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MATERIALITY: AN ELEMENT OF 18 U.S.C. § 1001 AND A QUESTION FOR THE JURY

I. INTRODUCTION

In the last few years the federal government has intensified its efforts to reduce fraudulent practices in the area of competition for government contracts.¹ A favorite weapon of the government in prosecuting procurement fraud is 18 U.S.C. § 1001.² This statute penalizes the concealment of material facts and the making of false statements within the jurisdiction of any department or agency of the federal government.³ Most federal circuit courts of appeals also require that false statements be material to constitute a violation of section 1001.⁴ However, the circuit courts are split on whether materiality is an issue of law or fact. A majority require that the question of materiality under section 1001 be decided by the court as a question of law,⁵ but a minority maintain that materiality should be decided by the trier of fact.⁶

1. Shirk, Greenburg & Dawson, *Truth or Consequences: Expanding Civil and Criminal Liability For the Defective Pricing of Government Contracts*, 37 CATH. U.L. REV. 935, 935-39 (1988).

2. *Id.* at 969-70. Section 1001 reads in pertinent part:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1988).

3. *See* 18 U.S.C. § 1001 (1988).

4. *United States v. Corsino*, 812 F.2d 26, 30 (1st Cir. 1987); *United States v. Brantley*, 786 F.2d 1322, 1327 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986); *United States v. Greber*, 760 F.2d 68, 73 (3d Cir.), *cert. denied*, 474 U.S. 988 (1985); *United States v. Lopez*, 728 F.2d 1359, 1362 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984); *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983); *United States v. Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *United States v. Voorhees*, 593 F.2d 346, 349 (8th Cir.), *cert. denied*, 441 U.S. 936 (1979); *United States v. Valdez*, 594 F.2d 725, 728 (9th Cir. 1979); *United States v. Beer*, 518 F.2d 168, 171 (5th Cir. 1975); *Freidus v. United States*, 223 F.2d 598, 601 (D.C. Cir. 1955).

5. *Corsino*, 812 F.2d at 31 n.3 (First Circuit); *Brantley*, 786 F.2d at 1327 (Seventh Circuit); *Greber*, 760 F.2d at 73 (Third Circuit); *Lopez*, 728 F.2d at 1362 n.4 (Eleventh Circuit); *Abadi*, 706 F.2d at 180 (Sixth Circuit); *United States v. Baker*, 626 F.2d 512, 514 n.4 (5th Cir. 1980); *United States v. Adler*, 623 F.2d 1287, 1292 (8th Cir. 1980); *United States v. Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); *United States v. Ivey*, 322 F.2d 523, 529 (4th Cir.), *cert. denied*, 375 U.S. 953 (1963); *Weinstock v. United States*, 231 F.2d 699, 703 (D.C. Cir. 1956).

6. *Irwin*, 654 F.2d at 677 n.8 (Tenth Circuit); *Valdez*, 594 F.2d at 729 (Ninth Circuit).

In *Sinclair v. United States*,⁷ the United States Supreme Court stated that materiality should be decided by a court as a question of law (the *Sinclair* rule).⁸ However, *In re Winship*⁹ requires that every element of a criminal offense be decided by the trier of fact (the *Winship* rule).¹⁰ If materiality is an "element" of a section 1001 offense, then both of these rules apply to the materiality requirement of section 1001.¹¹ The convergence and incompatibility of these two rules on the issue of materiality in section 1001 accounts for the aforementioned circuit split.¹²

This Comment summarizes the current law regarding the section 1001 materiality question, and determines whether the *Sinclair* rule or the *Winship* rule controls. Section II of this Comment contains a brief description of section 1001 and an explanation of *Sinclair* and *Winship*. The Comment then examines how each federal circuit court reconciles the conflicting precedent, and how each decides the section 1001 materiality question. Section III states the problem presented by the clash of these two cases on the materiality question.

Section IV examines whether *Sinclair* and *Winship* are actually in conflict by exploring the question of whether materiality is an "element" of a section 1001 offense. Concluding that materiality is an element and therefore both *Sinclair* and *Winship* apply to the section 1001 materiality question, this Comment discusses the prospect of treating the *Sinclair* rule as an exception to the *Winship* rule. Additionally, this Comment addresses whether recent United States Supreme Court decisions require that materiality be treated as a question of law. The Comment concludes that, to the extent proof of materiality is required to convict under section 1001, materiality must be treated as a question of fact.

II. BACKGROUND

A. *The Statute: 18 U.S.C. § 1001 and the Materiality Question*

Section 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully fal-

7. 279 U.S. 263 (1929).

8. *Id.* at 298-99.

9. 397 U.S. 358 (1970).

10. *Id.* at 361-64. See *infra* notes 60-74 and accompanying text for a discussion of the *Winship* rule.

11. See *Winship*, 397 U.S. at 361-64. See also *infra* notes 60-74 and accompanying text for a discussion of the *Winship* rule. See also *Sinclair*, 279 U.S. at 298-99.

12. See *supra* notes 5-6 and accompanying text. See also *infra* notes 79-134 and accompanying text for a discussion of the source of the rule for each of the federal circuits.

sifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.¹³

The statute proscribes both the concealing of material facts, and the making of false representations within the jurisdiction of the federal government.¹⁴ This statute was "designed 'to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described.'"¹⁵ Congress enacted the statute over 100 years ago to penalize fraudulent monetary claims against the government.¹⁶ In 1934, Congress revised the statute to reach non-monetary frauds.¹⁷

Section 1001 covers two distinct offenses.¹⁸ The first clause proscribes concealing material facts within the jurisdiction of the federal government.¹⁹ This clause explicitly requires that a concealed fact be "material" to constitute a violation of section 1001.²⁰ To be material, a fact must be capable of influencing or affecting a government function;²¹ however, the government does not actually have to be influenced.²² The second clause of section 1001 covers false representations made within the jurisdiction of the federal government.²³ Every federal circuit except the Second²⁴ has grafted a materiality requirement onto the second

13. 18 U.S.C. § 1001 (1988).

14. *Id.* See also *United States v. Tobon-Builes*, 706 F.2d 1092, 1096 (11th Cir. 1983).

15. *Tobon-Builes*, 706 F.2d at 1096 (quoting *United States v. Gilliland*, 312 U.S. 86, 92-93 (1941)).

16. *United States v. Beer*, 518 F.2d 168, 170 (5th Cir. 1975).

17. Act of June 18, 1934, Pub. L. No. 73-394, ch. 587, 48 Stat. 996; *United States v. Bramblett*, 348 U.S. 503, 507 (1955).

18. *United States v. Diogo*, 320 F.2d 898, 902 (2d Cir. 1963).

19. *Tobon-Builes*, 706 F.2d at 1096. To convict a defendant under section 1001 for concealment of a material fact, the government must prove the defendant had a duty to disclose the material fact at the time of the alleged concealment. *United States v. Irwin*, 654 F.2d 671, 678 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982). The duty to disclose usually arises from a statute, government regulation, or form. *Tobon-Builes*, 706 F.2d at 1096.

20. See 18 U.S.C. § 1001 (1988). See also *United States v. Silver*, 235 F.2d 375, 377 (2d Cir.), *cert. denied*, 352 U.S. 880 (1956).

21. *United States v. Lichenstein*, 610 F.2d 1272, 1278 (5th Cir.), *cert. denied sub nom. Bella v. United States*, 447 U.S. 907 (1980).

22. *Id.*

23. *Tobon-Builes*, 706 F.2d at 1096.

24. The Second Circuit concluded that no proof of the materiality of a false representation is required for a conviction under section 1001. *Silver*, 235 F.2d at 377. The Second Circuit based this decision on two factors. First, unlike the first clause of section 1001, which explic-

clause of section 1001.²⁵

Courts add the materiality requirement to section 1001 for two reasons. First, the statute is couched in very broad terms.²⁶ Therefore, courts require that false statements be material to ensure that trivial falsehoods are not prosecuted under section 1001.²⁷

Second, the courts hold, the statute was intended to protect government functions from the exploitation that might result from false statements.²⁸ No exploitation of government functions could result, the courts reason, from a false statement that is not capable of influencing a government agency's decision.²⁹ Thus, the courts conclude, the legislative purpose was to proscribe only material false statements.³⁰

The circuits are split as to who should decide whether a concealed fact or false representation is material. The Ninth and Tenth Circuits hold that the question is one of fact and should be decided by the trier of fact.³¹ All other circuits conclude that the materiality question is one of law and should therefore be decided by the court.³² The United States

itly covers the concealment of a "material fact," the second clause contains no such materiality requirement. *Id.* Thus, the Second Circuit stated that "[w]e suggest that it is of doubtful wisdom, not to say potentially dangerous, to import conditions into a penal statute which appear to have been studiously omitted by the lawmakers themselves." *Id.* Second, the court held that although the prohibition of the concealment of facts could be limited to the concealment of material facts, all false statements should be punished because even an immaterial false statement could interfere with an investigation into fraud upon the government. *Id.*

25. *United States v. Corsino*, 812 F.2d 26, 30 (1st Cir. 1987); *United States v. Brantley*, 786 F.2d 1322, 1327 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986); *United States v. Greber*, 760 F.2d 68, 73 (3d Cir.), *cert. denied*, 474 U.S. 988 (1985); *United States v. Lopez*, 728 F.2d 1359, 1362 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984); *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983); *United States v. Irwin*, 654 F.2d 671, 677 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *United States v. Valdez*, 594 F.2d 725, 728 (9th Cir. 1979); *United States v. Voorhees*, 593 F.2d 346, 349 (8th Cir.), *cert. denied*, 441 U.S. 936 (1979); *United States v. Beer*, 518 F.2d 168, 171 (5th Cir. 1975); *Freidus v. United States*, 223 F.2d 598, 601 (D.C. Cir. 1955).

26. *Beer*, 518 F.2d at 170.

27. *Id.* at 170-71.

28. *Freidus*, 223 F.2d at 601. For example, in *United States v. Valdez*, the defendants were convicted under section 1001 for preparing false employment letters which were submitted to the United States Consular authorities by Mexican aliens seeking immigrant visas to enter the United States. 594 F.2d 725, 727-28 (9th Cir. 1979). Similarly, in *United States v. Abadi*, the appellant was convicted of violating section 1001 because he submitted fraudulent medical bills to the Medicaid program. 706 F.2d 178, 179 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983).

29. *See, e.g., Freidus*, 223 F.2d at 601-02.

30. *See, e.g., id.* at 601.

31. *Irwin*, 654 F.2d at 677 n.8 (Tenth Circuit); *Valdez*, 594 F.2d at 729 (Ninth Circuit).

32. *Corsino*, 812 F.2d at 31 n.3 (First Circuit); *Brantley*, 786 F.2d at 1327 (Seventh Circuit); *Greber*, 760 F.2d at 73 (Third Circuit); *Lopez*, 728 F.2d at 1362 n.4 (Eleventh Circuit); *Abadi*, 706 F.2d at 180 (Sixth Circuit); *United States v. Baker*, 626 F.2d 512, 514 n.4 (5th Cir. 1980); *United States v. Adler*, 623 F.2d 1287, 1292 (8th Cir. 1980); *United States v. Bernard*,

Supreme Court has refused to settle the controversy.³³

B. *Inconsistent Supreme Court Precedent*

To understand this conflict, it is necessary to examine two distinct lines of Supreme Court cases and how they converge on the section 1001 materiality question.

