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Oh What a Tangled Web We Weave when First We Practice to Deceive Under the Federal Sentencng Guidelines: Enhancing Sentences for Defendant Perjury at Trial

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OH WHAT A TANGLED WEB WE WEAVE WHEN FIRST WE PRACTICE TO DECEIVE UNDER THE FEDERAL SENTENCING GUIDELINES: ENHANCING SENTENCES FOR DEFENDANT PERJURY AT TRIAL*

I. INTRODUCTION

Historically, federal judges have had several options when confronted with testimony by a criminal defendant that they believed to be perjurious. On one hand, the judge could rely on the prosecutor to file a perjury charge for later trial.[1] Alternatively, if the judge thought the perjury was so severe that it rose to a level that obstructed justice, the judge could find the defendant in contempt of the court and punish the defendant directly.[2] Complicating the equation, in 1978,

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*Dedicated to my wife Sara, my daughter Kelsey, and my entire family for their continued support and encouragement throughout law school and at every turn in life. Special thanks to Mark Walker for his tireless efforts as my note advisor and to Professor Elizabeth T. Lear for introducing me to this topic and for providing advice, insight, and a unique perspective on the criminal justice system.

1. 18 U.S.C. § 1621(1) (1988) (describing the crime of perjury to include, among other activities, willfully testifying falsely before a court after taking an oath to testify truthfully).

2. 18 U.S.C. § 401(1) (1988) (empowering courts to punish any misbehavior in the presence of the court that obstructs justice). This power has been used to punish defendant perjury if the perjury is obstructive. *See infra* part II.A.

the Supreme Court declared that a trial judge could use his belief that a defendant had lied at trial when deciding the proper sentence for the underlying crime of conviction. The judge could do so because the alleged perjury was indicative of the defendant's poor prospects for rehabilitation.[3] These approaches are in conflict today as federal judges have attempted to administer the Federal Sentencing Guidelines (Guidelines),[4] which provide that a defendant's sentence must be enhanced for obstruction of justice.[5] The Guidelines cite perjury as an example of the type of conduct for which this enhancement should apply.[6]

In applying the Guidelines, the majority of the courts of appeals have allowed, or even required, the obstruction enhancement when a criminal defendant testifies on his own behalf but is found guilty by the jury.[7] This note analyzes the current application of the obstruction enhancement to defendant trial testimony. Part II describes the two pre-Guidelines options available to courts to punish defendant perjury: (1) using the contempt sanction to punish perjury that obstructs justice; and (2) considering defendant perjury as an indicator of the defendant's poor prospects for rehabilitation when sentencing for the underlying conviction offense. Part III reviews the change in sentencing philosophy which accompanied Congress' adoption of the Guidelines and the split of authority among the courts of appeals concerning the effect that the new philosophy should have when enhancing Guidelines sentences for alleged perjury. Part IV argues that, in applying the Guidelines, the circuits have relied on inapposite case law and have ignored the historical distinction between simple perjury and perjury that rises to the level of obstruction. Part IV argues that by ignoring the historical distinction, the courts have eliminated the need for prosecutors to bring a perjury charge against defendants alleged to have testified falsely, thus impairing a defendant's right to a trial on the perjury charge. Finally, Part V proposes a solution to harmonize the judge's need to control a defendant's behavior and the defendant's right to present a defense within the structure of the Guidelines.

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3. United States v. Grayson, 438 U.S. 41 (1978); *see infra* part II.B.
4. United States Sentencing Commission, *Guidelines Manual* (Nov. 1991).
5. U.S.S.G. § 3C1.1.
6. *Id.* cmt. (n.3(b)).
7. *See infra* part III.B.

II. THE PRE-GUIDELINES OPTIONS FOR PUNISHING DEFENDANT PERJURY

A. *Using Contempt to Punish Perjury that Obstructs Justice*

A court has traditionally had the "power to punish by fine or imprisonment . . . such contempt of its authority . . . as . . . [m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice."[8] Given the sense of judicial indignation present when a judge believes that a defendant has committed perjury,[9] it is not surprising that courts have traditionally sought to punish perjury as contempt of court rather than awaiting the prosecutor's decision to file a separate perjury charge.

In 1919, Chief Justice White, writing for the Supreme Court in *Ex Parte Hudgings*,[10] stated that "[b]ecause perjury is a crime defined by law and one committing it may be tried and punished does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject matter of a punishment for contempt."[11] The Chief Justice then discussed what the exceptional conditions might be that would allow "justifying punishment under both [contempt and a separate perjury trial]."[12] He distinguished simple perjury from perjury which also obstructs the court and held that the court must find the additional element of obstruction present to punish perjury from the bench as contempt.[13] Citing an opinion by Judge Learned Hand, Justice White maintained that obstruction occurs only in cases in which the alleged perjury frustrates the court in performing its duty.[14]

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8. 18 U.S.C. § 401 (1988).

9. *See* United States v. Arbuckle, 48 F. Supp. 537, 537-38 (D.D.C. 1943). The *Arbuckle* court called the contempt finding necessary for maintaining respect for the courts. *Id.* Such respect would be lost "if witnesses are permitted to give false testimony without both [immediate] challenge and punishment." *Id.* However, the court recognized that dealing with this behavior through the contempt power was proper only if the defendant intended that his testimony block the court's inquiry, rather than merely to deceive the court. *Id.*

10. 249 U.S. 378 (1919).

11. *Id.* at 382.

12. *Id.* at 383.

13. *Id.* at 383-84.

14. *Id.* at 383 (citing United States v. Appel, 211 F. 495 (S.D.N.Y. 1913)). In *Appel*, Judge Hand found that a witness' refusal to tell what he knew blocked the inquiry of the court and constituted obstruction. *Appel*, 211 F. at 495. Judge Hand warned against using the contempt power to punish perjury alone, establishing that the test to distinguish between perjury and

The issue in *Hudgings* was whether Hudgings' alleged perjury was egregious enough to rise to the level of obstruction.[15] Hudgings petitioned for habeas corpus after a district court judge found him in contempt of court for his testimony as a witness at the trial of two of his co-workers.[16] The prosecution wanted to establish through Hudgings' testimony that the co-workers had written on some documents.[17] Hudgings maintained at trial, under questioning from both the prosecutor and the judge, that he could not recall whether or not he had ever seen the two co-workers write during the time he worked with them.[18] When Hudgings finally testified that "I would not say I have not, but I would not say that I have [seen them write]," the court announced that it was satisfied that the witness was giving false testimony. The court, with its patience exhausted, found Hudgings in contempt.[19]

The Supreme Court discharged the contempt order, holding that the judge had imposed the contempt penalty for perjury alone, without any finding of an obstruction of justice.[20] The Court noted that courts must avoid the mistake of attributing "a necessarily inherent obstructive effect to false swearing."[21] The Court concluded that Hudgings' incarceration for contempt was inappropriate, "a conclusion irresistibly following from the fact that the punishment was imposed for the supposed perjury alone without reference to any circumstance or condition giving to it an obstructive effect."[22]

The *Hudgings* Court reasoned that allowing a judge to punish perjury alone, without an obstructive effect present, would lead to situations where the judge might

> impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come

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contempt was "whether on its mere face, and without inquiry collaterally, the testimony is not a bona fide effort to answer the questions at all." *Id.* at 496.

15. *Hudgings*, 249 U.S. at 383-84.

16. *Id.* at 379-81. Interestingly, on the same day that Hudgings was held for contempt, he also was indicted by a grand jury for perjury resulting from his testimony. *Id.* at 381. Although he obtained an order releasing him on bail for the perjury charge, he was not released because he was simultaneously being held on the contempt charge. *Id.* at 381-82.

17. *Id.* at 380.

18. *Id.*

19. *Id.* at 381.

20. *Id.* at 384-85.

21. *Id.* at 384.

22. *Id.*

> to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled.[23]

The Court believed that the perjury-obstruction distinction would prevent judges from pressuring witnesses with the threat of immediate punishment without trial to provide testimony "deemed truthful" by the judge.[24] The Court balanced the truth-seeking function of a trial against the liberty interest of the witness and concluded that the liberty interest should prevail unless the allegedly perjurious testimony actually obstructed justice.[25]

The Supreme Court returned to this theme in *In re Michael*.[26] Writing for a unanimous Court, Justice Black further developed the perjury-obstruction distinction. Justice Black recognized that all perjured testimony creates some difficulty in finding the truth at trial, noting that all such testimony is "at war with justice" due to the risk that the testimony could lead to an erroneous outcome.[27] He maintained, however, that perjured testimony does not necessarily obstruct justice because "the function of trial is to sift the truth from a mass of contradictory evidence, and to do so the fact-finding tribunal must hear both truthful and false witnesses."[28] Thus, according to Justice Black, a judge should expect conflicting testimony at trial, some of which may be perjurious. Because a trial judge is a professional factfinder, experienced at gleaning the truth from testimony, simple perjury by a witness, without more, does not constitute an obstruction of justice.[29]

Unlike *Hudgings*, *United States v. Karns*[30] provides an illustration of perjury rising to the level of obstruction. In *Karns*, the defendant was charged with violating an injunction which closed down her bar as a public nuisance.[31] In her defense she testified that she had rented her building to a person named Rush and no longer assumed responsibility for the building.[32] In addition to this testimony, she presented

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23. *Id.*
24. *Id.*
25. *Id.*
26. 326 U.S. 224 (1945).
27. *Id.* at 227.
28. *Id.* at 227-28.
29. *Id.* at 229.
30. 27 F.2d 453 (N.D. Okla. 1928).
31. *Id.*
32. *Id.*

a lease signed by Rush and a money order for rent paid.[33] Later, when developments proved that Rush did not exist and that the lease and money order had been signed by Karns' bartender, the court found Karns in contempt.[34] Applying the *Hudgings* distinction between simple perjury and perjury that obstructs justice, the district judge noted that the combination of falsified evidence and false testimony rose to the level of obstruction necessary to permit the judge to punish Karns for contempt.[35] The judge maintained that: "[p]erjury, while it may not of itself be punishable as a contempt apart from its obstructive tendency, yet where it is attended with other circumstances of an obstructive tendency, inherently affecting and impeding the administration of justice, such is punishable as contempt."[36]

The elaborate but unconvincing defense Karns presented, combining her denial of guilt on the stand with the submission of false evidence, differentiated Karns' offense from simple perjury. Consequently, her perjury placed her within reach of the judge's contempt power to punish obstruction.[37] Applying the Supreme Court's reasoning in *Hudgings* to a defendant testifying on her own behalf, the trial court found that Karns had attempted to block the court's inquiry.[38] Karns lied in her testimony and presented false evidence to support her claim.[39] Without the false evidence, however, her perjurious testimony alone would not have risen to the level of obstruction of justice required under *Hudgings*.

