criminal obstructive behavior if they may "materially alter" the conduct of a proceeding.<sup>203</sup> Two examples are instructive:

One defendant, Barfield, worked as a DEA informant in connection with the investigation of Donald Flores.<sup>204</sup> After Flores was indicted, Barfield contacted Flores's attorney and provided the attorney with information regarding the factual basis for the indictment of Flores. Thereafter, in an apparent effort to assist Flores's defense, Barfield gave a sworn statement to Flores's attorney that was inconsistent with information he had originally provided. The United States indicted Barfield for obstruction of justice, alleging that his provision of inconsistent information to Flores's attorney was intended to obstruct justice by providing Flores's attorney with a basis for cross-examining

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<sup>202</sup> United States v. Shannon, 836 F.2d 1125, 1128 (8th Cir.) (citing United States v. Risken, 788 F.2d 1361, 1369 (8th Cir. 1986)), cert. denied, 486 U.S. 1058 (1988).

<sup>203</sup> United States v. Field, 738 F.2d 1571, 1574 (11th Cir. 1988).

<sup>204</sup> United States v. Barfield, 999 F.2d 1520, 1523 (11th Cir. 1993).

Barfield and impeaching his testimony at Flores's trial. The Court concluded that the false statement to Flores's attorney was intended to "materially alter [the] government's treatment" of Flores, and thus constituted obstruction of justice.<sup>205</sup>

Two other defendants were officers of the Border Patrol.<sup>206</sup> They were charged with conspiring to secure sexual favors from illegal aliens whom they had encountered. While those charges were pending, they gave documentation to their attorneys which purported to provide them with an alibi and their attorneys provided the documentation to the United States. Subsequent investigation established that the documentation was fabricated, and a superceding indictment added a charge of obstruction of justice in violation of § 1503. Defendants' challenge to the sufficiency of the evidence supporting their conviction was rejected.<sup>207</sup>

## 2. Civil Proceedings

Obstruction of justice charges may also arise in the context of civil proceedings. For example, in a recent case of some notoriety the defendants were former officials of Texaco, Inc.<sup>208</sup> Texaco was sued in a civil class action employment discrimination

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<sup>205</sup> Id. at 1524 (citation omitted).

<sup>206</sup> United States v. Davila, 704 F.2d 749 (5th Cir. 1983).

<sup>207</sup> Id. at 752-53.

<sup>208</sup> United States v. Lundwall, 1 F.Supp.2d 249 (S.D.N.Y. 1998).

suit, alleging racial discrimination. The defendants were advised of the pendency of the lawsuit and the need to retain documents relevant to the lawsuit. Following a request for document production, the defendants allegedly withheld and then destroyed documents sought by plaintiff's counsel. Defendants were charged with a violation of § 1503. They moved to dismiss the indictment, arguing that the destruction of documents during civil discovery was not covered by § 1503.

The district court rejected the defendants' argument. First, the court broadly construed the term "due administration of justice":

[T]he words 'due administration of justice' import a free and fair opportunity to every litigant in a pending cause in federal court to learn what he may learn (if not impeded or obstructed) concerning the material facts and to exercise his option as to introducing testimony or such facts. The violation of the law may consist in preventing a litigant from learning facts which he might otherwise learn, and in thus preventing him from deciding for himself whether or not to make use of such facts.<sup>209</sup>

The court thus recognized that § 1503 had been "repeatedly applied in a wide variety of civil matters."<sup>210</sup> It therefore concluded that nothing in the statute limited its application to grand jury proceedings and denied the motion to dismiss.

The court also offered these observations on the use of § 1503 in the prosecution of civil obstruction:

Of course, there are a great many good reasons why federal prosecutors should be reluctant to bring

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<sup>209</sup> Id. at 252.

<sup>210</sup> Id. at 253.

criminal charges relating to conduct in ongoing civil litigation. Civil litigation typically involves parties protected by counsel who bring frequently exaggerated claims that, under supervision of a judicial officer, are narrowed and ultimately compromised during pretrial proceedings. Prosecutorial resources would risk quick depletion if abuses in civil proceedings -- even the most flagrant ones -- were the subject of criminal prosecutions rather than civil remedies. Thus, for numerous prudential reasons, prosecutors might avoid entering this area. But that is quite different from concluding that § 1503 precludes their doing so.

. . . .

This case, however, goes beyond civil discovery abuse remediable through civil sanctions. Defendants here are not charged with concealing and destroying documents they incorrectly concluded were not sought, or erroneously thought to be irrelevant or burdensome. Rather, they are charged with seeking to impair a pending court proceeding through the intentional destruction of documents sought in, and highly relevant to, that proceeding.<sup>211</sup>

In an earlier Ninth Circuit decision during the course of a civil case, the defendant falsely swore that a written employment agreement existed.<sup>212</sup> He also attempted to induce a witness to testify that she had seen a copy of the written agreement. Roberts was charged with perjury<sup>213</sup> and with obstruction of justice for his effort to influence a witness. He argued that a simple effort to suborn perjury was not a violation of § 1503. The court rejected that argument, holding that the "obstruction of justice statute is broad enough to cover the attempted

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<sup>211</sup> Id. at 254-55. The defendants were subsequently acquitted, following trial.

<sup>212</sup> Roberts v. United States, 239 F.2d 467 (9th Cir. 1956).

<sup>213</sup> Thus, Roberts is another civil perjury case charged as a criminal violation.

corruption of a prospective witness in a civil action in Federal District Court."<sup>214</sup>

A seminal Fourth Circuit case also bears mention.<sup>215</sup> The defendants were charged under the predecessor statute of § 1503,<sup>216</sup> for soliciting false testimony in a civil action. The court said:

[t]he contention that a violation of section 5339, consisting of obstructing the administration of justice in a civil litigation, between private citizens in a federal court, is not an offense against the United States, need not be discussed at any length. One of the sovereign powers of the United States is to administer justice in its courts between private citizens. Obstructing such administration is an offense against the United States, in that it prevents or tends to prevent the execution of one of the powers of the government.<sup>217</sup>

It therefore rejected the defendant's demurrer to the indictment.

### III. Witness and Evidence Tampering -- 18 U.S.C. § 1512

Although witness and evidence tampering are prohibited by § 1503's general prohibition upon obstruction of justice,<sup>218</sup> they are also specifically prohibited by § 1512. This latter section

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<sup>214</sup> Id. at 470.

<sup>215</sup> Wilder v. United States, 143 F. 433 (4th Cir. 1906).

<sup>216</sup> section 5339, Rev. Stat. (U.S. Comp. 1901).

<sup>217</sup> Id. at 440 (citations omitted).

<sup>218</sup> The House and Senate agree that actions prosecutable under § 1512 can be prosecuted under § 1503 as well. See 134 Cong. Rec. S7446-01 (June 8, 1988) (stating that the amendments are intended "merely to include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503") (emphasis added); 134 Cong. Rec. S17360-02 (Nov. 10, 1988) (same).

provides, in part:

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct<sup>219</sup> toward another person, with intent to --

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to --

(A) withhold testimony, or withhold a record document, or other object, from an official proceeding;

(B) alter, destroy, mutilate or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . .

shall be fined under this title or imprisoned for not more than ten years, or both.

18 U.S.C. § 1512(b).

#### A. Elements

Some elements of a § 1512(b) offense vary with the nature of the conduct charged -- for example, whether the person is charged under § 1512 (b) (1) or under § 1512(b) (2), and whether the person is charged with tampering with the witness or evidence through "force," "corrupt[] persua[sion]," or "misleading conduct."

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<sup>219</sup> Misleading conduct is defined by the statute as:

- (A) knowingly making a false statement;
- (B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement; . . .
- (E) knowingly using a trick, scheme, or device with intent to mislead[.]

