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Lying to Get a Court-Appointed Attorney Is Not an Obstruction of Justice

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ABSTRACT

The United States Sentencing Guidelines provides the starting place for courts sentencing individuals convicted of federal crimes. Under § 3C1.1 of the Guidelines, offenders can receive a two-level increase in their offense level for obstructing or impeding the administration of justice. The Fourth, Fifth, Ninth, and Eleventh Circuits have held that this increase for obstruction applies to defendants who lie about their assets to obtain a court-appointed attorney. In reaching this decision, these courts have focused on the materiality of the lies and the examples of obstruction set forth in the commentary to § 3C1.1. The Second Circuit, though, has held that the adjustment does not apply to these offenders because the adjustment requires an intent to obstruct justice, not merely an intent to deceive the court. This circuit split raises the question of whether there is a difference between obstruction of justice and obstruction of the justice system. Because application of the adjustment can have a significant effect on an offender's overall sentence, this split should be resolved so that sentences are no longer disparately harsh in certain circuits. The examples in the commentary to § 3C1.1 do not provide conclusive evidence of whether the adjustment applies to particular behavior, so courts should focus on the language of § 3C1.1 and construe it so that it does not apply to offenders who lie to obtain court-appointed counsel. This interpretation accords with an understanding of justice as a concept distinct from the concept of the justice system.

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 I would like to thank my parents, Julia and the late Larry Baker, as well as all of my siblings, Hannah, Landon, Abigail, Olivia, Rachel, and Jonathan, for their love and support that have made law

school possible. I would also like to thank Clint Hamilton for his help with this Comment, particularly in formulating the question at the heart of this circuit split.

COMMENT

LYING TO GET A COURT-APPOINTED ATTORNEY IS NOT AN OBSTRUCTION OF JUSTICE

Meredith L. Baker [†]

I. INTRODUCTION

What is obstruction of justice? While there are various forms of obstruction of justice in today's criminal law,[1] the United States Sentencing Guidelines contains its own version of obstruction in the form of a sentence adjustment.[2] Consequently, many people today are punished for obstruction of justice without being convicted of it—and courts do not always agree on what conduct constitutes obstruction. If a defendant wants to obtain a court-appointed attorney and thus lies about his assets to appear indigent, that lie can be considered obstruction in the Fourth, Fifth, Ninth, and Eleventh Circuits but will fall outside the sentence adjustment in the Second Circuit.[3] Thus, under a sentencing system that was supposed to foster uniformity,[4] sentences for the same conduct can differ depending on where the defendant committed the underlying offense. This Comment proposes a resolution of this circuit split in favor of the Second Circuit's more limited view of obstruction of justice.

[†] Senior Staff, LIBERTY UNIVERSITY LAW REVIEW, Volume 16; J.D. Candidate, Liberty University School of Law (2022). I would like to thank my parents, Julia and the late Larry Baker, as well as all of my siblings, Hannah, Landon, Abigail, Olivia, Rachel, and Jonathan, for their love and support that have made law school possible. I would also like to thank Clint Hamilton for his help with this Comment, particularly in formulating the question at the heart of this circuit split.

[1] Juliana DeVries, *20 Years for Clearing Your Browser History?*, 22 BERKELEY J. CRIM. L. 13, 17 (2017).

[2] U.S. SENT'G GUIDELINES MANUAL § 3C1.1 (U.S. SENT'G COMM'N 2018). The Guidelines also uses the term "enhancement" to refer to the sentence adjustment for obstruction, and courts have used this term. *See id.* § 3C1.1 cmt. n.3. For consistency's sake, the term "adjustment" is used in this Comment.

[3] *See* United States v. Khimchiachvili, 372 F.3d 75, 82–83 (2d. Cir. 2004); United States v. Iverson, 874 F.3d 855, 857 (5th Cir. 2017); United States v. Hernandez-Ramirez, 254 F.3d 841, 842 (9th Cir. 2001); United States v. Ruff, 79 F.3d 123, 126 (11th Cir. 1996) (per curiam); United States v. Westmoreland, 72 F. App'x 29, 31 (4th Cir. 2003) (per curiam).

[4] Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985-1987*, 45 HOFSTRA L. REV. 1167, 1184–85 (2017).

II. BACKGROUND

A. *The Federal Sentencing Guidelines*

Today, many people convicted of federal crimes are sentenced under a system instituted in 1987.[5] Before that time, federal sentencing was vastly different from what it is today.[6] Federal judges exercised great discretion in sentencing, which led to disparate sentences across the country for the same offenses.[7] Good behavior credits and the parole system, which at first operated without any fixed guidelines, compounded the disparate treatment.[8] For many inmates, parole was available after they served a third of their sentence.[9] Knowledge of that fact incentivized judges to impose harsher sentences—but the possibility of parole was not guaranteed parole, so sentences remained disparate.[10] Sentencing courts could consider numerous factors, such as employment and family status, which may have compounded the problem by skewing sentences to favor people of a higher socioeconomic status.[11] Furthermore, Congress wanted to not only fix disparity but also get tougher on crime.[12] In a bipartisan effort, Congress passed the Sentencing Reform Act of 1984,[13] which created a Sentencing Commission and charged it with promulgating sentencing guidelines.[14]

The Sentencing Commission considered both current average sentences for various crimes and theories of punishment, but it was the average sentences, along with the relatively recent parole guidelines, that largely influenced the first Sentencing Guidelines.[15] The Commission crafted a grid-like structure, with offense levels on one axis and prior criminal history levels on the other axis.[16] The Commission eliminated consideration of most offender characteristics, including employment, and instead focused on the

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[5] *Id.* at 1168, 1200. *See generally* FED. R. CRIM. P. 32(d); 3 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 521 (4th ed. 2021).

[6] Newton & Sidhu, *supra* note 4, at 1169.

[7] *Id.* at 1169, 1174, 1178–80.

[8] *Id.* at 1170–74.

[9] *Id.* at 1171.

[10] *Id.* at 1173–74.

[11] *Id.* at 1240–42, 1241 n.520, 1242 n.521.

[12] Newton & Sidhu, *supra* note 4, at 1181–83.

[13] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified in scattered sections of 18 U.S.C. and 28 U.S.C.).

[14] Newton & Sidhu, *supra* note 4, at 1184–85.

[15] *Id.* at 1171–72, 1171 n.27, 1206, 1235–36, 1235 n.482.

[16] *Id.* at 1288.

offense itself.[17] The court could reduce an offense level by two levels if the defendant accepted responsibility for the crime[18] as well as reduce the final sentence if the defendant gave substantial assistance to the prosecution.[19] The Guidelines also reflected new congressional legislation setting harsher penalties for drug crimes and violent crimes.[20] The Commission's handiwork automatically went into effect in the fall of 1987 after Congress declined to reject it.[21] The Sentencing Guidelines initially faced constitutional challenges based on separation of powers and impermissible delegation, and over 200 district court judges struck it down, but the Supreme Court upheld the Guidelines.[22]

Today's Guidelines largely reflects the Commission's original work, with a major exception.[23] Despite the Supreme Court's original determination that the Guidelines is constitutional, in 2005 the Court struck down the mandatory nature of the Sentencing Guidelines and held that it is advisory only.[24] In fiscal year 2019, courts sentenced about 51% of offenders within the recommended range for the particular offense, but courts sentenced another 24% of offenders in conformity with the departures allowed by the Guidelines, in particular the substantial assistance departure and the Early Disposition Program.[25] Courts must still calculate an offender's punishment under the Sentencing Guidelines before departing from that range,[26] and the

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[17] *Id.* at 1240, 1290–91.

[18] *Id.* at 1283.

[19] *Id.* at 1285.

[20] Newton & Sidhu, *supra* note 4, at 1273, 1277–79.

[21] *Id.* at 1200.

[22] *Id.* at 1193–94.

[23] *Id.* at 1168 n.7. *See generally* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 2018) (demonstrating that the modern Sentencing Table remains similar to the original table).

[24] Newton & Sidhu, *supra* note 4, at 1168 n.7; United States v. Booker, 543 U.S. 220, 245 (2005).

[25] U.S. SENT'G COMM'N, UNITED STATES SENTENCING COMMISSION QUARTERLY DATA REPORT: FISCAL YEAR 2019, intro., 11 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2019_Quarterly_Report_Final.pdf.

[26] U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A.2 (U.S. SENT'G COMM'N 2018) (citing 18 U.S.C. § 3553(a)(4)–(5); United States v. Booker, 543 U.S. 220, 264 (2005); Rita v. United States, 551 U.S. 338, 351 (2007); Gall v. United States, 552 U.S. 38, 49 (2007)). A probation officer initially investigates the defendant and prepares a report including the appropriate sentencing range. FED. R. CRIM. P. 32(c), (d). But this Comment follows the Sentencing Guidelines in referring to the work of sentencing as the responsibility of the court without breaking the process down into those tasks performed by a probation officer and those tasks

Guidelines provides standards to inform trial judges and promote consistency.[27]

Under the Guidelines, an offender's base offense is placed on one of forty-three levels, depending on both the crime charged and factors that contributed to the severity of the crime,[28] such as the use of a weapon[29] or the value of stolen property.[30] The range ascends from the least severe crime at level one to the most severe at level forty-three.[31] The court then adjusts this level based on "victim-related factors, the extent of the offender's participation (role in the offense), obstruction, conviction for multiple offenses, and the offender's acceptance of responsibility."[32] Finally, the court considers the offender's prior criminal history and assigns him points for recent convictions, with the points translating to a scale of one to six based on the length or severity of his criminal record.[33] The court then uses the sentencing table to determine where the base offense level, on a vertical axis, and the offender's criminal history points, on a horizontal axis, intersect.[34] That intersection will outline the range of what the Sentencing Commission has determined is the appropriate penalty for the offense.[35] For ranges in which the minimum penalty is at least two years of imprisonment, the maximum imprisonment, in years, is no more than 125% of the minimum imprisonment, except that the range with a minimum of thirty years has a maximum of life imprisonment.[36] With exceptions for certain crimes, if the range has a maximum of six months, the court may impose probation instead of incarceration.[37] If the maximum sentence is fifteen months or less, the court may impose probation with some form of confinement, such as home detention.[38] The Sentencing Guidelines authorizes imposing a sentence

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performed by a judge. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.1 (U.S. SENT'G COMM'N 2018).

[27] CHARLES DOYLE, CONG. RSCH. SERV., HOW THE FEDERAL SENTENCING GUIDELINES WORK: AN OVERVIEW 1 (2015), https://crsreports.congress.gov/product/pdf/R/R41696/9.

[28] *Id.* at 2, 6.

[29] *Id.* at 6.

[30] U.S. SENT'G GUIDELINES MANUAL § 2B1.1(b)(1) (U.S. SENT'G COMM'N 2018).

[31] *Id.* ch. 5, pt. A.

