

UNITED STATES of America, Appellee,  
v.  
Janet Leslie Cooper BYRNES, Appellant.

No. 822, Docket 80-1359.

United States Court of Appeals,  
Second Circuit.

Argued Feb. 9, 1981.

Decided March 17, 1981.

Defendant was convicted in United States District Court for the Northern District of New York, Neal P. McCurn, J., on two counts of false declarations before the grand jury, and she appealed. The Court of Appeals, Mulligan, Circuit Judge, held that defendant's perjury in stating before grand jury that illegally imported swans and geese were dead when she received them and that she buried them at municipal dump was "material," where such testimony shielded from conspiracy charge defendant's employer, who was target of grand jury's investigation, and delayed discovery of identity of person to whom the birds had in fact been delivered pursuant to arrangement with defendant's employer.

Affirmed.

[1] PERJURY ⇔ 33(6)  
297k33(6)

The government has the burden of establishing that perjury was committed in response to question within purview of grand jury investigation, but that nexus need not be established beyond a reasonable doubt and is normally satisfied by introducing into evidence grand jury minutes or the testimony of the foreperson of that jury, to enable the district court to determine the scope of the grand jury investigation and the relationship of the questions which elicited the perjury. 18 U.S.C.A. § 1623(a).

[2] PERJURY ⇔ 11(2)  
297k11(2)

For purposes of determining whether false declaration before the grand jury was "material," materiality is broadly construed.

18 U.S.C.A. § 1623(a).

[3] PERJURY ⇔ 11(7)  
297k11(7)

Defendant's perjury in stating before grand jury that illegally imported swans and geese were dead when she received them and that she buried them at municipal dump was "material," where such testimony shielded from conspiracy charge defendant's employer, who was target of grand jury's investigation, and delayed discovery of identity of person to whom the birds had in fact been delivered pursuant to arrangement with defendant's employer. 18 U.S.C.A. §§ 1623, 1623(a).

[4] CRIMINAL LAW ⇔ 1171.2  
110k1171.2

Any error arising from prosecutor's statement in opening remarks that third person had pleaded guilty to an offense in connection with incident which led to charges against defendant was harmless in case in which such third person was never thereafter mentioned and in light of the strength of the government's case in perjury charge against defendant and defendant's concession of the sufficiency of the evidence to support her perjury.

[5] CRIMINAL LAW ⇔ 304(17)  
110k304(17)

In prosecution for perjury arising from defendant's grand jury testimony that illegally imported swans and geese were dead when she received them while in fact they had been delivered by her to third person, trial court committed no abuse of discretion in refusing to take judicial notice of regulations requiring registration of trumpeter swans and permits for their possession, and in not submitting such regulations to the jury, despite contention that lack of registration meant that third person never "possessed" swans, as lack of registration was irrelevant to the charge against defendant and would only confuse the issue before the jury.

\*108 Gustave J. DiBianco, Asst. U. S. Atty.,  
Syracuse, N. Y. (George H. Lowe, U. S. Atty.,  
Syracuse, N. Y., of counsel), for appellee.

argument that it was simply limited to the importation of wildlife and had nothing to do with matters subsequent to importation is not accurate. Fitzsimmons was a target of the investigation and appellant's testimony that he had not received the birds shielded Fitzsimmons from the conspiracy charge relating to his role in the transactions in which he and Clare were allegedly involved. Moreover, had the truth been told Ida Meffert would have been identified months before her role in the matter was actually discovered. Appellant's false testimony clearly impeded and hindered the investigative efforts of the grand jury. Her perjury was therefore material within the meaning of the statute. See *Carroll v. United States*, 16 F.2d 951, 953 (2d Cir.), cert. denied, 273 U.S. 763, 47 S.Ct. 477, 71 L.Ed. 880 (1927).

## II.

(4) Appellant's remaining arguments are even less meritorious. In his opening to the jury, while explaining the background of the case, the prosecutor stated that Kenneth Clare had pleaded guilty to falsifying shipping documents. Appellant immediately moved for a mistrial; Judge McCurn denied the motion, but admonished the jury to disregard the prosecutor's remark, pointing out that "the guilt or innocence of any of these parties is not binding on the young lady." In the three day trial that followed, \*112 the Government never mentioned Clare in its case or on summation. In view of the strength of the Government's perjury case and appellant's concession of the sufficiency of evidence to support her perjury, it is apparent that even if any error was committed it was harmless and did not warrant the granting of a new trial. *United States v. Frascone*, 299 F.2d 824, 828 (2d Cir.), cert. denied, 370 U.S. 910, 82 S.Ct. 1257, 8 L.Ed.2d 404 (1962).

(5) Finally, appellant urges that the trial judge committed reversible error by not taking judicial notice of Migratory Bird Permit Regulations, 50 C.F.R. Part 21 (1979) which require the registration of trumpeter swans and the obtaining of permits for their possession and disposal. Mrs. Meffert

admitted that she had never registered the swans but also stated that she was unaware that any such regulations were in existence. Appellant argues that since they were not registered Mrs. Meffert never possessed the trumpeter swans. The argument is totally unpersuasive. Count II, charging appellant with false testimony that the swans were mute rather than trumpeters, was withdrawn from the jury. Thus, the relevance of the registration was minimal. Furthermore, Mrs. Meffert admitted that the swans weren't registered. Therefore, the point was made and her conceded ignorance of the Migratory Bird regulations hardly establishes that she didn't possess the swans which she didn't consider birds in any event. [FN9] The existence of the regulations was irrelevant and whether or not Mrs. Meffert violated them would only confuse the issue before the jury. The trial judge has broad discretion in these matters and he committed no abuse of discretion in refusing to take judicial notice of the regulations or submitting them to the jury. See *United States v. Albergo*, 539 F.2d 860, 863 (2d Cir. 1973), cert. denied, 429 U.S. 1000, 97 S.Ct. 529, 50 L.Ed.2d 611 (1976); *United States v. Bowe*, 360 F.2d 1, 15 (2d Cir.), cert. denied, 385 U.S. 961, 87 S.Ct. 401, 17 L.Ed.2d 306 (1966).

FN9. For a liberal construction of the term "birds," by a Canadian court see *Regina v. Ojibway*, 8 Criminal Law Quarterly 137 (1965-66) (Op. Blue, J.), holding that an Indian who shot a pony which had broken a leg and was saddled with a downy pillow had violated the Small Birds Act which defined a "bird" as "a two legged animal covered with feathers." The court reasoned that the statutory definition "does not imply that only two-legged animals qualify, for the legislative intent is to make two legs merely the minimum requirement.... Counsel submits that having regard to the purpose of the statute only small animals 'naturally covered' with feathers could have been contemplated. However, had this been the intention of the legislature, I am certain that the phrase 'naturally covered' would have been expressly

inserted just as 'Long' was inserted in the Longshoreman's Act. "Therefore, a horse with feathers on its back must be deemed for the purpose of this Act to be a bird, a fortiori, a pony with feathers on its back is a small bird." Id. at 139.

The judgment of conviction is affirmed, justice has triumphed and this is my swan song.

END OF DOCUMENT