1. The *Sinclair* line of cases: materiality is a question of law

The first line of cases evolved from *Sinclair v. United States*.³⁴ In *Sinclair*, the defendant was convicted of violating 2 U.S.C. § 192³⁵ because he refused to answer questions of a senate committee investigating the Teapot Dome scandal.³⁶ To sustain a conviction under section 192, the question the defendant refused to answer had to be pertinent to the issue the committee was investigating.³⁷ On appeal the defendant argued that the trial court had erred in deciding the issue of pertinency as a question of law, instead of submitting it to the jury.³⁸

The United States Supreme Court affirmed the conviction.³⁹ The Court analogized pertinency to the questions of relevancy and materiality.⁴⁰ The Court stated that materiality, as an element of perjury, is a question of law.⁴¹ Similarly, the Court stated that relevancy was traditionally a question of law.⁴² The Court reasoned that because materiality and relevancy were questions of law, it would be "incongruous" to leave the question of pertinency to the jury.⁴³

384 F.2d 915, 916 (2d Cir. 1967); *United States v. Ivey*, 322 F.2d 523, 529 (4th Cir.), *cert. denied*, 375 U.S. 953 (1963); *Weinstock v. United States*, 231 F.2d 699, 703 (D.C. Cir. 1956).

33. *Greber v. United States*, 474 U.S. 988 (1985) (White, J., dissenting from denial of certiorari).

34. 279 U.S. 263 (1929).

35. 2 U.S.C. § 192 (1928) provides in pertinent part:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House [of Congress], . . . willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Id.

36. *Sinclair*, 279 U.S. at 284, 288.

37. *Id.* at 284-85 (citing 2 U.S.C. § 192 (1928)).

38. *Id.* at 291.

39. *Id.* at 299.

40. *Id.* at 298-99.

41. *Id.* at 298.

42. *Id.*

43. *Id.* at 298-99.

The question of pertinency under section 1[9]2 was rightly decided by the court as

Recently, in *Kungys v. United States*,⁴⁴ the Supreme Court reiterated *Sinclair* dicta that "the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court."⁴⁵ In *Kungys*, the petitioner had applied for a visa to immigrate to the United States.⁴⁶ The visa was issued in 1948, and Mr. Kungys came to the United States.⁴⁷ He was naturalized as a United States citizen in 1954.⁴⁸ In 1982, the United States Justice Department filed a complaint pursuant to 8 U.S.C. § 1451,⁴⁹ to denaturalize and deport Mr. Kungys.⁵⁰ The complaint alleged that, in his visa application, Mr. Kungys gave false information regarding his date and place of birth, his wartime occupation, and his wartime residence.⁵¹ Although the trial court found that Kungys made these false representations, it held they were not material within the meaning of section 1451(a).⁵² Therefore, the trial court entered judgment for Mr. Kungys.⁵³ The Third Circuit Court of Appeals reversed

one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law. And the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court.

The reasons for holding relevancy and materiality to be questions of law in cases such as those above referred to apply with equal force to the determination of pertinency arising under section 1[9]2. The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be "pertinent to the question under inquiry." It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury.

Id. (citations omitted). The Supreme Court also cited three cases for the proposition that materiality is a question of law. *Id.* at 298 (citing *Carroll v. United States*, 16 F.2d 951 (2d Cir.), cert. denied, 273 U.S. 763 (1927); *United States v. Singleton*, 54 F. 488 (S.D. Ala. 1892); *Cothran v. State*, 39 Miss. 541 (1860)).

44. 485 U.S. 759 (1988).

45. *Id.* at 772 (quoting *Sinclair v. United States*, 279 U.S. 263, 298 (1929)).

46. *Id.* at 764.

47. *Id.*

48. *Id.*

49. 8 U.S.C. § 1451(a) (1988). Section 1451(a) provides:

(a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation

Id.

50. *Kungys*, 485 U.S. at 764.

51. *Id.*

52. *Id.* at 764-65.

53. *Id.* at 766 (citing *United States v. Kungys*, 571 F. Supp. 1104 (D.N.J. 1983), *rev'd*, 793 F.2d 516 (3d Cir. 1986), *rev'd*, 485 U.S. 759 (1988)).

the trial court and found that Mr. Kungys' misrepresentations regarding the date and place of his birth were material under section 1451(a).⁵⁴ The United States Supreme Court reversed the Third Circuit and held that Mr. Kungys' misrepresentations were not material.⁵⁵

The Court also considered whether materiality under section 1451(a) is an issue of law, which the Court itself could decide, or one of fact, which had to be decided by the trial court.⁵⁶ In deciding that the question was one of law, the Court cited *Sinclair* for the proposition that the issue of the materiality of a false representation, when an element of a perjury offense, is a question of law.⁵⁷ Moreover, the Court analogized materiality under section 1451(a) to materiality under 18 U.S.C. § 1001.⁵⁸ The Court quoted a Sixth Circuit opinion that materiality under section 1001 was a question of law because the materiality of a false statement had to be determined through interpretation of substantive law.⁵⁹

2. *In re Winship*: every element of a crime must be proven beyond a reasonable doubt to the trier of fact

In *In re Winship*,⁶⁰ the Supreme Court held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."⁶¹ In *Winship*, a judge in an adjudicatory hearing found that a twelve year-old boy had stolen \$112 from a woman's pocket-book.⁶² The judge admitted that he was not convinced beyond a reasonable doubt that the juvenile had stolen the money; however, he

54. *United States v. Kungys*, 793 F.2d 516, 533 (3d Cir. 1986), *rev'd*, 485 U.S. 759 (1988). The Third Circuit stated: "[H]ad [Kungys] told the truth at the time he applied for his citizenship, the discrepancies between the truth and his visa materials would have resulted in either a field investigation or an outright denial of the petition." *Id.*

55. *Kungys*, 485 U.S. at 774. The Court stated: "[W]hat is relevant is what would have ensued from official knowledge of the misrepresented fact (in this case Kungys' true date and place of birth), not what would have ensued from official knowledge of inconsistency between a posited assertion of the truth and an earlier assertion of falsehood." *Id.* at 775.

56. *Id.* at 772.

57. *Id.* (citing *Sinclair v. United States*, 279 U.S. 263, 298 (1929)).

58. *Id.* (citing *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983)).

59. *Id.* (quoting *United States v. Abadi*, 706 F.2d 178 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983)). For a discussion of the impact of the Court's statement that materiality under section 1001 is a question of law, and of its use of *Abadi* to support that proposition, see *infra* notes 268-78 and accompanying text.

60. 397 U.S. 358 (1970).

61. *Id.* at 364.

62. *Id.* at 359-60.

was convinced by a preponderance of the evidence.⁶³ This decision was affirmed by both the New York Supreme Court and the New York Court of Appeals.⁶⁴

The United States Supreme Court reviewed the case to determine whether the Due Process Clause of the United States Constitution required that guilt be proven beyond a reasonable doubt.⁶⁵ The Court concluded that the reasonable-doubt standard was constitutionally mandated for a number of reasons.⁶⁶ First, the Court observed the requirement that guilt be established beyond a reasonable doubt dated back to the early years of the United States, and was almost unanimously accepted in common-law jurisdictions.⁶⁷ Second, the Court defended the standard's importance as a means of reducing the risk of erroneous convictions.⁶⁸ Similarly, the Court reasoned the standard provided substance to the foundational "presumption of innocence."⁶⁹ Third, the Court concluded that requiring proof beyond a reasonable doubt expressed a value judgment of our society—that the cost of the unavoidable factual errors in the criminal justice system should not be born by the defendant.⁷⁰ Fourth, the Court asserted that the reasonable doubt stan-

63. *Id.* at 360. At that time, New York state law required facts at an adjudicatory hearing to be established by a preponderance of the evidence. *Id.* (citing N.Y. FAM. CT. ACT § 744(b) (McKinney 1983)).

64. *Id.*

65. *Id.* at 361.

66. *Id.* at 362.

67. *Id.* at 361.

68. *Id.* at 363. The Court stated that:

"Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."

Id. at 364 (quoting Dorsen & Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 FAM. L.Q. 1, 26 (No. 4 1967)).

69. *Id.* at 363.

70. *Id.* at 363-64. The Court noted:

"There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt"

Id. at 364 (quoting Dorsen & Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 FAM. L.Q. 1, 26 (No. 4 1967)).

Justice Harlan stated in his *Winship* concurrence that:

[T]he trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions. In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous fac-

dard was necessary to ensure the public's respect for the legal system.⁷¹ The Court, reversing the New York Court of Appeals, held that the reasonable doubt standard is required during the adjudicatory stage of a delinquency proceeding.⁷²

Subsequently, the Court interpreted *Winship*, and due process, to require every "element" of a criminal offense be proven beyond a reasonable doubt to the trier of fact.⁷³ Although *Winship* dealt with the due process requirements in a state court proceeding, it is also the decisive case on the burden of proof in federal prosecutions.⁷⁴

In summary, *Winship* requires every element of a criminal offense be

tual determination can result in a judgment for the defendant when the true facts justify a judgment in the plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.

....

Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each. . . .

....

In a criminal case . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. . . .

....

In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

Id. at 370-72 (Harlan, J., concurring).

71. *Id.* at 364. The standard is required, the Court said, to assure the public that innocent people are not being condemned, and to assure any given individual that the government may not convict him or her of a crime without convincing the *proper factfinders* beyond a reasonable doubt. *Id.*

72. *Id.* at 368.

73. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (citing *In re Winship*, 397 U.S. 358, 364 (1970)). The *Jackson* Court stated:

Winship presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Id. at 316. Similarly, in both *Francis v. Franklin*, 471 U.S. 307 (1985) and *Sandstrom v. Montana*, 442 U.S. 510 (1979), the Court stated that "the Fourteenth Amendmen[t] require[s] that the state prove every element of a criminal offense beyond a reasonable doubt" (citations omitted). *Francis*, 471 U.S. at 309 (quoting *Sandstrom v. Montana*, 442 U.S. 510, 512 (1979)). The Court recently summarized this area of law:

A defendant charged with a serious crime has the right to have a jury determine his guilt or innocence, and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof. Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime.

Cabana v. Bullock, 474 U.S. 376, 384-85 (1986) (citations omitted).

74. *United States v. Taylor*, 693 F. Supp. 828, 830 n.4 (N.D. Cal. 1988). Therefore, this Comment refers to the *Winship* rule as the requirement that every element of a criminal offense must be proven beyond a reasonable doubt to the trier of fact. *Id.* ("For simplicity the court

proven beyond a reasonable doubt, to the trier of fact.⁷⁵ Since materiality is arguably an element of a section 1001 offense,⁷⁶ it must presumably be proven to the trier of fact. However, *Sinclair* requires a court to decide materiality as a question of law.⁷⁷ Thus, the cases are in conflict—whether a false statement or a concealed fact is material cannot be decided by the court as a matter of law and also be decided by the trier of fact.⁷⁸

C. *The Different Approaches of the Federal Circuit Courts in Determining Materiality Under Section 1001*

The federal circuit courts have treated the conflict between *Sinclair v. United States*⁷⁹ and *In re Winship*⁸⁰ in at least four different ways. First, the Ninth and Tenth Circuits have required that materiality be proven, beyond a reasonable doubt, to the trier of fact.⁸¹ Second, the Sixth Circuit treats materiality as a question of law and does not consider materiality to be an “element” of an offense as “element” is used in *Winship*.⁸² Thus, according to the Sixth Circuit, the *Sinclair* and *Winship* rules do not conflict.⁸³ Third, the Seventh Circuit considers materiality an “essential element” of a section 1001 offense;⁸⁴ nonetheless, it treats

shall refer to *Winship* as shorthand for the defendant’s argument that materiality is an element of perjury that must be determined by the jury”).

Winship itself implicitly requires that elements must be proven to the trier of fact, because the reasonable doubt standard cannot apply to a question of law. *United States v. Hausmann*, 711 F.2d 615, 617-18 (5th Cir. 1983) (evidentiary or factual burdens do not apply to questions of law).