[32] DOYLE, *supra* note 27, at 7.

[33] *Id.* at 19–20; U.S. SENT'G GUIDELINES MANUAL § 4A1.1, ch. 5, pt. A (U.S. SENT'G COMM'N 2018).

[34] U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A, cmt. n.1 (U.S. SENT'G COMM'N 2018).

[35] *See id.*

[36] *Id.* ch. 5, pt. A; Newton & Sidhu, *supra* note 4, 1237 n.495.

[37] U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A, § 5B1.1(a) (U.S. SENT'G COMM'N 2018).

[38] *Id.*

outside the range if the court finds there is a specific circumstance "not adequately taken into consideration" by the Guidelines or, upon the government's motion, if the offender "provided substantial assistance in the investigation or prosecution of another person."[39]

Finally, the court must "consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole."[40] These factors include "the nature and circumstances of the offense and the history and characteristics of the defendant," the purposes of punishment, "the kinds of sentences available," the Guidelines, policy concerns, avoidance of disparity, and the need for restitution, all under the umbrella requirement that the sentence be "sufficient, but not greater than necessary" to serve the purposes of punishment.[41]

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[39] *Id.* §§ 5K2.0(a)(2)(A), 5K1.1; *see* CHARLES DOYLE, CONG. RSCH. SERV., FEDERAL MANDATORY MINIMUM SENTENCES: THE SAFETY VALVE AND SUBSTANTIAL ASSISTANCE EXCEPTIONS 9–11 (2019), https://fas.org/sgp/crs/misc/R41326.pdf.

[40] U.S. SENT'G GUIDELINES MANUAL § 1B1.1(c) (U.S. SENT'G COMM'N 2018).

[41] 18 U.S.C. § 3553(a). The subsection states in full:

> (a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments

For example, consider the hypothetical case of Jim Doe, a person convicted of insider trading. A court sentencing Jim would first examine the Guidelines and see that insider trading has a base level of eight.[42] The offense also includes instructions for special characteristics:

> (1) If the gain resulting from the offense exceeded $6,500, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
>
> (2) If the offense involved an organized scheme to engage in insider trading and the offense level determined above is less than level 14, increase to level 14.[43]

If, in this example, Jim gained $10,000 from his crime, the table in § 2B1.1

> have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
>
> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
>
> (5) any pertinent policy statement—
>
> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[;]
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

Id.

[42] U.S. SENT'G GUIDELINES MANUAL §§ 1B1.1(a)(1)–(2), 2B1.4(a) (U.S. SENT'G COMM'N 2018); *see* DOYLE, *supra* note 27, at 6–7.

[43] U.S. SENT'G GUIDELINES MANUAL § 2B1.4 (U.S. SENT'G COMM'N 2018).

would prescribe a two-level increase.[44] Assuming that the crime was not part of an organized scheme, the base level would be ten. The court would then consider adjustments related to the victim, the offender's role in the crime, and whether the offender obstructed justice or committed a related offense.[45] Here, if Jim had obstructed justice in connection with the charged offense, his base level would be increased by two, to twelve.[46] Next, the court would repeat the process for additional counts and potentially group counts together.[47] The court would then consider a reduction for acceptance of responsibility.[48] Here, if Jim committed only a single offense and did not accept responsibility, the base level would remain at twelve, and the next consideration would be Jim's criminal history.[49]

The Sentencing Guidelines assigns points for prior criminal history based on the length, recency, and number of prior sentences, as well as whether any sentences were for certain kinds of conduct, such as drug-related or violent conduct.[50] Sentences for some types of minor offenses are never counted, while specific rules apply for an offender considered a "career offender" or an "armed career criminal."[51] Even serious prior crimes are not counted if the offender's sentence ended at least fifteen years prior, and the time requirement is lower for less serious crimes.[52] If, in our example, Jim had only one prior conviction for a non-violent offense committed ten years prior, and he had been sentenced to five years in prison, he would have three points.[53] Those points would then translate to Criminal History Category II, which includes offenders with two or three points.[54]

The court would then look to the table to determine where Jim's base offense level of twelve and criminal history of two intersect.[55] The Sentencing Guidelines suggests a sentence of twelve to eighteen months imprisonment, which is in Zone C, meaning Jim would not be eligible for probation.[56]

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[44] *Id.* § 2B1.1(b)(1).

[45] *Id.* § 1B1.1(a)(3), ch. 3; DOYLE, *supra* note 27, at 7.

[46] U.S. SENT'G GUIDELINES MANUAL § 3C1.1 (U.S. SENT'G COMM'N 2018).

[47] *Id.* § 1B1.1(a)(4); DOYLE, *supra* note 27, at 15–16.

[48] U.S. SENT'G GUIDELINES MANUAL § 1B1.1(a)(5) (U.S. SENT'G COMM'N 2018).

[49] *Id.* § 1B1.1(a)(5)–(6).

[50] *Id.* §§ 4A1.1 cmt. background, 4A1.2(e), 4B1.1(a).

[51] *Id.* §§ 4A1.2(c), 4B1.1(a), 4B1.4(a); DOYLE, *supra* note 27, at 20.

[52] U.S. SENT'G GUIDELINES MANUAL § 4A1.2(e) (U.S. SENT'G COMM'N 2018).

[53] *Id.* §§ 4A1.1(a), 4A1.2(e).

[54] *Id.* ch. 5, pt. A; DOYLE, *supra* note 27, at 18.

[55] U.S. SENT'G GUIDELINES MANUAL § 1B1.1(a)(7) (U.S. SENT'G COMM'N 2018).

[56] *Id.* ch. 5, pt. A, § 5B1.1 cmt. n.2.

However, the court would next look at sentencing options and find that Jim would be eligible for a sentence that only requires half of the minimum sentence to be served in prison, with the other half to be served under supervised release.[57] Finally, lest the sentencing be too rigid, the court would consider special characteristics and grounds for departing from the sentencing range, "policy statements or commentary in the [G]uidelines," and factors from 18 U.S.C. § 3553(a), including the purposes of punishment: justice, deterrence, protection of the public, and rehabilitation.[58]

B. *Obstruction of Justice as a Sentence Adjustment*

The Sentencing Guidelines provides for an increase in the offense level if warranted by certain factors related to the victim, the defendant's role in the criminal activity, or the defendant's obstruction of justice.[59] For obstruction of justice, § 3C1.1 of the Sentencing Guidelines instructs courts as follows:

> If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.[60]

There has been some confusion about what behavior constitutes obstruction of justice.[61] The commentary to the Guidelines outlines examples of activities that do and do not constitute obstruction.[62] For example, it provides that lying under oath to police is obstruction only if it "significantly obstructed or

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[57] *Id.* §§ 1B1.1(a)(8), 5C1.1(d).

[58] *Id.* § 1B1.1(b); 18 U.S.C. § 3553(a).

[59] U.S. SENT'G GUIDELINES MANUAL § 1B1.1(a)(3) (U.S. SENT'G COMM'N 2018); DOYLE, *supra* note 27, at 7.

[60] U.S. SENT'G GUIDELINES MANUAL § 3C1.1 (U.S. SENT'G COMM'N 2018).

[61] *See, e.g.*, United States v. Iverson, 874 F.3d 855, 857 (5th Cir. 2017) (holding that lying about assets to obtain court-appointed counsel is obstruction); United States v. Khimchiachvili, 372 F.3d 75, 82–83 (2d Cir. 2004) (holding that lying about assets to obtain court-appointed counsel is not obstruction); 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, 934, 959–60 (1992) (presenting the view that a defendant's false testimony should be treated as obstruction, but not based on a jury's guilty verdict alone).

[62] U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. nn.4–5 (U.S. SENT'G COMM'N 2018); DOYLE, *supra* note 27, at 13–14.

impeded the official investigation or prosecution of the instant offense."[63]

In the example above, Jim would have received a sentence of eight to fourteen months if he had not received the obstruction of justice adjustment.[64] It is possible his sentence would have been the same regardless of whether he received the adjustment, because there is overlap between the applicable ranges. However, the lower sentence would have been in Zone B, making Jim eligible for probation combined with some type of non-prison confinement, thereby potentially allowing him to escape prison altogether.[65] Thus, the question of what constitutes obstruction of justice can impact an offender significantly.

III. DOES LYING TO OBTAIN COURT-APPOINTED COUNSEL CONSTITUTE OBSTRUCTION?

The commentary to the Sentencing Guidelines provides eleven examples of conduct that constitutes obstruction of justice, including "providing materially false information to a judge or magistrate judge" and "providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense."[66] Federal circuit courts are divided on the question of whether lying about assets to obtain court-appointed counsel constitutes obstruction for purposes of the sentence adjustment.[67] Most of the circuits that have considered this question determined that it constitutes obstruction.[68] The Second Circuit, however, determined that lying about assets is *not necessarily* obstruction.[69] Thus, in cases where a defendant lied about her assets to obtain court-appointed counsel, a sentence calculated in the Second Circuit could differ significantly from a sentence calculated elsewhere.

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[63] U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. nn.4–5 (U.S. SENT'G COMM'N 2018); DOYLE, *supra* note 27, at 13–14.

[64] U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 2018).

[65] *Id.* § 5B1.1(a), ch. 5, pt. A.

[66] U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.4 (U.S. SENT'G COMM'N 2018).

[67] *Circuit Splits*, 14 SETON HALL CIR. REV. 292 (2018); *see* United States v. Iverson, 874 F.3d 855, 857 (5th Cir. 2017) (holding that lying about assets to obtain court-appointed counsel is obstruction); United States v. Khimchiachvili, 372 F.3d 75, 83 (2d Cir. 2004) (holding that lying about assets to obtain court-appointed counsel is not obstruction).

[68] *Iverson*, 874 F.3d at 857; United States v. Hernandez-Ramirez, 254 F.3d 841, 842 (9th Cir. 2001); United States v. Ruff, 79 F.3d 123, 126 (11th Cir. 1996) (per curiam); United States v. Westmoreland, 72 F. App'x 29, 31 (4th Cir. 2003) (per curiam). *See also* United States v. Jallad, 468 F. App'x 600, 607–08 (6th Cir. 2012) (holding that there was no plain error where the court imposed the adjustment for lying on a financial affidavit and also affirming the sentence based on "the doctrine of invited error").

[69] *Khimchiachvili*, 372 F.3d at 82–83.