18 U.S.C. § 1515(a) (3).

However, because the elements break down into two types -- the defendant must have acted in a certain manner, and must have done so with the specific intent to tamper with a witness<sup>220</sup> -- the courts have generally interpreted the common elements uniformly, without regard to the subsection under which the defendant is charged.<sup>221</sup>

In proving intent to influence a witness's testimony or tamper with evidence, the government need not show that the action (whether corrupt persuasion, misleading conduct, or force) was successful -- or even likely to be successful -- in altering that conduct.<sup>222</sup> Rather, courts have stated that in proving

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<sup>220</sup> See United States v. Gabriel, 125 F.3d 89, 104 (2d Cir. 1997) ("Section 1512(b) has two elements that are germane to the offenses charged: (1) that the defendant engaged in misleading conduct or corruptly persuaded a person, and (2) that the defendant acted with an intent to influence the person's testimony at an official proceeding.").

<sup>221</sup> See, e.g., Gabriel, 125 F.3d at 103 (relying on case construing § 1512(a)(1)(C) to interpret § 1512(b)(1)). Compare the following: In connection with a charged violation of § 1512(b)(2)(B), the government must prove: "the defendant . . . knowingly attempted to use intimidation or to corruptly persuade the person identified in the indictment; and the defendant did so with the intent to cause or induce the person to alter, destroy, mutilate, or conceal an object or impair the object's integrity or availability for use in a federal . . . proceeding." United States v. Mullins, 22 F.3d 1365, 1369 (6th Cir. 1994). Similarly, "[i]n order to prove the defendant guilty of the [§ 1512(a)(1)(C)] charge in the indictment, the government must prove each of the following elements beyond a reasonable doubt: First, that on or about the date charged, the defendant used intimidation, physical force, or threats, or attempted to do so; and second, that the defendant acted knowingly and with intent to prevent the communication to a law enforcement officer of information relating to the commission or possible commission of a federal offense." United States v. Stansfield, 101 F.3d 909, 912-13 (3d Cir. 1996).

<sup>222</sup> Gabriel, 125 F.3d at 103-05.

intent under § 1512, "it is the endeavor to bring about a forbidden result and not the success in actually achieving the result that is forbidden."<sup>223</sup> Unsuccessful or inchoate efforts to influence are also covered by the statute, therefore.<sup>224</sup> For example, when a defendant killed a potential witness in violation of § 1512(a), the Government could prosecute him without having to prove that the victim "was willing to cooperate or that an investigation was underway . . . or even [that the victim] had evinced an intention or desire to so cooperate."<sup>225</sup>

#### **B. Pending and Civil Proceedings**

Section 1503's prohibition against obstruction of justice applies only when there is a proceeding pending at the time of the offense, but there is no such limitation upon § 1512.<sup>226</sup>

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<sup>223</sup> United States v. Maggitt, 784 F.2d 590, 593 (5th Cir. 1986) (citations omitted)

<sup>224</sup> It is an affirmative defense available to a defendant to show by a preponderance of the evidence "that the conduct [in question] consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce or cause the other person to testify truthfully." 18 U.S.C. § 1512(d). A defendant is not, of course, obliged to present such evidence. See generally United States v. Clemons, 658 F. Supp. 1116, 1123-26 (W.D. Pa. 1987).

<sup>225</sup> United States v. Romero, 54 F.3d 56, 62 (2d Cir. 1995).

<sup>226</sup> The Senate Report notes that the Congress intended in § 1512 to remove the requirements in § 1503 that an inquiry be "pending" and that the witness's testimony be admissible in court. See S. Rep. 97-532, 97th Cong., 2d Sess. § 4.C (1982). Specifically, the Report notes that "(d) (1) obviates the requirement that there be an official proceeding in progress or pending" and that "the scope of the offense should not be limited by concerns about the status of the victim as a person who has testified or will be able to testify in court." See also Stansfield, 101 F.3d at 913 ("The law does not require that a

Furthermore, a person may be charged under § 1512 even when the testimony or record in question is subject to a claim of privilege or otherwise not likely to be admitted at trial.<sup>227</sup>

While conviction under § 1512 does not require "proof that the proceeding in question actually was pending . . . it [does] require[] . . . that the defendant 'fear[ed]' that such a proceeding 'had been or might be instituted' and 'corruptly persuaded persons with the intent to influence their possible testimony in such a proceeding.'"<sup>228</sup> In other words, there is still a requirement that the defendant intended to influence any possible future proceeding.<sup>229</sup>

It is also evident that § 1512 permits prosecution for

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federal proceeding be pending at the time or even that it was about to be initiated when the intimidation, physical force or threats were made."); but see United States v. Kassouf, 144 F.3d 952 (6th Cir. 1998) (applying pending investigation limit of § 1503 to § 1512, over dissent citing other circuits to argue that no such limit applies).

The Senate Report also states that "(d)(2) makes explicit the theory that section 1512 is meant to protect the integrity of the process. It is not for the alleged violator to determine what is, or is not, legally privileged evidence or what evidence may prove to be legally inadmissible. These findings are made by the court, not someone who seeks to withhold the evidence." S. Rep. No 97-532 at § 4.C.

<sup>227</sup> 18 U.S.C. § 1512(e).

<sup>223</sup> United States v. Morrison, 98 F.3d 619 (D.C. Cir. 1996) (quoting United States v. Kelley, 36 F.3d 1118, 1128 (D.C. Cir. 1994)) (some brackets in original).

<sup>229</sup> Cf. United States v. Aguilar, 515 U.S. 593 (1995) (reversing conviction for witness tampering under § 1503 -- which does have pending proceeding requirement -- where court found defendant had not intended to influence grand jury proceeding but had intended only to misdirect separate FBI investigation that did not count as "proceeding" under § 1503).

witness or evidence tampering in a civil matter as well as in a criminal one, because § 1512(i) provides for enhanced penalties when the conduct in question occurs in the context of criminal proceedings -- enhancements that would be unnecessary if the general statute did not apply to the civil context.

### C. Intent

To sustain a tampering charge, the government must prove intent. The type of proof needed depends upon whether the tampering was performed through force, corrupt persuasion, or misleading conduct.

#### 1. "Misleading Conduct"

Section 1512(b)(1) prohibits engaging in misleading conduct in order to influence testimony before a grand jury or other investigative body. "The most obvious example of a section 1512 violation [for misleading conduct] may be the situation where a defendant tells a potential witness a false story as if the story were true, intending that the witness believe the story and testify to it before the grand jury."<sup>230</sup>

Such a violation occurred when the Governor of Guam (Ricardo Bordallo), who was accepting bribes and keeping the money for his personal use, told the person paying the bribes (Johnny Carpio)

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<sup>230</sup> See United States v. Rodolitz, 786 F.2d 77 (2d Cir. 1986) (dicta describing statute). An unpublished disposition extended Rodolitz by holding that "[t]he witness tampering statute is offended not only by making false statements but also by providing potential witnesses with incomplete information in an attempt to hinder a prosecution." Kliczak v. United States, 940 F.2d 660 (Table), 1991 WL 132499 (6th Cir., July. 19, 1991).

that the money was being used to help the poor. The Governor was convicted of witness tampering under § 1512, and the Ninth Circuit upheld the jury verdict, stating: "The jury could have concluded that Bordallo initially knowingly misled Carpio, intending that Carpio would offer Bordallo's explanation concerning the funds to the FBI."<sup>231</sup>

Analogously, several cases have held that a defendant violates § 1512 by falsifying a handwriting exemplar with the intent to mislead a handwriting expert into testifying that the exemplar did not match the handwriting on the sample.<sup>232</sup>

## 2. "Corruptly Persuades"

The term "corruptly persuades" was added to the statute in 1988, when Congress amended § 1512 in order to reach actions that reflected an intent to tamper with a witness but did not fall within the definition of "misleading conduct."<sup>233</sup> The difference between the two turns more upon the witness's level of knowledge and upon the defendant's degree of honesty. As explained above,

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<sup>231</sup> See United States v. Bordallo, 879 F.2d 519, 525 (9th Cir.) (citing Rodolitz), amended on other grounds, 872 F.2d 334 (9th Cir. 1988).