75. *Winship*, 397 U.S. at 364.

76. See *infra* notes 150-228 and accompanying text.

77. *Sinclair*, 279 U.S. at 298.

78. Materiality cannot be decided as both a question of fact and a question of law for two reasons. First, “as a question of law, there cannot appropriately be any evidentiary or factual burden with respect to the issue of materiality. A question of law is by definition susceptible of only two answers: ‘yes,’ the requirements of legal principles are met or ‘no,’ they are not met.” *Hausmann*, 711 F.2d at 617-18 (quoting *United States v. Watson*, 623 F.2d 1198, 1202 (7th Cir. 1980)). Second, the trier of fact in a criminal case is often a jury. See, e.g., *United States v. Johnson*, 718 F.2d 1317 (5th Cir. 1983); *United States v. Irwin*, 654 F.2d 671 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *United States v. Valdez*, 594 F.2d 725 (9th Cir. 1979). If the jury decides the materiality question, the judge cannot also decide it.

79. 279 U.S. 263 (1929).

80. 397 U.S. 358 (1970).

81. *Irwin*, 654 F.2d at 677 n.8; *Valdez*, 594 F.2d at 729.

82. An element in the *Winship* sense is “every fact necessary to constitute the crime with which [the defendant] is charged.” *Winship*, 397 U.S. at 364.

83. *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983).

84. *United States v. Brantley*, 786 F.2d 1322, 1326 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986).

materiality as a question of law.⁸⁵ That court considers materiality an exception to the general rule that the existence of every element of a criminal offense be decided by the trier of fact.⁸⁶ Finally, a number of circuits simply follow the *Sinclair* rule that materiality is a question of law,⁸⁷ without even considering the impact of *Winship*.⁸⁸ The next four subsections discuss these four approaches to the section 1001 materiality question.

1. The Ninth and Tenth Circuit approach—materiality as an element is a jury question

In *United States v. Valdez*,⁸⁹ the Ninth Circuit announced that section 1001's materiality requirement should be decided by the trier of fact.⁹⁰ In *Valdez*, the appellants were convicted of violating 18 U.S.C. § 1001.⁹¹ They had prepared false employment letters for Mexican aliens who then used the letters to obtain immigration visas from the United States Consulate.⁹² On appeal, the appellants claimed that the district court had erred in treating the false statements' materiality as a question of law⁹³ and argued that the issue of materiality should have been submitted to the jury.⁹⁴

The Ninth Circuit agreed with the appellants' contention, stating: "Since it is an essential element, materiality, as with all other elements of the offense charged, must be determined by the jury."⁹⁵ However, the court held that in view of the overwhelming evidence of the materiality of the appellants' false statements, the district court's failure to submit

85. *Id.* at 1327.

86. *Id.*

87. *Sinclair*, 279 U.S. at 298-99; see also *supra* notes 34-59 and accompanying text for a discussion of *Sinclair*.

88. See *United States v. Corsino*, 812 F.2d 26, 30 (1st Cir. 1987); *United States v. Greber*, 760 F.2d 68, 73 (3d Cir.), *cert. denied*, 474 U.S. 988 (1985); *United States v. Lopez*, 728 F.2d 1359, 1362 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984); *United States v. Krause*, 507 F.2d 113, 118-19 (5th Cir. 1975); *United States v. Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); *United States v. Ivey*, 322 F.2d 523, 529 (4th Cir.), *cert. denied*, 375 U.S. 953 (1963); *Weinstock v. United States*, 231 F.2d 699, 703 (D.C. Cir. 1956). See *infra* notes 130-34 and accompanying text for a discussion of cases following *Sinclair*, without any additional reasoning, and which treat materiality as a question of law.

89. 594 F.2d 725 (9th Cir. 1979).

90. *Id.* at 729.

91. *Id.* at 727.

92. *Id.* The letters purported to offer the aliens jobs in the United States. *Id.* at 728.

93. *Id.*

94. *Id.*

95. *Id.* at 729.

the issue of materiality to the jury was harmless error.⁹⁶

In *United States v. Irwin*,⁹⁷ the Tenth Circuit held that "materiality is a factual question to be submitted to the jury with proper instructions like other essential elements of the offense."⁹⁸ In *Irwin*, the City of Delta hired Management Services Company (MSC), a trade name used by James Irwin,⁹⁹ as a consultant to help the City obtain federal funds to finance the development of an industrial park.¹⁰⁰ In the grant application, Irwin falsely stated that MSC received no compensation from the City for completing the application.¹⁰¹ Irwin was convicted of violating section 1001 because he wilfully made a material false representation within the jurisdiction of the federal government.¹⁰²

Irwin argued to the Tenth Circuit that the trial court had erred in submitting the materiality question to the jury.¹⁰³ However, the Tenth Circuit found that he had requested jury instructions on the question of materiality and had not objected to submission of that issue to the jury.¹⁰⁴ The court of appeals concluded that Irwin could not object to an alleged error that he invited.¹⁰⁵ The Tenth Circuit also announced its general rule—that materiality was a question of fact which had to be submitted to a jury.¹⁰⁶

96. *Id.* According to the Ninth Circuit, the letters were clearly material since an alien cannot receive a visa unless he or she is not likely to become a public charge. *Id.*

97. 654 F.2d 671 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

98. *Id.* at 677 n.8.

99. *Id.* at 674.

100. *Id.* Irwin was hired as a "grantsman." He was to research which grants were available to the city and do whatever was necessary to obtain the government funds. *Id.* at 674 n.4.

101. *Id.* at 675.

102. *Id.* (citing 18 U.S.C. § 1001 (1988)).

103. *Id.* at 673.

104. *Id.* at 677.

105. *Id.* The Tenth Circuit also concluded that testimony at trial established the materiality of the false statement because it showed that if Irwin had admitted he was being paid the government would have investigated the application. *Id.* at 678.

106. *Id.* at 677 n.8.

Defendant argues that the majority rule is that materiality is a question of law for the court in prosecutions under § 1001, citing *United States v. Haynie*, 568 F.2d 1091 (5th Cir.); *United States v. Beer*, 518 F.2d 168 (5th Cir.); *United States v. Bernard*, 384 F.2d 915 (2d Cir.) and *United States v. Ivey*, 322 F.2d 523 (4th Cir.), *cert. denied*, 375 U.S. 953, . . . and that the trial court erred here in submitting the issue to the jury. We are not persuaded that our procedure is wrong and remain convinced that materiality is a factual question to be submitted to the jury with proper instructions like other essential elements of the offense, unless the court rules, as a matter of law, that no submissible case is made out by the Government on the issue of materiality.

Id.

2. The Sixth Circuit approach—because materiality is not an element
Winship does not apply

In *United States v. Abadi*,¹⁰⁷ the Sixth Circuit decided that materiality under section 1001 should be decided by the court as a question of law.¹⁰⁸ Dr. Abadi was convicted under section 1001 for submitting fraudulent bills to the Medicaid program.¹⁰⁹ On appeal, Abadi argued that he had been denied his right to a jury trial because the district court decided that his false statements were material, instead of submitting the materiality question to the jury.¹¹⁰

The Sixth Circuit stated that, although materiality rests on a factual showing, the ultimate determination turns on the interpretation of substantive law.¹¹¹ Since the court is the interpreter of substantive law, a court must decide the materiality of a false statement.¹¹² Moreover, the Sixth Circuit reasoned that *Winship* did not require that materiality be proven beyond a reasonable doubt to the trier of fact because the materiality of a false statement was not an element of a crime charged under the second clause of section 1001.¹¹³ Rather, said the Sixth Circuit, the materiality requirement was a judicially created device to limit application of section 1001.¹¹⁴

3. The Seventh Circuit approach—materiality is an exception to the
general rule that every element must be proven beyond a
reasonable doubt to the trier of fact

In *United States v. Brantley*,¹¹⁵ the Seventh Circuit held that materiality should be decided by the court as a question of law.¹¹⁶ In *Brantley*, the appellant was co-founder and president of a community youth organization.¹¹⁷ The appellant coerced some of his employees into lying on

107. 706 F.2d 178 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983).

108. *Id.* at 180.

109. *Id.* at 179.

110. *Id.* Abadi also claimed: 1) there was insufficient evidence to support his conviction; 2) his case was prejudiced by remarks made by the government attorney; and 3) the trial judge abused her discretion by admitting evidence that suggested the appellant had violated federal narcotics laws. *Id.*

111. *Id.* at 180.

112. *Id.*

113. *Id.* at 180 n.2.

114. *Id.* This method of distinguishing *Winship* applies only to the second clause of section 1001 because the first clause explicitly requires that any concealed fact prosecuted under the statute be material. 18 U.S.C. § 1001 (1988).

115. 786 F.2d 1322 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986).

116. *Id.* at 1327.

117. *Id.* at 1324.

applications for a government-assisted on-the-job training program.¹¹⁸ Under the training program, federal funds were used to reimburse employers for fifty percent of the cost of training applicants.¹¹⁹ The Secretary of Labor allocated the funds to prime sponsors of the program whose applications had been approved by a regional administrator.¹²⁰ Thus, any false statements that could cause funds to be disbursed were capable of influencing a federal agency and were material.¹²¹ Because the applicants were not actually eligible for the program, the trial court held that their statements were material,¹²² and the jury convicted the appellant of violating section 1001.¹²³

On appeal, the appellant argued that the materiality question should have been submitted to the jury as a question of fact.¹²⁴ The Seventh Circuit concluded that although materiality was an essential element of a section 1001 offense, it was nonetheless a question of law.¹²⁵ First, the court noted, *Sinclair* held that the materiality of perjured statements was a question of law.¹²⁶ Second, the court observed that *Sinclair* was still good law.¹²⁷ Third, the court stated that the majority of the circuits consider the materiality question under section 1001 to be a question of law.¹²⁸ Therefore, the court reasoned, since the Supreme Court and the majority of federal circuit courts consider materiality to be a question of law, the materiality question must be an exception to the general rule

118. *Id.* at 1325-26.

119. *Id.* at 1325 n.1 (citing Comprehensive Employment and Training Act, 29 U.S.C. §§ 801-999, *repealed by* Job Training Partnership Act, Pub. L. No. 97-300, § 184(a), 96 Stat. 1322, 1357-58 (1982)).

120. *Id.* at 1326 (citing Comprehensive Employment and Training Act, 29 U.S.C. §§ 801-999, *repealed by* Job Training Partnership Act, Pub. L. No. 97-300, § 184(a), 96 Stat. 1322, 1357-58 (1982)).

121. *Id.* at 1327.

122. *Id.*

123. *Id.* at 1326.

124. *Id.*

125. *Id.* at 1327.

Despite the objections of Brantley, the trial court refused to submit the question of materiality to the jury. In so doing, the trial court ruled consistently with the law in this Circuit This exception to the general rule that the Government must prove every element of a charged offense beyond a reasonable doubt evolved from *Sinclair v. United States* The *Sinclair* Court held that the question as to materiality of false testimony charged as perjury is a question of law. . . . Because *Sinclair* continues to be good law, and because the greater weight of authority is consistent with the decision of the trial court, we persist in holding that materiality is a question of law to be decided by the judge in prosecutions under 18 U.S.C. § 1001.

Id. (citations omitted).

126. *Id.* (citing *Sinclair v. United States*, 279 U.S. 263, 298 (1929)).

