

CRS Report for Congress

Perjury Under Federal Law: A Brief Overview

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Summary

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

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

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

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

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

The false statement statute, 18 U.S.C. 1001, is closely akin to the perjury statutes. It outlaws false statements in any matter within the jurisdiction of a federal agency or department, a kind of perjury with oath prohibition.

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

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Introduction

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

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

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

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

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

Congress enacted Section 1623 to avoid some of the common technicalities embodied in the more comprehensive perjury provisions found in subsection 1621⁸ and thus “to facilitate perjury prosecutions and thereby enhance the reliability of

² Prohibitions against misconduct very much like perjury are scattered throughout the United States Code. The most widely prosecuted is probably 18 U.S.C. 1001, discussed *infra*, that outlaws material false statements made with respect to a matter within the jurisdiction of a department or agency of the United States. For a discussion of 18 U.S.C. 1503 and 1505 which outlaw corrupt endeavors to impede the due administration of justice before the courts and executive tribunal and the due exercise of the power of Congressional inquiry see CRS Report RL34303, *Obstruction of Justice: An Overview of Some of the Federal Laws that Prohibit Interference with Judicial, Executive or Legislative Activities*.

³ 18 U.S.C. 1961(1), 1956(c)(7).

⁴ 18 U.S.C. 2, 3, 4, 371.

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

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

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

⁸ Unlike subsection 1621, subsection 1623 permits a conviction in the case of two mutually inconsistent declarations without requiring proof that one of them is false, 18 U.S.C. 1623(c); it recognizes a limited recantation defense, 18 U.S.C. 1623(d); it dispenses with the so-called two-witness rule, 18 U.S.C. 1623(e); and it employs a “knowing” mens rea standard rather than the more demanding “willfully” standard used in subsection 1621.

testimony before federal courts and grand juries.”⁹ Parsed into elements, Section 1623 declares that:

- I. Whoever
- II. a. under oath or
 - b. in any
 - i. declaration,
 - ii. certificate,
 - iii. verification, or
 - iv. statement
 under penalty of perjury as permitted under Section 1746 of title 28, United States Code¹⁰
- III. in any proceeding before or ancillary to
 - a. any court or
 - b. grand jury of the United States
- IV. knowingly
- V. a. makes any false material declaration or
 - b. makes or uses any other information, including any
 - i. book,
 - ii. paper,
 - iii. document,
 - iv. record,
 - v. recording, or
 - vi. other material,
 knowing the same to contain any false material declaration,
 shall be fined under this title or imprisoned not more than five years, or both.¹¹

In most cases, the courts abbreviate their description of the elements and state in one form or another that to prove perjury the government must establish that the

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

¹⁰ “Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

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

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

¹¹ 18 U.S.C. 1623(a).

defendant (1) knowingly made a (2) false (3) material declaration (4) under oath (5) in a proceeding before or ancillary to any court or grand jury of the United States.¹²

The allegedly perjurious declaration must be presented in a “proceeding before or ancillary to any court or grand jury of the United States.” An interview in an attorney’s office in preparation for a judicial hearing cannot be considered such an ancillary proceeding,¹³ but the phrase “proceedings ancillary to” court or grand jury proceedings does cover proceedings to take depositions in connection with civil litigation,¹⁴ as well as a variety of pretrial proceedings in criminal cases,¹⁵ including habeas proceedings,¹⁶ bail hearings,¹⁷ venue hearings,¹⁸ or suppression hearings.¹⁹

The Supreme Court’s observation that a statement that is misleading but literally true cannot support a conviction under Section 1621 because it is not false,²⁰ applies with equal force to perjury under Section 1623.²¹ Similarly, perjury cannot be the product of confusion, mistake, or faulty memory, but must be a statement that the defendant knows is false,²² although this requirement may be satisfied with evidence

¹² *United States v. Safa*, 484 F.3d 818, 821 (6th Cir. 2007)(“To convict an individual of a violation of 18 U.S.C. 1623, the government must prove beyond a reasonable doubt that the defendant: (1) knowingly made, (2) a materially false declaration (3) under oath (4) in a proceeding before or ancillary to any court of the United States”); *United States v. Pagan-Santini*, 451 F.3d 258, 266 (1st Cir. 2006)(“A statement under oath constitutes perjury if it is false, known to be so and material to the proceeding”); *United States v. Clifton*, 406 F.3d 1173, 1177 (10th Cir. 2005)(“The government must prove the following elements beyond a reasonable doubt under §1623: (1) the defendant made a declaration under oath before a grand jury; (2) such declaration was false; (3) the defendant knew the declaration was false and (4) the false declaration was material to the grand jury’s inquiry”); *United States v. Hirsch*, 360 F.3d 860, 864-65 (8th Cir. 2004)(the government had to prove the following four elements beyond a reasonable doubt: (1) Hirsch gave the testimony under oath in his criminal trial; (2) such testimony was false in whole or in part; (3) at the time he so testified, he knew his testimony was false; and (4) the false testimony was material”).