<sup>232</sup> See, e.g., United States v. Yusufu, 63 F.3d 505 (7th Cir. 1995) (giving obstruction-of-justice sentence enhancement under 3C1.1 to defendant who so falsified his handwriting; citing three other cases doing same).

<sup>233</sup> See H.R. Rep. No. 100-169, at 13 n.27 (100th Cong., 1st Sess., 1987). The revision was necessary because some circuits had held that the 1982 version of § 1512 did not prohibit simply asking a witness to lie, reasoning that doing so was neither "misleading" nor "intimidating." See, e.g., United States v. King, 762 F.2d 232 (2d Cir. 1985); United States v. Kulczyk, 931 F.2d 542, 547 (9th Cir. 1991).

when a defendant lies to a witness hoping the witness will believe the falsehood and pass it on to investigators, this is "misleading conduct." But when a defendant simply asks a witness to lie (and the witness knows that he is being asked to lie), then the defendant is "corruptly persuading" that witness.

Several cases have recently discussed the meaning of "corruptly persuades."

- The D.C. Circuit comprehensively reviewed the interpretation of the term "corruptly persuades" in a 1991 case.<sup>234</sup> The defendant in that case, Morrison, had been charged with attempting to prevent a witness from testifying truthfully at trial because he had asked her to tell "anyone who asked" that he had been living with her for the past year (which he had not). Morrison argued on appeal that the term "corruptly persuades" excluded from its coverage a "simple request to testify falsely."<sup>235</sup> He also argued that the term

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<sup>234</sup> See United States v. Morrison, 98 F.3d 619 (D.C. Cir. 1996).

<sup>235</sup> Id. at 629.

required a "transitive" reading, referring to the "manner of influencing another, not the motive for influencing another."<sup>236</sup> The court agreed that the term "corruptly persuades" has a transitive meaning under § 1512, but concluded that asking a person to lie did constitute corrupt persuasion because it constituted "'corrupt[ion] of] another person by influencing him to violate his legal duty."<sup>237</sup> The Court therefore concluded that the evidence was sufficient to support Morrison's conviction. As the Court said: "while Morrison assuredly didn't use the word 'testify' or 'trial' when he attempted to influence Holmes' behavior, the clear import of this request was that 'anyone who asked' should be deceived."<sup>238</sup>

- In another case, the defendant spoke to the mother of his friend Brian shortly after FBI agents had visited her.<sup>239</sup> He

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<sup>236</sup> Id. (relying on the "transitive" reading given to the term "corruptly persuades" in the D.C. Circuit's interpretation of § 1505, see United States v. Poindexter, 951 F.2d 369, 379 (D.C. Cir. 1992)).

<sup>237</sup> Id.

<sup>238</sup> Id. at 630; see also United States v. Hernandez-Limon, 15 F.3d 1092, 1994 WL 2543 at \*\*1, \*\*7 (9th Cir. 1994) (unpublished) (upholding conviction of defendant who told witness: "Tell the truth, that if you didn't know anything, I knew even less," as a corrupt attempt to persuade a co-defendant to lie).

Courts have rejected challenges to the use of the phrase "corruptly" in § 1512 as unconstitutionally vague. United States v. Schott, 145 F.3d 1289, 1998 WL 384047 at \*9-\*10 (11th Cir. July 10, 1998) (collecting cases).

<sup>239</sup> See United States v. Frankhauser, 80 F.3d 641 (1st Cir. 1996).

advised her to "clean out everything that's upstairs in Brian's room, get rid of everything because the FBI will be back with a search warrant," and admonished her: "Do you want to be responsible for putting your son in jail?"<sup>240</sup> On appeal, the First Circuit affirmed his conviction for violating § 1512(b)(2)(B). Construing the phrase "corrupt persuasion," the court held that a defendant must "act knowingly and with intent to impair an object's availability for use in a particular official proceeding."<sup>241</sup>

- In another D.C. Circuit case, the court held that the jury must "be reasonably able to infer from the circumstances that [defendant], fearing that a grand jury proceeding had been or might be instituted, corruptly persuaded persons with the intent to influence their possible testimony at such a proceeding."<sup>242</sup>

#### IV. Conspiracy -- 18 U.S.C. § 371

##### A. Generally

Title 18 U.S.C. § 371 provides, in pertinent part, that it is a crime:

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<sup>240</sup> Id. at 646.

<sup>241</sup> Id. at 651.

<sup>242</sup> United States v. Kelley, 36 F.3d 1118, 1128 (D.C. Cir. 1994). See also United States v. Mullins, 22 F.3d 1365 (6th Cir. 1996) (finding intent proven where government showed that defendant had instructed various employees to alter their log books prior to producing them in response to a grand jury subpoena, because intent encompassed the "general intent of knowledge as well as the specific intent of purpose to obstruct").

If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy . . . .

The essence of the crime of conspiracy is a criminal partnership, that is, an "agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy."<sup>243</sup> "[T]he gist of conspiracy is the agreement; that of aiding, abetting or counseling is in consciously advising or assisting another to commit particular offenses, and thus becoming a party to them; that of substantive crime, going a step beyond mere aiding, abetting, counseling to completion of the offense."<sup>244</sup>

Section 371 is violated when two or more persons conspire or agree to engage in conduct which is prohibited by a substantive federal statute, and one does an act in furtherance of that agreement. This includes federal statutes prohibiting obstruction of justice and false statements.<sup>245</sup> A single

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<sup>243</sup> United States v. Falcone, 311 U.S. 205, 210 (1940).

<sup>244</sup> Pinkerton v. United States, 328 U.S. 640, 649 (1946) (Rutledge, J. dissenting) (emphasis added).

<sup>245</sup> See, e.g., United States v. Fulbright, 105 F.3d 443, 446 (9th Cir. 1997) (conspiracy to obstruct justice); United States v. Kelley, 36 F.3d 1118 (D.C. Cir. 1994) (conspiracy to obstruct justice and tamper with witnesses in violation of 18 U.S.C. §§ 1503, 1512); United States v. Ballis, 28 F.3d 1399, 1403 (5th Cir. 1994) (conspiracy to obstruct justice); United States v. Mullins, 22 F.3d 1365, 1367 (6th Cir. 1994) (same); United States v. Cure, 804 F.2d 625, 628 (11th Cir. 1986) (conspiracy to make false statements in violation of 18 U.S.C. § 1001); United States v. Jeter, 775 F.2d 670, 682-83 (6th Cir. 1985) (conspiracy to obstruct justice under 18 U.S.C. § 1503); United States v. Treadwell, 760 F.2d 327, 333 (D.C. Cir. 1985) (conspiracy to make false statements in violation of 18 U.S.C. § 1001); United States

conspiracy may involve the violation of many statutes.<sup>246</sup>

Because it is the criminal partnership agreement itself which is the crime, the success of the conspiracy or the attainment of its objective is immaterial. The crime is complete once the agreement is reached and a reasonably foreseeable overt act is committed in furtherance of the objective of the conspiracy by one of its members.<sup>247</sup> Moreover, because the agreement is a crime in and of itself, a defendant may be convicted of both the conspiracy and the substantive offense which is the object of the conspiracy.<sup>248</sup>

A conspirator is criminally liable not only for his or her own acts but "all of the acts of his coconspirators undertaken in furtherance of the conspiracy and reasonably foreseeable to" the defendant.<sup>249</sup> Thus, if a co-conspirator commits a crime that (1) furthers the object of the conspiracy that (2) the defendant could have reasonably foreseen, the defendant is criminally

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v. Heldt, 668 F.2d 1238, 1250-51 (D.C. Cir. 1981) (describing conspiracy to obstruct justice under § 1503 and upholding conviction); United States v. Shoupe, 608 F.2d 950, 956 (3d Cir. 1979) (upholding conviction for conspiracy to obstruct justice under § 1503); United States v. Franklin, 598 F.2d 954, 955 n.1 (5th Cir. 1979) (per curiam) (conspiracy to obstruct justice).

