No. 18-

IN THE

Supreme Court of the United States

JOHN CHING EN LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When determining whether an alleged false statement has a literal truth defense, may a court isolate the ambiguous question or view it in the totality of its real-world context?

2. After *Ajoku*, to meet the requisite mens rea under 18 U.S.C. § 1001(a)(2), must a defendant have knowledge or a reckless disregard that the underlying conduct of the lie was unlawful?

3. Does *Maslenjak's* "materiality" requirement demand that the government establish that a false statement influenced an actual decision of an agency?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner (Defendant-Appellee) John Ching En Lee respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

This case presents three important legal questions that arise in the prosecution of false statements against the government.

First, it is established that a factually-true answer to an ambiguous question is an insufficient predicate act for a false statement conviction under 18 U.S.C. § 1001(a)(2). However, the courts are divided on whether a court may assess a statement for ambiguity in isolation or in the actual context in which it as asked. Because Mr. Lee has a literal truth defense, the Ninth Circuit erred in holding that the question was not ambiguous.

Second, this case also presents whether a willful mens rea arises when a defendant gives a factually-true answer to an ambiguous statement. In *Ajoku v. United States*, the Court did not define the requisite mens rea for a false statement conviction because the parties agreed that their instructions had been erroneous. The courts are divided over whether knowledge or recklessness is needed. The Ninth Circuit erred in not requiring knowledge when upholding Mr. Lee's conviction.

Third, this case presents an important legal question as to the meaning of "materiality" in the context of 18 U.S.C. § 1001(a)(2) with respect to what must the government establish to prove that a false statement influenced a potential investigation.

Without this Court's intervention, the lack of a consistent and coherent interpretations of whether ambiguous questions, the meaning of the willful mens rea, and the meaning of the word "materiality" as used in 18 U.S.C. § 1001(a)(2) will produce inconsistent and unpredictable results in district courts and courts of appeal. This case squarely presents these important and recurring questions and is an ideal vehicle for the Court to address these questions. For these reasons, Petitioner respectfully requests that the Court grant his petition.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, (App., *infra,* 1a–3a) was unpublished at 726 Fed. App'x. 589 and issued on June 6, 2018. The opinion of the district court was unpublished and issued on September 20, 2016 (App. *infra*, 4a–24a).

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2018. (App., *infra,* 1a–3a). On August 24, 2018, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including November 2, 2018.

STATUTORY PROVISIONS INVOLVED

The Questions Presented implicates 18 U.S.C. § 1001(a)(2). The relevant text provides:

18 U.S.C. § 1001 Statements or entries generally

> Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
>
> [. . .]
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation

STATEMENT OF THE CASE

On February 28, 2014, by a complaint filed in the Northern District of California, Mr. Lee was charged with two felony counts of violating 18 U.S.C. § 1030(a) (fraud and related activity in connection with a computer) (Count 1) and violating 18 U.S.C. § 1001 (false statements) (Count 2). On November 19, 2015, by indictment filed in the Northern District of California, Mr. Lee was charged with two felony counts of making false statements: Count 1 (false statement made on August 26, 2009 in violation of 18 U.S.C. § 1001(a)(2)) and Count 2 (false statement made on October 10, 2013 in violation of 18 U.S.C. § 1001(a)(2)).

On June 28, 2016, a three-day trial commenced. On June 30, 2016, a jury convicted Mr. Lee of both counts.

On August 5, 2016, Mr. Lee filed a Rule 29 motion seeking acquittal or a new trial. On September 20, 2016, the district court granted the motion for acquittal with respect to Count 2 (false statement made on October 10, 2013) and upheld the conviction for Count 1 (false statement made on August 26, 2009).

On October 14, 2016, for Count 1, the district court imposed a sentence of two-years probation, a $500 fine, and a special assessment fine of $100.00. On October 17, 2016, the district court signed the final judgment. October 18, 2016, Mr. Lee timely filed a notice of appeal.

STATEMENT OF FACTS

In 1975, when Mr. Lee was 14 years old, he came to the United States. When he was 27 years old, he became a U.S. citizen. He received a law degree and, in 2001, when he was 40 years old, began working for the Immigration Naturalization Service, which later was reorganized into the U.S. Immigration and Citizenship Services agency. Mr. Lee started as an adjudications officer and later became an Immigration Services Officer whose responsibilities included adjudicating applications for lawful permanent residency and citizenship.

Mr. Lee met his wife Qingmin Liu through an ad placed in a Chinese newspaper. He petitioned to have her arrive as his fiancé, they married, and he later petitioned for her lawful permanent residency, which was granted.

Initial Investigation

In 2008, Deputy Sheriff Leslie Severe, of the Contra Costa County Sheriff's Office, was a Vice detective who focused her investigations on criminal activities relating to prostitution, massage parlors, and illegal gambling. In 2008, a patrol officer informed Deputy Severe that the Crystal Massage Therapy business in Walnut Creek, California may be of interest to her unit. Deputy Severe "put together an undercover operation" and to determine if undercover agents would be solicited for sexual activity.

In February 2008, the first undercover operation occurred. In March 2008, Deputy Severe obtained a search warrant, and on March 6, 2008, Deputy Severe returned for a second undercover operation. At this time, Deputy Severe found a room with a mattress that looked like someone was living in the room. The police made two arrests for solicitation of prostitution: Ms. Liu, who was Mr. Lee's wife and the owner of the business, and an employee identified as Ms. Chen. Deputy Severe was concerned that the mattress was evidence of "possible human trafficking."

Mr. Lee posted bail for both Ms. Liu and Ms. Chen. Mr. Lee identified himself as Ms. Liu's husband and an immigration officer with the U.S. Citizenship and Immigration Services. Deputy Severe contacted the Immigration and Customs Enforcement agency ("ICE") to report her suspicions of human trafficking. Also, Deputy Severe reported to ICE that Mr. Lee had bailed out the owner of the massage parlor, and asked to confirm whether Mr. Lee was or was not employed as an immigration officer.

Ultimately, Deputy Severe's suspicious of human trafficking were unfounded. After an investigation, no criminal charges relating to human trafficking were ever brought against Ms. Liu. There was an employee living at the massage parlor, but she was there on a temporary basis to escape "domestic issues."

No one from the Crystal Massage Parlor was convicted of any crime. In October 2008, Ms. Liu was charged with a misdemeanor count for solicitation of prostitution. That same month, Crystal Massage Therapy ceased operating and went out of business.

In June 2009, Ms. Liu received diversion, and in November 2009, she completed pre-trial diversion. In June 2010, Ms. Liu was granted citizenship.

