**8.135 PERJURY—TESTIMONY**

**(18 U.S.C. § 1621)**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with perjury in violation of Section 1621 of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant testified under oath orally or in writing that [*specify false testimony*];

Second, the testimony was false[, with all of you agreeing as to which statement was false];

Third, the false testimony was material to the matters before [*specify proceeding*]; that is, the testimony had a natural tendency to influence, or was capable of influencing, the actions of [*specify, for example,* the grand jury]; and

Fourth, the defendant acted willfully, that is deliberately and with knowledge that the testimony was false.

The testimony of one witness is not enough to support a finding that the testimony of [*name of defendant*] was false. There must be additional evidence—either the testimony of another person or other evidence—which tends to support the testimony of falsity. The other evidence, standing alone, need not convince you beyond a reasonable doubt that the testimony was false. But after considering all the evidence on the subject, you must be convinced beyond a reasonable doubt that the testimony was false.

**Comment**

The bracketed language in the second element of this instruction should be given when the indictment charges that the defendant made more than one false statement. *See Vitello v. United States*, 425 F.2d 416, 423 (9th Cir. 1970). *See also* Instruction 7.9 (Specific Issue Unanimity).

The Committee believes that what is “a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered” for purposes of Section 1621 is a question of law and need not be submitted to the jury.

The Supreme Court has held that materiality is a question of fact for the jury. *Johnson v. United States*, 520 U.S. 461, 465-66 (1997) (in context of perjury prosecution). Accordingly, it is necessary to include materiality as an element of the offense in this instruction. *See, e.g.,* Instruction 8.73 (False Statement to Government Agency). The common law test for materiality in the false statement statutes, as reflected in the third element of this instruction, is the preferred formulation. *United States v. Peterson,* 538 F.3d 1064, 1072 (9th Cir. 2008).

Because the jury must determine whether a statement is material under *Johnson*, the definition of materiality has been included in this instruction. *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir.) (discussing the materiality of false statements in the context of perjury), *cert. denied*, 540 U.S. 941 (2003).

Whether a statement that may be literally true can support a conviction requires careful consideration. *See* *United States v. Thomas*, 612 F.3d 1107, 1121-23 (9th Cir. 2010). If the defendant’s theory of defense is that his or her statement was literally true, some modification of the instruction may be appropriate.  *Id.*

When the defendant is accused of multiple falsehoods, the jury must be unanimous on at least one of the charges in the indictment. *Vitello*, 425 F.2d at 423.

The last paragraph of the instruction concerning corroboration is worded to cover the case where the perjury is in the giving of testimony. Where the perjury consists of one or more false statements in a writing, such as an affidavit, it should be substituted for “testimony.” This paragraph applies to a charge of perjury in violation of 18 U.S.C. § 1621 and to a charge of subornation of perjury in violation of 18 U.S.C. § 1622. *See* Instruction 8.136 (Subornation of Perjury). In the case of a Section 1622 charge, the name of the person alleged to have been suborned should be inserted.

A paragraph in the instruction concerning corroboration is not required when a defendant is accused of violating 18 U.S.C. § 1623. *See* Instruction 8.137 (False Declaration Before Grand Jury or Court).

When the alleged false testimony is proved by circumstantial evidence, corroboration is not required.  *Gebhard v. United States,* 422 F.2d 281, 288 (9th Cir. 1970).

Corroborative evidence may be circumstantial and need not be independently sufficient to establish the falsity of the testimony. *United States v. Howard*, 445 F.2d 821, 822 (9th Cir. 1971); *Arena v. United States*, 226 F.2d 227, 233 (9th Cir. 1955).

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