<sup>246</sup> See, e.g., United States v. Richerson, 833 F.2d 1147, 1153-54 (5th Cir. 1987).

<sup>247</sup> See United States v. Kibby, 848 F.2d 920, 922 (8th Cir. 1988); United States v. Nicoll, 664 F.2d 1308, 1315 (5th Cir. 1982).

<sup>248</sup> See Pinkerton, 328 U.S. at 645-46.

<sup>249</sup> United States v. Doyle, 121 F.3d 1078, 1091 (7th Cir. 1997); see also United States v. Casiano, 113 F.3d 420, 427 (3d Cir. 1997).

liable as if he or she had committed the crime personally.

### B. Elements of § 371

To sustain a conviction for conspiracy, the government must prove three elements: (1) that there was an agreement to commit a federal offense; (2) that the defendant knowingly and voluntarily joined the agreement; and (3) that at least one overt act was committed in furtherance of the object of the agreement.<sup>250</sup>

#### 1. Existence of an Agreement

In general, a conspiracy requires an agreement or understanding to violate the law. This criminal partnership or meeting of the minds "need not be proven by direct evidence; a common purpose and plan may be inferred from a 'development and

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<sup>250</sup> See United States v. Mullins, 22 F.3d 1365, 1368 (6th Cir. 1994); accord United States v. Dean, 55 F.3d 640, 647 (D.C. Cir. 1995); United States v. Treadwell, 760 F.2d 327, 333 (D.C. Cir. 1985). The model federal jury instructions denote the elements thus:

1. The conspiracy, agreement, or understanding to violate one or more federal statutes or defraud the United States was formed, reached or entered into by two or more persons;
2. At some time during the existence or life of the conspiracy, agreement, or understanding, one of its alleged members knowingly performed an overt act in order to further or advance the purpose of the agreement;
3. At some time during the existence or life of the conspiracy, agreement or understanding, the defendant knew the purpose of the agreement, and then deliberately joined the conspiracy, agreement or understanding.

collocation of circumstances.'"<sup>251</sup> "Conspiracy can be proven circumstantially; direct evidence is not crucial. . . . Seemingly innocent acts taken individually may indicate complicity when viewed collectively and with reference to the circumstances in general."<sup>252</sup> "Because a conspiratorial agreement is often reached in secrecy, the existence of the agreement or common purpose may be inferred from relevant and competent circumstantial evidence."<sup>253</sup>

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<sup>251</sup> Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Khoury, 901 F.2d 948, 962 (11th Cir. 1990).

<sup>252</sup> United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984) (citations omitted).

<sup>253</sup> United States v. Ballard, 663 F.2d 534, 543 (5th Cir. 1981). Thus courts charge juries:

A criminal conspiracy is an agreement or a mutual understanding knowingly made or knowingly entered into by at least two people to violate the law by some joint or common plan or course of action. A conspiracy is, in a very true sense, a partnership in crime.

A conspiracy or agreement to violate the law, like any other kind of agreement or understanding, need not be formal, written, or even expressed directly in every detail.

To prove the existence of a conspiracy or an illegal agreement, the government is not required to produce a written contract between the parties or even produce evidence of an express oral agreement spelling out all the details of the understanding. . . .

The government must prove that the defendant and at least one other person knowingly and deliberately arrived at some type of agreement or understanding that they, and perhaps others, would (violate some law(s)) by means of some common plan or course of action. . . . It is proof of this conscious understanding and deliberate agreement by the alleged members that should be central to your consideration of the charge of conspiracy.

For example, "coordinated actions of the co-defendants are strong circumstantial evidence of an agreement."<sup>254</sup> The jury "may infer the existence of a conspiracy from the presence, association, and concerted action of the defendant with others."<sup>255</sup> The government need merely prove that the "defendant knew the essential objective of the conspiracy;" it need not prove that the defendant knew the details or played an extensive role.<sup>256</sup>

A tacit or implicit understanding is sufficient to fulfill the agreement requirement; the conspirators need not formally contract with each other.<sup>257</sup> The existence of an implicit agreement "may be inferred from acts done with a common purpose."<sup>258</sup> The government may establish an implicit agreement

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§ 28.04.

<sup>254</sup> United States v. Hernandez, 876 F.2d 774, 777 (9th Cir. 1989).

<sup>255</sup> United States v. Gonzales, 121 F.3d 928, 935 (5th Cir. 1997).

<sup>256</sup> See United States v. Suba, 132 F.3d 662, 672 (11th Cir. 1998).

<sup>257</sup> See United States v. Boone, 951 F.2d 1526, 1543 (9th Cir. 1991); United States v. Reifsteck, 841 F.2d 701, 704 (6th Cir. 1988) ("A tacit or mutual understanding between or among the alleged conspirators is sufficient to show a conspiratorial agreement."); United States v. Ayotte, 741 F.2d 865, 867 (6th Cir. 1984) ("Proof of some kind of formal agreement is not necessary to establish a conspiracy").

<sup>258</sup> Ayotte, 741 F.2d at 867; accord United States v. Alvarez, 548 F.2d 542, 544 (5th Cir. 1977).

by showing "[t]he coordinated actions of the co-defendants,"<sup>259</sup> or by "acts done with a common purpose."<sup>260</sup> A jury can conclude that the defendant was part of an implicit agreement from evidence that the conspirators "acted as a team" or by a defendant's "knowledge of the scope of the operation."<sup>261</sup>

For example, the Sixth Circuit found an implicit agreement to commit health insurance fraud by misrepresenting the identity of the patient even though the defendant (the patient) was unconscious and injured when the conspiracy began. The court held that the defendant "furthered the conspiracy" by responding to the name of a person with insurance, and "signed various forms." "These acts sufficiently established a tacit and mutual understanding . . . and show conspiratorial agreement."<sup>262</sup>

## 2. Membership in the Conspiracy

The prosecution must also prove a defendant's membership in a conspiracy. The evidence need not prove that the defendant knew all the details of the conspiracy or the identities of all the participants.<sup>263</sup> Mere presence or association, however, is

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<sup>259</sup> United States v. Hernandez, 876 F.2d 774, 788 (9th Cir. 1989).

<sup>260</sup> United States v. Milligan, 17 F.3d 177, 183 (6th Cir. 1994).

<sup>261</sup> Boone, 951 F.2d at 1543.

<sup>262</sup> Milligan, 17 F.3d at 183.

<sup>263</sup> See United States v. Massa, 740 F.2d 629, 636 (8th Cir. 1984); United States v. Diecidue, 603 F.2d 535, 548 (5th Cir. 1979).

not sufficient to establish membership in a conspiracy.<sup>264</sup>

The acts and declarations of co-conspirators are admissible to prove a defendant's membership in a conspiracy.<sup>265</sup> To admit a co-conspirator statement or act, the prosecution need only show by a preponderance of the evidence to the trial judge there is "evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made in the course and in furtherance of the conspiracy."<sup>266</sup> The trial

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<sup>264</sup> See United States v. Cintolo, 818 F.2d 980, 1003 (1st Cir. 1987); United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984). Thus, the standard charge to the jury is:

the evidence . . . must show beyond a reasonable doubt that the defendant knew the purpose or goal of the agreement or understanding and deliberately entered into the agreement intending, in some way, to accomplish the goal or purpose by this common plan or joint action.

