04-4392-cr

To Be Argued By:
JAMES K. FILAN, JR.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-4392-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

AARON J. CELIS, II,
Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

==

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STATEMENT OF JURISDICTION

The district court (Chatigny, C.J.) had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on August 6, 2004, following entry of judgment on August 2, 2004. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

I. Viewed in the light most favorable to the government, was there sufficient evidence upon which any rational trier of fact could conclude that the defendant's statements on a contractor information form regarding his prior criminal history were both false and material, in violation of 18 U.S.C. § 1001(a)(2)?

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 04-4392-cr

UNITED STATES OF AMERICA,
Appellee,
-vs-

AARON J. CELIS, II
Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Aaron J. Celis, II has appealed his conviction by a jury of making false statements in violation of Title 18, United States Code, § 1001(a)(2). The conviction was the result of statements the defendant made as part of a security clearance process to have unescorted access at Sikorsky Aircraft Corporation, Stratford, Connecticut, a Division of United Technologies, a significant defense contractor ("Sikorsky"). As part of that process, the defendant was required to fill out a "Contractor Information Form" ("Form"). The Form asked the defendant whether he had "ever been arrested, charged or held by federal, state or

other law enforcement authorities for any violation of any federal, state, county, or municipal law, regulation or ordinance? Include all court martials while in military service. Traffic violations must also be included if the penalty imposed was $50.00 or more." The defendant answered "N/A." The Form signed by the defendant also contained the following certification: "I hereby certify that the answers and statements given by me in this form are correct without consequential omissions of any kind."

At the time the defendant answered the question and signed the Form, he had a state felony conviction for grand theft auto and a federal felony conviction for importation of marijuana. He now claims that the responses he gave on the Form he filled out at Sikorsky could not be considered false statements and that the government failed to present evidence that his response on the Form was material, as required by the statute. The defendant's challenge to his conviction has no merit.

STATEMENT OF THE CASE

On May 21, 2003, a federal grand jury in Connecticut returned a one-count indictment charging the defendant with one count of making false statements in violation of 18 U.S.C. § 1001(a)(2). A-5.[1]

Trial by jury began on April 19, 2004. At the close of the government's case-in-chief, the defendant moved for a judgment of acquittal pursuant to Fed. R. Crim. P. 29,

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[1] Citations to the Appendix filed by the defendant, which includes the trial transcript, are cited as "A-__."

which the court denied. A-97-106. On that same date, the jury found the defendant guilty. The defendant was sentenced on July 28, 2004, and the district court entered judgment on August 2, 2004. A-14. The district court sentenced the defendant to a term of probation of two years with the first three months to be served in home confinement, as well as 100 hours of community service. Id. The district court did not fine the defendant, but ordered him to pay a $100 special assessment. *Id.* On August 6, 2004, the defendant filed a timely notice of appeal and challenges only his conviction. A-12.

STATEMENT OF FACTS

The evidence at trial showed that an investigation was undertaken by a joint task force comprised of Federal, State and local law enforcement authorities in Connecticut ("Task Force") to ensure the security of the defense industry infrastructure in the State of Connecticut. A-34. The Task Force initiated an investigation at Sikorsky, a significant contractor for the United States Department of Defense ("DOD") that manufactures and develops helicopters for the United States Army, Navy, Air Force, Marine Corps and Coast Guard. *Id*. Among other things, the Sikorsky facility contains sensitive and classified technologies as well as trade secrets, information, materials, processes, and government property. A-35-36, 60. Access to the Sikorsky facility is restricted and controlled by Sikorsky in order for Sikorsky to be eligible for access to classified information. *Id*. The Sikorsky corporate security procedures are mandated by the Defense Security Services' National Industrial Security Program Operating Manual ("NISPOM") and other

governmental contractual obligations devised specifically to protect government property as referenced in the Federal Acquisition Regulations ("FAR"). A-35-37, 57, 59-60.

Sub-contractors or vendors who are not direct employees of Sikorsky may be given access to the Sikorsky facility through a badge control system that gives them either escorted or unescorted access to the facility. A-60-61. The badge control system was developed and regulated pursuant to Sikorsky internal security procedures in compliance with the NISPOM and established DOD standards for such manufacturing facilities. A-59. In order to gain unescorted or unrestricted access to the Sikorsky facility, the defendant had to complete the Form. A-63-64. The Form was part of a package used by Sikorsky in determining whether to grant a person unescorted access to the facility. A-68.

As part of his application for unescorted access at the Sikorsky facility, the defendant completed the Form. Among other information which the applicant must truthfully supply in the Form, the Form asked the defendant whether he had "ever been arrested, charged or held by federal, state or other law enforcement authorities for any violation of any federal, state, county, or municipal law, regulation or ordinance? Include all court martials while in military service. Traffic violations must also be included if the penalty imposed was $50.00 or more." A-43-44. To this question the defendant answered "N/A." A-44. The evidence further showed that the Form signed by the defendant contained the following certification: "I hereby certify that the answers and statements given by me

in this form are correct without consequential omissions of any kind." Below that certification, the defendant signed his name. *Id*.

Certified copies of two of the defendant's previous convictions were entered as full exhibits. A-40-42. The first record demonstrated that the defendant had been arrested and charged in 1987, and convicted in 1988 of grand theft auto in the State of California, for which he served a term of imprisonment. *Id*. The second record demonstrated that in 1992 the defendant was arrested, charged, held and convicted of importation of 160 pounds of marijuana in the United States District Court for the Southern District of California. *Id*. The defendant was sentenced to 33 months' imprisonment on that conviction. *Id*.

Thomas Fischer, the Director of Security at Sikorsky, testified that a problem with the Sikorsky background check was that Sikorsky was limited to commercial databases for conducting those checks and thus if a person was untruthful on the Form about residence or criminal history, the limited background check performed by Sikorsky or a subcontractor might not reveal the true nature of a person's past. Thus, Sikorsky relied on the accuracy of the answers to the questions on the Form. As such, the defendant's claim that misrepresentations on the Form, in and of themselves, cannot be relied on in any material way, is not supported by the evidence. Mr. Fischer's testimony, however, demonstrates exactly how those statements are relied on. Mr. Fischer testified as follows regarding the purpose of the question about arrests on the Form:

> Q. Well, how does Sikorsky assure that a person does not have a criminal history?
>
> A. You have to rely on the integrity and the accuracy of the information that's been filed by the person.
>
> Q. On that contractor information form?
>
> A. Yes.
>
> Q. What happens if a person has identified a criminal record on that form? Would they get access at Sikorsky?
>
> A. There's a review made of the nature of the arrest, history or conviction history, that will be identified by the investigative process. And the person's suitability would be reviewed in relation to the severity of the record.
>
> Q. And so a person is not, is it fair to say a person is not automatically disqualified if they have a criminal record?
>
> A. That's correct?

A-68-69. Mr. Fischer further testified that an applicant's honesty in their responses on the Form was a significant consideration in granting them access to the Sikorsky facility:

> Q. If a person did not list the criminal history, arrest history on that form, and you later or your investigation determined that there was a criminal history, what generally would be your reaction, or your policy I guess, towards that?
>
> A. Our policy is that a person is expected to be honest and forthright what they put on the form. If they're not, just irrespective of the charge or the conviction that's identified, that if a person falsifies or misrepresents an entry on the form, that is almost universally grounds for the person being removed from the facility.

A-70.

Finally, when asked about the particular crimes for which the defendant had been arrested, charged and held, Mr. Fischer testified that the defendant would not have been given access to the Sikorsky facility. A-74.

SUMMARY OF ARGUMENT

The evidence was sufficient to sustain the defendant's conviction for making false statements when completing and submitting the Form required to gain unescorted access to the Sikorsky facility.

First, the evidence unequivocally showed that the defendant answered two questions on the Form falsely. He answered "N/A" to the first question on the Form, as to whether he had been previously arrested, charged or convicted, despite the fact that he had in fact been twice so

convicted in state and federal courts. Because the question was clearly applicable to the defendant, and because his response of "N/A" was equivalent to a denial of any such charges or convictions, his statement in this regard was false. Moreover, by failing to disclose his arrests, charges, and convictions, his certification at the end of the Form that his answers were "correct without consequential omissions of any kind" was likewise false.

Second, the evidence clearly established that the defendant's answers to these two questions were material for purposes of 18 U.S.C. § 1001. There was direct testimony from a Sikorsky officer that information regarding a person's criminal convictions was relevant to the decision whether to grant him unescorted access to the Sikorsky facility pursuant to industrial security rules established by the Department of Defense, and that had the defendant disclosed his prior convictions, he would have been denied such access. Given such testimony, the defendant's false statements were clearly material.

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTION FOR MAKING FALSE STATEMENTS ON THE CONTRACTOR INFORMATION FORM IN VIOLATION OF 18 U.S.C. § 1001(a)(2)

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts, above.

B. Governing Law and Standard of Review

Section 1001(a)(2) of Title 18 of the United States Code provides that "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" is guilty of an offense. A statement is material "if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *Neder v. United States*, 527 U.S. 1, 16 (1999) (quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995)). *See also United States v. Rodriguez*, 140 F.3d 163, 168 (2d Cir.1998) (noting, in the context of bank fraud, that "[a] misrepresentation is material if it is capable of influencing the bank's actions"); *United States v. Antique Platter of Gold*, 184 F.3d 131, (2d Cir. 1999) (adopting *Neder*'s "natural tendency" test for purposes of statute proscribing false statements on customs forms,

because such a test "is far more consistent with the purpose of the statute -- to ensure truthfulness of representations" made on such forms).

Further, it is settled that a defendant challenging a conviction on sufficiency grounds "bears a heavy burden." *United States v. Masotto*, 73 F.3d 1233, 1241 (2d Cir. 1996). The Court considers the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government. The evidence must be viewed in conjunction, not in isolation, and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for reversal on appeal. The task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See, e.g., United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003); *United States v. Johns*, 324 F.3d 94, 96-97 (2d Cir. 2003); *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002); *United States v. Downing*, 297 F.3d 52, 56 (2d Cir. 2002). These principles apply to both direct and circumstantial evidence. *See, e.g., United States v. Griffith*, 284 F.3d 338, 348 (2d Cir. 2000) (citing *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998)). A witness's direct testimony to a particular fact provides sufficient evidence of that fact for purposes of sufficiency of the evidence review. *See United States v. Jespersen*, 65 F.3d 993, 998 (2d Cir. 1995). "The ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998)

(emphasis in original) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

In the district court, the defendant moved for a judgment of acquittal based on the materiality element of § 1001 conviction. This Court engages in de novo review of such properly preserved arguments, applying the same standard that governs a general challenge to the sufficiency of evidence. *See Jackson*, 335 F.3d at 180; *United States v. Thorn,* 317 F.3d 107, 132 (2d Cir.), *cert. denied*, 538 U.S. 1064 (2003).

The defendant did not move for acquittal in the district court on the grounds of insufficient proof as to the falsity of his statements. With respect to that unpreserved argument, he bears "the burden of persuading a court of appeals on the insufficiency issue that there has been plain error or manifest injustice." *United States v. Finley*, 245 F.3d 199, 202 (2d Cir. 2001); *see also United States v. Muniz*, 60 F.3d 65, 67 (2d Cir. 1995) (holding that defendant who fails to challenge sufficiency of evidence in trial court "cannot prevail on that ground on appeal unless it was plain error for the trial court not to dismiss on its own motion"), *amended*, 71 F.3d 93 (2d Cir. 1995), *reversed on reconsideration, based on other grounds,* 184 F.3d 114 (2d Cir. 1997); *United States v. Kaplan*, 586 F.2d 980, 982 n.4 (2d Cir. 1978).

Before a reviewing court may review claims under the plain error rule, it must find not only the occurrence of a "plain" (i.e., "clear" or "obvious") error at trial, but also that the error was so prejudicial that it "affected substantial rights," that is, that it "must have affected the outcome of

the district court proceedings" pursuant to Fed. R. Crim. P. 52(b). *United States v. Olano*, 507 U.S. 725, 732-34 (1993); *see also United States v. Henry*, 325 F.3d 93, 100 (2d Cir.), *cert. denied*, 540 U.S. 907 (2003). The defendant, not the government, bears the burden of persuasion with respect to a showing of prejudice. *See Olano*, 507 U.S. at 734. Even if the defendant meets this exacting burden, the reviewing court is authorized to exercise its discretion and order correction only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467 (1997); *see also United States v. Whab*, 355 F.3d 155, 158 (2d Cir.), *cert. denied*, 124 S. Ct. 2055 (2004).

Under this standard, the defendant must show not only that the evidence was legally insufficient, but that the district court's failure to dismiss the convictions on its own motion was so plainly erroneous that the court was derelict in its duties. *Muniz*, 60 F.3d at 70 (quoting *United States v. Yu-Leung*, 51 F.3d 1116, 1121 (2d Cir. 1995)).

C. Discussion

The defendant makes two arguments in support of his claim that the evidence was insufficient to support his conviction for making a false statement. First, he claims that his response to the question regarding prior criminal history could not be considered false. Second, he claims that his statement was not material. For the reasons that follow, these arguments are meritless.

1. The Defendant's Answer of "N/A" Constituted a False Statement Under 18 U.S.C. § 1001(a)(2)

The defendant first claims that use of the notation "N/A", which he readily admits means "not applicable," cannot be considered a false statement. Pet. Br. at 11. As noted above, the defendant failed to raise this issue before the district court when moving for acquittal under Fed. R. Crim. P. 29, *see* A-97-106, and accordingly this claim is reviewed only for plain error under Fed. R. Crim. P. 52(b). Yet under any standard of review, the defendant's claim fails.

The defendant's argument regarding the falsity of his statement is less than clear, since he concedes that the question regarding his criminal history indeed "would apply to anyone requesting security clearance," including him. *Id.* He simply claims as a conclusory matter that "[t]here is no way a security staff member reviewing Mr. Celis' Contractor Information Form could have read such a response and simply interpreted it as 'No.'" *Id.* at 11-12.

Such an argument defies the usual meaning of "N/A," which the defendant himself defines. He states that "applicable" is defined as "capable of being applied; fit or suitable to be applied; having relevance." App. Br. at 11. The question on the Form was as follows: "Have you ever been arrested, charged or held by federal, state or other law enforcement authorities for any violation of any federal, state, county, or municipal law, regulation or ordinance? Include all court martials while in military service. Traffic violations must also be included if the

penalty imposed was $50.00 or more." As the evidence at trial demonstrated, the defendant had indeed been arrested, charged and held on a state felony and a federal felony. Accordingly, the question on the Form was unquestionably capable of being applied to him, and any answer other than "Yes" could lead a reasonable factfinder to conclude that the defendant had made a false statement. A rational factfinder could reasonably have found that by responding "N/A," the defendant was representing that the question was inapplicable because he had no such arrests, charges, or convictions referenced in the question. Such a representation was undeniably false, and hence the falsity element of the defendant's § 1001 conviction was amply supported by sufficient evidence.

While the defendant cites the Fifth Circuit case of *United States v. Mattox*, 689 F.2d 531, 532 (5th Cir. 1982) (per curiam), and concludes, without analysis, that the case is distinguishable, even a cursory look at that case shows that it supports the government's position.

In *Mattox*, the defendant was convicted of making a false statement in violation of § 1001. In response to certain questions regarding his employment, the defendant answered either "N/A" or left the answer blank. The issue surrounding the questions asked in *Mattox* was described by the Court as follows:

> In connection with his receipt of federal workers' compensation benefits, Mattox was required to file annually CA 1032 forms with the Department of Labor. These forms each contained the following instructions:

> 1. You must report all employment during the past 12 months (or since your last employment and pay was reported to our office if less than 12 months ago).
>
> 2. You must account for the entire time, including periods of self-employment or unemployment.
>
> The forms provide spaces for the employee to provide information as to names of employers, dates of employment, rates of pay and kind of work. Above the signature line on each form is the statement: "I Hereby Certify That The Information Given By Me On And In Connection With This Questionnaire Is True And Correct To The Best Of My Knowledge And Belief."
>
> Although employed, Mattox failed to provide the requested information on four CA 1032 forms. Instead, he wrote "N/A" in answer to the employment questions on three of the forms. On the fourth, he simply left the employment questions blank.

Mattox, 689 F.2d at 532.

The defendant in *Mattox* argued that his answers on the form he was required to fill out could not be characterized as false; rather, they were "only failures to fill in a blank or no answers at all." *Id.* The Fifth Circuit rejected that claim. It held that "[a]nswering 'N/A' to a question is not the same as failing to answer the question. In common

usage, 'N/A' means 'not applicable.' Since Mattox was employed, the question was applicable to him. Therefore, the insertion of 'N/A' was sufficient to warrant a jury in concluding that there was an answer, and that the answer given was a false response. *Id*. The Court ultimately held that "either the insertion of N/A or the knowing failure to supply the information requested is sufficient to permit, although it does not require, a jury to conclude that he has made a false statement." *Id*. at 531.

Comparing the questions in *Mattox* with the question in this case, it is clear that answering the question that did apply to him with the response "N/A" constituted the making of a false statement, as the court logically found in *Mattox*. The same reasoning applies in the present case. Since the defendant had been arrested, charged and held, the question on the Form applied to him. Accordingly a jury could, as in *Mattox*, conclude that the defendant had made a false statement.