¹³ *Dunn v. United States*, 442 U.S. 100, 111-12 (1979).

¹⁴ *Id.*; *United States v. Wilkinson*, 137 F.3d 214, 225 (4th Cir. 1998); *United States v. Holland*, 22 F.3d 1040, 1047-48 (11th Cir. 1994); *United States v. McAfee*, 8 F.3d 1010, 1013-14 (5th Cir. 1993).

¹⁵ *United States v. Farmer*, 137 F.3d 1265 (11th Cir. 1998).

¹⁶ *United States v. Johnson*, 325 F.3d 205, 209 (4th Cir. 2003).

¹⁷ *United States v. Greene*, 591 F.2d 471 (8th Cir. 1979).

¹⁸ *United States v. Durham*, 139 F.3d 1325 (10th Cir. 1998).

¹⁹ *United States v. Renteria*, 138 F.3d 1328 (10th Cir. 1998).

²⁰ *Bronston v. United States*, 409 U.S. 352, 358-59 (1973).

²¹ *United States v. Richardson*, 421 F.3d 17, 32-3 (1st Cir. 2005); *United States v. McKenna*, 327 F.3d 830, 840-41 (9th Cir. 2003); *United States v. Shotts*, 145 F.3d 1289, 1297 (11th Cir. 1998); *United States v. Hairston*, 46 F.3d 361, 375 (4th Cir. 1996).

²² *United States v. Fawley*, 137 F.3d 458, 466 (7th Cir. 1998); *United States v. Reveron Martinez*, 836 F.2d 684, 689 (1st Cir. 1988); *cf.*, *United States v. Dunnigan*, 507 U.S. 87, 94 (1993).

that the defendant was deliberately ignorant or willfully blind to the fact that the statement was false.²³ On the other hand, “[a] question that is truly ambiguous or which affirmatively misleads the testifier can never provide a basis for a finding of perjury, as it could never be said that one intended to answer such a question untruthfully.”²⁴ Yet ambiguity will be of no avail if the defendant understands the question and answers falsely nevertheless.²⁵

Materiality is perhaps the most nettlesome of perjury’s elements. It is usually said that a statement is material “if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to whom it is addressed.”²⁶ This definition is not easily applied when the precise nature of the underlying inquiry remains somewhat undefined such as in grand jury proceedings or in depositions at the discovery stage of a civil suit. On the civil side, the lower federal courts appear divided between the view (1) that a statement in a deposition is material if a “truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit” and (2) that a statement is material “if the topic of the statement is discoverable and the false statement itself had a tendency to affect the outcome of the underlying civil suit for which the deposition was taken.”²⁷

In the case of perjury before the grand jury, rather than articulate a single standard the courts have described several circumstances under which false testimony may be considered material.²⁸ In any event, a statement is no less material because

²³ *United States v. Fawley*, 137 F.3d 458, 466-67 (7th Cir. 1998).

²⁴ *United States v. Richardson*, 421 F.3d 17, 33 (1st Cir. 2005); *United States v. DeZarn*, 157 F.3d 1042, 1049 (6th Cir. 1998); *see also*, *United States v. Turner*, 500 F.3d 685, 689 (8th Cir. 2007) (“If, however, a question is fundamentally vague or ambiguous, then an answer to that question cannot sustain a perjury conviction”).

²⁵ *United States v. McKenna*, 327 F.3d 830, 841 (9th Cir. 2003) (“A question leading to a statement supporting a perjury conviction is not fundamentally ambiguous where the jury could conclude beyond a reasonable doubt that the defendant understood the question as did the government and that so understood, the defendant’s answer was false”); *United States v. Brown*, 459 F.3d 509, 529 (5th Cir. 2006); *United States v. Turner*, 500 F.3d 685, 690 (8th Cir. 2007).

²⁶ *United States v. Brown*, 459 F.3d 509, 529 (5th Cir. 2006), citing, *United States v. Gaudin*, 515 U.S. 506, 509 (1995), and *Kungys v. United States*, 485 U.S. 759, 770 (1988); *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir. 2003); *United States v. Lee*, 359 F.3d 412, 417 (6th Cir. 2003); *United States v. Durham*, 139 F.3d 1325, 1329 (10th Cir. 1998).