First False Statement (Predicate for Conviction)

After Deputy Severe filed a complaint against Mr. Lee, the Department of Homeland Security Office of the Inspector General opened an investigation. Special Agent Richard Fuentes was assigned to head the investigation. Agent Fuentes testified that he remembered Deputy Severe telling him that the sheriff's office had "seized or found information of a bank account with $50,000 in it." When asked to corroborate that memory, the only report from Deputy Severe, was dated on March 19, 2008, and in that report the deputy reported that Mr. Lee and Ms. Liu had a joint Wells Fargo account with approximately $15,000 in it.

In commencing the investigation, Agent Fuentes was concerned that Mr. Lee might have improperly interfered in processing any immigration claims for his wife's employees, might be involved in human trafficking, may be receiving improper monetary compensation arising from any improper business venture, or may be associated with any criminal association that could subject him to blackmail or involve him in criminal activity.

The investigation into these matters did not ripen into criminal charges or convictions.

In August 2009, Agent Fuentes initiated an interview with Mr. Lee to learn about Mr. Lee's prior "financial interest" in the Crystal Massage Therapy business. A

year earlier, Crystal Massage Therapy had gone out of business. Agent Fuentes was aware of this fact before scheduling the interview with Mr. Lee.

On August 26, 2009, Agent Fuentes and Special Agent John Henderson met Mr. Lee at his office. This interview lasted more than an hour and was neither recorded nor transcribed. Mr. Lee also did not provide any written statement.

During this interview, Agent Fuentes wanted to know "how did [Ms. Liu] fund this business. So [he] asked [Mr. Lee] . . . 'Well, did you ***loan her or give her any money to start*** this business?'" (emphasis added). Agent Fuentes also testified that the question he asked was "if [Mr. Lee] had ***actually funded or assisted*** that business." (emphasis added). Agent Fuentes further explained that "[i]n a ***roundabout way*** I asked if [Mr. Lee] had ***ever provided assistance***. . . ." (emphasis added). To all questions, Mr. Lee allegedly answered no.

Agent Fuentes took 13 pages of handwritten notes during the meeting. Within two weeks, he prepared a memoranda of the meeting, which indicated that his investigation relating to "brothel operating as a massage parlor." On cross-examination, Agent Fuentes confirmed that his notes do not have any mention of questions funding the business. When asked again to restate the "precise questions that you asked Mr. Lee regarding the funding of the business", Agent Fuentes answered "***I don't know***." (emphasis added).

Agent Henderson, who was also at the interview, said that he recalled only one instance of Agent Fuentes asking

a question relating to whether Mr. Lee funded his wife's business. He did not recall or record the exact wording of that question.

In 2010, Special Agent Lamont Scott took over the investigation from Agent Fuentes. His initial concerns were whether Crystal Massage Therapy was engaging in human trafficking and "what [Mr. Lee's] overall involvement might be" with the business. To that end, Agent Scott looked at all 15 immigration files of those who were associated with the Crystal Massage Therapy business. For all individuals, including Ms. Liu, "Mr. Lee did not have any kind of dealings with giving immigrants any kind of benefits." Agent Scott again investigated potential human trafficking activity and concluded that "there was no involvement of human trafficking with the Crystal Massage Therapy."

Agent Scott also wanted to know what degree Mr. Lee was involved with the business so he sent out five grand jury subpoenas to the Wells Fargo bank, where he knew Mr. Lee and Ms. Liu had accounts based on the 2008 investigation by the county sheriff.

On August 29, 2013, Agent Scott interviewed Ms. Liu about "Mr. Lee's involvement with Crystal Massage Therapy." Following this interview, Agent Scott contacted Mr. Lee and scheduled an appointment with him the next day. No recording was made of this interview. Agent Scott asked Mr. Lee "if he funded or put any money towards Crystal Massage Therapy. How—and how she opened the business." To this question, Mr. Lee answered that he had secured a $30,000 loan from Wells Fargo that he in turn used the money to provided Ms. Liu with "a $30,000 loan to open up the business."

By stipulation, Mr. Lee "obtained two lines of credit from Wells Fargo Bank in 2006 with an aggregate credit limit of $34,000." One, issued on July 20, 2006, was for $19,000, and a second, opened on July 21, 2006, was for $15,000.

Upon learning about this loan, Agent Scott was "surprised" because he believed that in the August 2009 interview, Mr. Lee claimed that "he had no dealings with—with her business and that he did not fund her business." Agent Scott claimed this information was significant because if he had known about it in 2009, he "would have been able to go directly and obtain the bank loan—the bank information without sending numerous subpoenas for numerous amounts of information." Agent Scott then sent out a subpoena to Wells Fargo about the loan documentation and subpoenas to credit bureaus. From the subpoenas, he confirmed that "there were two lines of credit, one for 15,000 and one for 19,000," which were from July 2006.

The record then had eight different versions of the question asked and answer provided. The parties stipulated, and the jury was instructed that, "[t]he statement charged in Count One is that Mr. Lee stated 'no' to the question whether ***he gave*** his wife any money to fund her business." (emphasis added). The jury convicted Mr. Lee of this count.

Second False Statement (Rule 29 Acquittal)

Agent Scott also explained that Mr. Lee's late disclosure of the loan "showed [him] that—that he—he lied to steer the investigation or do something to the investigation to where he wouldn't be found out about his

activity or involvement with the Crystal Message Therapy Parlor; and to me he violated his ethics, his morals, and everything that goes along with being an Immigration Services officer." Agent Scott's outrage led him to "wonder, what else was he involved in," so he reached out to another agent named Ryan Lid to investigate whether Mr. Lee improperly ran background searches.

TECS, is the abbreviation for the "Treasury Enforcement Communications System," which is a database that records border crossings and criminal investigations. Officer Lid ran a query and determined that, on March 19, 2009, Mr. Lee had run three searches in the TECS database using "three different variations of [his wife's] name."

On October 13, 2013, Agent Scott then scheduled an interview with Mr. Lee to "talk to him about the TECS queries that I'd found and see why he ran them." This meeting was not recorded.

Agent Scott asked Mr. Lee "whether he had made [TECS] queries for personal use," to which Mr. Lee answered that "he didn't recall, and then he said no." Agent Scott made more specific inquires relating to whether he had searched himself, his wife, his friends, or his family. Mr. Lee answered these questions by explaining he did not remember, "I didn't do it," and "no."

Agent Scott claimed he showed Mr. Lee a document that showed that he had made three searches using three iterations of his wife's name. Agent Scott repeated his questions, asking whether he ran any TECS searches with respect to "family, friends, his wife, or himself." Mr. Lee said "no."