Historically, judges could only punish alleged perjury directly when the perjury exceeded "simple" false testimony and reached the level of obstruction of justice.[40] The Supreme Court established the distinction between perjury and obstruction to prevent trial judges from using the threat of a sanction to mold testimony into a form deemed truthful by that trial judge.[41] Recognizing that the differentiation between truthful and false testimony is one of the functions of a trial, the Court left the prosecutor the discretion to pursue charges for non-obstructive perjury.[42] The limitation on the use of the contempt

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *See id.*
38. *Id.*
39. *Id.*
40. *See supra* text accompanying notes 8-13.
41. *See supra* text accompanying notes 23-25.
42. *See supra* text accompanying notes 26-29.

power applied both to perjury by witnesses and by defendants testifying on their own behalf.[43] When the defendant as a witness presented perjurious testimony, however, pre-Guidelines era judges also viewed such behavior as a relevant factor when determining the length of the defendant's sentence for the underlying crime of conviction.[44]

B. *Using Perjury to Predict a Defendant's Prospects for Rehabilitation*

Prior to the adoption of the Guidelines, judges were permitted to consider a defendant's alleged perjury when setting the sentence for the underlying offense of conviction within the broad range available under the indeterminate sentencing system then in effect.[45] The indeterminate sentencing system acknowledged that the reformation and rehabilitation of the defendant were the goals of incarceration.[46] Statutes defined broad ranges within which a defendant might be sentenced, and judges were free to select any period within the range they believed appropriate for a given defendant.[47] Once incarcerated, a prisoner could be released before serving the entire sentence if the United States Parole Commission determined that the prisoner had in fact been rehabilitated.[48]

To arrive at the initial sentence, judges were directed to consider a variety of defendant characteristics as sentencing factors and were not required to justify their selection of a certain sentence within the

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43. *See supra* text accompanying notes 38-39.

44. *See* United States v. Grayson, 438 U.S. 41, 50 (1978).

45. *See id.*

46. *See* Williams v. New York, 337 U.S. 241, 247-48 (1949) (noting that reformation and rehabilitation of offenders were important goals of the criminal justice system); *see also* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 892-99 (1990) (recounting the history of the movement away from retribution and punishment and toward rehabilitation as the goal of imprisonment). Professor Nagel, a member of the Sentencing Commission, traces the origin of the prior indeterminate sentencing system to 1870. *Id.* In this system, the judge sentenced a defendant to prison until such time as he reformed. *Id.* Prior to 1870, according to Nagel, retribution and punishment were the aims of incarceration. *Id.* However, in 1870, the National Congress of Prisons adopted the view that prisons should be used to reform prisoners, not to punish them. *Id.* Legislatures were swept into the reform movement and began to delegate more flexibility in sentence lengths to judges and corrections departments. *Id.*

47. *See* United States v. Grayson, 438 U.S. 41, 47-48 (1978) (noting the wide discretion available to the sentencing judge to sentence within the statutory limits depending on various characteristics of the defendant).

48. *Id.*

prescribed range.[49] In *United States v. Grayson*,[50] the Supreme Court determined that a defendant's alleged untruthful testimony could be one of the sentencing factors considered by a judge.[51] *Grayson* upheld a two-year sentence for a prison escapee.[52] The trial judge's belief that Grayson's testimony at trial was "a complete fabrication" heavily influenced this sentence.[53] The district judge clearly stated that he considered Grayson's alleged perjury in determining the sentence.[54] The judge first noted that he had the ability to simply impose any sentence within the statutory range without stating his reasons for doing so.[55] However, he then specifically described the alleged perjury as a sentencing factor in the hope that on review an appellate court would rule on the constitutionality of that approach.[56] The Supreme Court agreed that the defendant's perjury was relevant in sentencing for the underlying crime of conviction.[57]

The Court's opinion in *Grayson* recounted the evolution of sentencing theories from the early common law, when all felonies were punished by death, to the more enlightened views behind the indeterminate sentencing system in use when *Grayson* was decided.[58] The opinion described the movement away from the retribution and punishment theory of sentencing and toward the theory that rehabilitation

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49. *Id.* at 50; *see also* 18 U.S.C. § 3577 (1976) (codifying the extent of the permissible inquiry by placing "no limitation" on the information available to a court at sentencing).

50. 438 U.S. 41 (1978).

51. *Id.* at 50.

52. *Id.* at 42-45.

53. *Id.* at 44.

54. *Id.* The sentencing judge said:

> "I'm going to give my reasons for sentencing in this case with clarity, because one of the reasons may well be considered by a Court of Appeals to be impermissible; and although I could come into this Court Room and sentence this Defendant to a five-year prison term without any explanation at all, I think it is fair that I give the reasons so that if the Court of Appeals feels that one of the reasons which I am about to enunciate is an improper consideration for a trial judge, then the Court will be in a position to reverse this Court and send the case back for re-sentencing.
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> . . . [I]t is my view that your defense was a complete fabrication without the slightest merit whatsoever. I feel it is proper for me to consider that fact in the sentencing, and I will do so."

Id. (quoting the district judge).

55. *Id.*

56. *Id.*

57. *Id.* at 50-51, 55.

58. *Id.* at 45-49.

of the offender was not only attainable, but was the primary goal of incarceration.[59] The Court noted that judges should impose sentences, keeping in mind the defendant's potential for rehabilitation.[60]

Because the *Grayson* Court found rehabilitation to be the primary purpose of incarceration, the Court allowed the sentencing judge to conduct a broad, virtually unlimited inquiry into the defendant's behavior and background to determine his potential for rehabilitation.[61] Viewed from this perspective, the Court reasoned that the lack of truthfulness in testifying was legitimately considered as an indication of a defendant's poor prospects for rehabilitation.[62] Logically, a defendant with poor rehabilitation prospects would require a longer period of incarceration in which to become rehabilitated.[63] The Court held, therefore, that the sentencing judge was justified in allowing his belief that Grayson committed perjury during the trial to influence the length of the sentence imposed.[64]

Although the *Grayson* Court upheld the sentencing judge's use of the defendant's perjurious testimony as indicative of his rehabilitative prospects, the Court cautioned against requiring a judge to enhance sentences automatically whenever a defendant allegedly testifies untruthfully.[65] The Court viewed the defendant's false testimony as one factor among many to be used in assessing the defendant's "prospects for rehabilitation and restoration to a useful place in society."[66] The

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59. *Id.*

60. *Id.* at 47-48.

61. *Id.* at 50.

62. *Id.* at 55. The Court found Grayson's untruthfulness especially telling because the trial court had categorized his lies as "flagrant." *Id.* at 52.

63. *Id.* at 55.

64. *Id.* The *Grayson* Court encouraged the sentencing judge to evaluate the defendant's false testimony in light of other information available about the defendant, rather than automatically increasing the defendant's sentence because he testified untruthfully. *Id.* The Court's decision built upon its earlier decision in Williams v. New York, 337 U.S. 241 (1949), wherein the Court upheld a state court decision to sentence the defendant to death in spite of a jury recommendation of life imprisonment. *Id.* at 241-42. The Court upheld the death sentence because the pre-sentence report indicated that the defendant had committed thirty uncharged burglaries in the same vicinity as the murder, had "a morbid sexuality" and was a "menace to society." *Id.* at 244. The *Williams* Court noted that, at sentencing, restrictions on a judge's ability to learn pertinent information about the defendant would undermine the sentencing goals of reformation and rehabilitation of criminals. *Id.* at 248-50. The Court, however, did not explain how Williams would be either reformed or rehabilitated by his execution. *Williams* application to death penalty cases has since been overruled. Gardner v. Florida, 430 U.S. 349 (1977).

65. *Grayson*, 438 U.S. at 55.