²⁷ *United States v. Wilkinson*, 137 F.3d 214, 225 (4th Cir. 1998), comparing, *United States v. Kross*, 14 F.3d 751, 754 (2^d Cir. 1994), and *United States v. Holley*, 942 F.2d 916, 924 (5th Cir. 1991), with, *United States v. Adams*, 870 F.2d 1140, 1146-148 (6th Cir. 1989) and *United States v. Clark*, 918 F.2d 843, 846 (9th Cir. 1990), overruled on other grounds, *United States v. Keys*, 133 F.3d 1282, 1286 (9th Cir., 1998); *see also*, *United States v. McKenna*, 327 F.3d 830, 839-40 (9th Cir. 2003) (acknowledging the division and continuing to adhere to the view expressed in *Clark*).

²⁸ *E.g.*, *United States v. Brown*, 459 F.3d 509, 530 n.18 (5th Cir. 2006) (“The materiality requirement of §1623 has been satisfied in cases where the false testimony was relevant to any subsidiary issue or was capable of supplying a link to the main issue under

it did not or could not divert the decisionmaker.²⁹

The courts seem to have had less difficulty dealing with a materiality issue characterized as the perjury trap doctrine. The doctrine arises where a witness is called for the sole purpose of eliciting perjurious testimony from him.³⁰ Under such circumstances it is said the tribunal has no valid purpose to which a perjurious statement could be considered material. The doctrine poses no bar to prosecution in most cases, however, since the government is usually able to identify some valid reason for the grand jury's inquiries.³¹

Subsection 1623(c) permits a perjury conviction simply on the basis of two necessarily inconsistent material declarations rather than a showing that one of the two statements is false.³² Conviction does require a showing, however, that the two

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

²⁹ *United States v. Silveira*, 426 F.3d 514, 518 (1st Cir. 2005); *United States v. Lee*, 359 F.3d 412, 416 (6th Cir. 2004); *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir. 2003).

³⁰ *Brown v. United States*, 245 F.2d 549, 555 (8th Cir. 1957), quoting, *United States v. Icardi*, 140 F.Supp. 383, 384-88 (D.D.C. 1956); *but see*, *United States v. Burke*, 425 F.3d 400, 408 (7th Cir. 2005)(“We have not embraced this doctrine, however, and do not see any reason to adopt it now”)(internal citations omitted).

³¹ *United States v. McKenna*, 327 F.3d 830, 837 (9th Cir. 2003)(“Here, the government did not use its investigatory powers to question McKenna before a grand jury. Rather, it merely questioned McKenna in its role as a defendant during the pendency of a civil action in which she was the plaintiff. The perjury trap doctrine is inapplicable to McKenna’s case for this reason”); *United States v. Regan*, 103 F.3d 1073, 1079 (2d Cir. 1997)(“[w]e have noted that the existence of a legitimate basis for an investigation and for particular questions answered falsely precludes any application of the perjury trap doctrine”); *United States v. Chen*, 933 F.2d 793, 797 (9th Cir. 1991)(“[w]hen testimony is elicited before a grand jury that is attempting to obtain useful information in furtherance of its investigation or conducting a legitimate investigation into crimes which had in fact taken place within its jurisdiction, the perjury trap doctrine is, by definition, inapplicable”), quoting, *United States v. Devitt*, 499 F.2d 135, 140 (7th Cir. 1974) and *United States v. Chevoor*, 526 F.2d 178, 185 (1st Cir. 1975).

³² 18 U.S.C. 1623(c)(“An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are

statements were made under oath; it is not enough to show that one was made under oath and the other was made in the form of an affidavit signed under penalty of perjury.³³ Moreover, the statements must be so inherently contradictory that one of them of necessity must be false.³⁴

Some years ago, the Supreme Court declined to reverse an earlier ruling that “[t]he general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment.”³⁵ Subsection 1623(e) permits a perjury conviction without compliance with this traditional two witness rule.³⁶ Since the two witness rule rests on the common law rather than on a constitutional foundation, it may be abrogated by statute without offending constitutional principles.³⁷

Most of the other subsections of Section 1623 are designed to overcome obstacles which the common law placed in the path of a successful perjury prosecution. Subsection 1623(d), in contrast, offers a defense unrecognized at common law. The defense is stated in fairly straightforward terms, “[w]here in the same continuous court or grand jury proceeding in which a declaration is made, the

inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if – (1) each declaration was material to the point in question, and (2) each declaration was made within the period of the statute of limitations for the offense charged under this section. In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true”); *United States v. Dunn*, 442 U.S.100, 108 (1979)(“By relieving the government of the burden of proving which of two or more inconsistent declarations was false, see §1623(c), Congress sought to afford greater assurance that testimony obtained in grand jury and court proceedings will aid the cause of truth”).

³³ *United States v. Jaramillo*, 69 F.3d 388 (9th Cir. 1995).