127. *Id.*

128. *Id.*

that the existence of each element is determined by the trier of fact.¹²⁹

4. Federal circuit courts that ignore *Winship* and hold that materiality is a question of law

The rest of the federal circuit courts of appeals treat the section 1001 materiality question as one of law.¹³⁰ The rule in these circuits, except in the Eighth Circuit,¹³¹ is rooted in the *Sinclair* Court's statement that materiality is a question of law.¹³² That is, each circuit, except the Eighth Circuit, supports its own rule with a cite to *Sinclair*, or a case that cites to *Sinclair*.¹³³ However, these circuits do not explicitly consider the im-

129. *Id.*

130. *United States v. Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States v. Greber*, 760 F.2d 68, 73 (3d Cir.), *cert. denied*, 474 U.S. 988 (1985); *United States v. Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984); *United States v. Hicks*, 619 F.2d 752, 758 (8th Cir. 1958); *United States v. Krause*, 507 F.2d 113, 118-19 (5th Cir. 1975); *United States v. Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); *United States v. Ivey*, 322 F.2d 523, 529 (4th Cir.), *cert. denied*, 375 U.S. 953 (1963); *Weinstock v. United States*, 231 F.2d 699, 703 (D.C. Cir. 1956). See *infra* note 133 and accompanying text for a discussion of the rule in these circuits.

131. The source of the Eighth Circuit rule cannot be traced back to *Sinclair*, or any case that addresses the issue of who should determine the materiality of a statement. Rather, it resulted from a misreading of Ninth Circuit case law.

The Eighth Circuit rule—materiality is a question of law—is rooted in *United States v. East*, 416 F.2d 351 (9th Cir. 1969). In *East*, the defendant was convicted under the false statement clause of section 1001. *Id.* at 351-52. On appeal, the defendant argued that the trial court had erred in not instructing the jury that the defendant's statement needed to be material to establish a violation of section 1001. *Id.* at 353. The Ninth Circuit stated: "The [trial] court then did not fully or accurately inform the jury as to the elements of the offenses charged in the indictment. No prejudice resulted, however, since under the circumstances of this case the materiality of the representations was established as a matter of law." *Id.* at 355.

When the Eighth Circuit cited *East* in *United States v. Jones*, 464 F.2d 1118 (8th Cir. 1972), *cert. denied*, 409 U.S. 1111 (1973), it subtly changed the meaning of the above quoted phrase. The *Jones* Court cited *East* for the proposition that the materiality of a statement need not be determined by the jury because "[t]hese are legal issues and no prejudice resulted because [in *Jones*] the trial judge did not submit them to the jury." *Jones*, 464 F.2d at 1124 (citing *United States v. East*, 416 F.2d 351, 355 (9th Cir. 1969)). A subsequent Eighth Circuit case cited *Jones* for the proposition that "[t]he question of materiality of a false statement or representation in § 1001 context is one of law . . ." *United States v. Hicks*, 619 F.2d 752, 758 (8th Cir. 1980) (citing *United States v. Jones*, 464 F.2d 1118, 1123-24 (8th Cir. 1972), *cert. denied*, 409 U.S. 1111 (1973)). Thus, from the *East* court's holding that in that specific case, the failure to submit the materiality question to the jury was not prejudicial, *East*, 416 F.2d at 355, came the Eighth Circuit rule that the section 1001 materiality question is one of law.

132. See *infra* note 133 and accompanying text.

133. A. *The First Circuit*

The First Circuit explicitly rejected *Valdez* (materiality like all essential elements is decided by the trier of fact) and instead chose to follow the majority rule. *Corsino*, 812 F.2d at 31 n.3. The First Circuit cited to *Abadi* "and the case cited therein" to support treating the materiality requirement of section 1001 as a question of law. *Id.* However, the First Circuit did not indicate that it was accepting the reasoning of *Abadi*. *Id.* Because the majority of the

federal circuits that follow the majority rule do so because of *Sinclair*, it is likely that the First Circuit rule is attributable to *Sinclair* rather than to *Abadi*.

B. The Second Circuit

The Second Circuit rule is supported by *United States v. Ivey*, 322 F.2d 523 (4th Cir.), *cert. denied*, 375 U.S. 953 (1963) and *United States v. Marchisio*, 344 F.2d 653 (2d Cir. 1965). *United States v. Bernard*, 384 F.2d 915, 916 (2d Cir. 1967) (materiality should be decided by court as question of law).

The Fourth Circuit in *Ivey* cited *Sinclair*, *Weinstock v. United States*, 231 F.2d 699 (D.C. Cir. 1956) and *United States v. Clancy*, 276 F.2d 617 (7th Cir. 1960), *rev'd*, 365 U.S. 312 (1961), to support its holding that the materiality requirement of section 1001 was a question of law. *Ivey*, 322 F.2d at 529. In *Weinstock*, the D.C. Circuit held that materiality under section 1001 was a question of law, and the court cited *Sinclair* for this proposition. *Weinstock*, 231 F.2d at 703. In *Clancy*, the Seventh Circuit held that materiality under section 1001 was a question of law. 276 F.2d at 635. The *Clancy* court cited *United States v. Parker*, 244 F.2d 943 (7th Cir.), *cert. denied*, 355 U.S. 836 (1957), and *United States v. Alu*, 246 F.2d 29 (2d Cir. 1957), to support its holding. *Clancy*, 276 F.2d at 635. The *Parker* Court relied on *Sinclair* in holding that the materiality question was one of law. 244 F.2d at 950 (citing *Sinclair*, 279 U.S. at 298-99). The *Alu* court cited *Sinclair*, *Carroll v. United States*, 16 F.2d 951 (2d Cir. 1927) *cert. denied*, 273 U.S. 763 (1927) and a number of other cases which are directly or indirectly supported by *Sinclair*. *Alu*, 246 F.2d at 32. The *Sinclair* Court relied on *Carroll* in holding that materiality was a question of law. *Sinclair*, 279 U.S. at 298-99. In addition to relying on *Sinclair* and *Carroll*, the *Alu* court cited *United States v. Slutzky*, 79 F.2d 504 (3d Cir. 1935), *Dolan v. United States*, 218 F.2d 454 (8th Cir.), *cert. denied*, 349 U.S. 923 (1955), *Travis v. United States*, 123 F.2d 268 (10th Cir. 1941), and *Harrell v. United States*, 220 F.2d 516 (5th Cir. 1955).

In *Slutzky*, the Third Circuit relied exclusively on *Sinclair* for its holding that materiality under 18 U.S.C. § 231 was a question of law. *Slutzky*, 79 F.2d at 506. Section 231 proscribes the giving of false statements while under oath before a competent tribunal. 18 U.S.C. § 231 (1909) (current version at 18 U.S.C. § 1621 (1988)).

In *Dolan*, the Eighth Circuit relied on *Sinclair*, *Carroll*, and *United States v. Moran*, 194 F.2d 623 (2d Cir.), *cert. denied*, 343 U.S. 965 (1952) for the proposition that materiality under 18 U.S.C. § 1621 was a question of law. *Dolan*, 218 F.2d at 457. Section 1621 proscribes giving false testimony under oath before a competent tribunal. 18 U.S.C. § 1621 (1988). The *Moran* court cited *Blackmon v. United States*, 108 F.2d 572 (5th Cir. 1940), for the conclusion that materiality was a question of law. In *Blackmon*, the Fifth Circuit cited *Sinclair*, *Carroll*, and *Slutzky* for the proposition that materiality under 18 U.S.C. § 231 was a question of law. *Blackmon*, 108 F.2d at 574.

In *Travis*, the Tenth Circuit cited *Sinclair*, *Carroll*, *Slutzky*, and *Blackmon*, for the statement that the materiality question was for the court to decide. *Travis*, 123 F.2d at 270.

In *Harrell*, the Fifth Circuit cited *Sinclair*, *Carroll*, *Slutzky*, *Moran*, *Travis*, *Blackmon* and *United States v. Marachowsky*, 201 F.2d 5 (7th Cir.), *cert. denied*, 345 U.S. 965 (1953) for the rule that the materiality question under 18 U.S.C. § 1621 was a question of law for the court to decide. *Harrell*, 220 F.2d at 518 (citations omitted). In *Marachowsky*, the Seventh Circuit relied on *Sinclair* and *Carroll* in deciding that the materiality of perjured testimony is a question of law. *Marachowsky*, 201 F.2d at 18.

The *Marchisio* court supported the rule that materiality is a question of law by citing *Alu*, *Carroll*, and *United States v. Siegel*, 263 F.2d 530 (2d Cir.), *cert. denied*, 359 U.S. 1012 (1959). *Marchisio*, 344 F.2d at 665. The *Siegel* court's statement that materiality is a question of law is supported with cites to *Sinclair*, *Carroll*, and *Alu*. *Siegel*, 263 F.2d at 533.

C. The Third Circuit

The Third Circuit supported its rule by citing to *Sinclair* and the "majority of the Courts

fact of *Winship* on the section 1001 materiality question.¹³⁴

III. SUMMARY OF THE PROBLEM

*In re Winship*¹³⁵ requires the prosecution to prove every element of a criminal offense beyond a reasonable doubt to the trier of fact (*Winship* rule).¹³⁶ The Court also stated, in *Sinclair v. United States*,¹³⁷ and reiterated in *Kungys v. United States*,¹³⁸ that materiality should be decided by the court as a question of law (*Sinclair* rule).¹³⁹ If the section 1001 materiality requirement is an element of a section 1001 offense, then it is subject to both the *Winship* and *Sinclair* rules.¹⁴⁰ However, the Supreme Court has not acted to resolve this conflict, and the federal circuits cannot agree on who should determine materiality under section 1001.¹⁴¹

of Appeals." *United States v. Greber*, 760 F.2d 68, 73 (3d Cir.), *cert. denied*, 474 U.S. 988 (1985) (materiality should be decided by court as question of law).

D. The Fourth Circuit

In *Ivey*, the Fourth Circuit held that the section 1001 materiality question is a question of law. *Ivey*, 322 F.2d at 529. The fact that this holding is based on *Sinclair* is discussed *supra*, at B.

E. The Fifth Circuit

In *United States v. Krause*, 507 F.2d 113 (5th Cir. 1975), the Fifth Circuit held that materiality under section 1001 was a question of law. *Id.* at 118-19. The court stated that the majority of federal circuit courts treat materiality as a question of law. *Id.* at 118. The Fifth Circuit cited *Ivey* and *Weinstock* for this proposition. *Id.*

F. The Eleventh Circuit

The rule in the Eleventh Circuit is supported by a cite to *United States v. Lichenstein*, 610 F.2d 1272 (5th Cir.), *cert. denied sub nom.*, *Bella v. United States*, 447 U.S. 907 (1980). See *United States v. Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984). *Lichenstein* is supported with a cite to *Krause*. *Lichenstein*, 610 F.2d at 1278.

G. The D.C. Circuit

In *Weinstock*, the D.C. Circuit stated that materiality under section 1001 is a question of law. *Weinstock*, 231 F.2d at 703. The *Weinstock* court cited *Sinclair* for this statement. *Id.*

134. *Corsino*, 812 F.2d at 31 n.3; *Greber*, 760 F.2d at 73; *Lopez*, 728 F.2d at 1362 n.4; *Hicks*, 619 F.2d at 758; *Krause*, 507 F.2d at 118-19; *Bernard*, 384 F.2d at 916; *Ivey*, 322 F.2d at 529; *Weinstock*, 231 F.2d at 703. See *supra* note 133 and accompanying text for a discussion of the rule in these circuits.

135. 397 U.S. 358 (1970).

136. *Id.* at 361-64. See also *supra* notes 60-74 and accompanying text for a discussion of *Winship*.

137. 279 U.S. 263 (1929).

138. 485 U.S. 759 (1988).

139. *Id.* at 772; *Sinclair*, 279 U.S. at 298.