66. *Id.*

Court also noted that perjury is a separate, chargeable offense and recognized that enhancing a sentence merely to save the government the trouble of bringing a subsequent perjury charge would be an "impermissible sentencing practice."[67] However, to the extent that the perjury was indicative of rehabilitation prospects, the Court recognized the permissible practice of enhancing the sentence while guarding against the "impermissible practice" of circumventing the right to a jury trial on a perjury charge.[68]

Prior to the development of the Federal Sentencing Guidelines, alleged perjury by a criminal defendant could be confronted and punished in three ways: by criminal perjury charges filed by the prosecutor, by the judge using the contempt of court power if the perjury also obstructed justice, and as a factor considered by the judge in setting the defendant's sentence if the perjury was indicative of the defendant's prospects for rehabilitation.[69] The three options were not necessarily exclusive of each other. Conceptually, at least, a defendant could be punished for contempt by the judge, prosecuted on a separate perjury charge for the same behavior, and find the perjury factored into the final sentence for the crime of conviction. To evaluate what impact, if any, the Federal Sentencing Guidelines have had on these options, it is helpful to examine the basis upon which the Guidelines were developed.

III. THE NEW ERA OF GUIDELINES SENTENCING

A. *Development of the Guidelines*

The Sentencing Reform Act of 1984[70] created the Federal Sentencing Commission (Commission)[71] to establish policies and practices for criminal sentencing in the federal courts.[72] The legislation developed in response to the perceived inequities of the indeterminate sentencing system which, due to the nearly unfettered discretion of the sentencing

67. *Id.* at 53.

68. *Id.*

69. *See supra* text accompanying notes 1-3.

70. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3580, 3601-3625, 3661-3673; 28 U.S.C. §§ 991-998 (1988)).

71. 28 U.S.C. § 991 (1988). The Commission is an agency within the judicial branch with seven voting members and one nonvoting, ex officio member. *Id.* § 991(a). At least three Commissioners must be federal judges and no more than four Commissioners may be members of the same political party. *Id.* The Attorney General or his designee serves as the ex officio member. *Id.*

72. *Id.* § 991(b).

judge, had created unacceptable disparities in sentences among similarly situated offenders.[73] The rationale behind the indeterminate system — that prisoners would be rehabilitated, reformed, and returned to a useful place in society — also fell into disrepute.[74]

Sentence disparity combined with disenchantment with the rehabilitative ideal led to the abandonment of the indeterminate system in favor of more structured guidelines which would recognize new purposes for incarceration: just punishment, deterrence, and incapacitation.[75] Further addressing the disparity issue, Congress directed the Commission to eliminate the consideration of many personal characteristics of offenders, which had been regularly considered in sentencing under the indeterminate system.[76] As a result, the Commission produced the Guidelines and submitted them for congressional review.[77] The Guidelines went into effect on November 1, 1987.[78]

The Guidelines narrow judicial sentencing discretion by defining a formulaic procedure for sentencing.[79] Determining a Guidelines sen-

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73. *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 12-25 (photo. reprint 1991) (1972) (demonstrating sentence disparity through personal anecdotes and concluding that the indeterminate system resulted in the loss of vital checks and balances on the power of judges); ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY, A REPORT TO THE JUDGES OF THE SECOND CIRCUIT (1974) (noting wide sentencing disparities in a series of hypothetical cases presented to the judges); *Developments in the Law — Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988); Joseph C. Howard, *Racial Discrimination in Sentencing*, 59 JUDICATURE 121 (1975); *see also* S. REP. NO. 225, 98th Cong., 2d Sess. 38 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3220, 3221 (noting that, under the indeterminate system, criminals with similar histories and crimes were sentenced in an "unjustifiably wide range" and received "widely differing prison release dates"); *cf.* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991) (arguing that the Guidelines have not eliminated the disparity of the previous system because sentencing factors may be manipulated).

74. *See* Nagel, *supra* note 46, at 896-97.

75. U.S.S.G. ch. 1, pt. A, intro. cmt. 2 notes that the purposes of punishing criminal conduct include deterrence, incapacitation, just punishment, and rehabilitation. However, 18 U.S.C. § 3582 (1991) abandons incarceration as an inappropriate means of promoting rehabilitation.

76. *See* 28 U.S.C. § 994(e) (1988) (mandating that the Guidelines "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant").

77. U.S.S.G. ch. 1, pt. A, intro. cmt. 2.

78. *Id.* For general commentary on the Guidelines development process, see Nagel, *supra* note 46, at 913-32; *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988) (discussing how practical needs influenced the compromises).

79. *See* U.S.S.G. § 1B1.1.

tence begins with a focus on the penalty for the basic crime charged.[80] Then, the sentencing judge uses her view of the defendant's overall behavior during the planning and execution of the crime as well as during the defendant's journey through the judicial process to make incremental sentence adjustments.[81] To arrive at an appropriate sentence accounting for the defendant's overall behavior, a judge may consider conduct for which a defendant has not been indicted or convicted and may even consider crimes for which the defendant has been acquitted by a jury.[82] Challenges to the reliance on behavior for which

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80. *Id.* § 1B1.1(b).

81. *Id.* § 1B1.1; *see also* U.S.S.G. ch. 1, pt. A, intro. cmt. 4(a) (calling the Guidelines as submitted a charge offense system with "a significant number of real offense elements" included in the sentence determination).

The inclusion of real offense elements has prompted much comment from academics and judges. *See, e.g.*, Michael Tonry & John C. Coffee, Jr., *Enforcing Sentencing Guidelines: Plea Bargaining and Review Mechanisms*, *in* ANDREW VON HIRSCH ET AL., THE SENTENCING COMMISSION AND ITS GUIDELINES 142, 152-63 (1987) (reviewing the real offense model in the context of guidelines systems in general); Breyer, *supra* note 78, at 8-12 (reviewing the Commission's reasons for including real offense elements in the system); Heaney, *supra* note 73, at 228 (contending that the Guidelines have not eliminated disparity because real factors may be manipulated, that the relevant conduct provisions violate due process by requiring judges to sentence for uncharged or unproven criminal acts, and recommending that an "offense-of-conviction model . . . replace the modified real offense model adopted by the Sentencing Commission"); Richard Husseini, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387 (1990) (arguing that the importance of factual determinations of real factors should require a higher burden of proof at sentencing); Nagel, *supra* note 40, at 925 n.228 (describing reasons for relying on modified real offense model); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem of Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 848-50 (1992) (responding to Heaney's criticism and rejecting Heaney's version of an offense-of-conviction model); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 272-84 (1989) (assessing the extent to which prosecutors manipulate sentences by withholding evidence of real conduct through fact and charge bargaining); Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 757-72 (1980) (discussing the difficulties in relying on real offense model to control prosecutorial power at sentencing); Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. L. & CRIMINOLOGY 1550 (1981) (rejecting real offense sentencing on constitutional and policy grounds before the adoption of the Guidelines); William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990) (discussing decision to include key provision incorporating real offense concept); Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880 (1992) (contending that defendants should enjoy a right to confrontation at sentencing given the impact of real factors on the ultimate sentence).

82. United States v. Rivera-Lopez, 928 F.2d 372 (11th Cir. 1991) (allowing the drug quantity alleged in an acquitted possession charge to be used when calculating the sentence for a different

a conviction has never been secured or for which a defendant was acquitted have been unsuccessful,[83] largely because the federal courts have drawn a critical distinction: the court is not punishing the defendant for the unconvicted conduct; rather, the court is enhancing the defendant's sentence for the offense of conviction based on factors that distinguish the defendant's crime from others.[84]

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possession conviction if acquittal quantity established by preponderance of the evidence); *see also* United States v. Manor, 936 F.2d 1238, 1243 (11th Cir. 1991) (applying preponderance standard at sentencing to base sentence in part on acquitted conduct); United States v. Rodriguez-Gonzalez, 899 F.2d 177 (2d Cir.), *cert. denied*, 498 U.S. 844 (1990) (allowing acquitted conduct in the sentencing calculation over defendant's claim of both due process and double jeopardy violations); United States v. Dawn, 897 F.2d 1444, 1450 (8th Cir.), *cert. denied*, 498 U.S. 960 (1990) (allowing enhancement for firearms used in a bank robbery despite a jury's acquittal on a charge of using a firearm during the robbery); United States v. Mocciola, 891 F.2d 13 (1st Cir. 1989) (allowing firearm enhancement despite acquittal on weapons possession charge); United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989) (allowing handgun possession acquittal to be considered in sentencing on cocaine distribution counts). *But see* United States v. Brady, 928 F.2d 844, 851 (9th Cir. 1991) (holding that the Guidelines do not "permit a court to reconsider facts during sentencing that have been rejected by a jury's not guilty verdict").

83. *See, e.g., Rivera-Lopez*, 928 F.2d at 372 (rejecting a challenge asserting that the use of acquitted conduct at sentencing is contrary to the foundation of our judicial system, is a denial of due process and usurps the jury's role); *Rodriguez-Gonzalez*, 899 F.2d at 182 (allowing the use of acquitted conduct over a double jeopardy challenge because the Guidelines did not change the practice as established in pre-Guidelines cases and over a due process challenge because it is well established "that disputed sentencing factors need only be proved by a preponderance of the evidence to satisfy due process"); *Mocciola*, 891 F.2d at 17 (allowing the use of acquitted conduct in sentencing because the jury's not guilty verdict did not mean that the conduct was "clearly improbable," but "simply means that the government did not meet its considerable burden under the reasonable doubt standard"); United States v. Ryan, 866 F.2d 604 (3d Cir. 1989) (affirming the use of acquitted conduct in sentencing over a challenge suggesting such use was inconsistent with the Guidelines by noting its use in pre-Guidelines cases and interpreting the Guidelines to allow that practice to continue); United States v. Isom, 886 F.2d 736, 738 (4th Cir. 1989) (dismissing a due process challenge to the use of acquitted conduct at sentencing because it was based on the "flawed" assumption that the acquittal established the defendant's innocence); *Juarez-Ortega*, 866 F.2d at 749 (allowing the use of acquitted conduct at sentencing despite the argument that its use overrode the jury's factual determination because the acquitted conduct was not used to punish for the acquitted offense, "but to justify the heavier penalties for the offenses for which [defendant] was convicted"); United States v. McGhee, 882 F.2d 1095, 1098 (6th Cir. 1989) (allowing sentence enhancement for uncharged firearms possession over a due process challenge that the enhancement violated the Sixth Amendment jury trial right because "[n]ot all factors that bear on punishment need to be proven before a jury"); United States v. Restrepo, 884 F.2d 1294 (9th Cir. 1989) (allowing enhancement for uncharged firearms possession over an argument that the Guidelines impermissibly shift the burden of proof to the defendant to show no connection between the firearm and the offense of conviction because the Guidelines do not require that any connection at all be shown, but merely require that the firearm be possessed during the offense of conviction).