If the evidence establishes beyond a reasonable doubt that the defendant knowingly and deliberately entered into an agreement . . . the fact that the defendant did not join the agreement at its beginning, or did not know all of the details of the agreement, or did not participate in each act of the agreement, or did not play a major role in accomplishing the unlawful goal is not important to your decision regarding membership in the conspiracy.

Merely associating with others and discussing common goals, mere similarity of conduct between or among such persons, merely being present at the place where a crime takes place or is discussed, or even knowing about criminal conduct does not, of itself, make someone a member of the conspiracy or a conspirator.

Devitt, Blackmar & O'Malley, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 28.05.

<sup>265</sup> Fed. R. Evid. 801(d)(2)(E) ("A statement is not hearsay if . . . [it is] a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.").

<sup>266</sup> Bourjaily v. United States, 483 U.S. 171, 173-79 (1987) (citing Fed. R. Evid. 104).

court's inquiry at this stage "is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied. Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issue."<sup>267</sup>

Once the government demonstrates that a conspiracy exists, its burden in showing that any particular defendant was a member of that conspiracy is light. The government need merely present "slight evidence . . . to implicate a defendant."<sup>268</sup> "[E]vidence which established beyond a reasonable doubt that a defendant is even slightly connected with the conspiracy is sufficient to convict him of knowing participation in the conspiracy."<sup>269</sup>

### 3. Overt Act

To sustain a conviction of conspiracy the government must also prove beyond a reasonable doubt that an overt act was done in furtherance of the conspiracy. The government need not prove that the defendant personally committed an overt act in furtherance of the conspiracy. The government need only prove

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<sup>267</sup> Bourjaily, 483 U.S. at 175. The prosecutor need not produce evidence independent of the statements themselves to show the existence of a conspiracy for evidentiary purposes, rather any evidence, except privileged communications, may be considered by the trial court, including the very statements being offered into evidence. Id. at 177 (overruling the "independent evidence" holdings of Glasser v. United States, 315 U.S. 60 (1942), and United States v. Nixon, 418 U.S. 683 (1974)).

<sup>268</sup> United States v. Milligan, 17 F.3d 177, 183 (6th Cir. 1994).

<sup>269</sup> United States v. Boone, 951 F.2d 1526, 1543 (9th Cir. 1991).

"that one of the co-conspirators did one or more overt acts in furtherance of the conspiracy."<sup>270</sup>

### C. Withdrawal Defense

Withdrawal from the conspiracy can be a conditional or an absolute defense to the crime of conspiracy, depending on when the withdrawal occurs. If the defendant withdraws from the conspiracy before any of the co-conspirators commits an overt act in furtherance of the conspiracy, the withdrawal is an absolute defense and the defendant cannot be convicted of the conspiracy. If a single overt act has occurred, withdrawal is not an absolute

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<sup>270</sup> United States v. Holloway, 128 F.3d 1254, 1257 (8th Cir. 1997). Thus the pattern jury instruction reads:

that one of the members to the agreement knowingly performed at least one overt act and that this overt act was performed during the existence or life of the conspiracy and was done to somehow further the goal(s) of the conspiracy or agreement.

The term "overt act" means some type of outward, objective action performed by one of the parties to or one of the members of the agreement or conspiracy which evidences that agreement.

Although you must unanimously agree that the same overt act was committed, the government is not required to prove more than one of the overt acts charged.

The overt act may, but for the alleged illegal agreement, appear totally innocent and legal.

Devitt, Blackmar & O'Malley, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 28.07; see also United States v. Hermes, 847 F.2d 493, 495 (8th Cir. 1988) ("government need show that only one of the conspirators engaged in one overt act in furtherance of the conspiracy, and the act itself need not be criminal in nature").

defense to the conspiracy charge.<sup>271</sup>

Withdrawal after the commission of an overt act, on the other hand, is a conditional defense. Such withdrawal excuses the defendant from liability for all criminal acts committed by the co-conspirators after the date of the withdrawal.<sup>272</sup> The defendant remains liable, however, for all reasonably foreseeable crimes committed by co-conspirators in furtherance of the conspiracy before the date of withdrawal, as well as for the conspiracy itself.

To demonstrate withdrawal from the conspiracy, the defendant must prove (1) that he or she has taken affirmative steps, inconsistent with the objectives of the conspiracy, to disavow or to defeat the objectives of the conspiracy and (2) that he or she has made a reasonable effort to communicate those acts to the co-conspirators or that he or she has disclosed the scheme to law enforcement authorities.<sup>273</sup> The burden of proof of withdrawal rests on the defendant.<sup>274</sup> The Eleventh Circuit has characterized the defendant's burden as "substantial."<sup>275</sup>

Mere physical distance from the co-conspirators is

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<sup>271</sup> See United States v. Sarault, 840 F.2d 1479, 1487 (9th Cir. 1988).

<sup>272</sup> See United States v. Lash, 937 F.2d 1077, 1083-85 (6th Cir. 1991).

<sup>273</sup> See United States v. Dabbs, 134 F.3d 1071, 1083 (11th Cir. 1998) (citation omitted).

<sup>274</sup> See United States v. Payne, 962 F.2d 1228, 1234-35 (6th Cir. 1992).

<sup>275</sup> Dabbs, 134 F.3d at 1083.

insufficient to demonstrate withdrawal. If, however, the defendant completely severs ties with the conspiracy, a court will find that the defendant withdrew absent evidence of continued acts in furtherance of the conspiracy or evidence that the defendant continued to receive benefits from the conspiracy.<sup>276</sup>

Even if the defendant takes affirmative action contrary to the objectives of the conspiracy, his or her withdrawal may be ineffective if he or she acquiesced in the conspiracy after the affirmative act. Thus, "[c]ontinued acquiescence negates withdrawal, leaving [the defendant] liable for the continuing acts in furtherance of the conspiracy by the other conspirators."<sup>277</sup>

#### V. Aiding and Abetting -- 18 U.S.C. § 2(a)

##### A. Generally

Title 18 U.S.C. § 2(a) governs liability for aiding and

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<sup>276</sup> Id.; see United States v. Antar, 53 F.3d 568, 582-83 (3d Cir. 1995).

<sup>277</sup> Lash, 937 F.2d at 1084. As the model federal jury instructions put it:

In order to withdraw from the conspiracy the defendant must take some definite, decisive, and affirmative action to disavow (himself) (herself) from the conspiracy or to defeat the goal or purpose of the conspiracy.

Merely stopping activities or cooperation or merely being inactive for a period of time is not sufficient to constitute the defense of withdrawal.

Devitt, Blackmar & O'Malley, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 28.11; see, e.g., United States v. Nerlinger, 862 F.2d 967, 974 (2d Cir. 1988).

abetting in the commission of a federal crime. This section provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

This section is premised on the common law view that a person who does not personally commit a crime but orders or assists another in committing that crime is as guilty as if he or she had committed the crime personally. The quintessential case of aiding and abetting is the getaway driver for a bank robbery. Although the getaway driver does not personally rob the bank, his or her assistance in the crime is sufficient to warrant his or her prosecution for the crime of bank robbery itself.<sup>278</sup>

In an aiding and abetting case, the person who actually commits the crime is called the principal. If the jury finds, beyond a reasonable doubt, that the aider and abettor aided, abetted, counseled, commanded, induced, or procured the principal to commit a federal crime, it should find the aider and abettor guilty. The aider and abettor is then subject to the same criminal penalties as the principal would be.

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<sup>278</sup> Also of potential applicability to conduct of this general nature is the misprision of felony provision, 18 U.S.C. § 4 which provides:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned for not more than three years, or both.