³⁴ *United States v. McAfee*, 8 F.3d 1010, 1014-15 (5th Cir. 1993)(“The Government must show that the statements are so irreconcilable that one of the statements is ‘necessarily false.’ We find the Fourth Circuit’s explanation of §1623(c) instructive and adopt the standard set forth in *United States v. Flowers*, 813 F.2d 1320 (4th Cir. 1987). In *Flowers*, the court concluded that subsection 1623(c) ‘requires a variance in testimony that extends beyond mere vagueness, uncertainty, or equivocality. Even though two declarations may differ from one another, the §1623(c) standard is not met unless taking them into context, they are so different that if one is true there is no way the other can also be true.’” *Id.* at 1324; see also *United States v. Porter*, 994 F.2d 470 (8th Cir. 1993)).

³⁵ *Weiler v. United States*, 323 U.S. 606, 607 (1945).

³⁶ 18 U.S.C. 1623(e)(“Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence”). See also *United States v. Kemp*, 500 F.3d 257, 294 (3d Cir. 2007).

³⁷ *United States v. Ruggiero*, 472 F.2d 599, 606 (2d Cir. 1973); *United States v. Diggs*, 560 F.2d 266, 269 (7th Cir. 1977)(citing cases in accord).

person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed,” 18 U.S.C. 1623(d). Although phrased in different terms, the courts seem to agree that repudiation of the false testimony must be specific and thorough.³⁸ There is some disagreement whether a recanting defendant must be denied the defense if both the substantial impact and manifest exposure conditions have been met or if the defense must be denied if either condition exists. Most courts have concluded that the presence of either condition dooms the defense.³⁹

Early construction required that a defendant establish both that his false statement had not substantially affected the proceeding before his recantation *and* that it had not become manifest that his false statement would be exposed.⁴⁰ One more recent appellate case, however, decided that the defense should be available to a witness who could show a want of *either* an intervening adverse impact *or* of likely exposure of his false statement.⁴¹ Even without the operation of subsection 1623(d), relatively contemporaneous corrections of earlier statements may negate any inference that the witness is knowingly presenting false testimony and thus preclude conviction for perjury.⁴²

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

When Congress passed Section 1623, it did not repeal Section 1621 either explicitly or by implication; where its proscriptions overlap with those of Section 1623, the government is free to choose under which it will prosecute.⁴³ Since Section 1623 frees prosecutors from many of the common law requirements of Section 1621, it is perhaps not surprising that they ordinarily elect to prosecute under subsection 1623. Section 1623 does outlaw perjury under a wider range of circumstances than Section 1621; it prohibits perjury before official proceedings generally – both judicial and nonjudicial. Separated into its elements, the section provides that:

³⁸ *United States v. Tobias*, 863 F.2d 685, 689 (9th Cir. 1988)(unequivocal repudiation); *United States v. Scivola*, 766 F.2d 37, 45 (1st Cir. 1985)(implicit recantation is insufficient); *United States v. Goguen*, 723 F.2d 1012, 1017 (1st Cir. 1983) (outright retraction and repudiation).

³⁹ *United States v. Sherman*, 150 F.3d 306, 313-18 (3d Cir. 1998); *United States v. Fornaro*, 894 F.2d 508, 510-11 (2d Cir. 1990); *United States v. Scivola*, 766 F.2d 37, 45 (1st Cir. 1985); *United States v. Denison*, 663 F.2d 611, 615 (5th Cir. 1981); *United States v. Moore*, 613 F.2d 1029, 1043 (D.C.Cir. 1979); *contra*, *United States v. Smith*, 35 F.3d 344, 345-47 (8th Cir. 1994).

⁴⁰ *United States v. Moore*, 613 F.2d 1029, 1043-44 (D.C. Cir. 1979); *United States v. Srimgeour*, 636 F.2d 1019, 1021 (5th Cir. 1980); *United States v. Scivola*, 766 F.2d 37, 45 (1st Cir. 1985); *United States v. Formaro*, 894 F.2d 508, 510-11 (2d Cir. 1990).

⁴¹ *United States v. Smith*, 35 F.3d 344, 345 (8th Cir. 1994).

⁴² *United States v. McAfee*, 8 F.3d 1010, 1014 (5th Cir. 1993).

⁴³ *United States v. Sherman*, 150 F.3d 306, 312-13 (3d Cir. 1998); *United States v. Ruggiero*, 472 F.2d 599, 606 (2d Cir. 1973).

(1)

- I. Whoever having taken an oath
 - II. before a competent tribunal, officer, or person,
 - III. in any case in which a law of the United States authorizes an oath to be administered,
 - IV. a. that he will
 - i. testify,
 - ii. declare,
 - iii. depose, or
 - iv. certify truly, or
 - b. that any written
 - i. testimony,
 - ii. declaration,
 - iii. deposition, or
 - iv. certificate
- by him subscribed, is true,
- V. willfully and contrary to such oath
- VI. a. states or
 - b. subscribes
- any material matter which he does not believe to be true; or

(2)

- I. Whoever in any
 - a. declaration,
 - b. certificate,
 - c. verification, or
 - d. statement
- under penalty of perjury as permitted under Section 1746 of title 28, United States Code,
- II. willfully subscribes as true
- III. any material matter
- IV. which he does not believe to be true
- is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.⁴⁴

The courts generally favor an abbreviated encapsulation such as the one found in *United States v. Dunnigan*: “A witness testifying under oath or affirmation violates this section if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.”⁴⁵

⁴⁴ 18 U.S.C. 1621.