84. *See e.g.*, United States v. Mobley, 956 F.2d 450, 457 (3d Cir. 1992) (noting that

In developing the Guidelines, the Commission gave each offense in the federal system a numerical "base offense level."[85] Various incremental changes to the base level result from specific offense characteristics, such as the quantity of drugs involved in a drug violation,[86] the degree of bodily harm caused to a victim,[87] or the use of a firearm during a crime.[88] Adjustments are also made if a defendant willfully obstructs or impedes justice[89] or recklessly endangers another person while fleeing from a law enforcement officer.[90] The base offense levels, numbered 1 through 43, then combine with six criminal history categories[91] to form a 258-box grid known as the sentencing table.[92] Each box in the grid contains a sentence range, expressed in months, within which the judge is free to sentence the defendant without further explanation.[93]

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defendant's argument "seeks to blur the distinction among a sentence, sentence enhancement, and definition of an offense"); *Mocciola*, 891 F.2d at 17 (noting that the defendant's argument "misperceives the distinction between a sentence and a sentence enhancement"); *Juarez-Ortega*, 866 F.2d at 749 (noting that "[t]he sentencing court was not relying on facts disclosed at trial to punish the defendant for the extraneous offenses, but to justify the heavier penalties for the offense for which he was convicted"). *But see* Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179 (1993) (criticizing the use of the traditional distinction as "no substitute for constitutionality" and arguing that an incremental increase in the defendant's sentence for a separate offense, absent a conviction is unconstitutional).

85. U.S.S.G. § 2.

86. U.S.S.G. § 2D1.1 (establishing the base level according to the weight of the drugs involved in the crime). The process for calculating the weight of the drugs has been criticized for including the weight of the "carrier medium" in addition to the weight of the drug itself. *See* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 919 (1991). Alschuler notes that wide and unjustifiable variations in sentences occur between a drug dealer who chooses to deliver a quantity of LSD in sugar cubes versus a dealer who delivers the same amount of the drug on blotter paper or in gelatin capsules or the pure drug. *Id.* at 919. Professor Alschuler argues that the variation is unjustified because it is based on the weight of the carrier medium and not the weight of the proscribed drug itself. *Id.*

87. *See, e.g.*, U.S.S.G. § 2A2.2 (providing a base level of 15 for aggravated assault, increased by 2 levels if bodily injury occurred, 4 levels for serious bodily injury, and 6 levels for permanent or life-threatening bodily injury).

88. *See, e.g.*, U.S.S.G. § 2B3.1 (establishing a base offense level of 20 for robbery, increased by 7 levels if a firearm was discharged, 6 levels if a firearm was otherwise used, and 5 levels if a firearm was brandished, displayed, or possessed).

89. U.S.S.G. § 3C1.1.

90. U.S.S.G. § 3C1.2.

91. U.S.S.G. § 4A1.1(a)-(f).

92. U.S.S.G. ch. 5, pt. A; *see infra* app. (containing a copy of the sentencing table).

93. *See* 28 U.S.C. § 994(b)(2) (1988) (providing that the maximum sentence in the range

Section 3C1.1 authorizes enhancements for alleged defendant perjury by instructing sentencing judges to add two levels to the defendant's base offense "score" if the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense."[94] The Guidelines' application notes suggest that this two-level upward adjustment applies for obstructing justice by, among other things, "committing, suborning, or attempting to suborn perjury."[95] Adding two levels to the base offense score for obstruction through alleged perjury may add from less than one year to almost seven years to a sentence, depending upon the defendant's criminal history and the severity of the crime of conviction.[96] The Guidelines do not require indictment or trial on the alleged violation of the federal perjury statute.[97] The court may simply enhance the sentence for the underlying crime of conviction if it finds that the defendant obstructed justice by committing perjury at trial.[98]

B. *Applying the Obstruction Enhancement for Alleged Perjury*

To date, all the courts of appeals have addressed challenges to the Guidelines perjury enhancement, although the Third Circuit has yet

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cannot exceed the minimum sentence by more than 25% or six months, whichever is greater). Commissioner Nagel describes this as "the tolerable level of disparity acceptable to Congress" for those convicted of the same crime with the same criminal history. Nagel, *supra* note 46, at 933.

94. U.S.S.G. § 3C1.1.

95. U.S.S.G. § 3C1.1, cmt. (n.3). Application note three provides a "non-exhaustive" list of examples of conduct that warrant use of the two-level enhancement. *Id.* In addition to perjury, the note suggests applying the enhancement for influencing witnesses, co-defendants, or jurors; for entering false or altered documents into a proceeding; for destroying or concealing evidence; and for escaping from custody or failing to appear for a proceeding and other similar acts. *Id.*

96. *See infra* app. For a defendant in criminal history category I with a base offense level of 10, raising the base offense level to 12 for perjury increases the sentence range by 4 months, from 6-12 months to 10-16 months. *Id.* At the other extreme, in criminal history category VI, a base offense level of 34 enhanced to 36 for perjury raises the sentence range from 262-327 months to 324-405 months, an increase of between 5 and 6.5 years. *Id.*

97. 18 U.S.C. § 1621 (1988). Interestingly, the maximum penalty for the federal crime of perjury is a $2000 fine and imprisonment for five years. *Id.* However, the enhancement for perjury under the Guidelines could add more than five years to the sentence of certain defendants. *See supra* note 96.

98. Courts have also added the two-level enhancement for obstruction of justice when defendants have allegedly lied at their sentencing hearing, United States v. Franco-Torres, 869 F.2d 797 (5th Cir. 1989), at other hearings related to the defendant's case, United States v. Austin, 948 F.2d 783 (1st Cir. 1991), and to probation officers preparing a pre-sentence report, United States v. Christman, 894 F.2d 339 (9th Cir. 1990).

to address the enhancement as applied in the context of a defendant's testimony at trial.[99] Of the circuits that have addressed the enhancement in the trial testimony setting, the Fourth Circuit stands alone in disallowing the enhancement, holding that it places an impermissible and unconstitutional chill on the defendant's right to testify.[100] The remaining circuits have upheld the constitutionality of the perjury enhancement against a variety of challenges. Several circuits maintain that the adoption of the Guidelines had no effect on the sentencing judges' pre-Guidelines ability to consider perjury in sentencing, as approved in *Grayson*, and consider the enhancement as merely the embodiment of pre-Guidelines case law.[101] Other circuits dispense with the argument that the enhancement chills a defendant's right to testify by relying on the *Grayson* Court's statement of the simple truism that "there is no [constitutionally] protected right to commit perjury."[102]

United States v. Wallace[103] illustrates the continued use of *Grayson* to justify the perjury enhancement under section 3C1.1. In *Wallace*, a jury convicted the defendant of attempted possession of marijuana with intent to distribute and of using the telephone in connection with a felony.[104] The trial court enhanced Wallace's sentence by two levels for obstructing justice, believing that his testimony at trial was false.[105] On appeal, the Eleventh Circuit maintained that the district court's failure to identify specific instances of false testimony by Wallace did

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99. United States v. Thompson, 962 F.2d 1069 (D.C. Cir. 1992), *cert. denied*, 61 U.S.L.W. 3620 (U.S. Mar. 8, 1993); United States v. Collins, 972 F.2d 1385 (5th Cir.), *petition for cert. filed*, 61 U.S.L.W. 3446 (U.S. Dec. 7, 1992) (No. 92-964); United States v. Becker, 965 F.2d 383 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3619 (U.S. Mar. 8, 1993); United States v. Batista-Polanco, 927 F.2d 14 (1st Cir. 1991); United States v. Bonds, 933 F.2d 152 (2d Cir. 1991); United States v. Dunnigan, 944 F.2d 178 (4th Cir. 1991), *rev'd*, 113 S. Ct. 1111 (1993); United States v. Barbosa, 906 F.2d 1366 (9th Cir.), *cert. denied*, 498 U.S. 961 (1990); United States v. Beaulieu, 900 F.2d 1537 (10th Cir.), *cert. denied*, 447 U.S. 1009 (1990); United States v. Wallace, 904 F.2d 603 (11th Cir. 1990); United States v. Acosta-Cazares, 878 F.2d 945 (6th Cir. 1989), *cert. denied*, 493 U.S. 899 (1990); United States v. Wagner, 884 F.2d 1090 (8th Cir. 1989), *cert. denied*, 494 U.S. 1088 (1990).