Defendants have been charged with aiding and abetting the obstruction of justice on numerous occasions.<sup>279</sup>

In one case, the Sixth Circuit affirmed a conviction for aiding and abetting the obstruction of justice when a defendant attempted to convince a witness to tell a false story to federal investigators to keep a third person from being prosecuted for a weapons violation. This charge was affirmed despite the fact that the third person was not charged with the weapons violation.<sup>280</sup>

#### B. Elements of § 2(a)

The crime of aiding and abetting has three elements. The government must prove beyond a reasonable doubt (1) an act by a defendant that (2) contributes to the execution of a federal crime (3) committed with the intent to aid in the commission of that crime.<sup>281</sup>

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<sup>279</sup> See, e.g., United States v. Fulbright, 105 F.3d 443 (9th Cir. 1997) (allowing the charge, although finding insufficient evidence); United States v. Morris, 1997 WL 331784, at \*1 (4th Cir. June 18, 1997) (per curiam); United States v. Ballis, 28 F.3d 1399, 1403 (5th Cir. 1994); United States v. Rankin, 870 F.2d 109, 110 (3d Cir. 1989); United States v. McKnight, 799 F.2d 443, 445 (8th Cir. 1986); United States v. Franklin, 598 F.2d 954, 955 n.1 (5th Cir. 1979); Hornick v. United States, 891 F. Supp. 72, 73 (N.D.N.Y. 1995); United States v. Tota, 672 F. Supp. 716, 723-24 (S.D.N.Y. 1987); United States v. Louie, 625 F. Supp. 1327, 1331 (S.D.N.Y. 1985).

<sup>280</sup> See United States v. Winkelman, 1996 WL 665379 (6th Cir. Nov. 15, 1996).

<sup>281</sup> See United States v. Stanley, 765 F.2d 1224, 1242 (5th Cir. 1985). The model federal jury instructions denote it thus:

In order to be found guilty of aiding and abetting the commission of the crime charged in . . . the indictment, the

## 1. Act

The statute itself lists several acts, all in the nature of instruction, that are sufficient to support liability.<sup>282</sup> Therefore, if the defendant directs the principal to commit the crime, that fact in and of itself is sufficient to satisfy the act element of aiding and abetting.

Besides instruction, the aider and abettor may simply perform some act that assists the principal in completing the crime. This occurs when the defendant "does not do all of the things which causes a crime to be complete but only a portion of the various items that are required to complete the crime."<sup>283</sup> The defendant must have "committed some overt act designed to facilitate the success of the criminal venture," and the act must

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government must prove beyond a reasonable doubt that the Defendant:

One, knew that the crime charged was to be committed or was being committed,

Two, knowingly did some act for the purpose of (aiding) (commanding) (encouraging) the commission of that crime, and

Three, acted with the intention of causing the crime charged to be committed.

Edward J. Devitt, Charles B. Blackmar, Michael A. Wolff & Kevin F. O'Malley, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 18.01 (1992).

<sup>282</sup> See 18 U.S.C. § 2(a) ("counsels, commands, induces or procures").

<sup>283</sup> United States v. Waller, 607 F.2d 49, 51 (3d Cir. 1979) (approving jury instructions).

"contribute[] to the execution of a crime."<sup>284</sup>

## 2. Crime Committed

The principal need not be convicted and punished for the aider and abettor to be charged. In fact, the Supreme Court has held that a conviction for aiding and abetting should be upheld even if the principal has been acquitted of that offense.<sup>285</sup>

Nonetheless, the jury must be convinced that the federal crime, in fact, did occur.<sup>286</sup> Thus, showing that the government failed to prove beyond a reasonable doubt that a completed federal crime was committed is a complete defense to aiding and abetting.

## 3. Intent

Central to the crime of aiding and abetting is the aider and abettor's affirmative desire to see that the federal crime actually be committed. An unknowing participant in a crime, who assists without knowledge of the principal's criminal intentions, is not guilty of aiding and abetting.

The aider and abettor must share with the principal "a community of unlawful purpose at the time the act is

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<sup>284</sup> United States v. Stanley, 765 F.2d 1224, 1242 (5th Cir. 1985).

<sup>285</sup> See Stanfeder v. United States, 447 U.S. 10, 14-20 (1980).

<sup>286</sup> See United States v. Fulbright, 105 F.3d 443, 452 (9th Cir. 1997); United States v. Waller, 607 F.2d 49, 52 (3d Cir. 1979).

committed."<sup>287</sup> The aider and abettor must wish that the crime occur and must seek by his or her acts to make it succeed.<sup>288</sup>

The sharing of criminal intent need not rise to the level of an agreement that would support a conspiracy charge.<sup>289</sup> Similarly, the "aider and abettor need not know every last detail of the substantive offense."<sup>290</sup> As the Eighth Circuit has put it: "Participation is wilful if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something that the law requires to be done."<sup>291</sup>

### C. Defenses and Limitations

The government may not convict a defendant for aiding and abetting merely because the defendant was present at the scene of the crime or was known to associate with the principal.<sup>292</sup> As explained above, the government must show that the defendant intended for the crime to be committed and assisted in its

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<sup>287</sup> Johnson v. United States, 195 F.2d 673, 675 (8th Cir. 1952).

<sup>288</sup> See United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990).

<sup>289</sup> See Nye & Nisen v. United States, 336 U.S. 613, 618 (1949).

<sup>290</sup> United States v. Sanborn, 563 F.2d 488, 491 (1st Cir. 1977).

<sup>291</sup> United States v. McKnight, 799 F.3d 443, 446 (8th Cir. 1986) (approving jury instruction).

<sup>292</sup> See United States v. Oberle, 136 F.3d 1414, 1422 (10th Cir. 1998).

commission by some act.

Aiding and abetting is a specific intent crime.<sup>293</sup> As a result, for example, voluntary intoxication is a defense to the crime of aiding and abetting.<sup>294</sup> This is true even if voluntary intoxication is not a defense to the underlying crime.<sup>295</sup>

## VI. Use of an Intermediary -- 18 U.S.C. § 2(b)

### A. Generally

Traditional aider-and-abettor liability under 18 U.S.C. § 2(a) requires that the principal and the defendant share criminal intent. Because a defendant using an innocent dupe to commit a crime is no less culpable than a defendant assisting another in the commission of a crime, Congress passed 18 U.S.C. § 2(b) to criminalize the use of an intermediary to commit a crime. This section provides:

Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The quintessential case is an employer who instructs an employee to mail a fraudulent document. Even though the employer did not use the mails directly, he or she still is guilty of mail

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<sup>293</sup> See United States v. Sayetsitty, 107 F.3d 1405, 1412 (9th Cir. 1997); but see United States v. Roan Eagle, 867 F.2d 436, 445 (8th Cir. 1989).

<sup>294</sup> See United States v. Hatatley, 130 F.3d 1399, 1404-05 (10th Cir. 1997).

<sup>295</sup> See Id. at 1404 (voluntary intoxication is not a defense to voluntary manslaughter but is a defense to aiding and abetting voluntary manslaughter).

fraud.<sup>296</sup>

The primary burden of the government is to show that the defendant "willfully cause[d] an act to be done by another which would be illegal if he did it himself."<sup>297</sup> The actions of the intermediary must be such that, had the defendant done them personally, the defendant would have committed a crime.

#### B. Intent

Unlike traditional aider-and-abettor liability, the government need not prove that the intermediary had any criminal intent.<sup>298</sup> The intermediary's mental state is wholly irrelevant; the government need not prove that the intermediary was innocent either.<sup>299</sup> The government must prove that the defendant had the mental state that would be required for a violation of the underlying offense.<sup>300</sup>

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<sup>296</sup> See Pereira v. United States, 347 U.S. 1 (1954).

<sup>297</sup> United States v. West Indies Transport, Inc., 127 F.3d 299, 307 (3d Cir. 1997).