⁴⁵ *United States v. Dunnigan*, 507 U.S. 87, 94 (1993); *United States v. McKenna*, 327 F.3d 830, 838 (9th Cir. 2003); *United States v. Singh*, 291 F.3d 756, 763 n.4 (11th Cir. 2002); *United States v. Nash*, 175 F.3d 429, 438 (6th Cir. 1999); see also, *United States v. Dumeisi*, 424 F.3d 566, 582 (7th Cir. 2005) (“the elements of perjury are (1) testimony under oath before a competent tribunal, (2) in a case in which United States law authorizes the administration of an oath, (3) false testimony, (4) concerning a material matter, (5) with the

Perjury is only that testimony which is false. Thus, testimony that is literally true, even if deceptively so, cannot be considered perjury for purposes of a prosecution under Section 1621.⁴⁶ Moreover, Section 1621 requires compliance with “the two witness rule” to establish that a statement is false. Under the rule, “the uncorroborated oath of one witness is not sufficient to establish the falsity of the testimony of the accused as set forth in the indictment as perjury.”⁴⁷ Thus, conviction under Section 1621 requires that the government “establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances.”⁴⁸ If the rule is to be satisfied with corroborative evidence, the evidence must be trustworthy and support the account of the single witness upon which the perjury prosecution is based.⁴⁹

The test for materiality under Section 1621 is whether the false statement “has a natural tendency to influence or [is] capable of influencing the decision-making body to which it [is] addressed.”⁵⁰

Conviction under Section 1621 requires not only that the defendant knew his statement was false (“which he does not believe to be true”), but that his false statement is “willfully” presented. There is but scant authority on precisely what “willful” means in this context. The Supreme Court in dicta has indicated that willful perjury consists of “*deliberate* material falsification under oath.”⁵¹ Other

willful intent to provide false testimony”).

⁴⁶ *Bronston v. United States*, 409 U.S. 352, 362 (1972) (“It may well be that petitioner’s answers were not guileless but were shrewdly calculated to evade. Nevertheless . . . any special problems arising from the literally true but unresponsive answer are to be remedied through the questioner’s acuity and not by a federal perjury prosecution”); *see also*, *United States v. McKenna*, 327 F.3d 830, 841 (9th Cir. 2003); *United States v. Roberts*, 308 F.3d 1147, 1152 (11th Cir. 2002); *United States v. DeZarn*, 157 F.3d 1042, 1047-48 (6th Cir. 1998).

⁴⁷ *Hammer v. United States*, 271 U.S. 620, 626 (1926).

⁴⁸ *Weiler v. United States*, 323 U.S. 606, 607 (1945); *United States v. Stewart*, 433 F.3d 273, 315 (2d Cir. 2006); *United States v. Chaplin*, 25 F.3d 1373, 1377 (7th Cir. 1994).

⁴⁹ *Weiler v. United States*, 323 U.S. 606, 610 (1945); *United States v. Stewart*, 433 F.3d 273, 315 (2d Cir. 2006) (“The rule is satisfied by the direct testimony of a second witness or by other evidence of independent probative value, circumstantial or direct, which is of a quality to assure that a guilty verdict is solidly founded. The independent evidence must, by itself, be inconsistent with the innocence of the defendant. However, the corroborative evidence need not, it itself, be sufficient, if believed to support a conviction”).

⁵⁰ *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir. 2003); *United States v. Roberts*, 308 F.3d 1147, 1155 (11th Cir. 2002); *United States v. Allen*, 892 F.2d 66, 67 (10th Cir. 1989); *United States v. Maren Morales*, 815 F.2d 725, 747 (1st Cir. 1987).