100. *Dunnigan*, 944 F.2d at 185.

101. *See Wallace*, 904 F.2d at 605; *Beaulieu*, 900 F.2d at 1539; *Acosta-Cazares*, 878 F.2d at 953.

102. *Grayson*, 438 U.S. at 54; United States v. Casanova, 970 F.2d 371, 378 (7th Cir. 1992); *Collins*, 972 F.2d at 1414; *Batista-Polanco*, 927 F.2d at 22; *Bonds*, 933 F.2d at 155.

103. 904 F.2d 603 (11th Cir. 1990).

104. *Id.* at 604.

105. *Id.*

not warrant reversal.[106] Reviewing Wallace's testimony in the record, the Eleventh Circuit found it "replete with internal contradictions" and "substantially inconsistent with the evidence put forward by the government."[107] The court noted that evidence in the record clearly contradicted the defendant's testimony that he had not previously bought or sold marijuana.[108] The evidence also supported the conclusion that the defendant was not truthful when testifying about his intent to purchase marijuana from a government informant.[109] On that basis, the Eleventh Circuit concluded that the defendant's testimony was perjurious and warranted application of the two-level enhancement for obstruction of justice.[110]

The Eleventh Circuit noted that the Guidelines' perjury enhancement was merely the embodiment of pre-Guidelines case law, interpreting *Grayson* to hold that defendants who give false testimony under oath deserve greater punishment for doing so.[111] The court then cited *Grayson*'s language that the willingness to lie under oath was indicative of a defendant's poor prospects for rehabilitation.[112] However, the court's assertion that *Grayson* allowed harsher sentences for defendants who testify falsely is arguably a mischaracterization of *Grayson*. Grayson's false testimony per se did not justify a harsher sentence.[113] Rather, Grayson's false testimony gave an indication about his rehabilitative prospects, thus justifying his increased punishment.[114] The *Wallace* court added another element to the *Grayson* formula by suggesting that defendants believed to have testified falsely deserve greater punishment because of the false testimony itself rather than because of their demonstrably poor rehabilitation prospects.[115] The court recognized that the obstruction enhancement should not attach in every situation where a defendant denies guilt. For example, the *Wallace* court held that judges could not enhance a defendant's sentence "simply because he or she pleads not guilty, thereby requiring the government to prove beyond a reasonable doubt the allegations

106. *Id.* at 605.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 604.
112. *Id.* at 604-05.
113. *See supra* notes 61-68 and accompanying text.
114. *See id.*
115. *Wallace*, 904 F.2d at 604.

in the indictment."[116] The court maintained that the plea of not guilty is a constitutional right "for which no increased punishment is permissible."[117]

Similarly, in *United States v. Bennett*,[118] the Sixth Circuit upheld enhancement for defendant perjury when a jury convicted the defendant of possession of a firearm and ammunition by a convicted felon.[119] Bennett and his girlfriend were involved in an accident while riding in the girlfriend's car on a rural road.[120] The girlfriend, who was driving the car, left the scene to get help.[121] When a police officer arrived, he found Bennett sitting in the car, intoxicated, and holding a pistol. The officer also found several other weapons and ammunition in the car.[122] At trial, both Bennett and his girlfriend testified that the guns and ammunition belonged to the girlfriend.[123] In spite of the testimony, the jury found Bennett guilty on both counts.[124] The judge added two levels to Bennett's base offense score at sentencing because the judge believed Bennett obstructed justice by lying under oath.[125]

On appeal, Bennett challenged the sentence enhancement for perjury, arguing that the jury's verdict and his testimony were consistent since the jury could have believed that the firearms belonged to the girlfriend and still found the defendant guilty of simply possessing them.[126] Bennett further asserted that application of the perjury enhancement has a chilling effect on a defendant's constitutional right to testify and proclaim his innocence before the jury.[127] On review, the Sixth Circuit noted that the district court had fully evaluated the evidence, rather than simply relying on the jury's verdict, before concluding that Bennett perjured himself.[128] In deciding to assess the

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116. *Id.*

117. *Id.*

118. 975 F.2d 305 (6th Cir. 1992).

119. *Id.* at 306; *see also* 18 U.S.C. § 922(g)(1) (1988) (making it a crime for anyone convicted of a crime punishable by more than one year in prison to possess any firearm or ammunition).

120. *Bennett*, 975 F.2d at 306.

121. *Id.* at 307.

122. *Id.* at 306.

123. *Id.* at 307.

124. *Id.*

125. *Id.*

126. *Id.* at 308.

127. *Id.* For a thorough discussion of the effect that use of the perjury enhancement has on a defendant's right to testify, see Peter J. Henning, *Balancing the Need for Enhanced Sentences for Perjury at Trial Under Section 3C1.1 of the Sentencing Guidelines and the Defendant's Right to Testify*, 29 AM. CRIM. L. REV. 933 (1992).

128. *Bennett*, 975 F.2d at 308.

enhancement for obstruction of justice "the [trial] court observed that penalizing the defendant for perjury 'was a policy which was in effect before the sentencing guidelines'" and applied the enhancement to the defendant.[129] The Sixth Circuit held that its own careful review of the transcript revealed that the trial court did not abuse its discretion in applying the two-level enhancement.[130] The court further noted that the sentencing court has broad discretion under the Guidelines to decide "whether [the] defendant's perjury amounts to an obstruction of justice."[131]

United States v. Bonds illustrates a situation where a court inferred perjury only from the combination of the defendant's testimony and a guilty verdict.[132] A jury convicted Bonds on three counts for knowingly passing counterfeit currency.[133] In his testimony, Bonds denied knowing that the money he distributed was counterfeit.[134] The district court concluded that this testimony was false and applied the two-level sentence enhancement for perjury.[135] On appeal, the Second Circuit held that the jury verdict of guilty on a charge of *knowingly* passing counterfeit currency "necessarily determined that Bonds knew that the money he had distributed was counterfeit" unless the verdict was unsupported by the evidence, which would warrant reversal of the conviction.[136] This meant that Bonds' testimony was "objectively false," because the testimony concerned Bonds' state of mind.[137] The court cautioned that its decision should not be interpreted to authorize the perjury enhancement every time a defendant is found guilty after testifying on his or her own behalf.[138] However, the court further noted that when the "defendant's testimony relates to an essential element of his offense, such as his state of mind or his participation in the acts charged in the indictment, the judgment of conviction necessarily constitutes a finding that the contested testimony was false."[139] Arguably, this caveat leaves very little ground upon which

129. *Id.*
130. *Id.*
131. *Id.*
132. 933 F.2d 152 (2d Cir. 1991) (per curiam).
133. *Id.* at 153.
134. *Id.* at 155.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*

a defendant might testify without fearing that a conviction by the jury will automatically lead to a court's conclusion that the defendant's testimony was perjurious.[140]

Only the Fourth Circuit has rejected the obstruction enhancement as applied to a defendant's trial testimony, calling it "an intolerable burden upon the defendant's right to testify in his own behalf."[141] In *United States v. Dunnigan*, the defendant was convicted of one count of conspiracy to distribute cocaine.[142] Six other persons were similarly charged, five of whom pleaded guilty.[143] The government presented these five as witnesses against Dunnigan during the government's case in chief.[144] All five described various drug transactions in which they participated with Dunnigan, including trips they made with her to purchase cocaine.[145] Dunnigan's entire defense was her testimony offering a blanket denial of everything alleged by the government's witnesses.[146]

During cross-examination, the prosecution asked Dunnigan about a specific sale of crack cocaine to Edward Dickerson on a specific date, which Dunnigan also denied.[147] In rebuttal, the government produced Edward Dickerson, who testified that he had previously been arrested and had become a government informant.[148] Dickerson testified further that despite Dunnigan's denial, he had in fact purchased crack cocaine from her in a monitored transaction.[149] Dunnigan was convicted, and the court enhanced her sentence under section 3C1.1 based upon her false testimony under oath when she denied all involvement in the crimes charged.[150]

On review, the Fourth Circuit abandoned the views of the other circuits that used *Grayson* to justify the perjury enhancement.[151] The

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140. *Id.* In this regard, the court noted that when the defendant's testimony relates to matters that do not determine the defendant's guilt or innocence, it "would ordinarily be an insufficient basis for imposing" the enhancement based on a judgment of conviction alone. *Id.* at 155.

141. *Dunnigan*, 944 F.2d at 185.

142. *Id.* at 179.

143. *Id.* at 179-80.

144. *Id.* at 180.