The jury was instructed that "[t]he statement charged in Count Two is that Mr. Lee stated 'no' to the question whether he ever made any unauthorized queries of his wife in the TECS for personal use." On June 30, 2016, the jury convicted Mr. Lee of this count.

On September 20, 2016, with respect to this count, the district court granted Mr. Lee's motion for acquittal pursuant to Federal Rules of Criminal Procedure, Rule 29. The district court found that the statement lacked materiality because the government's arguments "read like after-the-fact justifications." Of note, Agent Scott testified that he knew Mr. Lee's denial was false when it was made and he had internal proof of the falsity before and during its occurrence. Despite this knowledge, the government 'failed to present at trial . . . what activities or decisions by the DHS were or could have been influenced by defendant's October 2013 denial."

REASONS FOR GRANTING THE PETITION

This case presents a situation in which a man was convicted of giving a false statement to a government agent when he provided a literally true answer of "no" to the ambiguous question "whether he ***gave*** his wife any money to fund her business."

First, the verb "gave" suggests a gift. Mr. Lee had loaned his wife money to start her business. As anyone who has a mortgage or student loans can attest, a loan is not a gift. It is reasonable for a lender to give a factually-true answer of "no" when asked if he had gifted a loan to another. The district court dismissed this challenge on the basis that the noun of "funding" can include bank loans.

Both the district court and court of appeals overlooked that, the ambiguity arises not from "funding" but from the verb "gave."

Second, in 2014 in *Ajoku v. United States*, the Court was presented with an opportunity to define the mens rea underlying 8 U.S.C. § 1001(a)(2). Because the parties agreed that the instructions were erroneous, the Court did not reach that question. The courts are divided over whether knowledge or reckless disregard is sufficient for a false statement conviction. Because a factually-true answer to an ambiguous statement does not meet the knowledge standard, the Ninth Circuit erred.

Third, there is no question that federal courts interpret "materiality" to be a low bar. If a lie or omission causes the government agent to take a left when he or she would have taken a right, the lie is usually material. But, even under such a low threshold, the key question on these facts are what would the government have done with information if a lie or omission had revealed the information when it was known. According to Agent Fuentes, if Mr. Lee had affirmatively clarified that he had loaned his wife money for her business, he would have asked for more financial information and the investigation "could proceed in a different way." This answer does not establish materiality. There is no showing that the loan was material to the actual investigation over whether Mr. Lee was abusing his power as an immigration officer in unethical or criminal ways. Agent Fuentes' vague statement that he would have done something does not in fact show what decision the agency was trying to make. Even if Mr. Lee's answer was an omission, it was not material to the abuse of power that was the subject of the investigation.

I. The Courts Are Divided Over How To Identify And Define A "Fundamentally Ambiguous" Question That Cannot Be A Predicate To A False Statement Prosecution

As a matter of common sense and fairness, factually-true answers to ambiguous statements should not be predicate acts for a federal felony conviction. As a legal mater, the Supreme Court has long ago recognized that "[p]recise questioning is imperative as a predicate for the offense of perjury." *Bronston v. United States,* 409 U.S. 352, 362, 93 S. Ct. 595, 602, 34 L. Ed. 2d 568 (1973).

As much as all courts agree on this principle, identifying and defining when a statement is ambiguous, or "fundamentally ambiguous," to defeat a false statement conviction has proven vexing.

This inquiry is far from theoretical.

In everyday life, every one—even the most upstanding of us—tell lies much more often than we care to admit. As observed by former Judge Alez Kozinski, among the reasons for telling lies, deceptions can serve important and legitimate purposes relating to privacy, safety, and the benefit of others:

> We lie to protect our privacy ("No, I don't live around here"); to avoid hurt feelings ("Friday is my study night"); to make others feel better ("Gee you've gotten skinny"); to avoid recriminations ("I only lost $10 at poker"); to prevent grief ("The doc says you're getting better"); to maintain domestic tranquility

> ("She's just a friend"); to avoid social stigma ("I just haven't met the right woman"); for career advancement ("I'm sooo lucky to have a smart boss like you"); to avoid being lonely ("I love opera"); to eliminate a rival ("He has a boyfriend"); to achieve an objective ("But I love you so much"); to defeat an objective ("I'm allergic to latex"); to make an exit ("It's not you, it's me"); to delay the inevitable ("The check is in the mail"); to communicate displeasure ("There's nothing wrong"); to get someone off your back ("I'll call you about lunch"); to escape a nudnik ("My mother's on the other line"); to namedrop ("We go way back"); to set up a surprise party ("I need help moving the piano"); to buy time ("I'm on my way"); to keep up appearances ("We're not talking divorce"); to avoid taking out the trash ("My back hurts"); to duck an obligation ("I've got a headache"); to maintain a public image ("I go to church every Sunday"); to make a point ("Ich bin ein Berliner"); to save face ("I had too much to drink"); to humor ("Correct as usual, King Friday"); to avoid embarrassment ("That wasn't me"); to curry favor ("I've read all your books"); to get a clerkship ("You're the greatest living jurist"); to save a dollar ("I gave at the office"); or to maintain innocence ("There are eight tiny reindeer on the rooftop").

United States v. Alvarez, 638 F.3d 666, 674 (9th Cir. 2011) (Kozinski, J., concurring with denial of rehearing en banc).

Judge Kozinski recited the numerous reasons and motives people have in lying when defending the Ninth Circuit's decision not to reconsider its decision striking down the Stolen Valor Act as violating the First Amendment. 638 F.3d at 674, affirmed by *United States v. Alvarez*, 567 U.S. 709, 730, 132 S. Ct. 2537, 2551, 183 L. Ed. 2d 574 (2012).

Of note, Judge Kozinski argued that "[s]aints may always tell the truth, but for mortals living means lying." 638 F.3d at 674. Indeed, according to a study cited, the average American lies two to 50 times each day. *Id.* at 675 (citing Jochen Mecke, *Cultures of Lying* 8 (2007)).

When the government then decides some of those lies amount to felonies, the conduct must not rest on factually-true statements to ambiguous questions.

The circuits courts, however, are divided on whether an ambiguous question is determined in isolation or in a broader context.