⁵¹ *United States v. Norris*, 300 U.S. 564, 574 (1937)(emphasis added).

courts have referred to it as acting with an “intent to deceive”⁵² or as acting “intentionally.”⁵³

Although a contemporaneous correction of a false statement may demonstrate the absence of the necessary willful intent to commit perjury, the crime is completed when the false statement is presented to the tribunal; without a statute such as that found in Section 1623, recantation is no defense nor does it bar prosecution.⁵⁴

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

Section 1622 outlaws procuring or inducing another to commit perjury: “Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned for not more than five years, or both,” 18 U.S.C. 1622. The crime consists of two elements – (1) an act of perjury committed by another (2) induced or procured by the defendant. Perjury under either Section 1621 or 1623 will support a conviction for subornation under Section 1622,⁵⁵ but proof of the commission of an act of perjury is a necessary element of subornation.⁵⁶ Although the authorities are exceptionally sparse, it appears that to suborn one must know that the induced statement is false and that at least to suborn under Section 1621 one must also knowingly and willfully induce.⁵⁷ Subornation is only infrequently prosecuted as such perhaps because of the ease with which it can now be prosecuted as an obstruction of justice under either 18 U.S.C. 1503 or 1512⁵⁸ which unlike Section 1622 do not insist upon suborner success as a prerequisite to prosecution.⁵⁹

⁵² *United States v. Rose*, 215 F.2d 617, 622-23 (3d Cir. 1954).

⁵³ *United States v. Friedman*, 854 F.2d 535, 560 (2d Cir. 1988); *United States v. Mounts*, 35 F.3d 1208, 1219 (7th Cir. 1994).

⁵⁴ *United States v. Norris*, 300 U.S. 564, 574 (1934); *United States v. McAfee*, 8 F.3d 1010, 1017 (5th Cir. 1993).

⁵⁵ *United States v. Endo*, 635 F.2d 321, 322 (4th Cir. 1980).

⁵⁶ *United States v. Hairston*, 46 F.3d 361, 376 (4th Cir. 1995)(if the underlying perjury conviction is reversed for insufficient evidence, the subornation conviction must likewise be reversed); *see also, United States v. Silverman*, 745 F.2d 1386, 1394 (11th Cir. 1984).

⁵⁷ *Rosen v. N.L.R.B.*, 735 F.2d 564, 575 n.19 (4th Cir. 1980)(“it is true that a necessary predicate of the charge of subornation of perjury is the suborner’s belief that the testimony sought is in fact false”); *Petite v. United States*, 262 F.2d 788, 794 (4th Cir. 1959)(“[i]t is essential to subornation of perjury that the suborner should have known or believed or have had good reason to believe that the testimony given would be false, that he should have known or believed that the witness would testify willfully and corruptly, and with knowledge of the falsity; and that he should have knowingly and willfully induced or procured the witness to give such false testimony”)(*Petite* only refers to Section 1621 since it was decided prior to the enactment of Section 1623).

⁵⁸ *United States v. Miller*, 161F.3d 977, 982-84 (6th Cir. 1998).

⁵⁹ 18U.S.C. 1503 (emphasis added) (“Whoever . . . endeavors to influence, obstruct, or impede the due administration of justice . . .”); 1512 (b) (emphasis added) (“Whoever . . . corruptly persuades another person, or attempts to do so . . . with intent to influence . . . the

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

The general false statement statute, 18 U.S.C. 1001, outlaws false statements, concealment, or false documentation in any matter within the jurisdiction of any of the three branches of the federal government, although it limits application in the case of Congress and the courts.⁶⁰ More specifically it states:

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

shall be fined under this title, imprisoned not more than 5 years or, imprisoned not more than 8 years if the offense involves international or domestic terrorism (as defined in section 2331) or if the matter relates to an offense under chapter 109A (sexual abuse), 109B (sex offender registration), 110 (sexual exploitation), or 117 (transportation for illicit sexual purposes), or Section 1591 (sex trafficking).⁶¹

testimony of any person in an official proceeding . . .”).

⁶⁰ There are scores of more limited false statement statutes that relate to particular agencies or activities and include 8 U.S.C. 1160(b)(7)(A) (applications for immigration status); 15 U.S.C. 158 (China Trade Act corporate personnel); 15 U.S.C. 645 (Small Business Administration); 15 U.S.C. 714m (Commodity Credit Corporation); 16 U.S.C. 831t (TVA); 18 U.S.C. 152 (bankruptcy); 18 U.S.C. 287 (false or fraudulent claims against the United States); 18 U.S.C. 288 (postal losses); 18 U.S.C. 289 (pensions); 18 U.S.C. 541 (entry of goods falsely classified); 18 U.S.C. 542 (entry of goods by means of false statements); 18 U.S.C. 550 (refund of duties); 18 U.S.C. 1003 (fraudulent claims against the United States); 18 U.S.C. 1007 (FDIC transactions); 18 U.S.C. 1011 (federal land bank mortgage transactions); 18 U.S.C. 1014 (loan or credit applications in which the United States has an interest); 18 U.S.C. 1015 (naturalization, citizenship or alien registry); 18 U.S.C. 1019 (false certification by consular officer); 18 U.S.C. 1020 (highway projects); 18 U.S.C. 1022 (false certification concerning material for the military); 18 U.S.C. 1027 (ERISA); 18 U.S.C. 1542 (passport applications); 18 U.S.C. 1546 (fraud in connection with visas, permits and other documents); 22 U.S.C. 1980 (compensation for loss of commercial fishing vessel or gear); 22 U.S.C. 4221 (American diplomatic personnel); 22 U.S.C. 4222 (presentation of forged documents to United States foreign service personnel); 42 U.S.C. 408 (old age claims); 42 U.S.C. 1320a-7b (Medicare).