145. *Id.*

146. *Id.* at 181.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *See id.* at 183.

court maintained that the abandonment of the rehabilitation goal for incarceration and the adoption of the Guidelines rendered the *Grayson* decision inapplicable.[152] The court examined *Grayson* closely and found that the Guidelines "have removed important underpinnings of the [Supreme] Court's analysis."[153] The *Dunnigan* court observed that the justification for enhancing the sentence in *Grayson* and the justification for the perjury enhancement found in the Guidelines are entirely different.[154] While the enhancement in *Grayson* relied on the defendant's rehabilitation prospects, the Fourth Circuit maintained that the Guidelines impose the perjury enhancement based on the defendant's obstruction of justice.[155] Calling the testimony of the accused in his own defense "basic to justice," the court found it disturbing that such testimony may be "deemed to 'obstruct' justice unless the accused convinces the jury."[156] This conclusion, in the view of the court, was unpalatable.[157] Therefore, the Fourth Circuit remanded the case for sentencing without the section 3C1.1 enhancement for perjury.[158]

The *Dunnigan* court feared that sentences could be enhanced automatically whenever a defendant is found guilty after testifying on his or her own behalf.[159] In fact, at oral argument the government claimed that the perjury enhancement should be given whenever the jury convicts a defendant who has testified on his or her own behalf.[160] The court agreed that, in terms of consistent application of the Guidelines, the government's argument was persuasive.[161] In fact, the court conceded that when a jury returns a guilty verdict in spite of a defendant's testimony claiming innocence, the logical conclusion "implies a disbelief of some material aspect of the defendant's testimony."[162] However, the court was unwilling to infer that false testimony potentially drawn from every guilty verdict could be expanded to justify application of the perjury enhancement.[163]

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152. *See id.* at 184.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 183.
157. *Id.*
158. *Id.* at 185.
159. *Id.* at 183.
160. *Id.*
161. *Id.*
162. *Id.*
163. *See id.*; *see also* United States v. Beaulieu, 900 F.2d 1531, 1536 (10th Cir.), *cert.*

The Supreme Court in *Grayson* noted that "[t]here is no protected right to commit perjury," suggesting that chilling perjury was not objectionable.[164] Other courts, meanwhile, have stated that guilt is properly denied by pleading not guilty while not under oath.[165] In contrast, the *Dunnigan* court maintained that the fear that the perjury enhancement might be applied if a defendant were found guilty, in spite of his testimony, would add to a growing list of factors that a defendant must consider when deciding whether or not to testify.[166] The *Dunnigan* court noted that an innocent defendant with a record must already weigh the probable, though impermissible, inference of guilt from not testifying against the potential for impeachment by prior conviction if he does testify.[167] The court feared that by causing defendants to consider, when deciding whether to testify, the possibility that failure to convince the jury would lead to an increased sentence, the balance would tip against testifying.[168] The court concluded that this would not be a desirable outcome because the overall ends of justice are better served by allowing a defendant to testify at trial.[169]

IV. APPLICABILITY OF THE PRE-GUIDELINES RATIONALES UNDER THE GUIDELINES

A. *Misplaced Reliance on* Grayson

Relying on *Grayson* to support sentence enhancements for perjury under the Guidelines is susceptible to three criticisms. First, it is clear that the rehabilitation goal that formed the basis for the decision in *Grayson* plays no role in sentencing under the Guidelines today.[170] Next, while the Court in *Grayson* held that automatically increasing

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denied, 447 U.S. 1009 (1990). The Fourth Circuit may not stand alone in its reluctance to make the enhancement automatic when a defendant who testifies is convicted. In upholding the perjury enhancement, the *Beaulieu* court noted that "[t]he general jury verdict against the defendant who here testified would not have been alone enough to demonstrate false testimony." *Id.*

164. *Grayson*, 438 U.S. at 50.

165. United States v. Acosta-Cazares, 878 F.2d 945, 953 (6th Cir. 1989), *cert. denied*, 493 U.S. 899 (1990); *see also Wallace*, 904 F.2d at 603.

166. *Dunnigan*, 944 F.2d at 183-84.

167. *Id.* at 184; *see* FED. R. EVID. 609.

168. *Dunnigan*, 944 F.2d at 185.

169. *Id.* The court was also concerned that appellate review of the decision to enhance for perjury would become an empty exercise. *Id.* The court reasoned that, considering the jury's finding of guilt, the decision to add the enhancement could never be considered clearly erroneous. *Id.*

170. *See infra* text accompanying notes 179-84.

sentences when a defendant commits perjury is inappropriate, some of today's courts rigidly mandate the application of the Guidelines enhancement whenever perjury is alleged.[171] Finally, while *Grayson* cautioned that enhancing a defendant's sentence for perjury simply to save the trouble of a separate perjury trial was an impermissible purpose,[172] subsequent decisions have undermined this caution.[173] Today, the *Grayson* decision is used to assert that a judge may enhance a sentence for perjury and bypass a trial on a perjury charge,[174] because no constitutional right to commit perjury exists.

With respect to the first criticism, the disappearance of rehabilitation as a primary purpose behind sentencing has been well documented.[175] In rejecting the initial constitutional challenge[176] to the Guidelines system in *Mistretta v. United States*,[177] the Supreme Court stated clearly that rehabilitation was not a goal of incarceration under the Guidelines.[178] In *Mistretta*, the Court charted the history of the indeterminate sentencing system that preceded the adoption of the Guidelines.[179] The Court noted that a basic premise of indeterminate sentencing was that rehabilitation was the best way to minimize the risk that a criminal would repeat his behavior after serving his sentence.[180] However, the *Mistretta* Court recognized congressional disappointment with indeterminate sentencing because of two basic flaws in the system: (1) similarly situated defendants appeared to receive widely disparate sentences;[181] and (2) rehabilitation was not an obtainable goal.[182]

The *Mistretta* Court reviewed the legislative history leading to the Guidelines' explicit rejection of rehabilitation as a goal of imprisonment.[183] By comparison, it found that the goals of imprisonment under

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171. *See infra* notes 198-206 and accompanying text.

172. *Grayson*, 438 U.S. at 53.

173. *See infra* notes 207-09 and accompanying text.

174. *See infra* text accompanying notes 207-09.

175. *See* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981); *see also supra* notes 73-76 and accompanying text.

176. *See* SENTENCING COMMISSION, 1989 U.S. ANN. REP. 11 (noting that 200 federal judges declared the Guidelines unconstitutional during the first year of operation).

177. 488 U.S. 361 (1989).

178. *Id.* at 365.

179. *Id.* at 363-67.

180. *Id.* at 363.

181. *Id.* at 366.

182. *Id.* at 365.

183. *Id.* at 367.

the Guidelines are retribution, incapacitation, deterrence, and education.[184] Sentences under the Guidelines system, unlike those under the indeterminate system, are designed to fit the crime circumstances generally, rather than the criminal personally, by focusing on specified factors related to the crime.[185] Logically, then, it is inappropriate to use information bearing on a particular defendant's prospects for rehabilitation, such as perjury at trial, in determining the sentence.[186]

Grayson approved the use of a defendant's false testimony at trial to enhance his sentence because of the negative indication the false testimony gave regarding the defendant's prospects for rehabilitation.[187] *Mistretta* confirmed the rejection of rehabilitation as a goal of incarceration under the Guidelines.[188] If Congress rejected the rehabilitation goal that formerly supported increasing sentences when a defendant committed perjury, pre-Guidelines case law rationale that relied on the rehabilitation goal can, therefore, no longer justify the enhancement for perjury under the Guidelines.

The second criticism of courts that use *Grayson* to justify the perjury enhancement is that, while the *Grayson* Court stressed flexibility and discretion in sentencing, application of the perjury enhancement today approaches the very rigidity *Grayson* cautioned against. The *Grayson* court advised that nothing in its decision required a sentencing judge "to enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false."[189] In fact, the rehabilitative theory underlying the *Grayson* decision mandated individual sentences for individual offenders, rather than wooden and reflexive application of standards.[190]

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184. *Id.*

185. *Id.* at 368; *see also* United States v. Mejia-Orosco, 867 F.2d 216, 218-19 (5th Cir.), *cert. denied*, 492 U.S. 924 (1989) (maintaining that Guidelines sentencing is based on two factors, the offense committed and the defendant's criminal history, without consideration of the defendant's prospects for rehabilitation).

186. *See* United States v. Ogbeifun, 949 F.2d 1013, 1014-15 (8th Cir. 1991) (Heaney, J., concurring) (calling for the circuit to convene en banc to consider whether applying the two-level perjury enhancement for false testimony at trial is ever appropriate). Judge Heaney recognized that many circuits allow the enhancement by relying on *Grayson*, but maintained that *Grayson* is no longer applicable because of the Guidelines' abandonment of rehabilitation as a goal in sentencing. *Id.*

187. *Grayson*, 438 U.S. at 52.

188. *Mistretta*, 488 U.S. at 365.

189. *Grayson*, 438 U.S. at 55.

190. *Id.* The *Grayson* Court noted that one drawback to the indeterminate model was "how rationally to make the required predictions [about rehabilitation potential] to avoid capricious

The Guidelines, however, are designed to remove the individual tailoring of sentences to offenders.[191] Rather than allowing individual offender characteristics to affect punishment, the new sentencing structure attempts to treat like offenses alike, without regard to characteristics of the offenders.[192] In *United States v. Mejia-Orosco*,[193] the Fifth Circuit noted that the Guidelines impose a framework intended to create uniform sentences.[194] While cautioning that the Guidelines were not intended to make sentencing an exact science, the *Mejia-Orosco* court also pointed out that Congress approved the Guidelines to limit judicial discretion and to insure that similar crimes are similarly punished.[195]

With respect to section 3C1.1 enhancements, however, some courts interpret the Guidelines' language to indicate that judges are without discretion in applying the two-level increase when they believe a defendant committed perjury. For example, the First Circuit, in *United States v. Austin*,[196] held that the district court was required to apply the two-level enhancement if the court found that the defendant had lied when testifying.[197] In *Austin*, the sentencing judge had declined to impose the perjury enhancement on the defendant because the judge believed the defendant's testimony was such a poor effort to fool the court that it stood absolutely no chance to succeed.[198] The Government appealed the judge's refusal to apply the enhancement to the defendant's sentence.[199] Approving the Government's interpretation, the First Circuit held that, once the district court noted the defendant's alleged perjury, the Guidelines mandated the two-level enhancement for obstruction.[200]

The First Circuit's *Austin* decision is echoed by the Sixth Circuit's decision in *United States v. Alvarez*.[201] In *Alvarez*, the Sixth Circuit

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and arbitrary sentences, which the newly conferred and broad discretion placed within the realm of possibility." *Id.* at 48.

191. *See supra* note 76 and accompanying text.

192. *See supra* note 76 and accompanying text.

193. 867 F.2d 216 (5th Cir. 1990).

194. *Id.* at 219.

195. *Id.* at 218-19.

196. 948 F.2d 783 (1st Cir. 1991).

197. *Id.* at 789.

198. *Id.* at 788. The sentencing judge also noted that the defendant committed perjury before a judge, not a jury. *Id.*

199. *Id.* at 784.

200. *Id.* at 789.

201. 927 F.2d 300 (6th Cir.), *cert. denied*, 111 S. Ct. 2246 (1991).

noted that the district court had found that "'[the defendant] lied openly, continuously, [and] almost ridiculously before the jury.'"[202] Due to this finding, the appeals court ruled that the district judge was without discretion under the Guidelines and had to apply the two-level sentencing enhancement.[203] Thus, it appears that many courts rigidly apply the perjury enhancement, in direct contrast to the cautions given by the *Grayson* Court about the automatic and mechanical use of perjury to increase a sentence.[204]

The third criticism of the application of *Grayson* to Guidelines perjury enhancement cases is that, absent the rehabilitative purpose, the *Grayson* Court cautioned that incarceration in order to save the trouble of a subsequent perjury trial was impermissible.[205] The Court justified the increase in Grayson's sentence for perjury solely as an indicator of Grayson's poor rehabilitation prospects, as distinguished from punishment for a crime without trial which the Court indicated would violate Grayson's due process rights.[206] Naturally, at least from Grayson's perspective, this was a distinction without a difference. However, with the abandonment of rehabilitation as a purpose behind incarceration, the rehabilitation rationale supporting *Grayson*, its permissible purpose, no longer stands. Left standing from *Grayson* is the "impermissible sentencing practice of incarcerating for the purpose of saving the Government the burden of bringing a separate and subsequent perjury prosecution."[207]

The continued use of the pre-Guidelines *Grayson* rationale to justify sentence enhancement is demonstrably misplaced because of the Guidelines' abandonment of rehabilitation as a goal of incarceration.[208] In addition, courts have rigidly applied the sentence enhancement for perjury, contrary to the view expressed by the *Grayson* Court.[209]

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202. *Id.* at 303 (quoting the district court).

203. *Id.*

204. *Grayson*, 438 U.S. at 55. Courts are not unaware of the *Grayson* caution against "wooden and reflex" use of defendant perjury in sentencing. *See* United States v. Lozoya-Morales, 931 F.2d 1216 (7th Cir. 1991). In *Lozoya-Morales*, the Seventh Circuit Court of Appeals vacated a perjury enhancement and held that use of the jury's guilty verdict to infer that a defendant's testimony was perjurious was precisely the type of wooden and reflex adjustment warned against in *Grayson*. *Id.* at 1219. However, the court allowed the judge on remand to apply the perjury enhancement if the judge made an independent finding that the defendant's testimony was perjurious. *Id.* at 1219-20.

205. *Grayson*, 438 U.S. at 53.

206. *Id.*

207. *Id.*

208. *See supra* text accompanying notes 179-84.

209. *See supra* notes 198-206 and accompanying text.

Arguably, courts now appear to apply the enhancement in lieu of a separate trial for the crime of perjury, which the *Grayson* Court explicitly warned against as a violation of a defendant's due process rights.[210] Yet, in spite of these problems, the Fourth Circuit stands alone in rejecting the perjury enhancement as an intolerable burden to the defendant's right to testify on his own behalf.[211] However, in rejecting the perjury enhancement outright, the Fourth Circuit, as well as the courts that mandate application of the enhancement to all instances of defendant perjury, have ignored the historical practice of allowing judges to punish perjury that rises to the level of obstruction of justice through contempt of court.

B. *Ignoring the Perjury-Obstruction Distinction*

The historical use of the contempt charge when perjury is deemed to have obstructed justice could explain the willingness of most judges to accept the Guidelines sentence enhancement for perjury. That is, perhaps it seems natural to judges to punish perjury committed right before their eyes. The court believes it is justified in punishing a defendant for committing perjury because perjury offends the court's sensibilities.[212] However, the pre-Guidelines case law draws a distinction between perjury, which is a separate, chargeable offense, and perjury that obstructs justice, which the judge may punish sua sponte.[213] That historical distinction has been lost under the Guidelines. The Guidelines' application note, which lists perjury as an example of the type of conduct which causes sentence enhancement, has overwhelmed the rule itself, which actually aims at punishing the "obstruction of justice."[214]

Analyzing the pre-Guidelines Supreme Court decisions that originally established the legal distinction between simple perjury and obstructive perjury, the Seventh Circuit concluded that "[p]erjury by a witness has been thought to be not enough where the obstruction to judicial power is only that inherent in the wrong of testifying

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210. *See supra* text accompanying note 68. Interestingly, since the adoption of the Guidelines, there are no reported appellate decisions involving charges under the federal perjury statute for perjurious trial testimony by a defendant.

211. *See* United States v. Warren, 973 F.2d 1304, 1309 (6th Cir. 1992) (joining the First, Second, Eighth, Ninth, Tenth, and Eleventh Circuits in declining to follow *Dunnigan*).

212. *See supra* note 9 and accompanying text.

213. *See* part II.A.

214. *See* U.S.S.G. § 3C1.1, cmt. (n.3).

falsely."[215] This view of perjury is vastly different from that of the Sixth Circuit which applied the Guidelines perjury enhancement in *United States v. Alvarez*.[216] The Sixth Circuit interpreted the Guidelines commentary as mandating that "where a defendant testifies untruthfully concerning a material fact, he should be deemed obstructing justice."[217] It seems that under the Guidelines, the words perjury and obstruction have become synonymous, despite the historical differentiation between the two.

It is quite possible to maintain the Guidelines perjury enhancement and avoid losing the distinction between perjury and obstruction. For example, *United States v. Keys*,[218] a post-Guidelines case, illustrates how the Guidelines obstruction enhancement might be applied in light of the simple perjury-obstruction distinction. In *Keys*, Michael Keys was charged and convicted of possessing a weapon while he was incarcerated at a federal prison.[219] The crux of Keys' defense was his testimony that the weapon had been planted on him without his knowledge.[220] Apparently recognizing the weakness in his case, Keys wrote a letter to another inmate, Molina, asking Molina and two other inmates to testify falsely that a guard had threatened and abused Keys, thus creating the inference that the guard had planted the weapon on Keys.[221] However, the government intercepted the Molina letter and included the letter along with the suggestion that Keys gave false testimony when the government requested the obstruction of justice enhancement for perjury.[222] The Tenth Circuit upheld the two-level enhancement because the district judge had personally observed the false testimony and because of Keys' letter requesting Molina's perjurious assistance to defeat the charge.[223]

Although the Tenth Circuit did not employ the distinction between simple perjury and obstructionist perjury and, in fact, merely quoted *Grayson* in noting that "[t]here is no protected right to commit perjury,"[224] the decision in *Keys* to add the perjury enhancement would

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215. United States *ex rel.* Johnson v. Goldstein, 158 F.2d 916, 920 (7th Cir. 1947) (quoting Clark v. United States, 289 U.S. 1, 11 (1933)).

216. 927 F.2d 300 (6th Cir.), *cert. denied*, 111 S. Ct. 2246 (1991).

217. *Id.* at 302.

218. 899 F.2d 983 (10th Cir.), *cert. denied*, 498 U.S. 858 (1990).

219. *Id.* at 985.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 989.

224. *Id.* at 988 (quoting *Grayson*, 438 U.S. at 54).

not be altered using the historical distinction analysis. Keys did not merely testify falsely; he attempted to suborn perjury from two other persons as well.[225] Suborning perjury, combined with his own false testimony, could support a determination that Keys' efforts were an attempt to block the inquiry of the court and therefore rose to the level of obstruction.

In other cases, however, using the criteria that perjury must rise to a higher level before the Guidelines enhancement applies, alleged false testimony by a defendant should be left to punishment by a separate perjury charge, rather than through a sentence enhancement. For example, enhancements such as those given to Bennett, for asserting that the firearms in the car belonged to his girlfriend,[226] or to Bonds, for denying that he knew the money he distributed was counterfeit, are inappropriate.[227] In those cases, the court used the testimony of the defendant alone in imposing the enhancement.[228] Viewing the distinction as articulated by Chief Justice White,[229] Justice Black,[230] Judge Learned Hand,[231] and others,[232] neither of those cases contains that added element necessary to raise perjury to the level of obstruction.