A. *The Inclusive Approach: Lying About Assets Is Obstruction*

The Fourth, Fifth, Ninth, and Eleventh Circuits have considered the question and have determined that lying about assets to obtain court-appointed counsel is obstruction.[70] These courts have dealt with slightly different challenges to the adjustment's application.[71] Each court, however, focused special attention on the commentary to § 3C1.1, which states that "providing materially false information to a judge or magistrate judge" is an example of obstruction.[72]

1. *United States v. Ruff*

In *United States v. Ruff*, the Eleventh Circuit considered the appeal of John Ruff, who had been charged with four drug and weapons violations.[73] Prior to trial, Ruff appeared before a magistrate seeking court-appointed counsel.[74] Ruff was under oath during the hearing.[75] The magistrate asked Ruff whether he had any checking accounts, savings accounts, or safe deposit boxes.[76] Ruff replied that he did not.[77] The magistrate determined that Ruff could not afford an attorney and appointed one to represent him.[78] However, Ruff

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[70] *Iverson*, 874 F.3d at 857; *Hernandez-Ramirez*, 254 F.3d at 842; *Ruff*, 79 F.3d at 126; *Westmoreland*, 72 F. App'x at 31.

[71] *Iverson*, 874 F.3d at 858 (discussing the defendant's argument that such lies do not interfere with justice and that he lacked the required intent); *Hernandez-Ramirez*, 254 F.3d at 843 (discussing the defendant's "conten[tion] that his conduct was not willful or material"); *Ruff*, 79 F.3d at 125 (discussing the defendant's argument that his lie was not material); *Westmoreland*, 72 F. App'x at 31 (discussing the defendant's argument that his lie was not material).

[72] U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.4 (U.S. SENT'G COMM'N 2018); *Iverson*, 874 F.3d at 858; *Hernandez-Ramirez*, 254 F.3d at 843; *Ruff*, 79 F.3d at 124; *Westmoreland*, 72 F. App'x at 31. Like the court in *Ruff*, the court in *Westmoreland* also focused on materiality, stating:

> The issue under determination here was whether Westmoreland had enough money to retain an attorney. We conclude that the district court did not err in finding that Westmoreland's failure to list $22,500 in cash "would tend to influence or affect" whether Westmoreland was entitled to court-appointed counsel, particularly when this amount of money is viewed in relationship to $46,200, which Westmoreland listed as his estimated net worth.

Id.

[73] *Ruff*, 79 F.3d at 124.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 124 & n.1.

[77] *Id.*

[78] *Id.* at 124.

obtained his own counsel within four days of the hearing.[79]

Meanwhile, an investigator took a key found on Ruff's person *prior* to the hearing, along with keys found on Ruff's father, and matched them to three safe deposit boxes that were registered to Ruff and his father.[80] The boxes contained a total of $37,675 and two and a half grams of crack cocaine.[81] Bank records showed that Ruff had visited each box and was the last to visit two of the boxes.[82]

Ruff eventually pleaded guilty to two of the charges, and the prosecution dropped the two remaining charges.[83] However, at sentencing the court determined that Ruff obstructed justice when he lied about having safe deposit boxes.[84] Consequently, the court applied the two-level sentence adjustment.[85]

Ruff appealed to the Eleventh Circuit, arguing that his lie was not material.[86] He pointed out that he obtained his own attorney and consequently was never represented by the court-appointed attorney.[87] Ruff also argued that his lie did not negatively affect the investigation, as the investigator found the safe deposit boxes anyway.[88] Furthermore, Ruff contended that the misrepresentation did not occur at trial or at any important pre-trial hearing.[89]

The Eleventh Circuit disagreed with Ruff.[90] The court particularly focused its analysis on materiality.[91] The court noted that, under the examples from the Sentencing Guidelines, a lie to an investigator must significantly obstruct or impede the investigation to constitute obstruction, but a lie to the court has no such limitation.[92] Materiality is the only limit on when a lie to the court is obstruction.[93] Thus, it was irrelevant that Ruff's lie did not prevent the

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[79] *Ruff*, 79 F.3d at 124.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 125.

[85] *Ruff*, 79 F.3d at 125.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Ruff*, 79 F.3d at 125–26.

[92] *Id.* at 125.

[93] *Id.*

investigator from discovering the safe deposit boxes.[94]

The court also rejected Ruff's argument that his lie was not material because he obtained his own attorney.[95] In the court's view, whether something is material depends on the question the court is answering in the particular proceeding.[96] The commentary to § 3C1.1 of the Sentencing Guidelines states that "'[*m*]*aterial*' evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination."[97] The Eleventh Circuit followed this reasoning to hold that a fact is deemed material if it is material to a particular issue under consideration.[98] Materiality is judged relative to a particular issue, rather than relative to determining guilt or innocence.[99]

In determining whether Ruff had obstructed justice, the court focused more on the examples in the commentary than on the text of the guideline.[100] The court did not seem particularly concerned with whether Ruff's lie obstructed or impeded "the administration of justice,"[101] though it held that the obstruction was sufficiently related to the underlying crime, noting that "[t]he subject matter of the hearing, Ruff's legal representation, involved the potential prosecution of the crime. This is sufficient to meet the requirements of the guideline."[102]Thus, the court affirmed Ruff's two-level adjustment.[103]

2. *United States v. Hernandez-Ramirez*

The Ninth Circuit considered the same issue in *United States v. Hernandez-Ramirez*, a case in which a tax preparer was charged, ironically, with "corruptly impeding and obstructing the administration of tax laws," passing forged checks, and "willfully assisting the preparation of false tax

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[94] *Id.* at 125–26.

[95] *Id.*

[96] *Id.* at 126.

[97] U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.6 (U.S. SENT'G COMM'N 2018). In formulating this definition, the Sentencing Commission may have had in mind the Federal Rules of Evidence, which state that a fact is material if it "is of consequence in determining the action." FED. R. EVID. 401(b) & advisory committee's notes.

[98] *Ruff*, 79 F.3d at 125–26.

[99] *See id.*

[100] *Id.* at 125.

[101] United States v. Khimchiachvili, 372 F.3d 75, 82 (2d Cir. 2004) ("We believe the Eleventh Circuit was wrong to read [sic] define 'material' without reference to the requirement that the conduct be designed to obstruct or impede the administration of justice.").

[102] *Ruff*, 79 F.3d at 125.

[103] *Id.* at 126.

returns."[104] Juan Hernandez-Ramirez told a probation officer about a bar he co-owned, but when he filled out an affidavit to determine eligibility for court-appointed counsel, he only listed the $35,000 debt he owed for the business, not the value of the business.[105] Hernandez later claimed that he did not think he was still the owner because he was behind on the payments and the business was not in his name.[106] Nevertheless, the court did not find his story credible and imposed the adjustment for obstruction of justice.[107]

On appeal, Hernandez argued that "his conduct was not willful or material."[108] The guideline itself requires willfulness, while the commentary's example specifically mentions materiality in connection with lying to a court.[109] Thus, willfulness is always required, but materiality is only necessary in certain instances, including when the court relies on the commentary's examples to base an obstruction adjustment on a lie told to the court.[110] Hernandez said that he had not intentionally misled the court and that his statement was immaterial because even if he had reported the ownership interest in the affidavit he still would have qualified for court-appointed counsel.[111]

The Ninth Circuit held that the district court's finding of willfulness was not clearly erroneous because Hernandez was a "tax preparer, familiar with the concept of assets and liabilities."[112] The court stated:

> If, as Hernandez contends, he did not believe that he owned the bar because he was not its nominal owner, or because he was unable to make payments on the note and assumed he would lose his interest, then he would have no debt. Either way, the affidavit was willfully false.[113]

The court did not consider the possibility that Hernandez no longer had an interest in the business but still had the debt. If Hernandez signed over his interest in the business it would not necessarily—indeed, would not likely—

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[104] United States v. Hernandez-Ramirez, 254 F.3d 841, 842 (9th Cir. 2001).

[105] *Id.* at 842–43.

[106] *Id.* at 843.

[107] *Id.*

[108] *Id.*

[109] U.S. SENT'G GUIDELINES MANUAL § 3C1.1 & cmt. n.4 (U.S. SENT'G COMM'N 2018).

[110] *Id.* § 3C1.1 cmt. nn.4–5. Because the list of examples in the commentary is "non-exhaustive," technically a non-material lie to the court could still constitute obstruction in some instances. *Id.*

[111] *Hernandez-Ramirez*, 254 F.3d at 843.

[112] *Id.*

[113] *Id.*

have freed him from personal liability for the debt.

The court likewise made short work of Hernandez's materiality argument.[114] The court noted that, unlike misrepresentations to law enforcement officers, "false representations to probation officers are material whether or not they result in an actual obstruction."[115] Like the court in *Ruff*, the Ninth Circuit applied the definition of materiality from the commentary and determined that Hernandez's statement was material because it "'would tend to influence or affect' whether the magistrate judge found him qualified for appointed counsel"—even if the final determination was the same.[116]

Hernandez also raised the issue of relatedness.[117] The guideline requires that "the obstructive conduct relate[] to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense."[118] The Sentencing Commission added that language as part of its 1998 amendments to the Guidelines.[119] However, the Ninth Circuit held that applying the adjustment to Hernandez did not violate the amended guideline, pointing to its decision in *United States v. Verdin* three months earlier,[120] where it had explained that this language was added in 1998 to *expand* the conduct covered by the guideline, not restrict it.[121] In amending the provision, the Sentencing Commission stated its intent to resolve a circuit split in favor of the majority view, which allowed the adjustment to apply in more cases.[122] Thus, in *Hernandez-Ramirez*, the Ninth Circuit determined that the obstruction need not "relate substantively" to the offense of conviction.[123] The lie related to the prosecution of the offense, and that was a sufficient relationship to meet the guideline's requirement.[124] Once again, the court did not consider whether Hernandez's misrepresentation met the baseline

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[114] *See id.* at 843–44.

[115] *Id.* at 844.

[116] *Id.*

[117] *Hernandez-Ramirez*, 254 F.3d at 844.

[118] U.S. SENT'G GUIDELINES MANUAL § 3C1.1 (U.S. SENT'G COMM'N 2018); *Hernandez-Ramirez*, 254 F.3d at 844.

[119] *Hernandez-Ramirez*, 254 F.3d at 843; U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 23 (1998).

[120] *Hernandez-Ramirez*, 254 F.3d at 844.

[121] United States v. Verdin, 243 F.3d 1174, 1180 (9th Cir. 2001).

[122] U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 23 (1998); *Hernandez-Ramirez*, 254 F.3d at 844;

Verdin, 243 F.3d at 1180.

[123] *Hernandez-Ramirez*, 254 F.3d at 844.