140. If materiality is an element of a section 1001 offense then *Winship* requires that it be proven to the trier of fact. *Winship*, 397 U.S. at 361-64. See also *supra* notes 60-74 and accompanying text for a discussion of *Winship*. Moreover, even if materiality is an element, *Sinclair* states that it should be decided as a question of law. *Sinclair*, 279 U.S. at 298-99.

141. Compare, e.g., *United States v. Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979) with, e.g., *United States v. Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States v. Brantley*,

Thus, whether materiality must be proven beyond a reasonable doubt to the trier of fact, or merely established to the satisfaction of the court,¹⁴² depends on where the defendant is brought to trial.

To determine which rule should control the section 1001 materiality question, three interrelated issues must be resolved. First, is materiality an element? Second, if materiality is an element, is the *Sinclair* rule an exception to the general rule that elements must be decided by the trier of fact? Third, although the rationale of *Sinclair* does not justify treating it as an exception to the *Winship* rule, does *Kungys*¹⁴³ nonetheless require that materiality be decided as a question of law?

IV. ANALYSIS

This section proposes that materiality is an element of a section 1001 offense and therefore, *In re Winship*¹⁴⁴ applies to the section 1001 materiality question. Accordingly, the Sixth Circuit is incorrect in asserting that because *Winship* does not apply to the section 1001 materiality question the Due Process Clause does not require that materiality be proven to the trier of fact.¹⁴⁵ Next, this Comment maintains that the rationales of *Sinclair v. United States*¹⁴⁶ cannot justify treating the *Sinclair* rule as an exception to *Winship*. Under this reasoning, the Seventh Circuit¹⁴⁷ should not follow *Sinclair*. Similarly, if *Winship* applies to the section 1001 materiality question, and *Sinclair* is not an exception to the *Winship* rule, then the circuits which follow *Sinclair* without considering *Winship* are in error.¹⁴⁸ Therefore, only the Ninth and Tenth Circuits employ a

786 F.2d 1322, 1327 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986); *United States v. Greber*, 760 F.2d 68, 73 (3d Cir.), *cert. denied*, 474 U.S. 988 (1985); *United States v. Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984); *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983); *United States v. Hicks*, 619 F.2d 752, 758 (8th Cir. 1980); *United States v. Beer*, 518 F.2d 168, 171 (5th Cir. 1975); *United States v. Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); *United States v. Ivey*, 322 F.2d 523, 529 (4th Cir.), *cert. denied*, 375 U.S. 953 (1963); *Freidus v. United States*, 223 F.2d 598, 601 (D.C. Cir. 1955).

142. If materiality is decided as a question of law the reasonable-doubt standard does not apply. *United States v. Hausmann*, 711 F.2d 615, 618 (5th Cir. 1983). See *Winship*, 397 U.S. at 361-64 for the United States Supreme Court's discussion of the benefits of the reasonable-doubt standard. See also *supra* notes 65-71 and accompanying text for a discussion of the reasonable-doubt standard.

143. See *supra* notes 44-59 and accompanying text for a discussion of *Kungys*.

144. 397 U.S. 358 (1970).

145. *United States v. Abadi*, 706 F.2d 178, 180 n.2 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983).

146. 279 U.S. 263 (1929). For a discussion of these rationales, see *infra* notes 229-78 and accompanying text.

147. *United States v. Brantley*, 786 F.2d 1322, 1327 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986).

148. See *United States v. Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States v.*

constitutionally permissible approach to the section 1001 materiality question because they follow *Winship* and require that materiality be proven to the trier of fact.¹⁴⁹

A. Materiality is an Element

The *Winship* rule requires that all elements of a criminal offense be proven beyond a reasonable doubt to the trier of fact.¹⁵⁰ In order to determine whether that rule applies to the question of materiality under section 1001, it must first be determined whether materiality is an element of a section 1001 offense.

1. Materiality meets the *Winship* criteria for what constitutes an element

The *Winship* Court stated:

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof [to the 'proper factfinder'] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.¹⁵¹

The section 1001 materiality question fits this description of elements that must be proven to the trier of fact. First, under the statute, proof of materiality is necessary to establish a violation.¹⁵² Second, materiality is often a factual determination, rather than one of law.¹⁵³ A

Greber, 760 F.2d 68, 73 (3d Cir.), *cert. denied*, 474 U.S. 988 (1985); *United States v. Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984); *United States v. Krause*, 507 F.2d 113, 118-19 (5th Cir. 1975); *United States v. Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); *United States v. Ivey*, 322 F.2d 523, 529 (4th Cir.), *cert. denied*, 375 U.S. 953 (1963); *Weinstock v. United States*, 231 F.2d 699, 703 (D.C. Cir. 1956). See *supra* note 133 for a discussion of cases following *Sinclair* without any additional reasoning, and treating materiality as a question of law.

149. *United States v. Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979).

150. *In re Winship*, 397 U.S. 358, 364 (1970). See also *supra* notes 60-74 for a discussion of the *Winship* rule.

151. *Winship*, 397 U.S. at 364; *United States v. Taylor*, 693 F. Supp. 828, 830 (N.D. Cal. 1988) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

152. See 18 U.S.C. § 1001 (1988); see also, e.g., *United States v. Beer*, 518 F.2d 168, 170-71 (5th Cir. 1975) (courts read materiality requirement into second clause of section 1001).

153. See *United States v. Swaim*, 757 F.2d 1530 (5th Cir.), *cert. denied*, 474 U.S. 825 (1985); *Beer*, 518 F.2d at 170-72. See *infra* notes 156-82 for a discussion of these cases. See also *United States v. Lueben*, 816 F.2d 1032 (5th Cir. 1987); *United States v. Corsino*, 812 F.2d 26 (1st Cir. 1987); *United States v. Greber*, 760 F.2d 68 (3d Cir.), *cert. denied*, 474 U.S. 988 (1985); *United States v. Lopez*, 728 F.2d 1359 (11th Cir.), *cert. denied*, 469 U.S. 828

statement or concealed fact is material if it is capable of influencing the outcome of a governmental department or agency decision.¹⁵⁴ Whether a false statement or concealed fact is capable of influencing a decision often turns on evidence of whether the decision maker was influenced, and not on the interpretation of substantive law.¹⁵⁵

For example, in *United States v. Swaim*,¹⁵⁶ the appellant was convicted of violating section 1001.¹⁵⁷ There, appellant sought to borrow \$2,225,000 from the North Mississippi Savings and Loan Association (Association) to purchase a home worth \$1,600,000 and then convert the remaining \$625,000.¹⁵⁸ However, the Association could not lend an amount in excess of eighty percent of the purchase price of the home.¹⁵⁹ Therefore, the appellant concealed its true purchase price.¹⁶⁰

At trial, the prosecution called the vice-president of the Federal Home Loan Bank to testify about the materiality of the concealed fact.¹⁶¹ The vice-president testified that federal regulations required that home loans by savings and loan institutions not exceed a certain percentage of the value of the home.¹⁶² He also testified that the reported purchase price of a home was "material" to his agency's determination of whether the loan should be made.¹⁶³ Finally, the vice-president testified that if the loan were not sound, the purchase price was material to determining the effect of the loan on the financial solvency of the lending institution.¹⁶⁴ On appeal, the appellant argued that "the testimony produced by the prosecution at trial [was] insufficient to support a finding by any factfinder that the purchase price was a material fact."¹⁶⁵ However, the Fifth Circuit concluded that the vice-president's testimony had estab-

(1984); *United States v. Irwin*, 654 F.2d 671 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *United States v. Adler*, 623 F.2d 1287 (8th Cir. 1980). See *infra* note 182 for information on these cases.

154. *Weinstock v. United States*, 231 F.2d 699, 701-02 (D.C. Cir. 1956).

155. See *infra* notes 156-82 and accompanying text for a discussion of the factual nature of the section 1001 materiality question.

156. 757 F.2d 1530 (5th Cir.), *cert. denied*, 474 U.S. 825 (1985).

157. *Id.* at 1532.

158. *Id.*

159. *Id.*

160. *Id.* Although the evidence would have also supported a conviction for submitting false statements in violation of section 1001, the indictment properly charged the appellant with concealment since there was "an affirmative act by which means a material fact [was] concealed." *Id.* at 1536 (quoting *United States v. London*, 550 F.2d 206, 213 (5th Cir. 1977)).

161. *Id.* at 1535.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

lished the materiality of the concealed fact.¹⁶⁶

Similarly, in *United States v. Beer*,¹⁶⁷ the appellant was president of the Venice-Nokomis Bank and Trust Company.¹⁶⁸ There, the bank loaned money to a friend of the appellant for the purchase of an airplane in which the appellant would have a one-half interest.¹⁶⁹ The appellant was not shown as an obligor on the loan.¹⁷⁰ The Federal Deposit Insurance Corporation (FDIC) conducted a routine examination of the Venice-Nokomis Bank and asked the appellant to fill out an Officer's Questionnaire.¹⁷¹ The appellant falsely answered "none" to the question, "List all extensions of credit made . . . for accommodation of others than those whose names appear on [bank] records . . ." ¹⁷² At trial, the only evidence of the materiality of the appellant's statement was the testimony of a bank examiner for the FDIC.¹⁷³ He testified that the FDIC relied on the information provided by the questionnaire because such information was not otherwise found in bank records.¹⁷⁴ The appellant was subsequently convicted of violating section 1001 for falsely representing that he was not accommodated by a loan from the Venice-Nokomis Bank.¹⁷⁵

The Fifth Circuit reversed the trial court and held that the showing of the potential effects of the false statement was insufficient.¹⁷⁶ The appellate court stated that in order to determine materiality, it needed to know what the FDIC would have done with information in the questionnaire had the information been accurate.¹⁷⁷ Moreover, the court needed to know how the inaccurate information impaired the FDIC's functions.¹⁷⁸ The court stated that "[f]rom the evidence in this record we cannot answer these questions with that degree of certainty sufficient to

166. *Id.* The Fifth Circuit stated: "According to this testimony, the concealment of the true purchase price of the building would 'have the capacity to impair or prevent the functioning of a governmental agency.'" *Id.* (quoting *United States v. Lichenstein*, 610 F.2d 1272, 1278 (5th Cir.), *cert. denied sub nom. Bella v. United States*, 447 U.S. 907 (1980)). Thus, the concealed fact satisfied the Fifth Circuit's definition of materiality, a definition established in *United States v. Lichenstein*, 610 F.2d 1272, 1278 (5th Cir. 1980).

167. 518 F.2d 168 (5th Cir. 1975).

168. *Id.* at 169.

169. *Id.*

170. *Id.* The appellant and his friend already owned one plane and used it to visit the appellant's family. They intended to acquire a larger and faster plane for this purpose. *Id.*

171. *Id.* at 170.

172. *Id.* at 169.

173. *Id.* at 170. The testimony did not indicate how the false statement affected the FDIC, but did reveal that it did not warrant cancellation of the bank's insurance by the FDIC. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 172.

177. *Id.*

178. *Id.* The court noted that soon after the false statement was made, the loan was repaid.

justify a felony conviction under the terms of the statute.”¹⁷⁹

It appears in *Swaim* that the materiality question turned entirely on evidence adduced at trial, and not on the interpretation of substantive law. Testimony at trial revealed that the concealed fact had the capacity to affect a government agency's function and was, therefore, material.¹⁸⁰ Similarly, in *Beer*, the Fifth Circuit reversed the appellant's conviction because there was not enough factual evidence adduced at trial to support conviction.¹⁸¹ There are many other examples of cases where the answer to the materiality question turned on the facts adduced at trial.¹⁸² Materiality should thus be seen as a fact that must be proven to constitute a violation of section 1001.