This historical approach is similar to that attempted by the trial judge in *United States v. Austin*,[233] who found perjury, but refused to enhance Austin's sentence because the defendant's attempt to mislead the court was doomed to failure.[234] Clearly, the judge in *Austin* did not believe that justice was obstructed by the perjured testimony. However, the First Circuit ruled that the judge was without discretion and was forced to apply the obstruction enhancement because perjury was present.[235] This reasoning is reminiscent of the lower court's ruling in *Hudgings* that was subsequently overturned by the Supreme Court because "the punishment was imposed for the supposed perjury alone without reference to any circumstance or condition giving to it an

225. *Id.* at 985.
226. *See supra* notes 118-30 and accompanying text.
227. *See supra* notes 132-40 and accompanying text.
228. *See supra* notes 118-40 and accompanying text.
229. *See supra* text accompanying notes 10-13.
230. *See supra* text accompanying notes 26-29.
231. *See supra* note 14 and accompanying text.
232. *See supra* text accompanying notes 35-36.
233. 948 F.2d 783 (1st Cir. 1991).
234. *Id.* at 788.
235. *Id.* at 788-89.

obstructive effect."[236] It would appear that the trial judge in *Austin* was able to "sift the truth from a mass of contradictory evidence"[237] without difficulty. Thus, applying the standards articulated by Justice Black in *In re Michael*,[238] the perjury in *Austin* would not rise to the obstruction of justice level and would not warrant an enhancement.

An approach that more fully incorporates the obstructionist perjury definition also fits within a plain meaning interpretation of Guidelines section 3C1.1. The language of section 3C1.1 speaks only to obstruction of justice.[239] It is the application notes to the section that include perjury among the list of factors to be considered in administering the enhancement.[240]

Courts and prosecutors have seized upon perjury alone as the element that triggers application of the enhancement. Once a court determines that a defendant lied about any matter at any point in the process, the defendant receives a two-level sentence enhancement. Combining the well established point that perjury does not obstruct justice in and of itself with a plain meaning interpretation of the statute leads to the conclusion that something more than a finding that the defendant committed perjury in testifying is needed to justify the enhancement under section 3C1.1.

V. CONCLUSION

Current interpretations of the Guidelines perjury enhancement create major constitutional problems and should be abandoned. Several arguments support this conclusion. First, *Grayson* is inapposite — the Guidelines marked the clear abandonment of the indeterminate sentence and the rehabilitative ideal. Justifications for the enhancement are not supportable under *Grayson*'s rationale. Second, punishment for the crime of perjury absent indictment and trial violates due process and ignores the warning issued by the *Grayson* Court to

236. *Hudgings*, 249 U.S. at 384.

237. *Michael*, 326 U.S. at 227.

238. *See supra* text accompanying notes 26-29.

239. U.S.S.G. § 3C1.1.

240. U.S.S.G. § 3C1.1, cmt. (n.3). The application notes provide additional guidance, including the caution that the obstruction enhancement provision "is not intended to punish a defendant for the exercise of a constitutional right." *Id.* cmt. (n.1). While this comment could arguably validate the *Dunnigan* court's holding that the enhancement is unconstitutional because it chills the defendant's right to testify, the counter-argument would rely on the quote from *Grayson* that "[t]here is no protected right to commit perjury" to explain that punishing defendant perjury does not punish exercise of a constitutional right. *Grayson*, 438 U.S. at 54.

refrain from enhancing sentences for perjury to avoid the trouble of a trial on the merits of the criminal charge. Third, the enhancement unreasonably chills the right of a defendant to testify if applied whenever a defendant is found guilty after testifying on his or her own behalf, without regard to whether the alleged perjury actually obstructed justice.

If the perjury enhancement is not abandoned altogether and replaced with trials for perjury where appropriate, as the Fourth Circuit suggests, its use should be modified to match the pre-Guidelines case law regarding perjury that obstructs justice. At a minimum, a defendant's testimony, standing alone, should not be considered sufficient for purposes of the enhancement because simple false testimony does not rise to the level of an obstruction of justice as historically defined. Enhancements for this type of perjury support the charge that the court is using enhancement as a short cut to save judicial resources, in violation of a defendant's due process rights.

Given the current application of the perjury enhancement, formal perjury trials may only occur for non-defendant witnesses who testify falsely or for false testimony before a grand jury. There simply is no reason for a prosecutor to file a separate, subsequent charge of perjury against a defendant alleged to have testified falsely. Consider three facts from the prosecutor's perspective: first, the perjury enhancement is mandatory in most circuits;[241] second, the burden of proof at sentencing (the preponderance of the evidence standard) is lower than the burden would be at trial on a separate perjury charge;[242] and, third, the penalty assessed through enhancement approximates or exceeds the penalty available under the perjury statute.[243] With enhancement available for perjury, prosecutors have every incentive to abandon separate perjury trials and simply wait for the pre-sentencing report to suggest that a defendant committed perjury. Then, if the judge

241. *See supra* notes 196-211 and accompanying text.

242. *See, e.g.*, United States v. Macklin, 927 F.2d 1272, 1280 (2d Cir.), *cert. denied*, 112 S. Ct. 146 (1991); United States v. Restrepo, 946 F.2d 654, 656-57 (9th Cir. 1991) (en banc); United States v. Manor, 936 F.2d 1238, 1242 (11th Cir. 1991); United States v. Salmon, 948 F.2d 776, 778-79 (D.C. Cir. 1991); United States v. Smith, 918 F.2d 664, 669 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1088 (1991); United States v. Dyer, 910 F.2d 530, 532 (8th Cir.), *cert. denied*, 111 S. Ct. 276 (1990); United States v. Reid, 911 F.2d 1456, 1462 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 990 (1991); United States v. Wright, 873 F.2d 437, 441 (1st Cir. 1989); United States v. Isom, 886 F.2d 736, 739 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747, 749 (5th Cir. 1989).

243. *See supra* notes 96-97 and accompanying text.

agrees, the two-level enhancement, adding as much as six and one half years to the sentence,[244] would be applied.

Until the Fourth Circuit's decision in *Dunnigan*, the courts of appeals applied the perjury enhancement somewhat uniformly. Now that the Fourth Circuit has criticized the use of *Grayson* to support the enhancement and has held such enhancement unconstitutional, the Supreme Court will need to reconsider the *Grayson* analysis in light of Congress' abandonment of rehabilitation as a purpose of incarceration. With additional critical examination, it appears that the Fourth Circuit was premature in abandoning the enhancement altogether, given the historical ability of courts to punish defendant perjury that obstructs justice through the contempt power. If the Guidelines are viewed as codifying this historic ability, then the perjury enhancement can remain viable in situations where defendant perjury combines with other factors in an effort to truly block the inquiry of the court. The Fourth Circuit justifiably recoiled at the government's assertion that enhancement is mandated whenever a defendant who testifies on his own behalf is convicted. It is this type of extreme application that should most frighten the Court and cause it to limit application of the enhancement to situations where justice is truly obstructed.

William J. Hazzard**

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244. *See supra* note 96.

***Author's note*: A draft of this note was made available to the Supreme Court prior to publication. Subsequently, the Court announced its opinion in *United States v. Dunnigan*. United States v. Dunnigan, 113 S. Ct. 1111 (1993), *rev'g* 944 F.2d 178 (4th Cir. 1991); *see supra* notes 141-69 and accompanying text. The Court overturned the Fourth Circuit's rejection of the § 3C1.1 enhancement for perjury and held that the Guidelines mandate an enhancement "[u]pon a proper determination that the accused has committed perjury at trial." *Dunnigan*, 113 S. Ct. at 1119. The Court rejected Dunnigan's arguments that application of the enhancement chills a defendant's right to testify, *id.* at 1117, and that the enhancement merely serves as a surrogate for a separate perjury prosecution. *Id.* at 1118-19.

Although the issue was not before the Court, the Court also addressed in dicta its historical distinction between simple perjury and perjury that obstructs justice and the relevance of that distinction in the context of the Guidelines. *Id.* at 1116; *see supra* Parts II.A and IV.B. Noting that both Dunnigan and the government "assume the phrase 'impede or obstruct the administration of justice' includes perjury," *Dunnigan*, 113 S. Ct. at 1115, the Court acknowledged that its decisions in both *Ex Parte* Hudgings, 249 U.S. 378 (1919), and *In re* Michael, 326 U.S. 224 (1945), "do not interpret perjury to constitute an obstruction of justice unless the perjury is part of some greater design to interfere with judicial proceedings." *Dunnigan*, 113 S. Ct. at 1116; *see supra* notes 8-29 and accompanying text. Notwithstanding the historical distinction, however, the Court indicated that, if the question were presented, it would defer to the Sentencing Commission's commentary to § 3C1.1 which equates perjury with obstruction in all instances. *Dunnigan*, 113 S. Ct. at 1116.

The Court's dicta rejects the middle ground solution offered in this note by refusing to import the distinction between perjury and obstruction of justice from the contempt of court context into the sentencing arena. In doing so, the Court sent a clear message to criminal defendants: testify at your peril.

APPENDIX

SENTENCING TABLE[24]
(in months of imprisonment)

CRIMINAL HISTORY CATEGORY
(CRIMINAL HISTORY POINTS)

Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	1-7	2-8	4-10	8-14	12-18	15-21
8	2-8	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262

SENTENCING TABLE (Continued)
(in months of imprisonment)

CRIMINAL HISTORY CATEGORY
(CRIMINAL HISTORY POINTS)

Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
33	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293
34	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327
35	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365
36	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405
37	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405	360 - life
38	235 - 293	262 - 327	292 - 365	324 - 405	360 - life	360 - life
39	262 - 327	292 - 365	324 - 405	360 - life	360 - life	360 - life
40	292 - 365	324 - 405	360 - life	360 - life	360 - life	360 - life
41	324 - 405	360 - life	360 - life	360 - life	360 - life	360 - life
42	360 - life	360 - life	360 - life	360 - life	360 - life	360 - life
43	life	life	life	life	life	life

[24]U.S.S.G. ch. 5, pt. A.