The Fourth Circuit did not permit a literal truth defense to immunize a man who was convicted in violation of 18 U.S.C. § 1542 for stating he was the "father" to the children on a passport application. *United States v. Sarwari*, 669 F.3d 401, 409 (4th Cir. 2012). The man explained that he considered himself the father to the children whom he loved, financially supported, and who loved him in return. *Id.* The Fourth Circuit took the very rigid approach that technical meanings of "father" and "step-father" in federal law trumped the real-world facts by which the children and man viewed themselves as having a parent and child relationship. *Id.*

By contrast, the Eleventh Circuit rejected *Sarawai's* approach of isolating the meaning of a term unmoored from its applied context. In permitting a literal truth defense to 18 U.S.C. § 1001(a)(2), the Eleventh Circuit noted that numerous questions—when read in isolation—present no ambiguity. *United States v. Manapat*, 928 F.2d 1097, 1101 (11th Cir. 1991). However, these same questions present confusion when read together on a standardized form "containing large numbers of general background questions." *Id.* In a departure from the Fourth Circuit's methodology, the Eleventh Circuit found ambiguity because "the government must not remove questions from the context in which their answers were given in an attempt to prove their clarity." *Id.*

Mr. Lee's case then presents the ideal vehicle to address this important question. He had answered "no" to the question of "whether he ***gave*** his wife any money to fund her business." The verb "gave" suggests a gift, and Mr. Lee had ***loaned*** his wife money to start her business. As anyone who has a mortgage or student loans can attest, a loan is not a gift. It is not unreasonable for a lender to give a factually-true answer of "no" when asked if he had gifted a loan to another.

The court of appeals and district court dismissed this challenge reasoning that in isolation the noun of "funding" can include bank loans. In doing so, the Ninth Circuit eschewed the Eleventh Circuit's methodology to look at the question in its actual context. Because a literally true answer was given, the questioner must be counseled to be more precise. The Ninth Circuit erred in holding that the question— "whether he gave his wife any money to fund her business"—was clear.

II. The Courts Are Divided Over The Meaning Of The Mens Rea Necessary For A False Statement Conviction

A key issue in this case was whether there was sufficient evidence that Mr. Lee had knowledge that his conduct of funding his wife's business was unlawful. Under the relevant jury instructions, the wilful mens rea is established when "the defendant acted deliberately and with knowledge both that the statement was untrue and ***that his or her conduct was unlawful***." Ninth Circuit Jury Instruction 8.73 (emphasis added). In August 2017, a district court affirmed the text of the instructions, finding that "in order to violate section 1001, a person must act ***with knowledge that their conduct is unlawful***." *Harris v. United States*, No. 2:12-CR-01085-CAS, 2017 WL 3443207, at *6 (C.D. Cal. Aug. 9, 2017). *Harris* noted that although there appears was no published Ninth Circuit authority addressing this issue, it was "join[ing] other district courts in this Circuit that have concluded" that the contrary rule set forth in *United States v. Carrier*, 654 F.2d 559, 561 (9th Cir. 1981), which had been overruled in *Bryan v. United States,* 524 U.S. 184, 191, 118 S. Ct. 1939, 141 L. Ed. 197 (1998) and *United States v. Ajoku*, 718 F.3d 882, 892 (9th Cir. 2013) ("*Ajoku I*"). *See* 2017 WL 3443207, at *6.

Accepting that rule as the correct one, the Government had argued there is sufficient evidence that Mr. Lee's funding his wife's business was unlawful because Mr. Lee had a legal education, worked at the USCIS, and was given *Garrity* warnings. All of those facts are true. But none show that Mr. Lee had knowledge that a literally true answer of "no" to the ambiguous question of whether

he "gave" funding to his wife for her business constitutes "willful."

In *Ajoku I*, a defendant was convicted of four counts of making false statements relating to health care matters in violation of 18 U.S.C. § 1035. 718 F.3d at 886. The defendant had argued that three of the four false statement convictions were not supported by sufficient evidence because "he believed his statements to be true and that some of the statements are true in the proper context" and that he also did not know about a wheelchair delivery scam that was underlying two of the counts. 718 F.3d at 888.

When the case was before the Supreme Court, the high court vacated the case after the Solicitor General acknowledged that he had erred in contending that a defendant need not have knowledge that the unlawful was conduct. *Ajoku v. United States*, ___ U.S. ___, 134 S. Ct. 1872, 188 L. Ed. 2d 905 (2014) ("*Ajoku II*"). On remand, the Court resolved the matter in an unpublished decision, remanding the case because it was "undisputed that Ajoku's jury received an erroneous instruction." *United States v. Ajoku*, 584 Fed. App'x 824, 824 (9th Cir. 2014) ("*Ajoku III*").

The Courts are divided over what mens rea meets the willful requirement.

The Second Circuit, Third Circuit, Fourth Circuit, Seventh Circuit, Ninth Circuit, and Circuit of the District of Columbia permit "reckless disregard" to be adequate. *See United States v. Blankenship*, 846 F.3d 663, 673–74 (4th Cir. 2017); *United States v. Trudeau*, 812 F.3d 578,

588–89 (7th Cir. 2016) (concluding that because meaning of "willful" is "influenced by its context," willful may be defined in terms of reckless disregard); *United States v. Anderson*, 741 F.3d 938, 948 (9th Cir. 2013) (stating that "recklessness" is a "valid theor[y]" for establishing defendant "willfully" engaged in criminal copyright infringement); *United States v. George*, 386 F.3d 383, 392–96 (2d Cir. 2004) (Sotomayor, J.) (concluding, after lengthy survey of case law, that *Bryan* did not displace earlier Supreme Court case law holding criminal "willfullness" requires "only the minimum *mens rea* necessary to separate innocent from wrongful conduct" and therefore interpreting "willfully" requirement in criminal passport fraud statute as proscribing "false statements that are knowingly included in the passport application"); *United States v. Johnstone*, 107 F.3d 200, 208–09 (3d Cir. 1997) (willful means "either particular purpose or reckless disregard"); *United States v. Rapone*, 131 F.3d 188, 195 (D.C. Cir. 1997) (defining "willful" for purposes of criminal contempt as "deliberate or reckless disregard of the obligations created by a court order").

The Fifth Circuit disagrees, requiring only the defendant's knowledge that he did the act sufficient to show willfulness. *United States v. Kay*, 513 F.3d 432, 447–48 (5th Cir. 2007) (concluding, post-*Bryan*, that a "defendant's ***knowledge*** that he committed the act is sufficient" to constitute criminal willfulness") (emphasis added).

This case thus is an ideal vehicle to define what is needed for a willful mens rea to make a false statement to a government officer or agent. At a minimum, the willful standard must require a heightened awareness that the

predicate conduct of the lie or omission is unlawful. Mr. Lee does not meet that standard.

On this record, there is no evidence that Mr. Lee knew that the conduct of giving his wife funding that she used in her business was unlawful, because it was in fact lawful.

Mr. Lee's statement about funding his wife's business was neither relevant nor material to the DHS investigation into wrongdoing arising from the business's operation or into the government investigation into whether Mr. Lee abused his position as a USCIS agent. The statement also is established to be wholly collateral because Mr. Lee's financial support of his wife when she was starting up her business was and is legal.