2. A substantial majority of the federal circuits consider materiality an essential element of a section 1001 offense

Most federal circuits consider materiality to be an “essential element” of a section 1001 offense.¹⁸³ Accordingly, two of these circuits hold that because materiality is an essential element, it must be proven beyond a reasonable doubt to the trier of fact.¹⁸⁴ Nonetheless, most of the circuits which consider materiality an essential element, also treat the section 1001 materiality requirement as a question of law.¹⁸⁵

Therefore, the court needed to know what the FDIC would have done had it learned of the accommodation from the questionnaire if the loan was in fact questionably collateralized. *Id.* 179. *Id.*

180. *Swaim*, 757 F.2d at 1535.

181. *Beer*, 518 F.2d at 172.

182. See *Lueben*, 816 F.2d at 1033 (trial court must consider testimony of expert witnesses in determining materiality); *Corsino*, 812 F.2d at 31 (evidence adduced at trial showed that appellant intended to influence investigation; therefore, appellant's false statements were material); *Greber*, 760 F.2d at 73 (evidence adduced at trial showed appellant's false statements allowed payments on his false claims; thus, his false statements were material); *Lopez*, 728 F.2d at 1362-63 (Eleventh Circuit considered how falsehood influenced and inconvenienced agency, in determining materiality); *Irwin*, 654 F.2d at 677 n.8 (materiality is factual question); *Adler*, 623 F.2d at 1292 n.8 (McMillian, J.) (“The question of materiality in a fraud type case like this proceeding is the factual tendency of the alleged fraud to induce action by the government. . . .”). The two other judges responsible for the *Adler* decision did not join in Judge McMillian's comments regarding the nature of the materiality question. *Id.*

183. *Corsino*, 812 F.2d at 30 (First Circuit); *United States v. Brantley*, 786 F.2d 1322, 1326 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986); *Greber*, 760 F.2d at 73 (Third Circuit); *Irwin*, 654 F.2d at 676 (Tenth Circuit); *United States v. Baker*, 626 F.2d 512, 514 (5th Cir. 1980); *United States v. Valdez*, 594 F.2d 725, 728 (9th Cir. 1979); *United States v. Voorhees*, 593 F.2d 346, 349 (8th Cir.), *cert. denied*, 441 U.S. 936 (1979); *Freidus v. United States*, 223 F.2d 598, 602 (D.C. Cir. 1955).

184. *Irwin*, 654 F.2d at 677 n.8; *Valdez*, 594 F.2d at 729. See *supra* notes 89-106 and accompanying text for a discussion of both of these cases.

185. *Corsino*, 812 F.2d at 31 n.3; *Greber*, 760 F.2d at 73; *Baker*, 626 F.2d at 514 n.4; *United States v. Adler*, 623 F.2d 1287, 1292 (8th Cir. 1980); *Freidus*, 223 F.2d at 602.

Initially, the fact that these circuits treat materiality as a question of law seems inconsistent with considering materiality to be an "element" of a section 1001 offense, since the *Winship* rule requires that elements be proven to the trier of fact.¹⁸⁶ However, the rule in each of these circuits can be traced to *Sinclair v. United States*.¹⁸⁷ These circuits may have reasoned that the *Sinclair* Court made materiality an exception to the *Winship* rule.¹⁸⁸ The *Winship* rule needs no exception if it does not apply, and the *Winship* rule does not apply unless materiality is an element. Therefore, the fact that these circuits treat materiality as a question of law should not reflect negatively on materiality's status as an element.

3. The fact that materiality is not explicitly stated in the second clause of section 1001 does not preclude it from being an element of a false statement offense

The United States Supreme Court has stated that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged."¹⁸⁹ However, this statement, initially made in *Patterson v. New York*¹⁹⁰ and repeated in *McMillan v. Pennsylvania*,¹⁹¹ does not limit the application of *Winship* to the statutorily defined elements of a crime.¹⁹² The rationales of both *Patterson* and *McMillan* should not be seen as limiting *Winship*'s applicability to the section 1001 materiality question.

In *Patterson*, the petitioner was convicted of murder under a New York statute that required proof of intent to kill and also permitted the

186. *Winship*, 397 U.S. at 361-64. See also *supra* notes 60-74 for a discussion of *Winship*.

187. 279 U.S. 263 (1929); see also *supra* note 133 and accompanying text for an illustration of how the rules in the First, Second, Third, Fourth, Fifth, Eleventh and D.C. Circuits can be traced to *Sinclair*. The rule in the Seventh Circuit is also based on *Sinclair*. See *Brantley*, 786 F.2d at 1327. The Eighth Circuit rule does not evolve directly from *Sinclair*, but rather from a misreading of Ninth Circuit case law. See *supra* note 131 and accompanying text. However, a later Eighth Circuit case cited *United States v. Schaffer*, 600 F.2d 1120 (5th Cir. 1979) for the rule that materiality is a question of law. *Adler*, 623 F.2d at 1292. *Schaffer* follows the Fifth Circuit rule which is itself traceable to *Sinclair*. *Schaffer*, 600 F.2d at 1123.

188. This is exactly what the Seventh Circuit said. The court stated that materiality is an essential element, but that *Sinclair* created an exception to the rule that every element must be proven beyond a reasonable doubt. *Brantley*, 786 F.2d at 1327. See also *United States v. Johnson*, 718 F.2d 1317, 1323-24 (5th Cir. 1983) (materiality is exception to *Winship* requirement that every element be proven beyond reasonable doubt).

189. *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986); *Patterson v. New York*, 432 U.S. 197, 210 (1977).

190. 432 U.S. 197 (1977).

191. 477 U.S. 79 (1986).

192. See *infra* notes 193-228 and accompanying text.

defendant to raise the affirmative defense of acting under extreme emotional disturbance.¹⁹³ Before the United States Supreme Court, the petitioner argued that allocating the burden of proof to the defendant on the issue of extreme emotional disturbance violated his right under the Due Process Clause to require that the prosecution establish every element of the offense beyond a reasonable doubt.¹⁹⁴ The Court rejected the petitioner's arguments and affirmed his conviction because, it concluded, proof of the absence of extreme emotional disturbance was not necessary for a conviction under the statute.¹⁹⁵ Furthermore, the Court recognized the state's paramount interest in the administration of criminal justice and was therefore reluctant to add an element to the statutorily defined offense.¹⁹⁶

In *McMillan*, the petitioners were convicted of various crimes ranging from robbery to voluntary manslaughter.¹⁹⁷ Pennsylvania's Mandatory Minimum Sentencing Act required a minimum sentence of five years if the state showed, by a preponderance of the evidence, that a firearm was used in the commission of the crimes.¹⁹⁸ However, the petitioners' sentencing judges refused to consider whether the petitioners had used firearms in committing their offenses because each judge found the Act to be unconstitutional.¹⁹⁹ The Supreme Court of Pennsylvania reversed.²⁰⁰ The petitioners then argued to the United States Supreme Court that if a state wants to punish the possession of a firearm, the state must prove such possession beyond a reasonable doubt.²⁰¹ The Court

193. *Patterson*, 432 U.S. at 198 (citing N.Y. PENAL LAW § 125.25 (McKinney 1975)).

194. *Id.* at 200-01.

195. *Id.* at 205-06.

196. *Id.* at 201-02. The Court stated:

It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Id. (citations omitted).

197. *McMillan*, 477 U.S. at 82.

198. *Id.* at 81.

199. *Id.* at 82.

200. *Id.* at 83.

201. *Id.* at 83-84. The petitioners argued that the statute violated the Due Process Clause as interpreted in *Winship* and *Mullaney v. Wilbur*, 421 U.S. 684 (1975). *McMillan*, 477 U.S. at 84. In *Mullaney*, the petitioner was convicted of murder under a statute where all homicides were punished as murder unless the defendant proved that he or she acted in the heat of passion on sudden provocation, in which case the crime was reduced to manslaughter. *Mulla-*

rejected the petitioners' argument, finding instead that possession of a firearm was not an element.²⁰² Rather, the Court concluded, possession of a firearm was a sentencing factor that came into play after the defendant had been found guilty beyond a reasonable doubt.²⁰³ Moreover, the Court stated, it was hesitant to interfere with the way states defined and punished crime.²⁰⁴

The Court's statements in *Patterson* and *McMillan*, that only those elements listed in the statutory definition of a crime must be proved beyond a reasonable doubt,²⁰⁵ should not be construed to mean that *Winship* does not apply to materiality under section 1001. First, section 1001 is a federal statute and therefore the statutory definition of the crime is not entitled to the deference the Court gave to the state statutes in *Patterson* and *McMillan*.²⁰⁶ Second, the Court in *McMillan* and *Patterson* concluded that the facts at issue, absence of extreme emotional disturbance and use of a firearm, were not subject to the *Winship* rule because those facts were not necessary for conviction under the state statutes.²⁰⁷ Conversely, most federal circuit courts require that the government establish the materiality of a false statement to convict under section 1001.²⁰⁸

The Supreme Court in *Patterson* did not address what the standard of proof would be if New York had to prove the absence of extreme emotional distress. Similarly, the *McMillan* Court did not address what the standard of proof would be if possession of a firearm were essential for a conviction. Thus, the Court's reasoning in both *Patterson* and *McMillan* is not applicable to the section 1001 materiality question, and the Court's statements in those cases that only legislatively defined elements are subject to the reasonable doubt standard²⁰⁹ should not control.

ney, 421 U.S. at 691-92. However, the Court affirmed the First Circuit's reversal of the respondent's conviction. *Id.* at 704. The Court reasoned that although the absence of malice was not required for a conviction under the statute, it was nonetheless a fact that the prosecution had to prove beyond a reasonable doubt. *Id.* at 696-701. Therefore, the statute improperly shifted the burden of persuasion from the prosecution to the defendant and violated the Due Process Clause. *Id.*

202. *McMillan*, 477 U.S. at 85-86.

203. *Id.*

204. *Id.* at 85.

205. *Patterson*, 432 U.S. at 210; *McMillan*, 477 U.S. at 85.

206. *Patterson*, 432 U.S. at 201-02; *McMillan*, 477 U.S. at 85-86 (deference).

207. *Patterson*, 432 U.S. at 205-11; *McMillan*, 477 U.S. at 85-86.

208. *Corsino*, 812 F.2d at 30 (First Circuit); *Brantley*, 786 F.2d at 1327 (Seventh Circuit); *Greber*, 760 F.2d at 73 (Third Circuit); *Lopez*, 728 F.2d at 1362 (Eleventh Circuit); *Abadi*, 706 F.2d at 180 (Sixth Circuit); *Irwin*, 654 F.2d at 677 (Tenth Circuit); *Voorhees*, 593 F.2d at 349 (Eighth Circuit); *Valdez*, 594 F.2d at 728 (Ninth Circuit); *Beer*, 518 F.2d at 171 (Fifth Circuit); *Freidus*, 223 F.2d at 601 (D.C. Circuit).

209. *Patterson*, 432 U.S. at 210; *McMillan*, 477 U.S. at 85.

Other Supreme Court cases further support this conclusion.²¹⁰ The Court has concluded, on at least two occasions, that elements which it has grafted onto federal statutes are, while not written into the relevant statute, nonetheless subject to *Winship*.²¹¹

In *Morissette v. United States*,²¹² the petitioner was convicted of converting government property after he took used artillery casings from an Air Force bombing range.²¹³ At trial, the petitioner claimed that he thought the property was abandoned; however, he was convicted under 18 U.S.C. § 641,²¹⁴ which did not explicitly require proof of intent for conviction.²¹⁵ Upon conviction, the petitioner appealed and the court of appeals affirmed the conviction.²¹⁶ The United States Supreme Court reversed and held that section 641 required proof of intent for three reasons: 1) intent was fundamental to culpability;²¹⁷ 2) section 641 codified common-law larceny which required proof of intent;²¹⁸ and 3) the statute's requirement of a knowing conversion implied that it also required an intentional conversion.²¹⁹ Moreover, the Court stated, where intent

210. See *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *Morissette v. United States*, 342 U.S. 246 (1952). See also *infra* notes 211-28 and accompanying text for a discussion of these cases.