<sup>298</sup> See, e.g., United States v. West Indies Transport, Inc., 127 F.3d 299, 307 (3d Cir. 1997); United States v. Walser, 3 F.3d 380, 388 (11th Cir. 1993) ("an individual is criminally culpable for causing an intermediary to commit a criminal act even though the intermediary has no criminal intent and is innocent of the substantive crime"); see also United States v. Laurins, 857 F.2d 529, 535 (9th Cir. 1988).

<sup>299</sup> See United States v. Rapoport, 545 F.2d 802, 806 (2d Cir. 1976).

<sup>300</sup> See United States v. Gabriel, 125 F.3d 89, 99, 101 (2d Cir. 1997); United States v. Trie, 1998 WL 427550 at \*4- \*6 (D.D.C. July 17, 1998) (holding same but noting elements of such proof would be higher in federal election law context); United States v. Curran, 20 F.3d 560, 569 (3d Cir. 1994) (same).

### C. Particular Cases

Courts have allowed charges for using an intermediary to commit a perjury or false statements offense.<sup>301</sup>

- The Eleventh Circuit found that a defendant was guilty of perjury where he gave a witness a false document and then allowed the witness to introduce it into evidence at a trial. Even though the defendant was not under oath and the witness did not commit perjury because he was not aware that the document was false, the defendant's actions were sufficient to trigger criminal liability under § 2(b).<sup>302</sup>
- In another case, the Second Circuit found sufficient evidence to support a conviction where the defendant used an intermediary in filing a false report. There, the defendant knew that the intermediary was preparing the report, "knew that the portfolio reports were false and misleading," and failed to provide correct information though requested to do so by the preparer. This evidence was found sufficient to support the conviction.<sup>303</sup>

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<sup>301</sup> See, e.g., United States v. Nolan, 136 F.3d 265 (2d Cir. 1998) (filing false reports under 18 U.S.C. § 1027); United States v. West Indies Transport, Inc., 127 F.3d 299, 307 (3d Cir. 1997) ("When a defendant uses an innocent intermediary to . . . make false statements to the government, the criminal intent of the intermediary is not an element of the crime."); United States v. Gabriel, 125 F.3d 89, 99 (2d Cir. 1997) (false statements in violation of 18 U.S.C. § 1001); United States v. Walser, 3 F.3d 380, 388 (11th Cir. 1993) (perjury).

<sup>302</sup> See Walser, 3 F.3d at 389.

<sup>303</sup> Nolan, 136 F.3d at 272.

- In a third case, a jury found a defendant guilty of making false statements in the form of false packing slips. The court found that evidence that the defendant "had some influence" over the slip preparers and "used that influence to cause [the preparers] to prepare the false slip" was sufficient to support criminal liability.<sup>304</sup>

## VII. Evidentiary Issues

We briefly summarize in this section certain evidentiary principles that appear to bear on the conduct described in this Referral. It is, of course, for Congress to assess the evidence as it sees fit. These principles, however, bore upon the Office's own judgment as to the substance and credibility of the information presented.

### A. Circumstantial Evidence

Courts distinguish "direct evidence" from "circumstantial evidence." A witness may provide direct evidence of a fact by stating the fact in testimony based on personal knowledge.<sup>305</sup> For example, a witness might provide direct evidence that a defendant destroyed documents by testifying that he or she saw the defendant shred them.

A witness may supply circumstantial evidence of a fact by

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<sup>304</sup> See Gabriel, 125 F.3d at 100.

<sup>305</sup> See Black's Law Dictionary 460 (6th ed. 1990) (defining direct evidence as "testimony from a witness who actually saw, heard or touched the subject of questioning").

testifying about circumstances from which the jury may infer the fact.<sup>306</sup> For instance, a witness may provide circumstantial evidence that the defendant destroyed documents by testifying that the documents were intact when the defendant went to examine them, but were found shredded immediately afterward. Although the witness did not see the defendant destroy the documents, the jury may infer that the defendant shredded them based on the witness's testimony.

One Court of Appeals has explained the difference between direct evidence and circumstantial evidence as follows:

The distinction between these two types of evidence is that with direct evidence, the jury does not have to draw inferences to decide whether the fact asserted exists, the evidence directly supports the existence or non-existence of the fact and the jury's involvement is to decide whether they believe what the witness says. With circumstantial evidence the jury must decide whether to draw the inference or connection between the evidence presented and the fact asserted.<sup>307</sup>

Even though the two types of evidence may be distinguished they are of equal probative weight.<sup>308</sup> A jury may convict a

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<sup>306</sup> Black's Law Dictionary, at 243 (defining circumstantial evidence as "[t]estimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved.").

<sup>307</sup> United States v. Henderson, 693 F.2d 1028, 1031 (11th Cir. 1982).

<sup>308</sup> Thus, the standard jury instruction on the consideration of evidence reads:

There are two types of evidence you may consider. One is direct evidence -- such as testimony of an eyewitness. The other is indirect or circumstantial evidence -- the proof of circumstances that tend to prove or disprove the existence or nonexistence of

defendant of a crime based solely on circumstantial evidence, provided that the evidence proves the defendant guilty of each of the elements of the crime beyond a reasonable doubt.<sup>309</sup> For example, in one case a jury convicted the defendant of obstruction of justice based solely on circumstantial evidence that he had altered documents sought by a subpoena. Although the defendant denied wrongdoing, the court stated: "A reasonable jury was entitled to believe the government's circumstantial evidence and disbelieve [the defendant]."<sup>310</sup>

Civil proceedings usually require proof only by a preponderance of the evidence. Because circumstantial evidence can prove guilt beyond a reasonable doubt, it naturally also can satisfy this lower standard.<sup>311</sup> As the Supreme Court stated in one civil case, "direct evidence of a fact is not required.

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certain other facts. The law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

Devitt, Blackmar & O'Malley, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 72.03.

<sup>309</sup> See Holland v. United States, 348 U.S. 121, 139-140 (1954). At one time, some courts held that a jury could convict based solely on circumstantial evidence only if the evidence excluded "every reasonable hypothesis except that of guilt." Johnson v. United States, 408 F.2d 1097, 1098 (5th Cir. 1969). All of the circuits, however, now have rejected that rule. See United States v. Bell, 678 F.2d 547, 549 n.3 (5th Cir. 1982) (en banc) (listing cases), aff'd 462 U.S. 356 (1983).

<sup>310</sup> United States v. Brooks, 111 F.3d 365, 373 (4th Cir. 1997).

<sup>311</sup> See Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453, 469 & n.21 (1972).

Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."<sup>312</sup>

**B. Inferences from False Exculpatory Testimony**

Criminal suspects often make exculpatory statements to investigators or to the courts (an alibi, for example). The courts have held that, if a jury determines that the exculpatory statement was false, it may draw an inference adverse to the suspect. In particular, the jury may consider the false statement to be circumstantial evidence that the defendant had a consciousness of guilt.<sup>313</sup> The jury may draw this inference because an innocent person generally does not have a reason to fabricate a description of his or her conduct.<sup>314</sup>

One defendant, for example, told the police that he could not have committed a robbery because he was at a different location when the robbery occurred. The prosecution later produced evidence contradicting this statement. The court of appeals held that the trial judge properly had instructed the jury that, if it found the defendant's testimony false, it could infer that the defendant was conscious of his guilt.<sup>315</sup>

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<sup>312</sup> Michalic v. Cleveland Tankers, Inc., 364 U.S. 325, 330 (1960).

<sup>313</sup> See Government of Virgin Islands v. Testamark, 570 F.2d 1162, 1168 (3d Cir. 1978).

<sup>314</sup> See United States v. Littlefield, 840 F.2d 143, 148 n.4 (1st Cir.), cert. denied 488 U.S. 860 (1988).

<sup>315</sup> United States v. Ingram, 600 F.2d 260, 262 (10th Cir. 1979).

