**8.137 FALSE DECLARATION BEFORE GRAND JURY OR COURT**

**(18 U.S.C. § 1623)**

 The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with having made a false declaration in violation of Section 1623 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 in or ancillary to any [court] [grand jury] proceedings;

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

 Third, the defendant knew that the testimony was false; and

 Fourth, the false testimony was material to the matters before the [court] [grand jury]; that is, it had a natural tendency to influence, or was capable of influencing, the [court] [grand jury’s investigations].

**Comment**

 *See* Comment to Instructions 8.135 (Perjury—Testimony) and 8.136 (Subornation of Perjury).

 The testimony under oath may be in conjunction with a proceeding that is ancillary to the main proceeding involving the defendant. *United States v. Brugnara*, 856 F.3d 1198, 1209 (9th Cir. 2017) (involving false declaration made during a supervised release revocation hearing).

 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* Instruction 7.9 (Specific Issue Unanimity).

 Materiality of the false declaration is an element of the offense and therefore an issue for the jury. *Johnson v. United States*, 520 U.S. 461, 465-66 (1997). The common law test for materiality in the false statement statutes, as reflected in the fourth element of this instruction, is the preferred formulation. *United States v. Peterson*, 538 F.3d 1064, 1072 (9th Cir. 2008). The government must present evidence from an earlier trial to prove that the statements were material; “simply offering the defendant’s statement itself is not enough.” *See United States v. Leon-Reyes*,177 F.3d 816, 819 (9th Cir. 1999).

 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 materiality of false statements in context of perjury).

 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.*

 Note that Section 1623 applies only to “any proceeding before or ancillary to any court or grand jury of the United States.” An “ancillary proceeding” is “an action conducted by a judicial representative or an action conducted pursuant to explicit statutory or judicial procedures.” *United States v. Tibbs,* 600 F.2d 19, 21 (6th Cir. 1979). *See also United States v. Krogh*, 366 F. Supp. 1255, 1256 (D.D.C.1973) (discussing sworn deposition in ancillary proceeding).

 Section 1623(c) authorizes a person to be accused of having “made two or more declarations, which are inconsistent to the degree that one of them is necessarily false,” and the government is not required to specify which declaration is false.

*Approved 6/2021*