211. *Gypsum*, 438 U.S. at 446 (intent is element of criminal antitrust offense that must be proven to the jury); *Morissette*, 342 U.S. at 274 (trial court's implying intent element into theft statute and failure to instruct jury regarding element was error). Although neither of these cases mentioned *Winship*, both held that intent is an element of a criminal offense and must be proven to the jury. *Gypsum*, 438 U.S. at 446; *Morissette*, 342 U.S. at 274.

212. 342 U.S. 246 (1952).

213. *Id.* at 248-49.

214. 18 U.S.C. § 641 (1988) states in pertinent part:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof;

.....
 Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Id.

215. *Morissette*, 342 U.S. at 248-49.

216. *Id.* at 249.

217. *Id.* at 250-51.

218. *Id.* at 260-62.

219. *Id.* at 270-71. The Court remarked:

Knowledge, of course, is not identical with intent and may not have been the most apt words of limitation. But knowing conversion requires more than knowledge that defendant was taking property into his possession. He must have knowledge of the facts, though not necessarily the law, that made the taking a conversion. In the case before us, whether the mental element that Congress required be spoken of as knowledge or as intent, would not seem to alter its bearing on guilt.

Id.

was an ingredient of the crime charged, its existence was a question of fact that had to be proven to the trier of fact.²²⁰

In *United States v. United States Gypsum Co.*,²²¹ the respondents, several major gypsum-board manufacturers, were convicted of engaging in a price-fixing conspiracy in violation of section 1 of the Sherman Act.²²² The respondents were found to have furthered the conspiracy through "interseller price verification"—that is, they had telephoned competing producers to find out the price on gypsum board currently being offered to a particular customer.²²³ At trial, the court had instructed the jury that intent to fix prices was irrelevant, if the verifications had the effect of fixing prices.²²⁴ However, the United States Supreme Court stated that intent was an essential element of the crime charged, even though intent was not explicitly required by the Sherman Act.²²⁵ Moreover, the Court stated that "ultimately the decision on the issue of intent must be left to the trier of fact alone."²²⁶ The Court disapproved of the jury instructions given by the trial court²²⁷ and affirmed the Third Circuit's reversal of the respondent's conviction.²²⁸ These cases demonstrate the Court's willingness to graft elements, notably that of

220. *Id.* at 274. In support of its holding that intent must be decided by the jury, the *Morissette* Court stated:

"It is alike the general rule of law and the dictate of natural justice that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system (unless in exceptional cases), both must be found by the jury to justify a conviction for crime. However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. Jurors may be perverse; the ends of justice may be defeated by unrighteous verdicts, but so long as the functions of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury."

Id. (quoting *People v. Flack*, 125 N.Y. 324, 334, 26 N.E. 267, 270 (1891)).

221. 438 U.S. 422 (1978).

222. *Id.* at 426-31.

223. *Id.* at 429.

224. *Id.* at 429-31. The trial court instructed the jury that:

The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.

Id. at 430.

225. *Id.* at 443.

226. *Id.* at 446. Neither *Gypsum* nor *Morissette* cited *Winship* for the proposition that intent had to be proven to the trier of fact because intent was an element of a crime. Nonetheless, both cases are consistent with *Winship*'s requirement that all elements of a crime must be proved beyond a reasonable doubt to the trier of fact. See *Winship*, 397 U.S. at 361-64. See also *supra* notes 60-74 and accompanying text for a discussion of *Winship*.

227. *Gypsum*, 438 U.S. at 435-36.

228. *Id.* at 433-34.

intent, onto various criminal statutes, and reflects the Court's insistence that intent be proven to a trier of fact. This practice should be extended to interpretation of the false statement clause of section 1001. That materiality is not explicitly required under this statute should not preclude materiality from being an element of the offense which must be proven to the trier of fact.

B. *Sinclair Should Not Be an Exception to the Winship Rule*

Both *Sinclair v. United States*²²⁹ and *In re Winship*²³⁰ apply to the section 1001 materiality question since *Sinclair* states materiality is a question of law²³¹ and *Winship* requires that all elements of a crime be decided by the trier of fact.²³² As previously mentioned, a majority of the federal circuit courts follow *Sinclair* and hold that the materiality question of section 1001 is a question of law.²³³ Also as previously discussed, a minority of federal circuits follow *Winship* and require that materiality under section 1001 be proven to the trier of fact.²³⁴ The question remains as to which rule controls issues of materiality under section 1001.²³⁵

The *Winship* rule is based on the Due Process Clause of the United States Constitution.²³⁶ The *Winship* rule: (1) protects the innocent; (2)

229. 279 U.S. 263 (1929).

230. 397 U.S. 358 (1970).

231. *Sinclair*, 279 U.S. at 298-99.

232. *Winship*, 397 U.S. at 361-64. See also *supra* notes 60-74 and accompanying text for a discussion of *Winship*.

233. *United States v. Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States v. Brantley*, 786 F.2d 1322, 1327 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986); *United States v. Greber*, 760 F.2d 68, 73 (3d Cir.), *cert. denied*, 474 U.S. 988 (1985); *United States v. Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984); *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983); *United States v. Baker*, 626 F.2d 512, 514 n.4 (5th Cir. 1980); *United States v. Adler*, 623 F.2d 1287, 1292 (8th Cir. 1980); *United States v. Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); *United States v. Ivey*, 322 F.2d 523, 529 (4th Cir.), *cert. denied*, 375 U.S. 953 (1963); *Weinstock v. United States*, 231 F.2d 699, 703 (D.C. Cir. 1956).

234. *United States v. Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979).

235. See *United States v. Taylor*, 693 F. Supp. 828, 838 (N.D. Cal. 1988). In reference to materiality and 18 U.S.C. § 1623, the *Taylor* Court stated:

The only substantial reason offered by the government for why *Winship* should not apply to materiality is the great weight of *Sinclair* precedent. If that precedent stood alone, the court would unquestionably be bound by it. However, because the Supreme Court has also evolved the more recent *Winship* line of cases, this court must do its best to determine whether the Supreme Court would consider that the reasoning of those precedents can be harmonized, or that one of them must be viewed as controlling.

Id.

236. *Winship*, 397 U.S. at 364.

ensures that the prosecuting party bears the risk of erroneous factual determinations; and, (3) ensures the public's respect for the legal system.²³⁷ These are compelling rationales. The *Sinclair* rule's rationale however, is not compelling or constitutionally derived.²³⁸

The *Sinclair* Court supported the rule that materiality is a question of law with an analogy to relevancy;²³⁹ however, that analogy is flawed.²⁴⁰ The concept of "relevancy" concerns the admissibility of evidence.²⁴¹ Conversely, materiality as an element of an offense is an issue upon which guilt or innocence depends.²⁴² As the court stated in *United States v. Taylor*,²⁴³ "A ruling by the court regarding evidence simply determines what information a jury may consider in reaching its decision regarding the elements of an offense; a ruling by the court regarding materiality precludes the jury from ever reaching a decision regarding that element."²⁴⁴ The concepts of materiality and relevancy should be viewed as distinct.²⁴⁵ Therefore, comparing materiality to relevancy does not firmly support the rule that materiality is a question of law.²⁴⁶

The *Sinclair* Court cited three cases for the proposition that materiality must always be a question of law.²⁴⁷ However, these cases do not firmly support the *Sinclair* rule. The first case the Court cited was *Carroll v. United States*.²⁴⁸ *Carroll* was a Prohibition-era case in which the

237. *Id.*

238. See *Sinclair v. United States*, 279 U.S. 263 (1929).

239. *Id.* at 298-99.

240. The Court's analogy has been criticized. See, e.g., *United States v. Johnson*, 718 F.2d 1317, 1323-24 (5th Cir. 1983); *United States v. Adler*, 623 F.2d 1287, 1292 n.8 (8th Cir. 1980); *Taylor*, 693 F. Supp. at 839-40; *Commonwealth v. McDuffee*, 379 Mass. 353, 361-62, 398 N.E.2d 463, 468 (1979).

241. *Johnson*, 718 F.2d at 1324.

242. *Id.* The Fifth Circuit has commented that "the comparability of a ruling on the admissibility of evidence, which is the sole question when relevancy is examined, and determining an issue upon which guilt or innocence depends is not immediately obvious to us." *Id.*

243. 693 F. Supp. 828 (N.D. Cal. 1988).

244. *Id.* at 839.

245. *Johnson*, 718 F.2d at 1324; *Adler*, 623 F.2d at 1292 n.8; *Taylor*, 693 F. Supp. at 839-40; *McDuffee*, 379 Mass. at 361-62, 398 N.E.2d at 468. As the New York Supreme Court's Appellate Division stated, "materiality as a substantive element of the crime of perjury is something more than materiality considered in an evidentiary ruling by the court. Materiality in such a case becomes a matter for ultimate determination by the decisional process." *People v. Clemente*, 285 A.D.2d 258, 262, 136 N.Y.S.2d 202, 206 (1954), *aff'd*, 309 N.Y. 890, 131 N.E.2d 294 (1955).

246. *Adler*, 623 F.2d at 1292 n.8; *Taylor*, 693 F. Supp. at 839-40; *McDuffee*, 379 Mass. at 361-62, 398 N.E.2d at 468.

247. *Sinclair*, 279 U.S. at 298 (citing *Carroll v. United States*, 16 F.2d 951 (2d Cir.), *cert. denied*, 273 U.S. 763 (1927)); *United States v. Singleton*, 54 F. 488 (S.D. Ala. 1892); *Cothram v. State*, 39 Miss. 541 (1860)).

248. 16 F.2d 951 (2d Cir.), *cert. denied*, 273 U.S. 763 (1927).

appellant lied to a grand jury about whether he had served alcohol at a party.²⁴⁹ The trial court decided that the appellant's false statements to the grand jury were material and the jury found him guilty of perjury.²⁵⁰

On appeal to the Second Circuit, the appellant argued that the trial court had erred in considering the statements' materiality as a question of law rather than submitting the issue to the jury.²⁵¹ The Second Circuit held that the materiality question was one of law.²⁵² The court of appeals cited only one federal court opinion for this assertion.²⁵³ That opinion, in turn, contained no authority for its statement that materiality was a question of law. The Second Circuit also cited seven state court opinions for the proposition that materiality was a question of law.²⁵⁴ However, two of the seven cases cited by the Second Circuit actually treated materiality as a mixed question of law and fact, and not strictly a question of law.²⁵⁵

249. *Id.* at 952-53. In *Carroll*, the evidence adduced at trial showed that the appellant stood near a bathtub full of champagne and held up a cloak while a Miss Hawley took off her clothes and climbed into the bathtub. *Id.* at 953. The appellant then said "the line forms to the right; come up, gentlemen." *Id.* Fifteen to twenty men then passed by the tub and filled their glasses with the beverage. *Id.* However, the appellant testified before a grand jury that the bathtub was placed on stage as a convenient receptacle for gingerale. *Id.* at 952. Moreover, the appellant testified that no one entered the bathtub. *Id.* The appellant was convicted of perjury. *Id.*

250. *Id.* at 954.

251. *Id.*

252. *Id.*

253. *Id.* (citing *United States v. Singleton*, 54 F. 488 (S.D. Ala. 1892)).

254. *Id.* (citing *People v. Lem You*, 97 Cal. 224, 32 P. 11 (1893) (conviction for perjury after defendant gave false testimony; materiality of some statements treated at trial as question of fact; court of appeal reversed, stating trial court must determine materiality based on facts found by jury); *State v. Greenberg*, 92 Conn. 657, 103 A. 897 (1918) (conviction for perjury after defendant gave false testimony; materiality of statements treated at trial as question of fact; appellate court held trial court ruling to be erroneous, but affirmed conviction on harmless error grounds); *People v. Glenn*, 294 Ill. 333, 128 N.E. 532 (1920) (conviction for perjury after defendant gave false testimony; materiality of statements treated at trial as question of fact; held on appeal that materiality should be assessed by court after jury finds facts surrounding suspect statement); *State v. Brown*, 128 Iowa 24, 102 N.W. 799 (1905) (conviction for perjury after defendant gave false testimony; materiality treated at trial as question of law; ruling and conviction affirmed); *State v. Lewis*, 10 Kan. 157 (1872) (conviction for perjury after defendant gave false testimony; materiality treated at trial as question of fact; appellate court held trial court ruling to be erroneous, but affirmed conviction on harmless error grounds); *People ex rel. Hegeman v. Corrigan*, 195 N.Y. 1, 87 N.E. 792 (1909) (conviction for perjury after defendant filed report falsely stating that defendant's insurance company had no loans secured by pledges of stocks, bonds or other collateral; materiality of false information held at trial and on appeal to be question of law)).

255. *See* *Wilkinson v. People*, 226 Ill. 135, 147, 80 N.E. 699, 703 (1907); *People v. Lem You*, 97 Cal. 224, 228-30, 32 P. 11, 12-13 (1893). When materiality is treated as a mixed question of law and fact, the court still determines the materiality of a statement. *Luse v.*

The second case cited by the *Sinclair* Court was *United States v. Singleton*.²⁵⁶ In *Singleton*, the defendant was charged with giving false testimony in a proceeding for "final proof" of a homestead entry.²⁵⁷ Allegedly, the defendant had falsely testified that a homesteader had settled and cultivated certain land for more than five years.²⁵⁸ The district court sustained a demurrer to the indictment because the indictment did not illustrate the materiality of the statement.²⁵⁹ In sustaining the demurrer, the court stated that the question of materiality is for the court.²⁶⁰ However, the court did not support this statement with any cases or reasoning.²⁶¹

The third case cited by *Sinclair* was *Cothram v. State*.²⁶² In *Cothram*, the defendant was convicted of falsely testifying during a civil suit.²⁶³ He appealed.²⁶⁴ The conviction was reversed because, among other reasons, the trial court was found to have erroneously submitted the materiality question to the jury as a question of fact.²⁶⁵ According to the appellate court, the issue should have been decided by the trial court as a question of law.²⁶⁶ Unfortunately, the *Cothram* court did not give any rationale for this rule, nor did the court support its rule with any case law.

Sinclair, then, is based on an arguably erroneous analogy to relevancy, and on case law which provides no rationale and little authority for the rule asserted. Moreover, the *Sinclair* rule is not constitutionally required.²⁶⁷ For this reason, *Sinclair* should not be seen as justifying treating materiality as an exception to the due process requirements embodied in *Winship*.

United States, 49 F.2d 241, 245 (9th Cir. 1931). However, the court does not determine the facts on which the materiality decision is based. Rather, the jury determines the facts. *Id.*

256. 54 F. 488 (S.D. Ala. 1892).

257. *Id.* at 489.

258. *Id.*

259. *Id.* at 489-90.

260. *Id.* at 489.

261. *Id.*

262. 39 Miss. 541 (1860).

263. *Id.* at 546.

264. *Id.*

265. *Id.* at 547. The court gave three additional reasons for reversing the conviction. *Id.* at 546-47. First, the jury was not informed that perjury requires a false statement that was intended to be false, and not merely an intentional statement that was also false. *Id.* Second, the jury instructions were premised on an incorrect version of the facts of the case. *Id.* at 547. Third, the jury instructions did not explain the law of perjury. Rather, the jury was instructed to find the appellant guilty if they found he had made the false statement and "the case [was] otherwise made out." *Id.*

266. *Id.*

267. See *Sinclair v. United States*, 279 U.S. 263 (1929).

C. *Kungys v. United States Does Not Require that Materiality Be Treated as a Question of Law*

The Court's statement in *Kungys v. United States*²⁶⁸ that materiality is a question of law should not be seen as determinative of the section 1001 materiality question for three reasons. First, the Court in that case directed the litigants to brief the issue of whether the materiality requirement of 8 U.S.C. § 1451(a) was a question of law or fact.²⁶⁹ However, neither party argued that because materiality was a factual element of a section 1451(a) offense, *In re Winship*²⁷⁰ required that it be proven to the trier of fact.²⁷¹ Since the Court was not presented with a *Winship* challenge to *Sinclair v. United States*,²⁷² it did not decide a *Winship* challenge to the *Sinclair* rule. Even after *Kungys*, then, *Winship* arguably still requires that the trier of fact decide materiality.²⁷³

Second, the Court's statement regarding section 1001's materiality question is not persuasive. The *Kungys* Court supported its reiteration of the *Sinclair* rule with a quote from *United States v. Abadi*:²⁷⁴

[A]lthough the materiality of a statement rests upon a factual evidentiary showing, the ultimate finding of materiality turns on an interpretation of substantive law. Since it is the court's responsibility to interpret the substantive law, we believe [it is proper to treat] the issue of materiality as a legal question.²⁷⁵

The problem with this statement is that the materiality of a false statement, or a concealed fact, often turns on facts, not law.²⁷⁶ Since it is the trier of fact's responsibility to determine facts,²⁷⁷ the materiality question should not be decided by the court as a question of law. Third, and finally, the *Kungys* Court's statements regarding the section 1001 materiality question should be viewed as dicta, since *Kungys* involved the

268. 485 U.S. 759 (1988).

269. *Id.* at 766 n.4.

270. 397 U.S. 358 (1970).

271. *United States v. Taylor*, 693 F. Supp. 828, 842 (N.D. Cal. 1988) ("the *Kungys* Court did not have before it and therefore of course did not decide a *Winship* challenge to *Sinclair*.").

272. 279 U.S. 263 (1929).

273. *Winship*, 397 U.S. at 361-64. See also *supra* notes 60-74 and accompanying text for a discussion of *Winship*.

274. 706 F.2d 178 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983).

275. *Kungys*, 485 U.S. at 772 (quoting *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983)).

276. See *supra* notes 155-82 and accompanying text for a discussion of the factual nature of the materiality question.

277. *Morissette v. United States*, 342 U.S. 246, 274 (1952) (quoting *People v. Flack*, 125 N.Y. 324, 334, 26 N.E. 267, 270 (1891)).

interpretation of a different statute.²⁷⁸

V. CONCLUSION

*In re Winship*²⁷⁹ requires that every element of a criminal offense be proven, beyond a reasonable doubt, to the trier of fact.²⁸⁰ However, most federal circuit courts follow *Sinclair v. United States*²⁸¹ and treat section 1001's materiality requirement as a question of law.²⁸²

The courts offer two reasons why the *Winship* rule does not control the question of materiality under section 1001. The first reason, according to the Sixth Circuit, is that materiality is not an element of a section 1001 offense.²⁸³ However, the Sixth Circuit may be mistaken. The materiality requirement of section 1001 fits the *Winship* description of elements that must be proven beyond a reasonable doubt to the trier of fact.²⁸⁴ Moreover, the majority of federal circuits hold that materiality is an "essential element" of a section 1001 offense;²⁸⁵ that is, materiality is a fact that must be proven to convict under section 1001. Finally, although the requirement of materiality is not explicit in the false statement clause of section 1001, materiality may still be an element of that offense in the same manner that intent was a silent, but judicially implied and thus required, element in *Morissette v. United States*²⁸⁶ and *United*

278. *Kungys*, 485 U.S. at 772.

279. 397 U.S. 358 (1970).

280. *Id.* at 361-64. See also *supra* notes 60-74 and accompanying text for a discussion of *Winship*.

281. 279 U.S. 263 (1929).

282. *United States v. Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States v. Brantley*, 786 F.2d 1322, 1327 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986); *United States v. Greber*, 760 F.2d 68, 73 (3d Cir.), *cert. denied*, 474 U.S. 988 (1985); *United States v. Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984); *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983); *United States v. Baker*, 626 F.2d 512, 514 n.4 (5th Cir. 1980); *United States v. Adler*, 623 F.2d 1287, 1291-92 (8th Cir. 1980); *United States v. Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); *United States v. Ivey*, 322 F.2d 523, 529 (4th Cir.), *cert. denied*, 375 U.S. 953 (1963); *Weinstock v. United States*, 231 F.2d 699, 703 (D.C. Cir. 1956).

283. *Abadi*, 706 F.2d at 180.

284. See *supra* notes 150-228 and accompanying text for a discussion of materiality's status as an element of a section 1001 offense.

285. *Corsino*, 812 F.2d at 30 (First Circuit); *Brantley*, 786 F.2d at 1327 (Seventh Circuit); *Greber*, 760 F.2d at 73 (Third Circuit); *Lopez*, 728 F.2d at 1362 (Eleventh Circuit); *Abadi*, 706 F.2d at 180 (Sixth Circuit); *United States v. Irwin*, 654 F.2d 671, 677 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *United States v. Voorhees*, 593 F.2d 346, 349 (8th Cir.), *cert. denied*, 441 U.S. 936 (1979); *United States v. Valdez*, 594 F.2d 725, 728 (9th Cir. 1979); *United States v. Beer*, 518 F.2d 168, 171 (5th Cir. 1975); *Freidus v. United States*, 223 F.2d 598, 601 (D.C. Cir. 1955).

286. 342 U.S. 246 (1952).

*States v. United States Gypsum Co.*²⁸⁷

A second reason given by one federal circuit court for treating materiality as a question of law, in the face of the *Winship* rule, is that *Sinclair* can be viewed as an exception to *Winship*.²⁸⁸ However, as discussed above, none of the rationales for the *Sinclair* rule are compelling enough to justify treating *Sinclair* as an exception to *Winship*.²⁸⁹ Finally, the Court's reiteration of the *Sinclair* rule, in *Kungys v. United States*,²⁹⁰ does not require that courts treat materiality as a question of law because the *Kungys* Court was not presented with a *Winship* challenge to *Sinclair*.²⁹¹

The rationales of the *Sinclair* rule do not firmly support the rule that materiality is a question of law.²⁹² If the United States Supreme Court is directly confronted with a *Winship* challenge to *Sinclair*, the Court should find *Winship* controlling. This Comment maintains that, to the extent proof of materiality is necessary to convict under section 1001, due process requires that materiality be proven beyond a reasonable doubt to the trier of fact.

Kenneth M. Miller*

287. 438 U.S. 422 (1978).

288. *Brantley*, 786 F.2d at 1327; *United States v. Johnson*, 718 F.2d 1317, 1323-24 (5th Cir. 1983).

289. *See supra* notes 229-78 and accompanying text.

290. 485 U.S. 759 (1988).

291. *United States v. Taylor*, 693 F. Supp. 828, 841-42 (N.D. Cal. 1988).

292. *See Sinclair*, 279 U.S. at 298-99; *Kungys*, 485 U.S. at 772. *See also supra* notes 229-78 and accompanying text for a discussion of the rationales for the *Sinclair* rule.

* This Comment is dedicated to the memory of my father, Morley L. Miller. I would also like to thank my family for giving me the strength to get through law school. Finally, I want to thank Karen L. Poston for helping make this Comment possible.