### C. Willful Blindness

The term "willful blindness" refers "to a situation where the defendant tries to avoid knowing something that will incriminate."<sup>316</sup> The federal courts equate willful blindness with knowledge.<sup>317</sup> As a result, if a federal criminal statute requires a defendant to have knowledge of a fact, proof of deliberate ignorance of the fact generally will suffice to establish proof of knowledge of the fact.<sup>318</sup>

For example, a participant in a drug smuggling operation deliberately avoided determining that a secret compartment in an automobile contained marijuana.<sup>319</sup> He argued that a jury could not convict him of knowingly importing drugs into the United States because he did not actually know that the compartment contained drugs. The Ninth Circuit rejected this argument, holding that "deliberate ignorance and positive knowledge are equally culpable."<sup>320</sup>

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<sup>316</sup> Black's Law Dictionary 1600 (6th ed. 1990).

<sup>317</sup> See United States v. Campbell, 977 F.2d 854, 858-59 (4th Cir. 1992), cert. denied, 507 U.S. 938 (1993); United States v. Antzoulatos, 962 F.2d 720, 724 (7th Cir.), cert. denied, 506 U.S. 919 (1992).

<sup>318</sup> See Leary v. United States, 395 U.S. 6, 46 n.93 (1969) (adopting Model Penal Code rule that "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.").

<sup>319</sup> United States v. Jewell, 532 F.2d 697, 698 (9th Cir.), cert. denied, 426 U.S. 951 (1976).

<sup>320</sup> Id. at 704.

Federal judges may instruct juries about willful blindness when the facts warrant. "A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge but the evidence supports an inference of deliberate ignorance."<sup>321</sup>

#### D. Testimony of a Cooperating Witness

In general, courts agree that the testimony of a witness who has been immunized or entered into a plea bargain in return for the his or her cooperation must be viewed with caution. Caution, however, does not equate to disregard and courts are equally clear that a cooperating witness's testimony is competent and forms a lawfully sufficient basis for conviction if the finder of fact determines it to be credible.<sup>322</sup>

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<sup>321</sup> United States v. Gruenberg, 989 F.2d 971, 974 (8th Cir.) (quoting United States v. Long, 977 F.2d at 1264, 1271 (8th Cir. 1992)), cert. denied 510 U.S. 873 (1993). The court in Gruenberg approved the following jury instruction on willful blindness:

The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact. It is entirely up to you as to whether you find any deliberate closing of the eyes and the inference to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

989 F.2d at 974.

<sup>322</sup> Thus, the standard jury instruction reads:

The testimony of an immunized witness, someone who has

Giving this type of instruction is generally considered "the better practice."<sup>323</sup> However, this cautionary instruction is not mandatory; failure to give such an instruction is not usually considered reversible error.<sup>324</sup>

Indeed, notwithstanding the cautionary instructions recommended, there "is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe

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been told either that (his) (her) crimes will go unpunished in return for testimony or that (his) (her) testimony will not be used against (him) (her) in return for that cooperation, must be examined and weighed by the jury with greater care than the testimony of someone who is appearing in court without the need for such an agreement with the government.

\_\_\_\_\_ may be considered to be an immunized witness in this case.

The jury must determine whether the testimony of the immunized witness has been affected by self-interest, or by the agreement (he) (she) has with the government, or by (his own) (her own) interest in the outcome of this case, or by prejudice against the defendant.

Devitt, Blackmar, Wolff, & O'Malley, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 15.03 (1992).

<sup>323</sup> Caminetti v. United States, 242 U.S. 470, 495 (1917) ("better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence").

<sup>324</sup> United States v. McGinnis, 783 F.2d 755, 758 (8th Cir. 1986); see also United States v. Braxton, 877 F.2d 556, 565 (7th Cir. 1989) (better practice is to instruct but failure to do so is not reversible error if corroborating evidence exists); United States v. Shriver, 838 F.2d 980, 983 (8th Cir. 1988) ("no absolute and mandatory duty is imposed upon the court to advise the jury by instruction that they should consider the testimony of an uncorroborated accomplice with caution") (internal quotations and citation omitted); but see United States v. Morgan, 555 F.2d 238, 242-43 (9th Cir. 1977) (defendant entitled to cautionary jury instruction).

them."<sup>325</sup> Decisions as to the credibility of a cooperating witness's testimony remain for the jury to make.<sup>326</sup>

In addition, courts agree that evidence of a cooperating witness's duty to testify truthfully as part of the plea agreement may be admitted into evidence.<sup>327</sup> Thus, evidence concerning a plea agreement and its provisions may have both a bolstering effect (because of the truthfulness requirement) and an impeaching effect (because of the promise of leniency) on the witness's credibility.<sup>328</sup> Hence, the entirety of the plea agreement allows the jury to accurately assess the witness's credibility.<sup>329</sup>

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<sup>325</sup> Caminetti, 242 U.S. at 495 (citation omitted); see also United States v. Winter, 663 F.2d 1120, 1134 n.24 (1st Cir. 1981) (approving instruction that reads, in part, "[o]ne who testifies with the benefit of immunity, with a promise from the government that he will not be prosecuted, does not become an incompetent witness"), cert. denied, 460 U.S. 1011 (1983).

<sup>326</sup> McGinnis, 783 F.2d at 758.

<sup>327</sup> See, e.g. United States v. Lord, 907 F.2d 1028, 1029-31 (10th Cir. 1990) (collecting cases); cf. United States v. Sobamowo, 892 F.2d 90, 95 n.3 (D.C. Cir. 1989) (witness' testimony that he was ordered by the court to cooperate as part of plea bargain was admissible). The only dispute is whether evidence of the truthfulness requirement of a plea agreement may be admitted on direct examination of the witness, as the majority of circuits permit, or whether it may only be offered as evidence in rebuttal to a challenge to the credibility of the witness, as a minority of the circuits require. See Lord, 907 F.2d at 1029-31 (describing majority rule of First, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits and contrasting with minority rule of Second and Eleventh Circuits).

<sup>328</sup> United States v. Drews, 877 F.2d 10, 12 (8th Cir. 1989); United States v. Townsend, 796 F.2d 158, 163 (6th Cir. 1986).

<sup>329</sup> United States v. Mealy, 851 F.2d 890, 899 (7th Cir. 1988).

### E. Testimony of the Accused

As with the testimony of a cooperating witness, courts agree that the testimony of an accused who has an interest in the resolution of the allegations made against him must also be viewed with caution. Here too, caution does not equate with disregard and the courts agree that an accused's testimony is competent and may be credited by a finder-of-fact.

Thus, while "[t]he fact that [a witness] is a defendant does not condemn him as unworthy of belief, . . . at the same time it creates an interest greater than that of any other witness, and to that extent [it] affects the question of credibility. It is therefore a matter properly to be suggested by the court to the jury."<sup>330</sup> Accordingly courts generally agree that, while it is not mandatory, it is "not improper for [a] district court, in instructing the jury about [a] defendant's credibility as a witness, to point out [the] defendant's vital interest in the outcome of the case."<sup>331</sup> Typical of such instructions is one reminding the jury of a defendant's "very keen personal interest in the result of your verdict."<sup>332</sup>

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<sup>330</sup> Reagan v. United States, 157 U.S. 301, 305 (1895).

<sup>331</sup> United States v. Firgurski, 545 F.2d 389, 392 (4th Cir. 1976); see also United States v. Anderson, 642 F.2d 281, 286 (9th Cir. 1981).

<sup>332</sup> United States v. Ylda, 643 F.2d, 348, 352 (5th Cir. 1981); see also United States v. Stout, 601 F.2d 325, 329 (7th Cir. 1979) (accused has a "vital interest in the outcome of his trial"), cert. denied, 444 U.S. 979 (1980); United States v. Vega, 589 F.2d 1147, 1154 n.6 (2d Cir. 1978) (accused's "deep