III. The Courts Are Divided Over The Meaning Of "Materiality"

Maslenjak explained that materiality is established in the 18 U.S.C. § 1425 context when "a person whose lies throw investigators off a trail leading to disqualifying facts gets her citizenship by means of those lies—no less than if she had denied the damning facts at the very end of the trail." *Maslenjak v. United States*, ___ U.S. ___, 137 S. Ct. 1918, 1929, 198 L. Ed. 2d 460 (2017). "By contrast, '[w]illful misrepresentations made for other reasons, such as embarrassment, fear, or a desire for privacy, were not deemed sufficiently culpable to brand the applicant as someone who lacks good moral character'—and so are not generally disqualifying." *Id*. at 1927 (quoting *Kungys v. United States,* 485 U.S. 759, 780, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988)) (internal quotation marks and citiations omitted).

Maslenjak suggests that "materiality" is not simply met when the Government is inconvenienced.

But the Fifth Circuit explains that a false statement need not actually influence a government decision. *United States v. Edwards*, for example held it irrelevant that a FBIT believed or was actually deceived by the defendant's representations. 303 F.3d 606, 637 (5th Cir. 2002).

The Third Circuit, by contrast, shares Maslenjak's more limited definition of materiality. A false statement is material when it influences "an ***actual, particular decision of the agency at issue***. . . ." *United States v. McBane*, 433 F.3d 344, 350 (3d Cir. 2005).

Mr. Lee's case is an ideal vehicle to address what is needed to establish materiality because the evidence established that even if his literally true statement to the agent was an actionable omission, there is no showing that information about his wife's business funding was actually or potentially relevant to the scope of the government's investigation.

The Ninth Circuit decision overlooked that:

- Mr. Lee's wife's business closed in 2008. This fact begs the question of how was lawful conduct that occurred before this business went out of business at all relevant to any criminal investigation—begun in 2013—that was focused on whether Mr. Lee was benefitting or facilitating from any criminal activity that occurred while the business was operating.

- Agent Scott explained that he first subpoenaed banking information from Wells Fargo in 2010, which usually takes "about a month and a half or so to get documents back. . . ." (in answering when he sent out financial record requests, he answered "I started sending them out in 2010, once I joined the case."). This too then begs the question of if the agents had the information in 2010, what were they doing in 2013 that had not already been done?

By not bringing any criminal charges, the Government's omission acknowledged that its subsequent actions were unnecessary and not material.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2, 2018

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JUNE 6, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-10448

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN CHING EN LEE,

Defendant-Appellant.

April 12, 2018, Argued and Submitted,
San Francisco, California
June 6, 2018, Filed

Appeal from the United States District Court
for the Northern District of California,
D.C. No. 3:15-cr-00541-SI.
Susan Illston, District Judge, Presiding.

Before: WARDLAW and NGUYEN, Circuit Judges, and OLIVER,* District Judge.

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* The Honorable Solomon Oliver, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

Appendix A

MEMORANDUM[**]

Appellant John Ching En Lee ("Lee") appeals the district court's denial of his motion for judgment of acquittal following his jury trial conviction for making a false statement to federal agents on the grounds that there was insufficient evidence of the false statement made to satisfy the elements of 18 U.S.C. § 1001(a)(2), and that the district court erred by failing to specifically instruct the jury on unanimity relative to which false statement Lee made. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. We review whether there was sufficient evidence to support a jury conviction *de novo. U.S. v. Vazquez-Hernandez*, 849 F.3d 1219, 1229 (9th Cir. 2017). There was ample evidence before the jury from which it could conclude that the questions the investigators asked Lee, numerous times in numerous iterations, about funding his wife's business were not misleading. Despite their clarity, Lee did not admit that he had provided her a bank loan. *See U.S. v. Jiang*, 476 F.3d 1026, 1028-30 (9th Cir. 2007). Lee's argument that these questions cannot support a conviction under § 1001(a)(2) has no merit, because a statement does not need to be recorded or transcribed in order to support a conviction. *Id.* Moreover, the false statement was material because the agents' testimony demonstrated it changed the scope of their investigation. *See U.S. v. De Rosa*, 783 F.2d 1401, 1408 (9th Cir. 1986).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Thus, there was sufficient evidence to satisfy the elements of falsity, specific intent, and materiality under 18 U.S.C. § 1001(a)(2) given the lack of ambiguity in the possible versions of the question posed as recalled by the agents during their testimony at trial; the context of the interview and Lee's background and experience; the agents' testimony as to the scope and course of their investigation; and the absence of other extrinsic factors weighing against conviction. *See Jiang*, 476 F.3d at 1029-30; *U.S. v. Serv. Deli Inc.*, 151 F.3d 938, 941 (9th Cir. 1998).

2. Because Lee failed to preserve his objection to the district court's failure to give a specific unanimity instruction for appeal, by stipulating to the false statement he allegedly made, we review the district court's failure to instruct the jury on specific unanimity for plain error. *See U.S. v. Campbell*, 42 F.3d 1199, 1204 (9th Cir. 1994); Fed. R. Crim. P. 30. Plain error is "error that is clear under the law and affects substantial rights." *Campbell*, 42 F.3d at 1204. The district court did not plainly err because a specific unanimity instruction was not required in this case. The general unanimity instruction was sufficient to charge the jury on the relevant law as there was considerable evidence presented at trial to support the parties' stipulation regarding the false statement Lee allegedly made. *See* 9th Cir. Model Crim. Jury Instructions §§ 7.9, 8.73.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED SEPTEMBER 20, 2016

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 15-cr-00541-SI-1

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN CHING EN LEE,

Defendant.

September 20, 2016, Decided
September 20, 2016, Filed

SUSAN ILLSTON, United States District Judge

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL

Re: Dkt. No. 136

Defendant John Ching En Lee moves for a judgment of acquittal or new trial on two charges of providing false statements to a government agency. Docket No. 136.

Argument on the matter was heard on September 16, 2016. Having considered the arguments of the parties and the papers submitted, the Court hereby GRANTS IN PART and DENIES IN PART defendant's motion.

BACKGROUND

Defendant was charged with two counts of making false statements to the government in violation of 18 U.S.C. § 1001(a), based upon statements he made in interviews with government agents on August 26, 2009, and October 10, 2013. Docket No. 14. The first count of the indictment charged defendant with "making false statements to representatives of the Department of Homeland Security about his involvement in providing funding to the owner of Crystal Massage Parlor, who was arrested for prostitution in relation to the Crystal Massage Parlor. The statements and representations were false because JOHN CHING EN LEE then and there knew that he had provided $30,000 to the owner to fund the Crystal Massage Parlor." *Id.* at 1-2. The second count charged defendant with "making false statements to representatives of the Department of Homeland Security about his use of Treasury Enforcement Communications System (TECS) for personal reasons. The statements and representations were false because JOHN CHING EN LEE then and there knew that he had queried his own name, as well as the name of the owner of the Crystal Massage Parlor, using multiple spellings of the owner's name and using the owner's birthdate." *Id.* at 2.