[124] *Id.*

requirement of obstructing or impeding "the administration of justice,"[125] or whether Hernandez had attempted to do so, relying on the commentary's examples as conclusive.[126]

3. *United States v. Iverson*

In 2017, the Fifth Circuit affirmed two previous unpublished opinions and held that lying about assets constitutes obstruction.[127] Michael Iverson was convicted of a brutal 1995 kidnapping and rape and thereafter was required to register as a sex offender.[128] He did not do so when he moved to Texas and was charged with failure to register.[129] When listing his assets for a determination of indigency, he stated that he owned three vehicles whose total worth was $5,500.[130] However, the presentence report valued the vehicles at $18,500.[131] Iverson admitted to intentionally lying to obtain court-appointed counsel, but he then argued that he had been confused about whether the vehicles should be valued as-is or as though they were in good condition.[132] The trial court applied the obstruction of justice adjustment and sentenced Iverson to thirty-seven months imprisonment and five years of supervised release.[133]

Iverson appealed, arguing that he did not intentionally mislead the court and that his misrepresentation did "not interfere with the investigation or prosecution of the offense."[134] Because Iverson had confessed to intentionally lying, the court of appeals would not disturb the district court's factual finding that Iverson intended to mislead the court.[135] The court responded to Iverson's other argument by looking at both the Guidelines and the precedent from sister circuits.[136]

The court began its analysis with the text of the guideline,[137] focusing more attention on the administration of justice than had the courts in *Ruff* and

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[125] U.S. SENT'G GUIDELINES MANUAL § 3C1.1 (U.S. SENT'G COMM'N 2018).

[126] United States v. Khimchiachvili, 372 F.3d 75, 81–82 (2d Cir. 2004); *Hernandez-Ramirez*, 254 F.3d at 843–44.

[127] United States v. Iverson, 874 F.3d 855, 858, 860 (5th Cir. 2017).

[128] *Id.* at 857, 861.

[129] *Id.* at 857.

[130] *Id.* at 858.

[131] *Id.*

[132] *Id.* at 860.

[133] *Iverson*, 874 F.3d at 857–58.

[134] *Id.* at 858.

[135] *Id.* at 860.

[136] *Id.* at 858–60.

[137] *Id.* at 858.

Hernandez-Ramirez.[138] Still, the court easily identified the defendant's conduct with the text of the guideline, stating:

> On its face, that language appears to include lying to a court to obtain free counsel. Procuring the financial resources of a court under false pretenses interferes with the proper administration of the criminal justice system. And that obstruction is with respect to, and relates to—that is, it occurred in connection with—the prosecution of Iverson's failure-to-report offense.[139]

After determining that the text applied, the court moved on to the commentary's examples, deciding that "producing a 'false, altered, or counterfeit document or record during an official investigation or judicial proceeding' and 'providing materially false information to a judge or magistrate judge'" both applied to Iverson's conduct.[140]

The court then turned to precedent.[141] The court noted that it had twice considered the issue and decided that lying about assets constitutes obstruction, a decision in accord with *Ruff* and *Hernandez-Ramirez*.[142] However, the court also discussed the Second Circuit's conflicting opinion in *United States v. Khimchiachvili*.[143] The court in *Iverson* addressed this split by stating that "[t]he disagreement among these circuits is over whether the defendant's false statements must have been intended to undermine the investigation or prosecution of the offense."[144] In siding with the circuits that answered in the negative, the court looked once again at the distinction

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[138] *Compare id.*, *with* United States v. Ruff, 79 F.3d 123, 125–26 (11th Cir. 1996) (per curiam) (identifying the defendant's conduct with the example in the commentary), *and* United States v. Hernandez-Ramirez, 254 F.3d 841, 843–44 (9th Cir. 2001) (focusing on willfulness and Part B of the guideline, along with the commentary's example).

[139] *Iverson*, 874 F.3d at 858.

[140] *Id.* (quoting U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. nn.4(C), 4(F) (U.S. SENT'G COMM'N 2018)).

[141] *Id.*

[142] *Id.*; *see* United States v. Sanchez, 227 F. App'x 412, 413 (5th Cir. 2007) (per curiam) ("False statements on a financial affidavit can serve as the basis for the obstruction adjustment."); United States v. Resendez, No. 98-40196, 1999 U.S. App. LEXIS 40361, at *1 (5th Cir. June 16, 1999) (per curiam) (holding that producing "a fraudulent financial affidavit" is grounds for the obstruction adjustment). Both prior opinions were unpublished, and neither contained more than a brief analysis of whether false statements about assets made to obtain court-appointed counsel warrant an adjustment for obstruction. *Sanchez*, 227 F. App'x at 413 & n.*; *Resendez*, 1999 U.S. App. LEXIS 40361, at *1 & n.*.

[143] *Iverson*, 874 F.3d at 859; *see infra* Section III.B.

[144] *Iverson*, 874 F.3d at 859.

between lying to the court and lying to law enforcement officers, a distinction reflected in the commentary.[145] The Fifth Circuit noted that "attempts to improperly influence judicial proceedings more directly interfere with the administration of justice than does similar conduct occurring in non-judicial contexts."[146] The court went on to say that the Second Circuit "may have overlooked a distinction between" the two types of lies.[147]

The Fifth Circuit also countered the Second Circuit's comparison between lying to the court about assets and lying to a probation officer about drug use—a type of conduct specifically excluded from the obstruction adjustment after a 1998 amendment to the commentary.[148] The court reasoned that lying about assets impacts the entire criminal proceeding and could even cause a delay if the misrepresentation were discovered prior to trial and a new attorney had to take over.[149] Thus, the Fifth Circuit held that lying about assets is obstruction of justice, joining the Ninth and Eleventh Circuits.[150]

B. *The Second Circuit Approach:* United States v. Khimchiachvili

In *United States v. Khimchiachvili*, the Second Circuit considered the case of George Englert, who had pleaded "guilty to mortgage fraud, wire fraud, and conspiracy to commit wire fraud" after being investigated for "an elaborate scheme" to defraud.[151] Englert had obtained court-appointed counsel.[152] After he pleaded guilty, Englert reported to the probation office that he had liabilities of $345,000 but assets of $817,000, including "paintings, furniture, and antiques worth $300,000."[153] His initial statement of financial

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[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.* at 859–60; U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 25 (1998).

[149] *Iverson*, 874 F.3d at 860.

[150] *Id.*

[151] United States v. Khimchiachvili, 372 F.3d 75, 76 (2d Cir. 2004). Englert, Robert Khimchiachvili, Cesar Viana, Christopher Berwick, and Brian Sherry were codefendants in the criminal proceedings. *Id.* at 75. Englert's appeal of his sentence adjustment was separated from Berwick and Viana's appeal of their convictions. United States v. Sherry, 107 F. App'x 253, 255 (2d Cir. 2004), *vacated on other grounds sub nom.* Berwick v. United States, 544 U.S. 917 (2005). Englert's codefendants' appeal was unsuccessful before the Second Circuit, but the Supreme Court vacated the judgment upon the appeal of Berwick. *Sherry*, 107 F. App'x at 259; *Berwick*, 544 U.S. at 917. Numerous aliases were listed in the caption naming the defendants; Englert's aliases were Dr. Moncrieffe, Baron Moncrieffe, and Prince George. *Khimchiachvili*, 372 F.3d at 75.

[152] *Khimchiachvili*, 372 F.3d at 76.

[153] *Id.* at 77.

worth for purposes of obtaining court-appointed counsel could not be found, but the trial court determined that Englert must have lied to obtain counsel, and it imposed the two-level adjustment for obstruction.[154] Because the court applied the adjustment, Englert did not receive the three-level reduction for acceptance of responsibility recommended in the probation report—a reduction the prosecution initially did not oppose.[155] He was sentenced to forty-one months imprisonment and five years of supervised release, in addition to restitution and a special assessment.[156]

Englert appealed his sentence, arguing that the adjustment should not have been imposed when the financial affidavit had not been produced "and there was no clear showing" of intent to obstruct.[157] He also argued that he should have received a reduction for accepting responsibility.[158] In hearing Englert's appeal, the Second Circuit considered only the issue of "whether swearing to a false financial affidavit in order to obtain court-appointed counsel constitutes obstruction of justice."[159] The court agreed with Englert that his conduct did not constitute obstruction and overturned his sentence.[160] Ironically, Englert's misrepresentation was more dramatic than anything perpetrated in *Ruff*, *Hernandez-Ramirez*, or *Iverson*, but Englert was the one who successfully defeated his adjustment for obstruction of justice.

In reaching its decision, the court focused on the Sentencing Guidelines's requirement of willfulness and determined that Englert did not demonstrate the necessary intent to obstruct.[161] In determining what constitutes willful obstruction of the administration of justice, the court looked not so much at the commentary's examples, as other courts did, but rather at the amendments over time.[162] First, the Second Circuit noted that in *United States v. Stroud* it had held that fleeing from law enforcement did not constitute obstruction because the fleeing suspect's primary intent was to "avoid apprehension," not to "frustrate or impede" an investigation.[163] The Sentencing Commission thereafter amended its Guidelines to agree with the

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154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.* at 77.

158 *Khimchiachvili*, 372 F.3d at 77.

159 *Id.* at 78.

160 *Id.* at 82–83.

161 *Id.* at 80.

162 *Id.* at 78–80.

163 *Id.* at 78 (quoting United States v. Stroud, 893 F.2d 504, 508 (2d Cir. 1990)).

Stroud holding,[164] and "avoiding or fleeing from arrest" is now listed in the examples as conduct that does not ordinarily constitute obstruction.[165]

The court next pointed to its earlier decision in *United States v. Thomas-Hamilton* that a "defendant's threats to a drug treatment counselor" did not constitute obstruction because there was "no indication whatsoever that [the defendant's] alleged threat was made with the *purpose* of obstructing justice."[166] The court noted that the Third Circuit similarly focused on purpose in holding that a defendant did not obstruct justice by attempting to quitclaim an interest in real estate so that the government would not obtain the interest.[167] The Third Circuit had simultaneously decided that lying to a probation officer about drug use was also not obstruction, notwithstanding the fact that "[t]he commentary to § 3C1.1 stated without qualification that, 'providing materially false information to a probation officer in respect to a presentence or other investigation for the court' was an example of obstruction of justice."[168] The Third Circuit's view was vindicated when the Sentencing Commission amended the commentary to clarify that "lying to a probation officer about drug use while released on bail" is not obstruction of justice.[169] The Second Circuit explained:

> By amending the Application Notes of § 3C1.1 . . . the Sentencing Commission twice reaffirmed a common sense definition of what constitutes obstruction of justice—conduct that willfully interferes with or attempts to interfere with the disposition of the criminal charges against a defendant. An enhancement for obstruction of justice is therefore only warranted "if the court finds that the defendant willfully and materially impeded *the search for justice in the instant offense*." Or, as we have written, the "conclusion that 'obstruct,' in this context, relates to anything that can make it more difficult to carry out a just result in a criminal case [is] erroneous as a matter of law." For a defendant's conduct to qualify as obstruction of justice,

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[164] *Khimchiachvili*, 372 F.3d at 78.

[165] U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.5 (U.S. SENT'G COMM'N 2018).

[166] *Khimchiachvili*, 372 F.3d at 78–79 (quoting United States v. Thomas-Hamilton, 907 F.2d 282, 286 (2d Cir. 1990)).

[167] *Id.* at 79 (citing United States v. Belletiere, 971 F.2d 961, 965 (3d Cir. 1992)).

[168] *Id.* (quoting U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.4(h) (U.S. SENT'G COMM'N 2018)) (discussing *Belletiere*, 971 F.2d at 965).

[169] *Id.* at 79–80 (quoting U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 25 (1998)).

> it must have the "potential to impede" the investigation, prosecution, or sentencing of the defendant. It cannot simply be a misrepresentation.[170]

Thus, the court considered intent to obstruct to be something more than intent to deceive the trial court.[171] The intent to obstruct was lacking in Englert's situation because Englert "was not seeking to prevent justice or even delay it"; rather, he was simply trying to avoid paying for his own lawyer.[172] Englert would have been represented by a lawyer regardless of whether he was truthful, and the identity of the fee-payer was inconsequential to the eventual verdict and sentencing.[173]

The court also rejected the argument the Eleventh Circuit found persuasive in *Ruff*, that a comparison of examples in the commentary to § 3C1.1 shows that materiality is the only requirement for a lie to the court to constitute obstruction.[174] The commentary lists as examples of obstruction both "providing materially false information to a judge or magistrate" and "providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense."[175] The Second Circuit, however, reasoned that this difference in language is intended to place an added limitation on when lies to a law enforcement officer constitute obstruction, not to imply that lies to the court are *always* obstruction.[176] In the Second Circuit's view, acting with "the purpose of obstructing justice" is still a necessary element of obstruction even if the defendant has told a material lie to the court.[177] The court pointed to yet another example of obstruction in the Sentencing Guidelines—"providing materially false information to a probation officer in respect to a presentence or other investigation for the court."[178] This language mirrors that of the other two examples but is definitely *not* intended to mean that providing such information is always obstruction, as demonstrated by the

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[170] *Id.* at 80 (emphasis added) (citations omitted) (first quoting United States v. Zagari, 111 F.3d 307, 328 (2d Cir. 1997); then quoting United States v. Stroud, 893 F.2d 504, 507 (2d Cir. 1990); and then quoting United States v. McKay, 183 F.3d 89, 95 (2d Cir. 1999)).

[171] *Id.*

[172] *Khimchiachvili*, 372 F.3d at 80.

[173] *Id.*

[174] *Id.* at 80–81; *see* United States v. Ruff, 79 F.3d 123, 125–26 (11th Cir. 1996) (per curiam).

[175] U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.4 (U.S. SENT'G COMM'N 2018).

[176] *Khimchiachvili*, 372 F.3d at 81.

[177] *Id.*

[178] *Id.* (quoting U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.4 (U.S. SENT'G COMM'N 2018)).

amendment clarifying that lying about drug use is not obstruction.[179]

Finally, the Second Circuit considered the precedent of *Ruff* and *Hernandez-Ramirez* but was unconvinced.[180] The court noted that the Eleventh Circuit's decision in *Ruff* did not give adequate weight to intent.[181] In the court's view, the Eleventh Circuit erred in "defin[ing] 'material' without reference to the requirement that the conduct be designed to obstruct or impede the administration of justice."[182] The false statement's "effect or its intention must be to somehow 'impede[] the search for justice.'"[183] Englert's statement had neither that intention nor that effect.[184]

The Second Circuit also considered *Hernandez-Ramirez* but reasoned that the Ninth Circuit "never squarely addressed the issue" of intent to obstruct.[185] Instead, the Ninth Circuit rejected the defendant's argument that the second clause of § 3C1.1 requires a substantive relation between the obstruction and the crime of conviction.[186] But the Second Circuit suggested the key to determining whether conduct is obstruction lies in the first clause.[187] The court said that it was "focus[ed] on the language of clause (A) that the Ninth Circuit passed over, and particularly the requirement that the defendant 'willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice.'"[188] The Second Circuit suggested that Englert's conduct could perhaps be punishable another way, through a different adjustment or an upward departure, but it was adamant that Englert had neither intended to obstruct justice nor actually obstructed justice, and the adjustment under § 3C1.1 was inapplicable.[189]

C. *Questions to Consider*

A comparison of the reasoning in *Ruff*, *Hernandez-Ramirez*, *Iverson*, and *Khimchiachvili* raises a few questions. First, do the examples in the commentary to § 3C1.1 represent conduct that always, or nearly always, constitutes obstruction of justice? The courts in *Ruff* and *Hernandez-Ramirez*

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179 *Id.*; *see* U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.5 (U.S. SENT'G COMM'N 2018).

180 *Khimchiachvili*, 372 F.3d at 81.

181 *Id.* at 82.

182 *Id.*

183 *Id.* (quoting United States v. Zagari, 111 F.3d 307, 328 (2d Cir. 1997)).

184 *Id.*

185 *Id.* at 81.

186 *Khimchiachvili*, 372 F.3d at 82.

187 *See id.*

188 *Id.*

189 *Id.* at 82–83.

treated the examples as conclusive.[190] The court in *Khimchiachvili*, however, pointed out that at least one example—materially lying to a probation officer—does not always constitute obstruction, as evidenced by the specific carve-out for lying about drug use.[191] Thus, it seems that the examples in the commentary should not be considered conclusive.[192] The examples represent types of obstruction, but the definition of obstruction must be found elsewhere.

Another question arises as to the intent required for obstruction of justice. As noted above, some courts focus more on materiality than intent.[193] Even the Second Circuit painted a less-than-clear image of the standard for determining intent.[194] Must the defendant always act with the purpose of obstructing justice? Or does the adjustment apply to intentional conduct that has the effect of obstructing justice?

Finally, what is obstruction of the administration of justice? Is obstruction of the *administration of justice* the same as obstruction of the *justice system*?

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[190] *See supra* Sections III.A.1, III.A.2.

[191] *Khimchiachvili*, 372 F.3d at 81; *see* U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.5 (U.S. SENT'G COMM'N 2018).

[192] *Khimchiachvili*, 372 F.3d at 81 ("There is no indication, however, that the Sentencing Commission intended to provide that a false statement to a judge or magistrate not made for the purpose of obstructing justice should warrant an enhancement."). The Supreme Court has said that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Stinson v. United States, 508 U.S. 36, 38 (1993). But this statement would only control the outcome here if the commentary itself treated the examples as conclusive interpretations. It is unclear that this is the case. The commentary does note that the examples of obstruction of justice make up "a non-exhaustive list of examples of the types of conduct to which this adjustment applies"—not to which it *might* apply. U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.4 (U.S. SENT'G COMM'N 2018). But the commentary also states that "[a]lthough the conduct to which this adjustment applies is not subject to precise definition, comparison of the examples set forth in Application Notes 4 and 5 should assist the court in determining whether application of this adjustment is warranted in a particular case." *Id.* at § 3C1.1 cmt. n.3. And importantly, the commentary uses the word "examples." *Id.* Thus, in light of the contradiction regarding lying about drug use that the *Khimchiachvili* court pointed out, it appears that the examples are *not* conclusive statements that particular conduct is always obstruction of justice. *See Khimchiachvili*, 372 F.3d at 81.

[193] *See supra* Sections III.A.1, III.A.2, III.B.

[194] *See supra* Section III.B. *See generally Khimchiachvili*, 372 F.3d at 82 ("We believe the Eleventh Circuit was wrong to read define [sic] 'material' without reference to the requirement that the conduct be *designed* to obstruct or impede the administration of justice. It is not enough to simply say that the false statements were material because they had an effect on some discrete action taken by a magistrate judge; that *effect or its intention* must be to somehow 'impede[] the search for justice.'" (emphasis added) (quoting United States v. Zagari, 111 F.3d 307, 328 (2d Cir. 1997))).

Does administration of justice include every minute detail of the criminal justice system, or should the prohibition on obstruction be read instead as a ban on conduct that interferes with the criminal receiving her just deserts? Does the language protect the justice system, or the overall concept of justice?

The court in *Khimchiachvili* adopted a view of administration of justice that would exclude obtaining court-appointed counsel and include only the ultimate conclusion of the case.[195] On one hand, if administration of justice refers to "justice," rather than "the justice system," then it would make little sense to consider lying about assets obstruction. If wrongfully avoiding paying for an attorney is obstruction, then paying for the attorney would have to be considered part of justice itself, effectively a punishment before a verdict. If the essence of § 3C1.1 is to protect the concept of justice, rather than the justice system, lying about assets is almost automatically excluded from a definition of obstruction.

The problem with this view of the sentence adjustment is that it does not neatly align with other applications of the adjustment. Some courts have held that lies told prior to trial, such as lies told to avoid bond revocation, can constitute obstruction.[196] In some cases, defendants lie to avoid punishment, in the form of bond revocation, for criminal conduct.[197] These cases fit, at least somewhat, into the "concept of justice" interpretation. Even though the defendant in a revocation hearing has not been convicted of the underlying conduct by a jury, the defendant is still being penalized for a wrongful action, and her lie to avoid that penalty could constitute interference with the workings of justice.

It is more difficult to square the "concept of justice" interpretation with those cases in which the defendant told a lie merely to obtain bail, instead of to avoid punishment. Even the Second Circuit has held that lying to obtain pre-trial release constitutes obstruction of justice, stating that "a defendant's

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[195] *See Khimchiachvili*, 372 F.3d at 80 ("[Mr. Englert]was not seeking to prevent justice or even delay it.").

[196] *See* United States v. Taylor, 749 F.3d 842, 848–49 (9th Cir. 2014) (holding that lying to avoid bond revocation can constitute obstruction); United States v. Jones, 308 F.3d 425, 426, 429 (4th Cir. 2002) (same); United States v. Blackman, 904 F.2d 1250, 1259 (8th Cir. 1990) (holding that giving law enforcement false identification can constitute obstruction). The commentary to § 3C1.1 now lists "providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense" as an example of conduct not considered obstruction. U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.5 (U.S. SENT'G COMM'N 2018). The statement was added as part of the 1990 amendments. *Amendment 347*, U.S. SENT'G COMM'N (Nov. 1, 1990), https://www.ussc.gov/guidelines/amendment/347.

[197] *Taylor*, 749 F.3d at 844–45 (domestic assault); *Jones*, 308 F.3d at 427 (4th Cir. 2002) (shooting at someone).

falsely obtaining bail always has the potential to impede the prosecution of the offense charged due to the inherent risk that a defendant on bail may not appear in court as scheduled."[198] Bail may be denied based on previous criminal conduct, which could place denial in the category of a punishment, albeit a second punishment for past crimes. But bail may also be denied because a defendant poses a flight risk. Thus, denial of bail is not always a punishment.[199] Because denying bail does not *always* constitute punishment, lying to get bail does not always constitute avoiding justice—if justice is thought of as getting one's just deserts.

On the other hand, interpreting "administration of justice" as "administration of the justice system" creates additional problems. The Fifth Circuit pointed out in *Iverson* that lying about assets could delay judicial proceedings and cited that possibility as evidence that such deceit is obstruction even though lying about drug use is not.[200] It is difficult to differentiate, though, between conduct that interferes with the smooth working of the justice system, such as lying about assets, and conduct specifically excluded from the adjustment in the examples, such as "avoiding or fleeing from arrest."[201] Judge Heaney, in his dissent in *United States v. Blackman*, criticized a broad interpretation of the guideline that equated giving law enforcement a false identification with more serious forms of obstruction, particularly because the "real time" increase of a two-level adjustment depends on the base level of the underlying crime.[202] This means that a defendant could end up serving more time for providing false identification than another defendant would serve for conduct that actually obstructed the prosecution:[203]

> Although such disparities are to some extent inevitable

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[198] United States v. Gumbs, 286 F. App'x 763, 765 (2d Cir. 2008); *see also* United States v. Charles, 138 F.3d 257, 267 (6th Cir. 1998) (holding that lying about identity to obtain bail is obstruction).

[199] Of course, when a defendant lies to obtain bail, there is likely some underlying wrongful conduct that the defendant wishes to conceal and that could form the basis for the "punishment" of denying bail. In *Gumbs*, the defendant lied about his birthplace and citizenship to obtain bail because he was in the United States illegally. 286 F. App'x at 764–65. The lie thus concealed criminal conduct. In *Charles*, the defendant presented false identification to the magistrate, "thereby conceal[ing] his prior criminal record," so that the magistrate would allow him to post bail. 138 F.3d at 266–67.

[200] *See supra* Section III.A.3.

[201] *See* U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.5 (U.S. SENT'G COMM'N 2018).

[202] United States v. Blackman, 904 F.2d 1250, 1261 (8th Cir. 1990) (Heaney, J., dissenting).

[203] *Id.*

> under the [G]uidelines, extending section 3C1.1 to conduct as innocuous as Blackman's futile attempt to avoid apprehension increases the risk that the obstruction adjustment will be used to punish widely varying levels of evasive conduct with sentences of undifferentiated severity. Moreover, by applying section 3C1.1 to conduct engaged in during the commission of a crime to avoid apprehension, the majority creates the possibility that any affirmative step taken by a defendant to avoid detection could qualify for a two-level increase for obstruction of justice. Thus, conduct such as concealing one's identity from one's victim during the commission of a crime or fleeing the scene of the crime arguably could merit the same two-level adjustment as committing perjury or threatening a witness, because all such acts ultimately are "calculated to mislead or deceive authorities."[204]

Judge Heaney's concern about where to draw the line applies to the broader question of what constitutes obstruction of justice generally, including when the conduct is charged as a separate crime. In fact, clearing one's browser history could be considered the independent crime of obstruction of justice, even when there is no nexus between the action and an official investigation.[205] When a defendant is charged with the separate *crime* of obstruction of justice, there are at least two safeguards—an elected legislature that defined the crime and a jury that will determine guilt. But when a defendant is not charged with a separate crime and is instead punished with a sentence adjustment, there is no legislative definition and no jury. This difference makes it imperative that courts accurately draw the line between actual obstruction and conduct that is merely blameworthy without being obstructive.

IV. PROPOSAL

"Obstruction of justice" is defined as "[i]nterference with the orderly administration of law and justice, as by giving false information to or withholding evidence from a police officer or prosecutor, or by harming or intimidating a witness or juror."[206] Notwithstanding this broad definition, in popular culture obstruction of justice may be thought of as a political

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[204] *Id.* at 1261–62 (citations omitted) (quoting U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. (U.S. SENT'G COMM'N 1989)).

[205] DeVries, *supra* note 1, at 14, 20–22.

[206] *Obstruction of Justice*, BLACK'S LAW DICTIONARY (11th ed. 2019).

crime,[207] a white-collar crime, or an organized crime activity. The crime may be associated with television images of potential defendants shredding documents in the last minutes before police raid an office or witnesses refusing to testify because they have been threatened by a well-connected defendant. Presidential scandals encourage an understanding of obstruction as a crime related to power.[208] In reality, though, the sentence adjustment under § 3C1.1 is often applied to ordinary defendants who simply commit perjury at trial.[209] Nevertheless, there may be good reason for a narrower understanding of obstruction, with deeper roots than either television programming or modern political scandals.

A. *The History of Obstruction*

One problem with determining whether lying to obtain court-appointed counsel is obstruction is that the Sixth Amendment was not originally understood to include a right to free counsel for indigent defendants,[210] although many federal judges would in fact appoint counsel for such defendants upon request.[211] If counsel was appointed as a charity, and not as a right, then it seems unlikely that defendants would pretend they could not afford an attorney in hopes of getting free representation. Still, the history of obstruction of justice prohibitions can shed light on whether the adjustment is about protecting the justice system itself or ensuring that justice prevails—that is, that the guilty are punished.

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[207] *See Obstruction of Justice*, HIST., https://www.history.com/topics/us-government/obstruction-of-justice (Aug. 21, 2018). This web page focuses on the political side of obstruction, beginning by stating:

> Obstruction of justice is a criminal charge that is used to bring down politicians and other public officials—elected or appointed—who have knowingly attempted to disrupt criminal proceedings or otherwise interfere with the workings of the criminal justice system. Obstruction statutes were put in place to punish politicians and other powerful public officials who lie or attempt to "cheat the system," and to prevent those transgressions from occurring.

Id. The article goes on to state that "[a]nyone who interferes with a criminal investigation, or a criminal or civil trial, can be charged with obstruction of justice. However, its use as a criminal charge made against public officials—judges, prosecutors, attorneys general and elected officials—is arguably more well known." *Id.*

[208] *See id.*

[209] *See* United States v. Dunnigan, 507 U.S. 87, 98 (1993); United States v. Sierra-Villegas, 774 F.3d 1093, 1102–03 (6th Cir. 2014).

[210] WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 29–30, 32–33 (1955).

[211] *Id.*

If obstruction of justice is merely any attempt to get out of the punishment for one's crimes, then obstruction is as old as crime itself.[212] Even the broad scope of the Sentencing Guidelines, though, does not pretend to include all such attempts in its definition, as made clear by the examples in the commentary.[213] In historic common-law England, when many felonies were punishable by death[214] and there was no right to testify on one's own behalf,[215] the opportunity for the accused to obstruct justice and the incentive to avoid doing so were both minimal. Likewise, there was little reason to try a person convicted of a capital offense for the additional crime of obstruction. The nature of the administration of justice, though, has always provided a reason to outlaw obstruction when perpetrated by third parties or the authorities.

The term "obstruction of justice" has been used historically to refer to misconduct by those in authority.[216] In the mid-seventeenth century, the Virginia Assembly published an authoritative collection of the laws of the colony, claiming that "the acts of Assembly of this country through multiplicitie of alterations and repeales are become so difficult, that *the course of justice is thereby obstructed* and those that are by the lawes intrusted with power to execute them, may by such their uncertainety be drawne to comit unwilled errors."[217] Here, obstruction of justice was accomplished not by an individual criminal, but by those in power who enacted a multiplicity of laws and failed to provide citizens with adequate notice of the laws. The term was used to denote the improper use of political power, foreshadowing today's association of the term with the corruption of public officials.

The most famous early historic charge of obstruction of justice is probably that levied against King George III in the Declaration of Independence. The Signers claimed that the King had "obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers."[218] The Signers also alleged that the King had "endeavoured to prevent the

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[212] When Cain killed his brother Abel, becoming the first murderer, he gave this evasive answer when God questioned him about Abel's whereabouts: "I know not: Am I my brother's keeper?" *Genesis* 4:9 (King James).

[213] *See* U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.5 (U.S. SENT'G COMM'N 2018).

[214] 4 WILLIAM BLACKSTONE, COMMENTARIES *18.

[215] Mary Bell Hammerman, *A Criminal Defendant's Constitutional Right to Testify—The Implications of* United States *ex rel.* Wilcox v. Johnson, 23 VILL. L. REV. 678, 680 (1978).

[216] *See generally* THE DECLARATION OF INDEPENDENCE para. 10 (U.S. 1776); 1 WILLIAM HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619; PUBLISHED PURSUANT TO AN ACT OF THE GENERAL ASSEMBLY OF VIRGINIA 432 (1823).

[217] 1 HENING, *supra* note 216, at 432 (1823) (emphasis added) (original spelling retained).

[218] THE DECLARATION OF INDEPENDENCE para. 10 (U.S. 1776).

population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands."[219] Here again, the charge was political in nature and raised against a person in a position of governmental authority.

But the concept of obstruction of justice was not limited to those in authority. In his *Commentaries on the Law of England*, Sir William Blackstone discussed twenty-two categories of offenses against public justice, some of which could be categorized as obstruction of justice today.[220] These crimes were embezzling, vacating, or falsifying records or court proceedings or impersonation;[221] using duress to force a prisoner in one's custody to testify against someone else; obstructing the execution of process; escaping from custody; breaking out of prison; rescuing someone from prison; returning from forced transportation to a colony; taking a reward for returning stolen goods; receiving stolen goods; agreeing not to prosecute in exchange for the return of stolen goods; barretry[222] or suing on behalf of a fictitious plaintiff; maintenance;[223] champerty;[224] taking money from a defendant to drop a criminal matter; conspiring to indict an innocent person of a felony; perjury and subornation of perjury; bribery; embracery;[225] returning a false verdict as a juror; negligence in performing the duties of a

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[219] *Id.* para. 9.

[220] 4 BLACKSTONE, *supra* note 214, at *127–41.

[221] *Id.* at *128 ("[T]o acknowlege [sic] any fine, recovery, deed enrolled, statute, recognizance, bail, or judgment, in the name of another person not privy to the same, is felony without benefit of clergy. . . . [T]o personate any other person . . . before any judge of assize or other commissioner authorized to take bail in the country, is also felony.").

[222] "Common *barretry* is the offence of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise." *Id.* at *134.

[223] Maintenance is "[i]mproper assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case; meddling in someone else's litigation." *Maintenance*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[224] Champerty is:

> An agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds; specif., an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim.

Champerty, BLACK'S LAW DICTIONARY (11th ed. 2019).

[225] "Embracery is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like." 4 BLACKSTONE, *supra* note 214, at *140.

public office; oppression and partiality on the part of judges; and extortion perpetrated by a public officer.[226]

Eight of these offenses against public justice could only be perpetrated by someone other than the offender in the underlying matter, and in some cases they could only be perpetrated by someone in a position of power. Notably, intentionally allowing a prisoner to escape from custody and rescuing someone from prison were only punishable *if* the person escaping was later convicted of the underlying offense,[227] and presumably this rule would extend to bar punishment of the escaping prisoner if he were later determined to be innocent. If these offenses against public justice were intended to include all offenses against the justice system, then it would make no sense to exclude prison breaks, which certainly cost the justice system the time and money involved in apprehending the fleeing suspect. It seems, then, that England was interested in punishing attempts to help defendants elude punishment only when such attempts, if successful, would actually obstruct justice itself, not merely the justice system.