Moreover, the defendant completely ignores the second false statement charged by the government, which is that "the answers and statements given by me in this form are correct without consequential omissions of any kind." A jury could reasonably conclude that failing to list two felony convictions that resulted in significant prison time are consequential omissions and thus the certification was a false statement. Not only did the defendant fail to challenge the evidence showing the falsity of this second statement pursuant to Rule 29, but he fails to address it in his appellate brief. For the reasons set forth above, there was sufficient evidence for the jury to conclude that the defendant made a false statement. The district court did

not err, much less plainly err, in declining to conclude otherwise.

2. The Defendant's Answer of "N/A" Was Material to the Decision Whether to Grant Him Unescorted Access to the Sikorsky Facility

The defendant next claims that the government failed to present sufficient evidence that his response, "N/A," to the question whether he had ever been arrested, charged or held was material to the decision whether to grant him access to the Sikorsky facility. The evidence at trial demonstrates that his response was material to the decision, and therefore the defendant's claim should be rejected.

"A false statement is material if it has a 'natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *United States v. Whab*, 355 F.3d 155, 163 (2d Cir. 2004) (quoting *Neder v. United States*, 527 U.S. 1, 16 (1999)). The evidence in this case clearly demonstrates that the defendant's response was material to the decision whether to grant him unescorted access to the Sikorsky facility.

As noted, the Director of Security at Sikorsky testified that the company relied on the accuracy of the answers provided on the Form, partly because the company had a limited ability to conduct background checks on potential employees. A-68-69. If a person reports a criminal history on the Form, the company reviews the nature of

that history in assessing his suitability for access to the Sikorsky facility. *Id.* He testified that felonies were considered more carefully than misdemeanors, and the type of arrest or conviction history was also an important consideration. A-69. For instance, a person with a history of physical threats would be considered a threat to the Sikorsky work force. A-69. Theft or fraud arrests are also considered as a part of the honesty or trustworthiness of the person given unescorted access. *Id.* A narcotics history also is considered important because Sikorsky manufactures aircraft. *Id.*

The particular crimes of which the defendant had been convicted -- involving grand theft auto and marijuana importation -- fell squarely within these latter two categories, of special concern to Sikorsky. Indeed, Mr. Fischer expressly testified that Sikorsky would have denied the defendant access to the Sikorsky facility had they known of these convictions. A-74. That answer by itself, if credited by the jury as it surely was, was a sufficient basis to find that the defendant made materially false statements on his Form seeking unescorted access to the Sikorsky facility.

Further, honesty in and of itself is a material consideration, which also applies to the defendant's statement that the Form contained no material omissions. As Mr. Fischer testified, had Sikorsky been aware that the information provided by the defendant was false, they would have denied him access to the facility. A-70.

The defendant's claim to the contrary -- that it was "ludicrous" for Sikorsky's security staff to rely on an

applicant's self-representations, because they were supposed to be conducting a background check of him, Pet. Br. at 12 -- turns the law of materiality on its head. In essence, the defense is claiming that *because* Sikorsky relied on the defendant's statement, it cannot be deemed material *because such reliance was misguided.* Ironically, in a typical challenge to materiality, a party usually claims that there was no actual reliance by the recipient of the false statement, and courts rebuff such arguments by pointing out that a statement "need not have exerted actual influence, so long as it was intended to do so and had the capacity to do so." *United States v. Gregg*, 179 F.3d 1312, 1315 (11th Cir.1999); *Antique Platter of Gold*, 184 F.3d at 135-36. Proof of actual influence on a decision, of course, is the strongest possible evidence that the statement had the "capacity" to exert such influence. By answering the Form as he did, and thereby inducing Sikorsky to grant him unescorted access to its facility, the defendant's false statements were "material" within the meaning of § 1001.

Finally, the defendant's claim that Sikorsky *and not the defendant* should be held responsible for the defendant's conduct because of a lapse in its own protocol is unsustainable. This is no different than a person who is caught stealing an unlocked bicycle, but claims that it was the victim's fault for leaving the bike unlocked. The defendant had the responsibility to be truthful on the Form. He was not truthful. The fact that the security screening process then in place at Sikorsky may have allowed the defendant's falsehoods to temporarily evade detection do not render those falsehoods any less material. Accordingly, the jury properly convicted the defendant of

making material false statements on the Form, and the jury's verdict should be upheld.

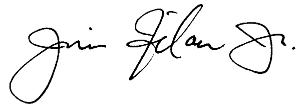
CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: January 18, 2005

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



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Addendum

18 U.S.C. § 1001(a)(2). Statements or entries generally

(a) 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;

. . .

shall be fined under this title or imprisoned not more than 5 years, or both.

. . . .