Appendix B

On June 30, 2016, a jury found defendant guilty of both counts. Docket No. 123. Defendant now moves for a judgment of acquittal under Federal Rule of Criminal Procedure 29 or for a new trial under Rule 33. Docket No. 136. In the alternative, defendant "requests an evidentiary hearing to determine whether the government committed discovery violations, violated the Jencks Act, . . . or otherwise committed constitutional error with respect to the October 10, 2013 interview of Mr. Lee." *Id.* at v.

LEGAL STANDARD

I. Rule 29

Rule 29 of the Federal Rules of Criminal Procedure requires the Court, on a defendant's motion, to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a).

The Court's review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), which requires a court to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319; *see also McDaniel v. Brown*, 558 U.S. 120, 133, 130 S. Ct. 665, 175 L. Ed. 2d 582 (2010). This rule establishes a two-step inquiry:

> First, a . . . court must consider the evidence presented at trial in the light most favorable to the prosecution. . . . [And s]econd, after viewing the evidence in the light most favorable to the prosecution, the . . . court must determine whether this evidence, so viewed, is adequate to allow "*any* rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt."

United States v. Nevils, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) (quoting *Jackson*, 443 U.S. at 319) (final alteration in *Nevils*).

II. Rule 33

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The Ninth Circuit described the standard for granting a new trial in *United States. v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206 (9th Cir. 1992), which it reaffirmed in *United States v. Kellington*, 217 F.3d 1084 (9th Cir. 2000):

> [A] district court's power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal. The court is not obliged to view the evidence in the light most favorable to the verdict, and it is free to weigh the evidence and evaluate for itself the credibility of the witnesses. . . . If the court concludes that, despite the abstract sufficiency

> of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

Kellington, 217 F.3d at 1097 (internal quotation marks and citations omitted).

DISCUSSION

Defendant urges the Court to grant his motion based on the following: as to Count One, he argues that the evidence was insufficient to sustain a conviction as to the elements of falsity, intent, and materiality; as to Count Two, he argues that the evidence was insufficient to sustain a conviction as to the elements of intent and materiality. He also argues that the government's case was weak, that the government improperly and prejudicially focused its case on prostitution, that the government committed discovery and Jencks Act violations, that the government's closing argument was misleading, and that the Court erred by not giving the defendant's proposed jury instruction on falsity.

I. Count One

Defendant argues, in part, that his conviction on Count One cannot stand because the government "did not offer sufficient evidence to prove beyond a reasonable doubt the exchange that was false, *i.e.*, the precise question asked

and the answer that was false." Mot. at 12. The Court is troubled by the fact that the August 26, 2009 interview was not recorded and that the agents' notes do not detail the exact question asked. Nevertheless, "viewing the evidence in the light most favorable to the prosecution," it finds that a "rational trier of fact could have found" the element of falsity beyond a reasonable doubt. *See Nevils*, 598 F.3d at 1164.

There was much testimony at trial from the agent who conducted the August 2009 interview regarding precisely what he asked. DHS Agent Ricardo Fuentes testified as follows:

> Q. And what questions did you ask?
>
> A. Based on that answer, I was actually thinking now at this point well, how did she fund this business. So I had asked him, I said, "Well, did you loan her or give her any money to start this business?"
>
> . . .
>
> Q. And what did you ask him?
>
> A. I asked him if he had actually funded or assisted with that business.

Tr. 236:20-237:9 (Fuentes Direct).

Q. And so you asked him exactly "what about funding the business" during that interview?

A. I asked him if he had ever given money to his wife to fund this business, to start it up.

Q. Your precise question was, "If you ever — Mr. Lee, have you ever given Ms. Liu any money to start up the business?"

A. To fund the business, yes.

...

Q. The same question over and over again, "Did you give" —

A. Right.

Q. — "your wife any money to fund the Crystal Massage Parlor?"

A. Correct. If he had provided any funds to her.

Q. Is it, "Did you provide any funds to her," or "Did you give her any money to fund" —

A. I think I probably asked it around three different ways.

Q. What three different ways did you ask him?

> A. Probably, "Have you ever funded this" — "have you ever provided money to fund this business," and then he denied doing that. And then later on I would ask him something similar and he would deny it.

Tr. 260:7-261:5 (Fuentes Cross).

> Q. You asked him that question, "Did you give your wife any money to fund the business." He said no?
>
> A. He denied that.

Tr. 261:17-19 (Fuentes Cross).

> Q. You asked — you testified that you asked Mr. Lee several times throughout the interview about funding of the massage parlor; is that right?
>
> A. Correct.
>
> Q. And that question was, "Did you give your wife any money to fund her business"; correct?
>
> A. Correct.

Tr. 276:7-13 (Fuentes Recross).

> Q. And to the best of your recollection, the precise terminology of that question was,

> "Did you give your wife any money to fund the business"?
>
> A. "Did you assist her with funding," yes.
>
> Q. "Did you assist her with funding" or "Did you give her any money to fund"?
>
> A. "Give her any money."
>
> Q. Which one is it?
>
> A. "Give her any money."
>
> Q. "Did you give her any money to fund the business"?
>
> A. Right.

Tr. 277:11-21 (Fuentes Recross).

> Q. Now, without reading your notes, do you recall what specific thing the defendant said?
>
> A. I asked him specifically if he had given money to fund this business, and he specifically said, "I have never funded this business."

Tr. 278:11-15 (Fuentes Further Redirect).

DHS Agent John Henderson, who also participated in the August 2009 interview, testified that he did not recall

what question Agent Fuentes asked defendant during the interview. Tr. 304:17-20; 306:19-307:16.

Although the testimony varies as to the exact wording of the question asked, it shares a common thread: the use of the word "fund" or "funding," which defendant attacks as ambiguous. Although this word may be susceptible to the interpretation that defendant put forward at closing argument—that it could be asking whether Mr. Lee funded his wife's business with money out of his own pocket rather than with a loan he obtained from a bank—a rational trier of fact could have found that the term "fund" included obtaining a loan. Moreover, upon further questioning from both defense counsel and government counsel, Agent Fuentes settled on the phrasing of his question as follows: "Did you give her any money to fund the business"? or ". . . specifically if he had given money to fund this business . . . ."[1] *See* Tr. 277:11-21; 278:11-15. In this scenario, the operative term is not "fund" but is rather "give." A rational trier of fact could have found the element of falsity by concluding that whether Mr. Lee *gave* money to his wife for her business included giving her money he borrowed from a bank.