It *appears* that some of the offenses in the *Commentaries*, such as obstructing process, maintenance, and champerty, were criminalized to protect the justice system.[228] Certain aspects of the justice system, though, require respect if justice, in terms of punishment of the wrongdoer and vindication of the innocent, is to be achieved. Obstructing process was probably outlawed because the justice system is held to be the most accurate way of achieving justice. Maintenance, barretry, and champerty could negatively affect the justice system by clogging the courts with pointless suits, but Blackstone's rationale for why maintenance was banned had more to do with the concept of justice.[229] Blackstone said that maintenance "is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression."[230] This rationale could have applied to barretry, as well. Furthermore, offenses that would have relieved the strain on the justice system, such as agreeing not to prosecute a theft in exchange for the return of the stolen item or dropping a criminal suit, were still considered offenses against public justice because they allowed the criminal to escape punishment.

Of course, perjury was considered an offense against public justice, and

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226 *Id.* at *128–41.

227 *Id.* at *130–31.

228 *See id.* at *129, *134–36.

229 *See id.* at *135.

230 *Id.*

lying under oath about one's assets can constitute perjury.[231] Still, according to Blackstone, perjury occurs "when the suit is past it's [sic] commencement, and come to trial"[232] and "must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance; to which no regard is paid, it is no more penal than in . . . voluntary extrajudicial oaths."[233] The Eleventh Circuit held that materiality is met when the lie is told to get a court-appointed attorney because the question in dispute is whether the defendant qualifies for a court-appointed attorney, not whether the defendant is guilty.[234] But even though the commentary to the Sentencing Guidelines lists perjury as an *example* of obstruction, perjury should constitute obstruction only if it actually fits under the guideline itself because, as noted above, the examples are not conclusive evidence that conduct is obstruction.[235]

Perjury in Blackstone's era is best understood as an offense against public justice because of its tendency to pervert justice being served and not because it interfered with the justice system, as evidenced by the materiality requirement that has survived in present statutes.[236] If the goal were to prevent obstruction of the justice system, it would seem that all lies told under oath, or all lies material to a court proceeding, would have been considered offenses against public justice, as they could cause officers of the court to waste time needlessly investigating. False statements about assets may be material to an advisement proceeding and thus constitute perjury, but because the examples in the Sentencing Guidelines's commentary are not conclusive, perjury itself should be considered obstruction under the adjustment only when the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction."[237] A view of obstruction of justice that focuses on justice itself, rather than the justice system, seems to fit with Blackstone's view of offenses against public justice. Even the Supreme Court has noted that "the ordinary task of trial courts is to sift true from false testimony," so when obstruction was punished under courts' contempt power, "the problem caused by simple perjury was not so much an obstruction of justice as an expected part of its

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[231] 18 U.S.C. § 1621 and 18 U.S.C. § 1623 punish only "material" false statements.

[232] 4 BLACKSTONE, *supra* note 214, at *137.

[233] *Id.*

[234] United States v. Ruff, 79 F.3d 123, 126 (11th Cir. 1996) (per curiam).

[235] *See supra* Sections III.B, III.C.

[236] *See* 4 BLACKSTONE, *supra* note 214, at *137; 18 U.S.C. § 1621; 18 U.S.C. § 1623.

[237] U.S. SENT'G GUIDELINES MANUAL § 3C1.1 (U.S. SENT'G COMM'N 2018).

administration."[238]

In 1909, Congress "codified, revised, and amended" the federal penal laws.[239] In a manner reminiscent of Blackstone's catalog, Chapter Six of the act was titled "Offenses Against Public Justice" and contained twenty-two sections.[240] The first section was a broad prohibition of perjury, with only the familiar requirements of willfulness, materiality, and knowledge of the statement's falsity, and the second was a prohibition of subornation of perjury.[241] Section 135 of the Act, titled "Intimidation or corruption of witness, or grand or petit juror, or officer,"[242] which was similar to a federal prohibition enacted in 1872,[243] stated:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate or impede any witness, in any court of the United States . . . or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or imepde [sic], or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.[244]

These three sections were the only ones that could be understood to cover

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238 United States v. Dunnigan, 507 U.S. 87, 93 (1993).

239 Act of Mar. 4, 1909, ch. 321, 35 Stat. 1088 (1909).

240 Act of Mar. 4, 1909, ch. 321, §§ 125–146, 35 Stat. 1088, 1111 (1909).

241 Act of Mar. 4, 1909, ch. 321, §§ 125–126, 35 Stat. 1088, 1111 (1909).

242 Act of Mar. 4, 1909, ch. 321, § 135, 35 Stat. 1088, 1111 (1909).

243 *See* Act of June 10, 1872, ch. 420, 17 Stat. 378 (1872).

> [t]hat if any person or persons shall corruptly, or by threats or force, or by threatening letters, or any threatening communications, endeavor to influence, intimidate, or impede any grand or petit jury or juror of any court of the United States, in the discharge of his or their duty, or shall corruptly, or by threats or force, or by threatening letters, or any threatening communications, influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, such person or persons so offending shall be liable to prosecution therefor by indictment, and shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or by both, according to the aggravation of the offence.

Id.

244 Act of Mar. 4, 1909, ch. 321, § 135, 35 Stat. 1088, 1113 (1909).

lying to obtain counsel[245] (if indigent defendants had been entitled to free counsel at the time). The remaining eighteen sections of Chapter Six dealt with other forms of conduct; twelve sections discussed conduct that could *only* have been committed by someone *other* than the defendant in the underlying proceeding or potential proceeding,[246] which hearkens back to both the *Commentaries* and early uses of the term "obstruction of justice."

The prohibitions on perjury and subornation of perjury would perhaps have covered lying about assets, but as noted above, that fact is not sufficient to bring the lies under the umbrella of obstruction of justice. The sentence adjustment is for obstruction of justice, not perjury, and even though perjury is given as an example, the commentary's examples are an inconclusive guide, not a suggestion that the plain language of the guideline is inconsequential. For the adjustment to apply, there must be either willful obstruction or an attempt to obstruct or impede.

Section 135 could be understood to include conduct such as lying about assets, but in light of the context, it seems the statute was intended more to prevent bribery, as opposed to perjury. This is so because the first part was directed at those who tamper with witnesses through threats, force, or corruption.[247] "Corruptly" is defined as "[i]n a corrupt or depraved manner; by means of corruption or bribery."[248] Black's Law Dictionary further states that "[a]s used in criminal-law statutes, corruptly usu[ally] indicates a wrongful desire for pecuniary gain or other advantage."[249] In the first part of § 135, "corruptly" could only mean some type of bribery or extortion, because the defendant was accomplishing the obstruction through a witness.[250] However, the language in the first part of the statute is parallel to the language in the second part, which prevents obstruction of the due

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[245] *See* Act of Mar. 4, 1909, ch. 321, §§ 125–126, 135, 35 Stat. 1088, 1111, 1113 (1909).

[246] *See* Act of Mar. 4, 1909, ch. 321, 35 Stat. 1088, 1111 (1909). The remaining sections were entitled: "Stealing or altering process; procuring false bail, etc."; "Destroying, etc., public records"; "Destroying records by officer in charge"; "Forging signature of judge, etc."; "Bribery of a judge or judicial officer"; "Judge or judicial officer accepting a bribe, etc."; "Juror, referee, master, etc., or judicial officer, etc., accepting bribe"; "Witness accepting bribe"; "Intimidation or corruption of witness; or grand or petit juror, or officer; "Conspiring to intimidate party, witness, or juror"; "Attempt to influence juror"; "Allowing prisoner to escape"; "Application of preceding section" (on allowing a prisoner to escape); "Obstructing process or assaulting an officer"; "Rescuing, etc., prisoner; concealing; etc., person for whom warrant has issued"; "Rescue at execution"; "Rescue of prisoner"; "Rescue of body of executed offender"; "Extortion by informer"; and "Misprision of felony." *Id.*

[247] *See* Act of Mar. 4, 1909, ch. 321, § 135, 35 Stat. 1088, 1113 (1909).

[248] *Corruptly*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[249] *Id.*

[250] *See* Act of Mar. 4, 1909, ch. 321, § 135, 35 Stat. 1088, 1113 (1909).

administration of justice.[251] Corruption probably has the same sense in the second part of the statute, where it is once again placed alongside threats and force.[252] This parallelism suggests that "corruptly" in the second part has the same meaning as that in the first part, which would require the defendant to exercise or attempt to exercise some kind of influence on external actors through conduct such as bribery or extortion. The second clause was perhaps intended to cover all situations in which a defendant tried to bribe or harm a judge, prosecutor, or bailiff, not necessarily all corrupt conduct affecting the justice system.

Thus, historically, obstruction of justice seems to have referred more to obstruction of the concept of justice, rather than the justice system. Lying about one's assets to obtain a free attorney does not fit squarely into the historic understanding.

B. *Obstruction as a Criminal Offense Today*

There are similarities between historic views of obstruction and obstruction in today's United States Code. Some of the language from § 135 is now found in 18 U.S.C. § 1503, which states:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).[253]

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[251] *See id.*

[252] *See id.*

[253] 18 U.S.C. § 1503(a).

This statute has been interpreted as requiring an intent to obstruct, and "[t]he action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding."[254] The Supreme Court has held that lying to an investigator is not necessarily obstruction because the defendant's "endeavor must have the 'natural and probable effect' of interfering with the due administration of justice."[255] The Court did not hold that the entirety of the potential investigation was within the concept of the administration of justice.[256] Thus, if the intent in the "omnibus"[257] obstruction statute must be more specific than just an intent to influence some part of an investigation, then the intent in an adjustment that specifically requires a willful act should be similarly understood.

In some ways, federal obstruction statutes *may* focus more on the justice *system* than historic statutes might have. For example, 18 U.S.C. § 1512 states:

> Whoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or *possible commission* of a Federal offense . . . shall be fined under this title or imprisoned not more than 20 years, or both.[258]

At first this statute seems to break with the "concept of justice" definition of obstruction of justice, because a person can be guilty of violating this statute even if there was really no underlying offense. But in reality, the statute was probably designed merely to punish *successful* attempts at obstruction—those that result in a witness refusing to testify and a consequent acquittal of a guilty party. If an actual, rather than possible, commission were required,

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[254] United States v. Aguilar, 515 U.S. 593, 599 (1995).

[255] *Id.* (quoting United States v. Wood, 6 F.3d 692, 695 (10th Cir. 1993)).