⁶¹ 18 U.S.C. 1001(a). For additional discussion of Section 1512 see, *Twenty-Second Survey of White Collar Crime: False Statements and False Claims*, 44 AMERICAN CRIMINAL LAW REVIEW 491 (2007).

The courts' description of the elements will ordinarily be limited to whichever of the forms of misconduct – false statement,⁶² concealment,⁶³ or false documentation⁶⁴ – is implicated in the particular case. In addition, Section 1001 imposes a limitation upon an offense that involves matters within the jurisdiction of either the judicial or legislative branch:

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

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

Those limitations constitute elements of the offense in such cases.⁶⁵

A matter is within the jurisdiction of a federal entity when it involves a matter “confided to the authority of a federal agency or department . . . A department or agency has jurisdiction, in this sense, when it has power to exercise authority in a particular situation. Understood in this way, the phrase ‘within the jurisdiction’ merely differentiates the official, authorized functions of a agency or department from matters peripheral to the business of that body.”⁶⁶ Several courts have held that the phrase contemplates coverage of false statements made to state, local, or private

⁶² *United States v. Blackwell*, 459 F.3d 739, 761 (6th Cir. 2006)(“Section 1001 of Title 18 prohibits any person from (1) ‘knowingly and willfully’; (2) ‘making any material false, fictitious, or fraudulent statement or representation’; (3) ‘in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States’”); *United States v. Rice*, 449 F.3d 887, 892 (8th Cir. 2006); *United States v. Hatch*, 434 F.3d 1, 5 (1st Cir. 2006); *United States v. Camper*, 384 F.3d 1073, 1075 (9th Cir. 2004).

⁶³ *United States v. Moore*, 446 F.3d 671, 677 (7th Cir. 2006)(“We have identified the five elements of a ‘false statement’ charge under §1001(a)(2) . . . (1) the defendant must . . . have a duty to disclose the information; (2) . . . there must be acts amounting to concealment; (3) the . . . concealed facts must be material; (4) the person must . . . conceal the facts knowingly and willfully; and (5) the . . . concealed information must concern a matter within the jurisdiction of a federal department or agency”).

⁶⁴ *United States v. McGauley*, 279 F.3d 62, 69 (1st Cir. 2002)(“To establish a violation of 18 U.S.C. 1001, the government must prove that the defendant knowingly and willfully made or used a false writing or document, in relation to a matter with the jurisdiction of the United States government with knowledge of its falsity”); *United States v. Blankenship*, 382 F.3d 1110, 1131-132 (11th Cir. 2004).

⁶⁵ *United States v. Horvath*, 492 F.3d 1075, 1077 (9th Cir. 2007); *United States v. Pickett*, 353 F.3d 62, 66-69 (D.C. Cir. 2004).

⁶⁶ *United States v. Rodgers*, 466 U.S. 475, 479 (1984); *United States v. Atalig*, 502 F.3d 1063, 1068 (9th Cir. 2007); *United States v. Blankenship*, 382 F.3d 1110, 1136 (11th Cir. 2004); *United States v. White*, 270 F.3d 356, 363 (6th Cir. 2001).

entities but relating to matters that involve federal funds or regulations.⁶⁷ Subsection 1001(b) precludes application of prohibitions in Section 1001(a) to the statements, omissions, or documentation presented to the court by a party in judicial proceedings. This includes statements of indigency filed by a defendant seeking the appoint of counsel,⁶⁸ or by a defendant for a probation officer's presentence report,⁶⁹ but not statements made by one on supervised release to a parole officer.⁷⁰

Although the offense can only be committed “knowingly and willfully,” the prosecution need not prove that the defendant knew that his conduct involved a “matter within the jurisdiction” of a federal entity⁷¹ nor that he intended to defraud a federal entity.⁷² Instead, the phrase “knowingly and willfully” refers to the circumstances under which the defendant made his statement, omitted a fact he was obliged to disclose, or included with his false documentation, i.e., “that the defendant knew that his statement was false when he made it or – which amounts in law to the same thing – consciously disregarded or averted his eyes from the likely falsity.”⁷³

Prosecution for a violation of Section 1001 requires proof of materiality, as does conviction for perjury, and the standard is the same: the statement must have a “natural tendency to influence, or be capable of influencing the decisionmaking body

⁶⁷ *United States v. White*, 270 F.3d 356, 363 (6th Cir. 2001) (“We have in the past looked to whether the entity to which the statements were made received federal support and/or was subject to federal regulation”); *United States v. Davis*, 8 F.3d 923, 929 (2^d Cir. 1993) (“In situations in which a federal agency is overseeing a state agency, it is the mere existence of the federal agency’s supervisory authority that is important to determining jurisdiction”), *contra*, *United States v. Blankenship*, 382 F.3d 1110, 1139, 1141 (11th Cir. 2004) (emphasis in the original) (“The clear, indisputable holding of *Lowe* is that a misrepresentation made to a private company concerning a project that is the subject of a contract between that company and the federal government does *not* constitute a misrepresentation about a matter within the jurisdiction of the federal government. . . . Because neither *Lowe* nor its central holding has ever been overruled . . . it remains good law”).

⁶⁸ *United States v. McNeil*, 362 F.3d 570, 573 (9th Cir. 2004) (but observing that “[s]ubmitting a false CJA-23 form may subject a defendant to criminal liability under other statutes, for example, under 18 U.S.C. 1621, the general statute on perjury, or 18 U.S.C. 1623, which punishes the making of a false material declaration in any proceeding, before, or ancillary to, any court”).

⁶⁹ *United States v. Horvath*, 492 F.3d 1075, 1078-1081 (9th Cir. 2007).

⁷⁰ *United States v. Curtis*, 237 F.3d 598, 605 (6th Cir. 2001).

⁷¹ *United States v. Yermian*, 468 U.S. 63, 75 (1984); *United States v. Gonzales*, 435 F.3d 64, 72 (1st Cir. 2006).

⁷² *United States v. Gonzales*, 435 F.3d 64, 72 (1st Cir. 2006).

⁷³ *Id.*; *United States v. Duclos*, 214 F.3d 27, 33 (1st Cir. 2000); *United States v. Hsia*, 176 F.3d 716, 721-22 (D.C. Cir. 1999); *United States v. Hoover*, 175 F.3d 564, 571 (7th Cir. 1999).

to which it is addressed.”⁷⁴ There is no need to show that the decision maker was in fact diverted or influenced.⁷⁵

Conviction for false statements or false documentation under Section 1001 also requires that the statements or documentation be false, that they not be true.⁷⁶ And the same can be said of the response to a question that is so fundamentally ambiguous that the defendant’s answer cannot be said to be knowingly false.⁷⁷ On the other hand, unlike the perjury provision of Section 1623, “there is no safe harbor for recantation or correction of a prior false statement that violates Section 1001.”⁷⁸

Prosecutions under subsection 1001(a)(1) for concealment, rather than false statement or false documentation, must also prove the existence of duty or legal obligation not to conceal.⁷⁹

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⁷⁴ *United States v. Johnson*, 485 F.3d 1264, 1270 (11th Cir. 2007); *United States v. McBane*, 433 F.3d 344, 350 (3d Cir. 2005); *United States v. Stewart*, 433 F.3d 273, 318 (2d Cir. 2006); *United States v. Mitchell*, 388 F.3d 1139, 1143 (8th Cir. 2004); *United States v. Finn*, 375 F.3d 1033, 1038 (10th Cir. 2004).

⁷⁵ *United States v. McBane*, 433 F.3d 344, 350 (3d Cir. 2005), quoting, *United States v. Gaudin*, 515 U.S. 506, 512 (1995); *United States v. Stewart*, 420 F.3d 1007, 1019 (9th Cir. 2005); *United States v. Mitchell*, 388 F.3d 1139, 1143 (8th Cir. 2004); *United States v. Hasner*, 340 F.3d 1261, 1273-274 (11th Cir. 2003).

⁷⁶ *United States v. Good*, 326 F.3d 589, 592 (4th Cir. 2003) (“The principle articulated in *Bronston* holds true for convictions under Section 1001. . . We cannot uphold a conviction . . . where the alleged statement forming the basis of a violation of Section 1001 is true on its face”); *United States v. Edwards*, 303 F.3d 606, 637 (5th Cir. 2002); *United States v. Kosth*, 257 F.3d 712, 719 (7th Cir. 2001).

⁷⁷ *United States v. Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003); *United States v. Good*, 326 F.3d 589, 592 (4th Cir. 2003); cf., *United States v. Martin*, 369 F.3d 1046, 1060 (8th Cir. 2004); *United States v. Hatch*, 434 U.S. 1, 4-5 (1st Cir. 2006).

⁷⁸ *United States v. Stewart*, 433 F.3d 273, 318 (2d Cir. 2006), citing, *United States v. Sebaggala*, 256 F.3d 59, 64 (1st Cir. 2001); *United States v. Meuli*, 8 F.3d 1481, 1486-487 (10th Cir. 1993); and *United States v. Fern*, 696 F.2d 1269, 1275 (11th Cir. 1983).

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

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