Defendant cites to two Ninth Circuit cases that, though analogous, do not justify overturning the jury's verdict here. The first, *United States v. Sainz*, 772 F.2d 559 (9th Cir. 1985), involved a perjury conviction where the grand

1. This is also the phrasing the parties agreed to in the jury instructions: "The statement charged in Count One is that Mr. Lee stated: 'No' to the question whether he gave his wife any money to fund her business." *See* Docket No. 121 at 36.

jury transcript clearly documented the exchange at issue. In that case, the question asked was a compound question containing an imprecise term, to which the defendant gave a literally true answer. *See* 772 F.3d at 563-64. The second case, *United States v. Jiang*, 476 F.3d 1026 (9th Cir. 2007), involved a bench trial for a charge involving false statements to the government under 18 U.S.C. § 1001(a). The appeals court overturned the conviction in part based on factors that are not present here: that the agent's notes "were recorded some time after the day of the interview" rather than contemporaneously, as here, *see* Tr. 242:11-18, 250:1-3, 283:9-11, 299:2-10; that the agent requested that Jiang bring documents to the interview regarding the specific topics at issue, unlike here, where the agents did not tell Mr. Lee the interview topic in advance, *see* Tr. 194:21-195:4; and that Jiang's English was "broken" and "poor."

Defendant argues that his case is also analogous because, when questioned directly in August 2013 about whether he obtained a loan for his wife, he was forthcoming, as were the defendants in *Sainz* and *Jiang*. However, those cases involved much shorter lapses in time between the challenged question and the follow-up question that elicited the truthful response. *See Jiang*, 476 F.3d at 1028-29 (follow-up question asked one week after original interview); *Sainz*, 772 F.2d at 561 (follow-up question asked during the same interview). Here, defendant gave his truthful answer four years after the alleged false statement, after his wife had revealed to agents that her husband had gotten a bank loan for her to purchase the massage parlor. Viewing the evidence here

in the light most favorable to the prosecution, as it must, the Court cannot say that the evidence is insufficient as to the element of falsity in Count One.

The Court also disagrees with defendant that the evidence was insufficient to sustain a conviction on the elements of materiality and intent. A statement is material if it "is *capable* of influencing or affecting a federal agency," although the false statement "need not have actually influenced the agency." *United States v. Service Deli, Inc.*, 151 F.3d 938, 941 (9th Cir. 1998); *see also United States v. De Rosa*, 783 F.2d 1401, 1408 (9th Cir. 1986) (statement is material if it "(1) could affect or influence the exercise of governmental functions; or (2) has a natural tendency to influence or is capable of influencing agency decision"). Even adopting the stated purposes for the investigation that defendant puts forth in his motion, a rational juror could have concluded that the false statement in Count One was material to DHS's actions. *See* Mot. at 16. Further, a rational juror could have concluded that defendant had the requisite intent[2] because, as the government notes, he had a law degree, he had worked as a federal employee since 2001, and at the beginning of the interview he signed a *Garrity* form warning him that "[a]nything you say may be used against you as evidence both in an administrative proceeding or any future criminal proceeding." *See* Oppo. at 8-9.

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2. Defendant's motion here focuses on whether there was sufficient evidence that he "knew his conduct was unlawful." *See* Mot. at 15.

For these reasons, the Court DENIES defendant's motion for a judgment of acquittal as to Count One. Likewise, finding that the evidence does not "preponderate[]sufficiently heavily against the verdict," the Court DENIES defendant's motion for a new trial on Count One. *See Kellington*, 217 F.3d at 1097.

II. Count Two

Defendant also moves for acquittal as to Count Two. The Court agrees with defendant that the evidence, even viewed in the light most favorable to the prosecution, is insufficient to sustain a conviction on Count Two because no rational trier of fact could find the essential element of materiality beyond a reasonable doubt.

At trial, the government introduced evidence that on March 19, 2009, defendant ran three queries of his wife's name in TECS, to which he had access as an Immigration Services officer. Tr. 378:2-379:10. Four and a half years later, on October 10, 2013, DHS Office of Inspector General Special Agent Lamont Scott interviewed defendant regarding his TECS usage, "to find out why he ran his wife in the TECS system . . . ." *See* Tr. 317:14-318:8; 386:10-387:4.

The jury found defendant guilty based on the following instruction:

> Mr. Lee is charged in Count Two with knowingly and willfully making a false statement on or about October 10, 2013, in a matter within

> the jurisdiction of a governmental agency or department, the United States Department of Homeland Security, in violation of Section 1001 of Title 18 of the United States Code. In order for Mr. Lee to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, Mr. Lee made a false statement in a matter within the jurisdiction of the Department of Homeland Security;
>
> Second, Mr. Lee acted willfully; that is, Mr. Lee acted deliberately and with knowledge both that the statement was untrue and that his conduct was unlawful; and
>
> **Third, the statement was material to the activities or decisions of the Department of Homeland Security; that is, it had a natural tendency to influence, or was capable of influencing, the agency's decisions or activities**.
>
> The statement charged in Count Two is that Mr. Lee stated: "No" to the question whether he ever made any unauthorized queries of his wife in TECS for personal use.

Docket No. 121 at 37 (emphasis added).

Defendant argues first that the statement in question could not have been material because "Agent Scott told the grand jury that the purpose [of his investigation] was to 'determine if Mr. Lee was associated with the brothel operating as a massage parlor'" and the massage parlor closed five years before the interview regarding the TECS search. Mot. at 17 (citing Tr. 424). The government counters that the March 2009 search date was "significant to [Special Agent Scott] because it raised the specter that Defendant had impermissibly run the queries to obtain restricted information about [his wife's] judicial proceedings or immigration status, or both." Oppo. at 15. But what the government fails to state, and what it failed to present at trial, was what activities or decisions of DHS were or could have been influenced by defendant's October 2013 denial.

The government's arguments that there was sufficient evidence as to materiality read rather like after-the-fact justifications. For instance, the government argues that defendant's August 2013 admission that he had obtained a bank loan for his wife "called Defendant's overall credibility into question" and so Special Agent Scott "then expanded his investigation to include Defendant's use of the TECS system . . . ." Oppo. at 14. That Special Agent Scott decided, years into the investigation of defendant, to explore the possibility of TECS misuse years before does not mean that a false statement regarding that misuse was material. Nor is there materiality in the government's assertion that the TECS question "was certainly an important part of the investigation regarding [defendant's] connection with Crystal Massage Therapy" when the

business had been closed for several years by the time of the October 2013 interview. *See id.* at 15.

