



WILL COURTS EMBRACE DOJ'S NEW DEFINITION OF WILLFULNESS FOR FALSE STATEMENT PROSECUTIONS?

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Among the most sweeping tools in the Department of Justice's (DOJ) vast arsenal for prosecuting criminal activity is the false statements statute, codified at 18 U.S.C. § 1001. Under § 1001, it is a felony to "knowingly and willfully" make a material false statement in any matter within the jurisdiction of the federal government. The law is incredibly broad and can apply to false statements given to federal agents who ask questions during the execution of a search warrant, or made in paperwork submitted with a government contract or passport application. The U.S. Supreme Court has even upheld convictions of individuals under § 1001 for giving agents a false "exculpatory no," merely denying the wrongdoing of which they were suspected.¹

In recent months, DOJ has changed its position on the level of proof necessary to convict an individual for making a false statement. In several cases involving 18 U.S.C. § 1035, which is analogous to § 1001 and prohibits "knowingly and willfully" making false statements involving a federal health benefit program, the government has conceded that in order to establish a defendant made a false statement "willfully," it must prove that the defendant knew that his conduct was unlawful. Previously, DOJ had argued that to establish the defendant acted "knowingly and willfully," the government need only prove that he acted deliberately and with knowledge that the statement was false.

On March 10, 2014, DOJ filed two concurrent briefs in opposition to petitions for writs of certiorari in *Ajoku v. United States* and *Russell v. United States*,² acknowledging that the correct interpretation of "willfully" under § 1035 and, by extension, under § 1001, is the one articulated by the Supreme Court in *Bryan v. United States*.³ In *Bryan*, the Court affirmed the petitioner's conviction for "willfully" dealing in firearms without a license, holding that, at least with criminal statutes that are not "highly technical," the requirement that a person act "willfully" is met by proof that he understood that his conduct is "unlawful."⁴

Ajoku involved a registered nurse who was hired as a nominal "exemptee" for a California medical supply business and who falsely certified that he was supervising the company's provision of prescription medical supplies. In fact, the defendant was working other jobs and not performing any services for the medical supplier. He was convicted of making false statements in violation of § 1035, and he appealed to the U.S. Court of Appeals for the Ninth Circuit in part on the basis of the district court's instruction to the jury that it should find he acted "knowingly and willfully" if he acted "deliberately and with knowledge" that the

¹ See *Brogan v. United States*, 522 U.S. 398 (1997).

² See *Ajoku*, 134 S. Ct. 1872 (Mem.) (2014) (No. 13-7264), and *Russell*, 134 S. Ct. 1872 (Mem.) (No. 13-7357).

³ 524 U.S. 184 (1998).

⁴ *Id.* at 193.

charged statements were materially false.⁵ The defendant argued, relying on *Bryan*, that the government should have been required to prove not only that his statements were false, but also that he “acted with knowledge that his conduct was unlawful.”⁶ The court of appeals affirmed the defendant’s conviction, holding that the district court properly instructed the jury that the government “was required only to show that Ajoku’s statements were made deliberately and with knowledge that the statements were untrue or the documents were false.”⁷

Opposing Ajoku’s petition for certiorari, the government announced that it had reversed its position in the lower courts and “[u]pon further consideration . . . now agrees that the correct interpretation of ‘willfully’ in § 1035 is the one articulated in *Bryan*”⁸ Citing *Bryan*, the government stated that “[t]o carry this burden, the government need not show that the defendant knew about the specific provision he is charged with violating or prove that he disregarded . . . a known legal obligation. . . . It is sufficient if the defendant was aware that the charged conduct was, in a general sense, in violation of the law.”⁹ The government added that its new position should apply to prosecutions for false statements under both §§ 1035 and 1001.¹⁰

In *Russell*, the defendant was convicted of filing false statements about his employment status when applying for indigent health benefits offered by the State of Maine. Russell argued on appeal that the district court erroneously instructed the jury that “a false statement is made knowingly and willfully if Rodney Russell knew it was false or demonstrated a reckless disregard for the truth with a conscious purpose to avoid learning the truth.”¹¹ The First Circuit concluded that the district court properly instructed the jury on this element of § 1035, relying upon the Ninth Circuit’s decision in *Ajoku* to hold that “the ‘willfulness’ element does not require the government to prove that the defendant knew it was a crime to make the particular false statement.”¹² Russell, like Ajoku, petitioned the Supreme Court for review. Articulating the same evolving position it had expressed in *Ajoku*, the government wrote that “although First Circuit precedent supported the position the government took below, the government now agrees that the general criminal-law interpretation of ‘willfully’ articulated in *Bryan* should govern in the context of Sections 1001 and 1035.”¹³ The government acknowledged that its prior position conflated intent with knowledge and thus neglected to give the term “willfully” independent meaning.¹⁴ “The need to give the term ‘willfully’ some independent effect thus further confirms that, in the context of Sections 1001 and 1035, it should be interpreted to require proof that the defendant knew his conduct was unlawful.”¹⁵ In both *Ajoku* and *Russell*, the Court granted the petitions for certiorari, vacated the judgments, and remanded the cases in light of the government’s changed position.¹⁶

A third case in which the government has expressed its newfound position is *Natale v. United States*,¹⁷ where the defendant argued a slightly different interpretation of the intent requirement of § 1035. In

⁵ *United States v. Ajoku*, 718 F.3d 882, 890 (9th Cir. 2013), vacated, 134 S. Ct. 1872 (Mem.) (2014).

⁶ Brief for Defendant at 8, *Ajoku v. United States*, 134 S. Ct. 1872 (2014) (No. 13-7264).

⁷ 718 F.3d at 890.

⁸ Brief for United States at 10, *Ajoku*.

⁹ *Id.* at 13 (citing *Bryan* at 189-91, 193-96, 198-99).

¹⁰ *Id.* at 10.

¹¹ *United States v. Russell*, 728 F.3d 23, 31 (1st Cir. 2013), vacated, 134 S. Ct. 1872 (Mem.) (2014).

¹² *Id.* at 32.

¹³ Brief for United States at 10, *Russell v. United States*, 134 S. Ct. 1872 (2014) (No. 13-7264).

¹⁴ *Id.*

¹⁵ *Id.* at 11.

¹⁶ See *Ajoku*, 134 S. Ct. 1872 (Mem.) (2014), vacating 718 F.3d 882 (9th Cir. 2013); *Russell*, 134 S. Ct. 1872 (Mem.) (2014), vacating 728 F.3d 23 (1st Cir. 2013).

¹⁷ 134 S. Ct. 1875 (Mem.) (2014).

Natale, the defendant was convicted of making false statements for misrepresenting cardiac procedures he performed as being more complex—and more expensive—than they actually were. The district court instructed the jury on § 1035 that “an act is done willfully if done voluntarily and intentionally and with intent to do something which the law forbids.”¹⁸ Although the defendant did not object to this instruction when given, on appeal he argued the instruction was erroneous because § 1035 requires a specific intent to deceive. Noting that Congress did not include such language in the statute, and observing that most courts had not found such a requirement when interpreting similarly-worded statutes, including § 1001, the Seventh Circuit rejected the defendant’s argument and upheld the jury instruction.¹⁹

In his petition for a writ of certiorari, Natale argued that the court of appeals’ decision read “willfulness” out of the statute and would criminalize any inaccurate statement made in a matter involving a federal health benefit.²⁰ The government countered that the jury instruction approved by the Seventh Circuit required the jury to find not only that the defendant made his false statements “knowingly,” but also that he made them “with the intent to do something the law forbids.”²¹ Repeating its new exposition of §§ 1035 and 1001, the government endorsed the district court’s jury instruction as accurately stating the standard for intent.²²

The Justice Department has updated its Criminal Tax Manual to alert prosecutors to the arguments it made in *Ajoku, et al.*, and instruct them, when considering charges under § 1001 or § 1035, to “proceed accordingly.”²³ This notice in the Tax Manual references a memorandum dated March 31, 2014, providing similar guidance to line prosecutors. However, to date, DOJ has not updated its Criminal Resource Manual, a document utilized by United States Attorneys and other DOJ enforcement personnel. DOJ should promptly institutionalize its new definition of “willfully” under §§ 1001 and 1035 by updating the Criminal Resource Manual, as it has done with the Criminal Tax Manual.

The significance of the government’s pulling back on its more aggressive interpretation of the willfulness requirement of §§ 1001 and 1035 is difficult to predict. It already has been DOJ’s stated policy not to prosecute individuals for an “exculpatory no” when they merely falsely deny the wrongdoing with which they are confronted,²⁴ and it is uncertain how many false statement prosecutions are brought where the defendant lacks “willfulness” as DOJ now defines it. Moreover, most prosecutions under § 1035 presumably involve false statements concerning medical necessity, misrepresenting a service provided, or certifying to a service not provided, in which cases it should be fairly easy for the government to prove knowledge by the defendant that his conduct was unlawful.

Nevertheless, it is significant any time DOJ takes a more measured approach to the prosecution of particular crimes, and even more so with a provision as sweeping as § 1001. Its refined definition of “willfully” will give defense counsel a more meaningful opportunity to argue that prosecutors should not charge their clients for making false statements because their clients lacked the requisite intent. That approach may be especially effective in cases of uncounseled interviews by government agents and with unsophisticated clients who may not appreciate the wrongfulness of their conduct when, for example, preparing paperwork with misinformation that is submitted to the government. At a minimum, the higher standard for intent under §§ 1001 and 1035 will require prosecutors to calculate a greater degree of litigation risk into their charging decisions and plea negotiations.

¹⁸ *United States v. Natale*, 719 F.3d 719, 732 n.4 (7th Cir. 2013), cert. denied 134 S. Ct. 1875 (2014).

¹⁹ See *id.* at 740-42.

²⁰ Brief for Petitioner at 14, 20, *Natale v. United States*, 134 S. Ct. 1375 (2014) (No. 13-744).

²¹ Brief for United States at 9, *Natale*.

²² *Id.* at 12.

²³ *Id.*

²⁴ *Id.* at § 916; United States Attorney’s Manual at § 9-42.160.

Still, it remains to be seen whether courts will adopt DOJ's heightened standard for proving willfulness under §§ 1001 and 1035. The Second and Third Circuits have previously held that § 1001 requires proof that the defendant not only knew that the statement he was making was false, but also that his conduct was unlawful.²⁵ The Seventh Circuit apparently did as well in *Natale*, when it approved the district court's jury instruction,²⁶ a decision left undisturbed when the Supreme Court denied certiorari. However, the First, Fourth, Fifth, Eighth, Ninth and Tenth Circuits have applied the more relaxed standard formerly advocated by the government.²⁷

What happened on remand in *Russell* may be instructive. The First Circuit accepted the government's position "*for purposes of this case,*" and concluded that the district court thus erred in not instructing the jury "that the government must prove 'bad purpose' to obtain a conviction."²⁸ Accordingly, after *Russell*, the force of the court's earlier holding in *Gonsalves*, certainly seems in doubt.²⁹

In sum, the Justice Department's new definition of "willfully" in the context of prosecutions for false statements under 18 U.S.C. §§ 1001 and 1035 will create new opportunities for criminal targets and defendants to argue to prosecutors and courts that they did not have the requisite intent to "knowingly and willfully" make false statements in violation of those criminal provisions. Nevertheless, it remains to be seen whether the application of the higher burden of proof on the element of intent will result in fewer prosecutions and convictions under these statutes.

²⁵ See, e.g., *United States v. Starnes*, 583 F.3d 196, 211-12 (3d Cir. 2009) (holding that "willfulness" requires "knowledge of the general unlawfulness of the conduct at issue"); *United States v. Whab*, 355 F.3d 155, 160 (2d Cir. 2004) (approving jury instructions that "clearly charged the jury that, in order to find that defendant acted 'willfully' under § 1001, the Government was required to show that he acted with a purpose to do something the law forbids, and with awareness of the generally unlawful nature of his actions").

²⁶ See note 15, *supra*.

²⁷ See, e.g., *United States v. Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006) ("Willfulness . . . means nothing more in this context than that the defendant knew that his statement was false when he made it . . ."); *United States v. Daughtry*, 48 F.3d 829 (4th Cir.), vacated on other grounds, 516 U.S. 984 (1995), reinstated in relevant part, 91 F.3d 675 (1996); *United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990); *United States v. Hildebrandt*, 961 F.2d 116, 118 (8th Cir. 1992); *United States v. Tatoyan*, 474 F.3d 1174, 1182 (9th Cir. 2007); *Walker v. United States*, 192 F.2d 47, 49 (10th Cir. 1951).

²⁸ *United States v. Russell*, No. 12-1315 (1st Cir. May 20, 2014) (emphasis added).

²⁹ *Gonsalves*, *supra* note 27; *Ajoku*, on remand to the Ninth Circuit, remains under consideration.