[256] *Id.*; Marinello v. United States, 138 S. Ct. 1101, 1106 (2018) ("The word 'administration' can be read literally to refer to every '[a]ct or process of administering' including every act of 'managing' or 'conduct[ing]' any 'office,' or 'performing the executive duties of' any 'institution, business, or the like.' But the whole phrase—the due administration of the Tax Code—is best viewed, like the due administration of justice, as referring to only some of those acts or to some separable parts of an institution or business." (citation omitted)).

[257] *Aguilar*, 515 U.S. at 597.

[258] 18 U.S.C. § 1512(b)(3) (emphasis added).

then it would be difficult to punish the recalcitrant witness without first proving that the acquitted guilty party was in fact guilty. The statute further provides:

> If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.[259]

This heightened punishment demonstrates that, although the net is cast wide enough to catch some otherwise innocent defendants who interfere with witnesses, the legislative intent is to prevent the guilty from escaping punishment when acquitted due to obstruction.

Furthermore, federal code provisions that seem to punish obstruction of the justice *system* are perhaps best understood as attempts to punish obstruction of what the Second Circuit called "*the search for justice in the instant offense.*"[260] Certain aspects of the justice system are essential to bringing about a just result. Statutes that protect whistleblowers from retaliation,[261] witnesses from harassment,[262] process servers from assault,[263] extradition agents from resistance,[264] and juries from eavesdropping[265] are necessary to protect the search for justice—not just the justice system. Lying to obtain a court-appointed attorney, though, has little to do with the search for justice. Even if certain statutes require only the intent to obstruct the system, the guideline does not clearly indicate that the intent need only be to obstruct the system. Defendants who lie in such situations are intending to get free representation, not "prevent justice or even delay it."[266]

C. *Obstruction under the Guidelines*

When it initially formulated the Sentencing Guidelines, the Sentencing Commission was, in certain areas, effectuating specific directives of Congress as outlined in either the Sentencing Reform Act or the legislative history of

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[259] 18 U.S.C. § 1512(j).

[260] United States v. Khimchiachvili, 372 F.3d 75, 80 (2d Cir. 2004) (quoting United States v. Zagari, 111 F.3d 307, 328 (2d Cir. 1997)).

[261] 18 U.S.C. § 1514A.

[262] 18 U.S.C. § 1512.

[263] 18 U.S.C. § 1501.

[264] 18 U.S.C. § 1502.

[265] 18 U.S.C. § 1508.

[266] United States v. Khimchiachvili, 372 F.3d 75, 80 (2d Cir. 2004).

that Act.[267] The adjustment for obstruction of justice, though, was not based on either Congress's directive or the legislative history of that directive.[268] Instead, it was based on the Commission's understanding of past sentencing practices.[269] In effect, it might be best to understand the Commission's creation of the adjustment as an attempt to label wrongful conduct that judges were already considering in their sentencing.[270] Still, by choosing the label "obstructing or impeding the administration of justice" and by including violations of federal obstruction statutes in the examples of obstruction,[271] the Commission insinuated that the criminal law should serve as a guide on close questions where both the plain language and the examples are inconclusive. As noted above, the federal code is perhaps best understood as protecting the concept of justice or the search for justice, rather than the justice system, because the provisions that protect the system appear designed to protect the search.[272] Even if a particular statute expands the concept to include conduct intended to obstruct more mundane aspects of the justice system, this interpretation should not be applied to a broadly-worded guideline that is already understood to include every type of obstruction of justice criminalized in the federal code.[273]

The Supreme Court has noted, however, that the sentencing phase is different from the guilt-determining phase:

> The commission of perjury is of obvious relevance in this regard, because it reflects on a defendant's criminal history, on her willingness to accept the commands of the law and the authority of the court, and on her character in general. Even on the assumption that we could construe a sentencing guideline in a manner inconsistent with its accompanying commentary, the fact that the meaning ascribed to the phrase "obstruction of justice" differs in the contempt and sentencing contexts would not be a reason for rejecting the Sentencing Commission's interpretation of that phrase. In all events, the Commission's interpretation is contested by

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[267] Newton & Sidhu, *supra* note 4, at 1185–87.

[268] *Id.* at 1286–87; *see also* Elizabeth T. Lear, *Double Jeopardy, the Federal Sentencing Guidelines, and the Subsequent-Prosecution Dilemma*, 60 BROOKLYN L. REV. 725, 751 (1994).

[269] Newton & Sidhu, *supra* note 4, at 1287.

[270] *See id.*

[271] U.S. SENT'G GUIDELINES MANUAL § 3C1.1 & cmt. n.4 (U.S. SENT'G COMM'N 2018).

[272] *See supra* Section IV.B.

[273] *See* U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.4(i) (U.S. SENT'G COMM'N 2018).

> neither party to this case.[274]

Although the Court deferred to the Sentencing Commission's interpretation of obstruction in the commentary, it did not decide that the commentary's examples would always be conclusive. Moreover, the Court seemed to contemplate a limit on the idea that perjury is obstruction, saying that "[t]he district court's determination that enhancement is required is sufficient" when "the court makes a finding of an obstruction of, or impediment to, justice that encompasses all of the factual predicates for a finding of perjury."[275] The Court further noted that the district court had made that finding by stating:

> The court finds that *the defendant was untruthful at trial with respect to material matters* in this case. By virtue of her failure to give truthful testimony on material matters *that were designed to substantially affect the outcome of the case*, the court concludes that the false testimony at trial warrants an upward adjustment by two levels.[276]

Interestingly, the Court emphasized the lower court's finding that the perjury would affect the outcome of the case, which would *not* be true of a lie told to get a court-appointed attorney.

Numerous arguments have been advanced to support the proposition that lying about assets is obstruction: that the plain language of the guideline and the examples include such lies, that public policy supports inclusion so as to preserve resources for truly indigent defendants, and that defendants should be held accountable for lying.[277] But the plain language of the guideline is only conclusive *if* the administration of justice is synonymous with the justice system and the Commission is intending to punish obstruction of the system rather than just corrupt attempts to avoid punishment. Additionally, while it is true that lying about assets wastes public resources[278] and is, as the Second Circuit has said, "reprehensible,"[279] these facts alone do not make such conduct obstruction. All perjury can be considered "reprehensible," but that does not make it obstructive. Courts and prosecutors can deter these lies in

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[274] United States v. Dunnigan, 507 U.S. 87, 94 (1993).

[275] *Id.* at 95.

[276] *Id.*

[277] John Bernans, *Lying to Procure a Free Lawyer: Is it Obstruction of Justice?*, U. CINCINNATI L. REV. (May 9, 2018), https://uclawreview.org/2018/05/09/lying-to-procure-a-free-lawyer-is-it-obstruction-of-justice/.

[278] United States v. Iverson, 874 F.3d 855, 858 (5th Cir. 2017); Bernans, *supra* note 277.

[279] United States v. Khimchiachvili, 372 F.3d 75, 80 (2d Cir. 2004).

ways that do not involve stretching the definition of obstruction. They can charge these defendants with perjury,[280] require repayment of the amount of the attorney's fees,[281] or consider the conduct when making the overall sentencing decision.[282] Society has a strong interest in deterring all manner of evils, but that interest is not sufficient to bring all manner of evils under umbrella statutes that do not neatly cover such conduct.

Obstruction of justice has the potential for abuse when charged as a distinct crime because it can be understood to cover such a broad range of conduct,[283] and the rule of lenity has been urged as a possible solution to that problem.[284] If the rule of lenity applies to statutes enacted by legislatures, it should be applied more strongly to a sentencing guideline promulgated by an unelected body whose intent matters less than the intent of the legislature.[285] Lenity is especially important because the punishment imposed is based not on a jury's verdict,[286] but on a judge's findings by a preponderance of the evidence.[287]

Furthermore, the Sentencing Guidelines commentary's examples of conduct that does *not* constitute obstruction suggest that the guideline

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[280] *See* 18 U.S.C. § 1621.

[281] 18 U.S.C. § 3006A(c) states:

> If at any time after the appointment of counsel the United States magistrate judge or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate.

18 U.S.C. § 3006A(f) further provides:

> Whenever the United States magistrate judge or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney . . . .

[282] *Khimchiachvili*, 372 F.3d at 82.

[283] DeVries, *supra* note 1, at 15–16; John L. Diamond, *Reviving Lenity and Honest Belief at the Boundaries of Criminal Law*, 44 U. MICH. J.L. 1, 27–29 (2010).

[284] Diamond, *supra* note 283, at 32–39.

[285] *See* Lear, *supra* note 268, at 751 ("Absent evidence of such intent [to impose cumulative punishment], the rule of lenity requires courts 'to resolve doubts in the enforcement of a penal code against the imposition of harsher punishment.' Realistically, the Guidelines represent the intent of the Sentencing Commission rather than of Congress." (footnote omitted) (quoting Bell v. United States, 349 U.S. 81, 83 (1955))).

[286] United States v. Alden, 527 F.3d 653, 663 (7th Cir. 2008).

[287] United States v. Montes-Medina, 570 F.3d 1052, 1061 (8th Cir. 2009).

should be understood to refer to obstruction of the concept of justice, rather than the justice system. For example, "avoiding or fleeing from arrest" not only imposes a burden on the justice system but is also an attempt to avoid justice altogether, and yet it is not ordinarily considered obstruction.[288] The commentary provides that "making false statements, not under oath, to law enforcement officers" is not obstruction unless the statements "significantly obstructed or impeded the official investigation or prosecution of the instant offense,"[289] even though the primary motivation for making such false statements is probably to avoid punishment, and the guideline itself clearly indicates that an *attempt* to obstruct is ordinarily punishable.[290] In the same way, "providing a false name or identification document at arrest" is not obstruction unless it significantly hinders the investigation,[291] just as "providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation" is also not obstruction.[292] If the examples themselves exclude conduct that obstructs both the justice system and justice itself, it seems that conduct that obstructs only the system while leaving intact the offender's accountability for the underlying offense should not be considered obstruction.

V. CONCLUSION

There is no definitive answer to whether the Sentencing Commission intended the obstruction of justice adjustment to cover lying to obtain court-appointed counsel. In light of the history of obstruction of justice and in the absence of conclusive evidence in the guideline or the commentary, courts should exercise caution and decline to further expand an already broad adjustment. Because the goal of the Sentencing Guidelines is uniformity, and because application of the obstruction adjustment can have a significant effect on an offender's sentence, the Sentencing Commission should consider resolving this circuit split in favor of a restrictive interpretation.

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[288] U.S. SENT'G GUIDELINES MANUAL § 3C1.1 cmt. n.5 (U.S. SENT'G COMM'N 2018).

[289] *Id.* § 3C1.1 cmt. nn.4–5.

[290] *Id.* § 3C1.1.

[291] *Id.* § 3C1.1 cmt. n.5.

[292] *Id.*