It is also not persuasive that if defendant had been forthcoming in October 2013 this would have saved the agency "further investigative steps" into his TECS queries. Special Agent Scott testified that in February 2014 and April 2014 he requested further documentation about defendant's queries and TECS history from Customs and Border Protection. Tr. 327:10-14, 399:2-25, 406:6-17. Special Agent Scott's reasons for wanting these documents were broad,[3] but several of the documents (a copy of the TECS exam, defendant's training records) appear to be related to TECS training, and Special Agent Scott testified that he had an opportunity to question defendant about TECS training during the October 2013 interview. *See id.* 393:1-9, 399:12-16.

Critically, Special Agent Scott testified that he knew defendant was lying at the October 2013 interview. Prior to the October 2013 interview, Special Agent Scott obtained a print-out from TECS showing defendant's March 2009 queries of his wife's name. Tr. 395:25-396:11. Therefore, before defendant made the false statement, the agency had internal proof that defendant had run such a search, and Special Agent Scott testified that he confronted defendant

3. Special Agent Scott testified that he wanted the information "[t]o gain more information into who Mr. Lee was and how he had authority, what his training was, all to basically let me know that he had — he knew about TECS training, he knew about the rules and the regulations, he was a TECS user, to provide me more backup documentation." Tr. 399:17-22.

with this information at the interview.[4] Tr. 395:25-396:17. Special Agent Scott further testified that "the answers that he was giving me in my opinion were not true" and that after Special Agent Scott confronted defendant with the document he "asked [defendant] a series of questions over again." Tr. 396:12-24. Where the agency knew that defendant's statement was false at the time it was made, the government's evidence does not suffice to show materiality.

Accordingly, the Court GRANTS defendant's motion for judgment of acquittal on Count Two. Where a court "enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed." Fed. R. Crim. P. 29(d)(1). For the same reasons stated above that the Court finds a judgment of acquittal should be granted, and because the evidence regarding the element of materiality in Count Two "preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred," the Court conditionally finds that a new trial should be granted if this judgment of acquittal is later vacated or reversed. *See Kellington*, 217

4. Defendant states that the first time he learned of the allegation regarding the TECS print-out was upon hearing Special Agent Scott's testimony at trial. Mot. at 10. No mention of the TECS printout is made in the Scott's notes or report, or those of his assistant, Special Agent Lee, nor is a copy of it appended to any of those documents. These allegations form the basis of defendant's argument regarding discovery violations and his request for an evidentiary hearing.

F.3d at 1097. Should that occur, the Court further finds that an evidentiary hearing in advance of the new trial is necessary for the reasons stated in defendant's motion. *See* Mot. at 26-27.

III. Other Matters

Having granted defendant's motion for acquittal on Count Two, the Court need not rule on defendant's allegations regarding potential discovery and Jencks Act violations, defendant's concerns with the government's closing argument,[5] and defendant's request for an evidentiary hearing.[6] The Court is not persuaded by defendant's argument that "the government's case was weak at best," *see* Mot. at 19, as the Court is granting defendant's motion for a judgment of acquittal as to the weakest part of the government's case—materiality under Count Two. This leaves defendant's arguments that the Court erred in failing to give his proposed instruction on falsity and that the trial was improperly prejudiced by references to prostitution.

The Court does not find that it was error to fail to give defendant's proposed instruction on falsity.[7] First,

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5. These concerns pertain primarily to the timing of defendant's TECS query.

6. This request is largely made to gather evidence in support of the defense's attack on Count Two.

7. Defendant sought the following instruction: "If you find that a particular question asked of Mr. Lee was ambiguous and that Mr. Lee truthfully answered one reasonable interpretation of

the Court does not find that the agent's question in this case was ambiguous to the same extent as the questions in *Jiang* and *Sainz*, which defendant cites in support. Second, the Court heard extensive argument on this point from both sides prior to the close of trial. *See* Tr. 563:17-568:11. The Court permitted defense counsel to make the argument contained in the proposed instruction during closing, and defense counsel did so. *See* Tr. 568:6-11, 622:1-5 ("If you all can decide on the exact question that Agent Fuentes asked, that question still has to be clear. If that question is ambiguous and there is a reasonable response to that ambiguous question, it is not a false statement. That is not a knowing and deliberate false statement.") The jury heard this argument and still convicted defendant on Count One.

The Court also finds that references to prostitution did not unfairly prejudice the jury, as defendant argues. The Court discussed this with the parties during the pretrial conference and again during the first day of trial. *See* Docket No. 105 at 2; Tr. 5:1-13:20. The Court limited the government to one witness on the topic of the alleged prostitution activities and ordered "that the testimony shall be for the purpose of showing how the massage parlor's allegedly illegal activities triggered DHS's investigation and how defendant's statements were material to that investigation." Docket No. 105 at 2. The Court does not agree with defendant that the government exceeded those bounds at trial.

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the question under the circumstances presented, then his answer would not be false. It is the burden of the government agents to clarify any ambiguous statements." Docket No. 119 at 2.

Appendix B

Defendant mainly takes issue with two pieces of testimony: (1) that government witness Leslie Severe testified that "undercover agents 'were solicited for some type of sexual activity'" at the massage parlor, and (2) that "Agent Fuentes testified that he read a portion of the police report to Mr. Lee during the August 2009 interview stating that Ms. Liu solicited sex from an undercover agent . . . ." *See* Mot. at 21-22. As to Ms. Severe's testimony, the government asked Ms. Severe on direct examination to respond "based on your personal observations." Tr. 157:18-22. When Ms. Severe stepped beyond those boundaries, defense counsel made a hearsay objection that the Court sustained. Tr. 157:23-158:6. Nor does the Court find that it was impermissible hearsay for Ms. Severe to testify as to the direction she gave her officers regarding when to use a "bust signal." *See* Tr. 160:23-162:2. As to Agent Fuentes's testimony that he read a police report regarding defendant's wife's alleged solicitations, the Court gave a limiting instruction to the jury. Tr. 198:24-199:22. The references to defendant's wife's actions constituted only a brief portion of Agent Fuentes's lengthy testimony, and was drawn out to show the effect on the listener as well as to explain why Agent Fuentes still remembered the interview conducted nearly seven years earlier. *See* Tr. 199:24-200:17. Overall, these limited references to sexual activity at the massage parlor did not "impermissibly taint[] the verdict," as defendant argues. *See* Mot. at v.

Appendix B

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby DENIES defendant's motion for judgment of acquittal or a new trial on Count One. The Court GRANTS defendant's motion for judgment of acquittal on Count Two.

IT IS SO ORDERED.

Dated: September 20, 2016.

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge