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IN THE
Supreme Court of the United States

DANIEL COLBY, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

The petitioner, Daniel Colby, Jr., asks leave to file the accompanying petition for writ of certiorari, without prepayment of costs, and to proceed *in forma pauperis*. Petitioner was represented by court-appointed counsel in the United States Court of Appeals for the First Circuit under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, and was permitted to proceed *in forma pauperis* in that court.

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the trial judge, in imposing an obstruction of justice two-level enhancement onto defendant's sentence, made a sufficient finding on the record to satisfy the requirements of *United States v. Dunnigan*, specifically that defendant had the necessary specific intent to commit perjury while testifying at his trial, and, by not so finding, imposed a penalty on defendant's statutory and constitutional rights to testify in his own behalf.

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PETITION FOR A WRIT OF CERTIORARI

Daniel Colby, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit, *United States v. Colby*, 882 F.3d 267 (1st Cir. 2018), is attached in the Appendix to this Petition. At sentencing, following conviction for possession of a firearm in interstate commerce by a previously convicted felon, the United States District Court for the District of Maine, over the objection of counsel, imposed an enhancement under the Sentencing Guidelines for obstruction of justice—specifically the commission of perjury during defendant’s trial testimony. The transcriptions of the arguments of counsel and the oral ruling on the issue are also attached in the Appendix to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on February 14, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1). The United States District Court for the District of Maine had original jurisdiction under 18 U.S.C. §3231.

RELEVANT CONSTITUTIONAL PROVISIONS

Fifth Amendment of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment of the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense

STATEMENT OF THE CASE

The United States District Court for the District of Maine entered final judgment against Daniel Colby, Jr., on December 27, 2016, after a two-day trial on June 1 and 2, 2016, at which the jury found him guilty of the single count in the indictment against him—possession of a firearm, a Colt Police Special .38 caliber revolver, in interstate commerce by a previously convicted felon on March 17, 2015, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Colby was sentenced on December 27, 2016, to imprisonment for a term of 95 months, and, thereafter, to supervised release for a term of three years, and a mandatory assessment fee of \$100.

1. The trial

a) The prosecution's case

Daniel Colby, Jr., who was then 33 years old and lived in a camper located on property belonging to his father, was charged with being a felon in possession of a firearm that had moved in interstate commerce. The defense stipulated that Colby had been previously convicted of a felony and that the firearm produced by the government, which was recovered from a location in the woods of Maine, had been manufactured in Connecticut. Therefore, the only factual question for the jury was whether Colby possessed the .38 caliber firearm recovered by the police.

At trial, the government called six witnesses. The first witness was Forrest Smith, who was 61 years old and lived in a trailer. (Trial Transcript 56, 59, hereinafter, e.g., Tr. 56, 59) Smith's trailer was located on the land that previously belonged to his stepsister's father. She let

Smith live there because Smith did some work for her father and took care of her father when he was sick, but he died. Smith's stepsister now owns the property. (Tr. 59, 79-80) Smith was not employed at the time of the trial, but he had worked for 15 to 20 years digging for bloodworms to be used as fishing bait. (Tr. 60) He identified Daniel Colby, Jr., as a neighbor he had met while working for Colby's father, Daniel Colby, Sr., doing odd jobs, such as splitting firewood. (Tr. 60-62, 81) Colby, Jr., had been to Smith's home, in order to charge his phone, on 5 or 6 occasions before the March 17, 2015, incident alleged by Smith. (Tr. 64-65)

A few days before March 17, Smith was walking home from visiting Colby's father. (Tr. 65-67) Soon after he left Colby, Sr.'s driveway, he ran into Colby, Jr., walking on the road toward him. Colby, Jr., threw an M-80 firecracker at him. It didn't hit him and it didn't go off. Although Smith said nothing, as he passed, Colby said "if you turn around, I'll shoot you." (Tr. 68-69) Smith just went home, and Colby kept on going the other way. (Tr. 69-70)

A couple of days later, on March 17, at about 3 p.m., Smith heard a knock on his trailer door. Colby was outside, but, when he knocked, he said that it was the power company (Tr. 71), probably as a joke (Tr. 90). Smith opened the door and then closed it and locked it. He said Colby then pushed the door in and broke the lock. Smith told Colby that he had called the cops on him the day that he threw the firecracker at Smith, but Smith actually had not called them. Colby then pulled a gun and stuck it in Smith's face, very close to touching him, and said, "I ought to shoot you right now for calling the f-ing cops on me." (Tr. 71) Smith then said "I think you better leave," and Colby left. (Tr. 72) Smith then went to the house of a neighbor, who called the police for Smith to report the incident. (Tr. 76)

The weapon used was described by Smith as having a short barrel, a cylinder, and a brown, wooden handle. (Tr. 72) He said that he could see brass shells in the cylinder when the

gun was pointed at him. (Tr.77) Smith said that years ago he owned a few guns, including a .22 caliber revolver, with which he accidentally shot himself in the foot. (Tr. 73-74)

On cross-examination, defense counsel brought out that before Colby, Jr., came back home, Smith had worked for Colby, Sr., on 20 or more occasions. (Tr. 81-82) After Colby, Jr., came home, he did the work for his father that Smith previously had done. (Tr. 83) Smith, in the past, had owned both a .357 Magnum pistol and two .22 caliber pistols, and knew the ammunition for the .357 was larger than that of the .22. (Tr. 85) Smith also knew that Colby, Jr.'s grandmother owned a .22 caliber handgun that had disappeared. (Tr. 84) He told the police officer who responded to the call that the weapon Colby used was a .22 caliber revolver and that Colby was wearing dungarees and a plaid shirt. (Tr. 89) He also said Colby was wearing a big, heavy coat. (Tr. 90) The conversation with Colby lasted only a minute or so. (Tr. 92) When shown photographs of the door to his trailer, Smith admitted that it opened outwards, but continued to say the door was pushed in, even though, in that direction, it fit against the frame of the door. (Tr. 93) He said Colby broke the deadbolt when he pushed the door in. (Tr. 93-94) After Colby, Jr., was arrested, Smith told Colby, Sr., that a friend was giving him a camper and he wanted to put it on Colby, Sr.'s property, since his son would be away for a long time. (Tr. 94-95)

On redirect examination, the prosecutor got Smith to say that the door had been pulled out, breaking the door (Tr. 99), but then Smith said that he remembered the door being pushed in (Tr. 100). He also said he wasn't certain the gun was a .22. (Tr. 101) On re-cross, however, Smith again said the gun was a .22. (Tr. 103) On a second redirect, Smith said he didn't know about the stolen .22 until after Colby had been arrested. (Tr. 103-104)

The second witness was Joey Rogers, who lived on the road near Smith's trailer. Before the incident in this case, he had known Colby, Jr., only because Colby had sold bloodworms to the bait shop where Rogers worked, and from seeing Colby often walking up and down the street in front of Rogers' house. (Tr. 108-109) On March 17, 2015, Rogers saw Colby at 8 or 9 a.m., walking on the road in front of his house. He then saw him again at 3 p.m., after Rogers got home from work, from inside the house he was renting. Colby was again walking up Bradford road and turning down Mountain Rd., towards Smith's trailer. (Tr. 110-112) About 30 to 40 minutes later, when he was outside sharpening his chainsaw, he heard footsteps on the road and then heard a sound from where his truck was parked. He stood up and saw Colby on the other side of Rogers' parked truck. (Tr. 113) Rogers asked him what he was doing, and Colby was mumbling to himself. Then Colby seemed to be pulling something from his front sweatshirt pocket, but he wasn't sure what it was. (Tr. 114) He thought he saw a handle. (Tr. 119) Rogers' dog then barked and came running up. Colby, who had been coming down the road in the opposite direction from earlier, went across the street and into the woods in a jog to a run. (Tr. 114-116)

The third witness was Jyllian York, who was 19 years old. (Tr. 125) At the time of the incident, she was 9 months pregnant; her daughter was born March 20, a few days later. (Tr. 126) She lived with her mother, Stacey Doray. Also living in her mother's house were Jyllian's boyfriend, Stuart "Cody" Wyman; her mother's boyfriend, Kelsey Sprague; her sister; her step-sister; and, from time to time, her brother, Greg Doray. (Tr. 126-128, 160-161) She knew Colby, Jr., because he was a friend of both her brother Greg and her boyfriend Cody. (Tr. 128)

A few days before the alleged Smith incident, on March 14, Colby, her brother Greg, and Greg's girlfriend, Jamie Simmons, spent the night at her mom's house. (Tr. 129, 173) Her mom

Stacey owned a Colt Police Special .38 caliber pistol, which she kept in her closet. (Tr. 130) Jyllian testified that everyone knew her mother had the gun, which had been given to her by her boyfriend Kelsey. (Tr. 162) Sometime before March 14, Jyllian had taken the gun in order to give it to her brother Greg, an addict, who she mistakenly thought needed the gun for protection. (Tr. 130-131, 164, 171) When she found out the gun wasn't needed, she said she put it on the shelf in her closet, rather than returning it to her mother's closet. (Tr. 131, 168)

On the morning of March 15, Jyllian and Cody noticed the gun was no longer in her closet. (Tr. 132-133, 174) They did not tell her mom that the gun was missing for a day or two, and searched for it, but they could not find it. Jyllian was scared, because she did not have permission to take the gun. (Tr. 132-133, 177-178) Jyllian then asked her brother Greg, his girlfriend Jamie, and Colby if they knew where the gun was. (Tr. 133) She said that Greg and Colby denied they had the gun. (Tr. 133, 175)

Jyllian testified that on March 17, she called and texted Colby trying to discover the location of the gun in order to get it back. It was then that Colby texted that he had the gun and told her where to go to get it back. (Tr. 134, 178) At first, Colby said he left it near his camper, but Jyllian and Cody went there, looked, and couldn't find it. A little later Colby texted Jyllian that he had placed it in a snowbank about 20 feet into the woods from a T type intersection and at the base of an 8-inch wide tree with no lower branches. (Tr. 134-135, 142-143, 145) Jyllian had spoken with Colby many times in the past and knew his voice on the phone, and the texts and phone calls were at the same time. (Tr. 136-138) Colby told her that he couldn't come help her because there were cops at his father's house looking for him, because a neighbor had called the police saying he had thrown firecrackers at the neighbor. (Tr. 140, 147, 153)

Jyllian testified that she went out to the location given by Colby and searched for about three hours. She saw no footprints in the snow. (Tr. 180-182) Later, on the night of the 17th, around 9:30 or 10 p.m., after Jyllian and Cody unsuccessfully tried to find Colby, they went back to the location again to look for the gun. Cody searched with a flashlight for about a half-hour while she stayed in the car, but he couldn't find it. (Tr. 182) The next morning, March 18, Lindsey Martin, a woman who was dating Jyllian's uncle, David Doray, delivered a map to Jyllian, drawn by Colby, indicating the same location of the gun in the snow. (Tr. 176, 179) Jyllian and her sister went back that morning to look again, with a metal detector, but they still couldn't find the gun. Jyllian said that after they had looked for about a half-hour, Officer Read drove by and saw them and asked what they were doing, and she told him. (Tr. 141-142, 182-183)

Officer James Read testified that on March 18, at about 7:15 or 7:20 p.m., as he was driving by the T intersection location, he saw a car parked on the side of the road. (Tr. 218) He pulled behind the car and called in the plate. Then he saw two girls in the ditch on the side of the car. Jyllian York was one of the girls, and she said the other girl, who got in the car, was her sister. Jyllian said they were looking for a gun where someone was directing them to look. York said she had been there three times earlier looking for the gun, even with a metal detector. (Tr. 244) He asked her to move her car to the other side of the street and she did. (Tr. 218-220) Jyllian told him where the gun was supposed to be and showed him a couple of text messages that were directing her to where the gun was—about 30 feet off the road at the T intersection and at the base of an 8-inch wide tree with no branches near the bottom. The first text message was from the evening of March 17. (Tr. 231-233) The last message regarding the 8-inch tree was at 11:45 a.m. on March 18. (Tr. 234) Jyllian also said she had a map to where the gun was, but she

didn't have it with her at that time. (Tr. 245) He told the girls to go home and he would look for the gun and come by later. (Tr. 225)

At the time that he came across the girls, he knew nothing about the alleged threat to Smith on March 17. (Tr. 217) He called the Lincoln County Sherriff's department and told them what he was doing and asked for a K-9 team to help him search. (Tr. 221) Deputy Mitkas, and Deputy Hayden and his dog partner, came out to assist in the search. (Tr. 226, 245) Deputy Mitkas told him about the alleged incident on March 17, and said he had been out there the previous day with a K-9 team looking for the weapon with no luck. (Tr. 255) However, since Jyllian was out there the next day looking for the gun, the three men and the dog searched for 30 to 40 minutes, but did not find the gun. (Tr. 226, 246) After the search, Officer Read went to Jyllian's address, and her mother gave them a description of the missing weapon, but Jyllian did not give them the text messages or the map. (Tr. 246-248) It wasn't until April that she gave Read a statement, because she didn't want to talk about it when he came over that night. (Tr. 184)

After March 18, Officer Read drove by at least weekly to see if the snow had melted. After it melted, 29 days later, on April 16, he looked for the gun and found it on the ground at the exact place where they were previously looking. (Tr. 230-231, 235, 242, 250-253) It was loaded. (Tr. 238) He gave the gun to Officer Skolfield, who was investigating the case. (Tr. 239) It was stipulated that neither Colby's fingerprints nor his DNA were found on the gun. (Tr. 260)

Cherylene Paddock, a custodian of records for Verizon, was called as a witness by the prosecution. (Tr. 191) She was asked about two phone numbers that were also involved in the text messages on March 17 regarding the location of the gun. The numbers belonged to Cody

Wyman and Kelsey Sprague, and the text messages came from the same number that was texting Jyllian York—Colby's phone. (Tr. 193-196, 198)

The last witness called by the prosecutor was Officer Jason Johnson, who was a Lewistown police officer deployed to work for the ATF Violent Crimes Task Force. (Tr. 261-262) Officer Skolfield sent the .38 caliber gun to the state crime lab where Officer Johnson test-fired the weapon. It worked. (Tr. 262) Officer Johnson had listened to the 911 call in which Smith said that the gun that was pointed at him looked like a .22 revolver. (Tr. 263) Officer Johnson got two other revolvers from the evidence vault that were .22 caliber, and took a photo of them and the .38. The .38 was in the middle of the photo. One of the .22 revolvers was smaller than the .38 and one was larger. (Tr. 266-268) Officer Johnson took a second photo of the three revolvers looking at them with the barrel pointed at the viewer. Caliber refers to the size of the ammunition and the size of the hole in the barrel. (Tr. 268-269) A photo of a ruler, with 1/16th of an inch marked, was also introduced into evidence. (Tr. 270) On cross-examination, however, Officer Johnson said the difference in the caliber was a measure of the circumference, not the diameter. (Tr. 273)

The government read a stipulation that the .38 caliber weapon was manufactured in Connecticut and recovered in Maine. (Tr. 274-275)

b) The defense

The defense called three witnesses. The first was Officer Aaron Skolfield, who responded to Smith's 911 call. (Tr. 279) There were three other officers who also responded to Smith's trailer. (Tr. 282, 285) Smith told them that Colby pushed in his door and threatened him with a gun. He said he thought the gun was a .22 revolver, bluish-black or dark colored. (Tr. 287-289) The officers then followed some footprints in the snow from the trailer down to the

road. They also followed some footprints going into the woods and toward a broken-down trailer and a camper on Colby, Sr.'s property. (Tr. 280, 284, 299) No one was in the trailer or the camper. (Tr. 285) They then followed more footprints going out to the road another way. When they got to the road, there were some tire tracks where a tire kicked up some dirt. (Tr. 296, 298-300) Officer Skolfield filled out an affidavit for an arrest warrant for Colby based on his conversation with Smith. (Tr. 288-289)

The next day, March 18, Officer Skolfield learned from Officer Read that a .38 revolver that was bluish or black in color was missing. (Tr. 290) On March 19, there was a report that a .22 caliber revolver was missing from the home of Colby's grandmother. (Tr. 291) Those reporting the loss had no idea when the .22 revolver was taken. (Tr. 309) Having received the report from Officer Read about the missing .38 and its supposed location, Officer Skolfield went back to the area several times near the T intersection to search for the gun. (Tr. 291) He looked for the gun by himself, and he also went back with a K-9 officer and searched. He knew of another officer on the force who also took a K-9 unit out to search the area. Also, Officer Read went back to search with a K-9 unit. So there were at least three different searches with trained dogs at the location where the gun was later found, but no gun was found during these earlier searches. (Tr. 292)

Daniel Colby, Sr., was also called as a witness. He is a land surveyor and has known Forrest Smith for 20 years. Smith had been to his house, and he had been to Smith's trailer. (Tr. 321) After Colby, Sr., had hip surgery, Smith helped him out doing various jobs that Colby, Sr., could no longer do, but mostly it was splitting firewood and bringing it into the house. Colby, Sr., paid Smith \$10 an hour. (Tr. 322) Smith probably worked for him on 40 or 50 different occasions. (Tr. 324) Colby, Jr., had been working in the northern part of the state for about 6

months—roofing, cutting firewood, and plowing. In early 2015, Colby, Jr., returned to the area, was living in an old camper on his father’s property, and helped his father with his survey business and the chores that previously Smith had done. (Tr. 324-326) After Colby, Jr., was arrested, Smith asked Colby, Sr., if he could put a new camper or trailer that a friend was giving him on his property. Smith said Colby, Jr., would be away a long time, and he needed a place to put his camper until he could get social security in 7 or 8 years. (Tr. 326-327) Smith had been friendly toward both Colby, Sr., and his son, and Colby, Jr., had spent the night at Smith’s on occasion. Smith let Colby, Jr., charge his phone at his trailer or have a meal or just come in to get warm. (Tr. 330)

The defendant, Colby, Jr., decided that he wanted to testify, against the advice of his counsel. (Tr. 337, 339) Colby’s counsel informed the court that he was “so reluctant to be the facilitator of what I believe to be false testimony. I don’t know that it is, but I just am in a box.” (Tr. 343) After informing the judge that he didn’t know anything that his client had to say was false, the court told him to go ahead with the examination. (Tr. 343)

Colby testified that he had two places that he lived—one in the northern part of the state in Embden and the other on his father’s property in a camper. (Tr. 344) He came down to his father’s property in 2015, mainly to help him with a land survey project. (Tr. 345) Colby knew Smith and also would help him out from time to time. He had no ill will toward him. Colby had spent the night at Smith’s trailer and had smoked with him—Colby had a medical permit. Smith was present when his father paid Colby, Jr., a few hundred dollars for helping him with a land survey project. (Tr. 346-347)

Colby testified that a few days before March 17, he was hanging out at his camper lighting off firecrackers when Smith walked by. As a joke, he threw a firecracker toward Smith.

He did not light it and did not throw it directly at him. He was just joking around. Colby said there was no threat of any kind made to Smith. (Tr. 348-349)

On March 17, Colby testified that he did not go to Smith's trailer. That day, he and Cody Wyman were going digging for bloodworms, but they got into an argument, so Cody dropped him off at the driveway to his camper and "spun off." (Tr. 349) So Colby walked up and down the road a few times making phone calls, because reception was bad at his camper in the woods and he was trying to get a ride. (Tr. 349-350) He didn't specifically remember seeing Rogers that day, but he usually does when he is walking in front of his house and Rogers is outside. Rogers' truck is always parked at the intersection about where he crosses the road. He remembered Rogers' dog barking and running at him, and he might have hustled across the road. Colby said he usually had his phone in his pocket. (Tr. 350)

Colby recalled the night that he and Greg Doray spent the night at Greg's mother's house where Jyllian lived. But Jyllian did not ask him about the missing gun that morning. It was later that day that she texted and called and asked if he knew where the gun was. He said he did not. (Tr. 351) Jyllian and Cody said they thought Greg had the gun and asked him to go check with Greg and see if he had it. (Tr. 352) Colby went to where Greg was staying with his girlfriend, Jamie Simmons, and asked him about the gun. He and Greg were friends. Greg showed him the gun, a .38 black revolver, and asked him if he wanted to buy it. Colby said he didn't want it and called Jyllian and Cody and told them Greg had the gun. They wanted him to get the gun and return it to them. (Tr. 353) Later, Colby called Stacey Doray and Kelsey Sprague, Greg and Jyllian's parents, and told them Greg had the gun and that Greg owed money to a lot of people. (Tr. 354)

The prosecutor then asked for a sidebar, at which she said that Greg and Cody were in fact drug dealers, but she believed Colby was also, and asked to question him about it later since he might open the door for this line of questioning. The judge deferred his ruling until later. (Tr. 355)

The defense questioning then continued and Colby said he told Stacey and Kelsey about seeing people from New York hanging around, and that he believed that this was why Greg took the gun. Kelsey came over to Greg's and started scolding Greg, who then asked Colby why he told his parents about it. (Tr. 357)

Greg and Cody and Jyllian then asked Colby to take the gun back to Stacey. (Tr. 357) Greg wanted to get the gun back to Stacey without his parents knowing that he took the gun, so he asked Colby to help him get the gun back to Stacey. A mutual friend of theirs named Jessie (Greg's girlfriend Jamie Simmons had a twin sister who lived with her named Jessie (Jamie Simmons' Grand Jury transcript, at p. 2, Sentencing Exhibit, Docket No. 123)) would take the gun and leave it in the woods on the trail, then Colby would text them and tell them where it was located so that Jyllian and Cody could recover the gun and return it to Stacey. Colby said that the text messages that were introduced by the prosecutor came from his phone and he sent them. Colby saw the gun when Greg showed the gun to him, but he never touched the gun and didn't see Greg give it to Jessie. Colby just texted Cody, Jyllian, and Kelsey saying he had the gun and where it could be found in order to help Greg. (Tr. 359-363)

At the conclusion of the direct exam of Colby, the prosecution asked for a sidebar and again said that she believed the door had been opened to allow her to ask Colby about his drug use and his drug dealing with Greg and Cody. (Tr. 363) The prosecutor stated: "The evidence in

the case is that Greg Doray got the gun and gave it to him in exchange for drugs.” (Tr. 364) The judge restricted the questions that the prosecutor could ask. (Tr. 364-365)

On cross, the prosecutor began by impeaching defendant Colby with three previous felony convictions in Maine Superior Court for aggravated assault, terrorizing, and illegal possession of a firearm by a felon. (Tr. 365-366) Colby was then asked if he took possession of the firearm from Greg in trade for drugs, which he denied. He also denied seeing the gun at the house of Stacey Doray when he spent the night there. (Tr. 366) Colby was then asked about the map of the location of the gun that Lindsey Martin gave to Jyllian. He said Lindsey gave him a ride on his way back to northern Maine and that he drew the map to give to Jyllian from the information he received as to where the gun had been placed. (Tr. 367-368)

Colby admitted that he was walking on the road in front of Rogers’s house on March 17, but denied that he went to Smith’s trailer that day, that he threatened Smith, that Smith told him that he had called the cops, and that he possessed the gun. (Tr. 369-371) Colby admitted using his phone to communicate with Jyllian, Cody, and Kelsey on March 17. He told them that he had the gun and took it to his camper, but there were cops all around. His father had called him and told him that cops were around, because Smith said Colby had threatened him. Colby then told Jyllian, Cody, and Kelsey that he hid the gun on the trail in the woods in the snow and gave them the location. But these texts were for the purpose of getting the gun back to Stacey without her knowing that Greg took it. It was a mutual friend, Jessie, who was supposed to leave the gun on the trail in the snow, because Colby didn’t want it on his property. That’s where she said she left it. But Colby didn’t believe she left it there at that time, because no one found it in the many searches, including the searches using dogs and a metal detector. He thought she must have put

it there later, because it was found in the location where he said it would be and where they had searched many times. (Tr. 373-382)

2. Sentencing

The Presentence Report found the base level for Colby's sentencing after his conviction for possession of a firearm having been convicted previously for a felony was 14, which, for one with a criminal history score of VI, results in a sentencing guidelines range of 37 to 46 months. However, there were recommendations for three enhancements: 2 levels for an offense involving a stolen firearm; 4 levels for possessing the firearm in connection with another felony—criminal threatening with a dangerous weapon; and another 2 levels for obstruction of justice in giving false testimony at trial, according to the prosecutor, including claiming he was not guilty of the offense and denying that he was at Smith's residence at the time he was threatened. The addition of 8 points for the three enhancements brought the recommendation to a total offense level of 22, which, under the guidelines, suggests a sentence of 84 to 105 months. (Appendix A20-A21; hereinafter App.)

Defense counsel objected to each of the enhancements. (App. A14-A19)

During the sentencing hearing, the judge asked the prosecutor: "Would you please deal with the issue that – his argument that the gun was not hidden by him nor that he committed perjury during the trial?" (App. A11)

In response to the question, the prosecutor stated (App. A12-A14):

... We could not through the testimony of the witnesses prove that Mr. Colby took the gun from Ms. Doray's home, and I have to concede that at the time he was at the house I can't prove that he, by a preponderance of the evidence or reasonable doubt, that he actually took the gun from Ms. Doray's home. Our investigation revealed more likely that Mr. Doray, Greg Doray, removed the gun from the home and then gave it to Mr. Colby. That was consistent with witness statements in our case.

...

But there isn't any evidence to suggest that Mr. Colby was taking it from the house but, rather, my theory is that he was in possession of it constructively on his property after he used it to assault Mr. Smith. And certainly someone who has it in that possession is not intending to return it to Ms. Doray. And for those reasons I think the Court can find it was stolen, even if you don't find he removed it from Ms. Doray's home.

The trial judge then asked: "And the obstruction and perjury enhancement?" To which the prosecutor replied (Add. A14):

Again, the testimony of the defendant was simply that he was just making those text messages communications in order to help these people, and I just did not find that to be truthful. The testimony of the other witnesses didn't reflect that. The testimony – the evidence of the text messages themselves doesn't reflect that. And so his testimony that he wasn't in possession of the gun, that he was merely just trying to help some people and he was innocent in all this I think is worth of the perjury enhancement.

At the trial, defense counsel filed "Defendant's Second Motion *in Limine* Seeking an Order to Compel Discovery" (motion sealed below), which sought to obtain a full and complete copy of grand jury transcripts in the investigative file in connection with the activities of Greg Doray. Defense counsel therein indicated that he had reviewed the redacted grand jury transcripts of four witnesses. Defense counsel at sentencing (new counsel had been appointed for sentencing after the trial) submitted the redacted grand jury transcripts of Stuart "Cody" Wyman and Jamie Simmons as sealed sentencing exhibits 1 and 2. (defendant's Sentencing Memorandum at 3-4 and nn.1-3). The prosecutor, in the comments above, was apparently referring to the sealed testimony of these witnesses at the grand jury.

The trial judge found, App. A20-A21:

I find the facts as set forth in the presentence report as amended. I find that the defendant has a prior conviction for a crime of violence and was a prohibited person at the time he committed the instant offense; the base offense level is 14. The firearm involved in this case was stolen; two levels are added to 16. I find this defendant possessed the firearm in connection with another felony offense, to wit, criminal threatening with a dangerous weapon; four levels are added for an offense level of 20. I find that he willfully obstructed or impeded or attempted to impede the administration of justice with

regard to his perjury at trial; two levels are added to 22. He has a criminal history category of VI, which results in an advisory guideline range of 84 to 105 months.

The judge then sentenced Colby to imprisonment for 95 months, supervised release of three years under numerous conditions, and a mandatory assessment fee of \$100.

3. The Appellate Opinion

The Opinion in the First Circuit concluded, App. A7:

Colby focuses on the willfulness element, arguing that the district court failed to make a particular finding as to whether Colby made false statements “with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.” [citation to *Dunnigan* omitted] We generally do not require the district court to “address each element of perjury in a separate and clear finding.” [*United States v. Matiz*, 14 F.3d [79,] at 84 [(1st Cir. 1994)]. Rather, we examine whether “a sentencing court’s findings encompass all of the factual predicates for a finding of perjury.” *Id.* Here, the district court found that Colby “perjured himself during trial by denying possession of the gun and denying his activities vis-à-vis Forrest Smith” and further found “all of those lies to be material” and “that those lies, perjury, constitute obstruction.”

REASONS FOR GRANTING THE WRIT

The trial judge, in imposing an obstruction of justice two-level enhancement onto defendant’s sentence, did not make a sufficient finding on the record to satisfy the requirements of *United States v. Dunnigan*, 507 U.S. 87 (1993), specifically that defendant had the necessary specific intent to commit perjury while testifying at his trial. The holding of the United States Court of Appeals for the First Circuit on this issue ignored the ruling and rationale of *Dunnigan* and also contradicts, or compares unfavorably to, recent holdings of the United States Court of Appeals for the Second Circuit. *United States v. Thompson*, 808 F.3d 190 (2d Cir. 2015); *United States v. Pena*, 751 F.3d 101 (2d Cir. 2014). The defendant has statutory and constitutional rights to testify on his own behalf, *Dunnigan*, 507 U.S. at 96; *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987); Fifth and Sixth Amendments to the United States Constitution; 18 U.S.C. §3481. The

failure to follow the *Dunnigan* requirements, in effect, imposed a penalty on defendant's exercise of his statutory and constitutional rights to testify in his own behalf.

While perjury at trial may satisfy the obstruction of justice enhancement under the Sentencing Guidelines, not every accused who testifies at trial and is convicted is subject to the imposition of the enhancement. As pointed out in *Dunnigan*, 507 U.S. at 95, a testifying witness may give false testimony as a result of confusion, mistake, or faulty memory. Or, a witness may testify to matters such as lack of capacity, insanity, duress, or self-defense. In testifying in his defense, the defendant may give truthful testimony, but the jury may nonetheless find the testimony insufficient to excuse his criminal liability or to prove lack of intent.

Colby was charged with illegal possession of a .38 caliber revolver, as a result of his having been previously convicted of a felony. His testimony in his defense was that he never took actual possession of the weapon. In trying to help his friend Greg return the weapon to Greg's mother Stacey, the owner of the gun, without Greg getting in trouble with Stacey, Colby testified that he falsely texted Jyllian York, Stacey's daughter, who had initially taken the weapon from her mom to give to Greg, that he, Colby, had taken the gun. He also texted her directions to where she could retrieve it in order to return it to Stacey, although he refused to touch the gun that Greg showed him, and was reporting where Greg had sent a mutual friend to place the gun.

The jury was instructed on both joint possession and constructive possession. The jury could have found that Colby was in joint, constructive possession of the weapon because he was controlling its movement and location by directing where the gun would be left in the snow. As indicated in *Dunnigan*, his testimony might be truthful with regard to actual possession, but the

jury may nonetheless have found his testimony insufficient to excuse his perhaps joint and constructive possession of the weapon.

In order to avoid imposing a penalty on a defendant who appropriately exercises his constitutional right to testify in his own defense, *Dunnigan*, 507 U.S. at 96-97, requires that, if a defendant objects to a sentence enhancement resulting from his trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the federal definition of perjury. The district judge did not make the required findings of specific intent; the judge merely stated his conclusion that he did not believe Colby, even though the jury could have convicted of constructive possession even if they did believe his testimony.

Sentencing Guideline §3C1.1 states in full:

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.

The commentary at note 4 makes it clear that perjury at trial may amount to obstructing justice. “*Examples of Covered Conduct*— ... (B) committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction.”

In *Dunnigan*, the Court considered the obstruction enhancement provision in the guidelines based on perjury, using the long established definition in applying the federal perjury statute, 18 U.S.C. §1621. “A witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false

testimony, rather than as a result of confusion, mistake, or faulty memory.” 507 U.S. at 94. The court went on to make it clear that, *id.*:

Of course, not every accused who testifies at trial and is convicted will incur an enhanced sentence under §3C1.1 for committing perjury. As we have just observed, an accused may give inaccurate testimony due to confusion, mistake, or faulty memory. In other instances, an accused may testify to matters such as lack of capacity, insanity, duress, or self-defense. *Her testimony may be truthful, but the jury may nonetheless find the testimony insufficient to excuse criminal liability or prove lack of intent.* For these reasons, if a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition we have set out. ... When doing so, it is preferable for a district court to address each element of the alleged perjury in a separate and clear finding. (*citations omitted*) (*emphasis added*)

While the trial judge in *Dunnigan* did not “address each element of the alleged perjury in a separate finding,” the Court found it “sufficient” in that case to impose the enhancement where there were “numerous witnesses who contradicted respondent regarding so many facts on which she could not have been mistaken,” and the judge found that “*the defendant was untruthful at trial with respect to material matters* in this case,” and concluded that she failed “to give truthful testimony on material matters *that were designed to substantially affect the outcome of the case.*” *Id.*, at 95-96 (*italics added by Court*).

The Court was mindful of the possibility that the enhancement would become automatic, even when perjury was contested. It stated, *id.*, at 96-97:

The concern that courts will enhance sentences as a matter of course whenever the accused takes the stand and is found guilty is dispelled by our earlier explanation that if an accused challenges a sentence increase based on perjured testimony, the trial court must make findings to support all the elements of a perjury violation in the specific case.

Note 2 of the commentary to Sentencing Guideline §3C1.1 incorporates guidance from *Dunnigan*:

Limitations on Applicability of Adjustment.—This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant’s denial of guilt (other

than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

The defendant's right to testify, of course, does not include the right to commit perjury. *Dunnigan*, 507 U.S. at 96; *Nix v. Whiteside*, 475 U.S. 157, 173 (1986). Nor does it matter that the defendant's decision to exercise his right to testify may be distorted by the potential of an enhancement of his sentence based on a finding that he committed perjury. *Dunnigan*, 507 U.S. at 96. The case of *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (upheld prosecutor's act of carrying out a threat made during plea negotiations to have accused re-indicted on more serious charges, on which he was plainly subject to prosecution, if he did not plead guilty to offense with which he was originally charged), illustrates the principle that there is no categorical ban on every governmental action that might affect the strategic decisions of an accused, including decisions regarding the exercise of constitutional rights.

The concern that courts will enhance sentences as a matter of course whenever the accused takes the stand and is found guilty is dispelled by the *Dunnigan* holding that requires the trial court, when an accused challenges a sentence increase based on perjured testimony, to make findings to support all the elements of a perjury violation in the specific case, including the specific intent to obstruct justice by willfully lying when testifying. *Dunnigan* is comparable to *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969), where the Court held that, in order to assure the absence of vindictiveness against a defendant for having successfully attacked his first conviction on appeal,

... whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based

upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Essentially, the district court judge in Colby's case simply said that he did not believe Colby's testimony, without findings regarding specific intent. Moreover, the judge's finding that Colby hid the gun in the snow in order "to hide the gun" contradicts both Colby's testimony and the statements in the text messages directing the return of the gun to the owner, without any basis other than his own disbelief in Colby's statements, not necessarily a belief shared by the jury. In order to render a verdict on constructive possession, the jury did not have to reach determinations regarding the credibility of Smith, whether Colby himself placed the gun in the snow, or whether he was trying to hide the gun or return it.

Although the trial judge did state that he found "the facts as stated in the presentence report" (App. A20), he can "rely on the PSR to impose an obstruction-of-justice enhancement only if the PSR 'sets forth reasonable detailed findings in support of its conclusions.'" *United States v. Thompson*, 808 F.3d 190, 195 (2d Cir. 2015), *quoting United States v. Johns*, 324 F.3d 94, 98 (2d Cir. 2003). In Colby's case, the presentence report made no detailed findings in support of the conclusion that he committed perjury. Instead, the perjury finding was based on the conclusion of the prosecutor that the defendant gave false testimony at trial, including claiming that he was not guilty of the offense and denying that he was at Smith's residence at the time he was threatened. (Revised Presentence Investigation Report at 4) When specifically asked at the sentencing hearing about the basis for the enhancement, the prosecutor stated that Colby lied at trial when he denied that he actually possessed the gun, and lied when he testified that he lied in his text messages about possessing the gun in order to protect his friend Greg Doray and to help return the gun to Greg's mother, Stacey, the owner of the gun. (App. A11).

With regard to the enhancement for obstruction of justice, the trial judge stated (Add. A20):

I find that the gun was hidden in the snow by the defendant and he did that to hide the gun. And I find that the defendant perjured himself during trial by denying possession of the gun and denying his activities vis-à-vis Forrest Smith. I find all of those lies to be material. I also find that those lies, perjury, constitute obstruction.

Under the facts as brought out in this trial, this finding by the judge was not sufficient to satisfy the *Dunnigan* standards.

The prosecutor admitted during the sentencing proceeding that their investigation revealed it was more likely that Greg Doray was the one who removed the gun from the Doray home, and later gave it to Colby. The jury was instructed on constructive possession—that if Colby was able to control the weapon, even if there was joint control, he was in constructive possession of it. (Tr. 456-457)

The only witness who ever claimed to have seen Colby with a revolver was Smith, who said Colby threatened him with a weapon that he believed was a .22 caliber revolver. The Doray revolver was a .38 caliber weapon. Moreover, Smith had owned two .22 caliber pistols in the past and a .357 caliber revolver. Yet he continually said that the gun with which he was threatened either was a .22 caliber revolver or looked similar to a .22 caliber revolver. His statements identifying the weapon as a .22 were especially strong immediately after the event in the statement he gave to the responding officer. (Tr. 89) Also, at approximately the same time, Colby's grandmother discovered that she was missing a .22 revolver. Rogers, who saw Colby soon after the alleged threat to Smith, saw no weapon—at most he saw Colby's hand in his sweatshirt pocket and maybe a "handle" of some sort.

Smith's testimony was impeached with contradictions and with a potential motivation to lie. He said that his trailer door had been "pushed in," when the photos of the door showed the

frame would have prevented the door, which opened outward, from being pushed in. Smith said that Colby was wearing a plaid shirt and dungarees, later adding a heavy coat, yet Rogers, who saw Colby before and soon after the alleged threat, said he was wearing a sweatshirt. Smith said the entire incident took only a minute, but Rogers, who allegedly saw Colby going to and then returning from the direction of Smith's trailer, said it was 30 to 40 minutes.

Cross examination of Smith showed that he was not employed, and had been employed during the past few years only by Colby's father to assist him with chopping and carrying firewood after Colby, Sr.'s hip operation. But after Colby, Jr., returned to the area, it was he, not Smith, who helped out Colby, Sr. After Colby, Jr., was arrested, Smith asked Colby, Sr., to allow him to place his camper on Colby, Sr.'s land since Colby, Jr., would be away for a long time. In addition, Smith's account of the alleged incident seems incredible in terms of the nature of the entry and threat followed by an immediate exit when asked to leave, all in the course of a minute.

No one claimed to have seen Colby place the .38 in the snowbank in the woods. Moreover, during the next four weeks, the gun was not found where the text messages and the map indicated it would be, even though, after specific directions were given by Colby to the gun's location, there were multiple searches at that specific location by Jyllian York (three searches), Jyllian's sister using a metal detector, Cody Wyman, Officer Read, Officer Skolfield, and at least three different searches by K-9 teams. It wasn't until a month later, after the 18 inches or so of snow had melted, that the gun was found in that location, perhaps suggesting that the gun had not been placed in that specific location at the time indicated by Colby, but rather later. Yet Colby was arrested two days after the alleged threat and a day between many of these

searches, and remained in jail since that time. If the gun was placed there later, it could not have been Colby who did so.

Under the facts as indicated above, the jury, in finding guilt, could simply have concluded that, by controlling the location of the gun, which was found where he said it would be, Colby was in at least joint, constructive possession of the gun. That was all that was needed for a finding that he was in possession of the weapon—the only charge decided by the jury. They could have believed that Colby was truthful on the stand and still convicted him. The jury could have convicted even if they found no threat with a weapon to Smith by Colby, or found that the weapon used in the threat was the missing .22 belonging to Colby’s grandmother. Therefore, the verdict of the jury did not support the findings of the trial judge. Instead, the judge’s findings were based on his belief that Colby lied at trial, even though he could have been convicted of the charge by the jury if his testimony was entirely truthful.

Such a possibility raises the concerns that *Dunnigan* addressed—the potential chilling effect on defendant’s right to testify in his own defense when a guilty verdict produces an additional penalty, the enhancement, based on “perjury” without specific findings that defendant lied in his trial testimony with the specific intent to obstruct justice. Here, defendant was testifying in his defense that he did not actually possess the specific weapon with which he was charged, explaining the reasons he sent the text messages in which he said he had the gun. The judge simply said he didn’t believe the testimony, not that defendant consciously lied with the purpose of obstructing justice.

Recent cases illustrate the concern. In *Thompson*, 808 F.3d 190, the defendant testified at a suppression hearing in which he alleged that his consent to search his apartment was coerced by the officers’ threats that if anything was found after obtaining a search warrant, his sister and

girlfriend “would” also be arrested. The officers’ testimony was basically that they said his sister and girlfriend “could” be arrested. The presentence report, on which the judge specifically relied, recommended an enhancement for perjury because the trial judge concluded that defendant’s testimony at the suppression hearing was “equivocal, inconsistent, and contradictory” and that defendant’s “conflicting testimony on this central issue could not be credited.” The appellate court remanded for resentencing because the obstruction by perjury charge could not be based on a finding that effectively adopts a rule that any time a court credits officer testimony over that of a defendant, the defendant must have given knowingly false testimony for the purpose of obstructing justice.

In *Pena*, 751 F.3d 101, the defendant’s written statements in support of his suppression motion were argued to support the enhancement of his sentence for obstruction of justice by perjury. The trial judge found that his statements that he requested an attorney during questioning at least seven times and that he was threatened with physical force were not credible when compared to the government’s witnesses, who said he asked for an attorney just once and was not threatened with physical force. An obstruction of justice by perjury finding based on credibility in such a situation would “efface” *Dunnigan*, where the enhancement is appropriate only where the defendant acts with the willful intent to provide false testimony, rather than a result of confusion, mistake or faulty memory, and raise the “troubling prospect” that future defendants might either be deterred from pressing arguably meritorious Fourth Amendment claims or unfairly punished when they do. *Id.*, at 106, n.1.

In Colby’s case, the trial judge simply stated that he did not believe Colby’s testimony that he personally did not possess the gun or hide the gun in the snow and that he did not believe Colby when he denied “his activities vis-à-vis Forrest Smith.” These lies, the judge found, were

material and constituted obstruction. The judge did not state what testimony, if any, he credited. The only witness to the “possession” of a weapon by Colby was Smith, who said Colby threatened him with a .22 caliber revolver or a gun similar to a .22 revolver. As explained above, there were many reasons to discredit the testimony of Smith, including his impeachment with his own inconsistent statements; the contradiction of his testimony by the known facts regarding his trailer door; the inconsistencies of his testimony with that of Rogers, who saw Colby before and after the alleged threat to Smith, especially with regard to the time consumed by the threat and the clothing worn by Colby at the time; and testimony regarding Smith’s motivation to lie—both financial and bias against Colby.

In addition, the prosecutor represented to the judge that their investigation suggested it was likely that Greg Doray took his mother’s gun, not Colby. Perhaps even more important, there were many unsuccessful searches on the day of, and the days after, the text messages were sent by Colby, which contained a detailed description of the exact location where Colby said the gun was located, and where it was actually found a month later—searches by numerous private citizens, one using a metal detector, and many police officers, including at least three separate searches by three different K-9 teams. Since Colby was arrested the day after his text messages and has been in jail ever since, it seems unlikely that the gun was placed in that location when Colby said it was or that he later placed the gun in that location.

Under these circumstances, *Dunnigan* required more of the judge—that he state on the record his factual findings regarding the necessary specific intent on the part of Colby to obstruct justice by lying during his trial testimony. Indeed, the judge did not even state the factual reasons why he believed Colby lied, which is especially crucial when the jury’s verdict did not depend on its disbelief of Colby’s testimony.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[May 14, 2018](#)

APPENDIX

Opinion of the United States Court of Appeals for the First Circuit	APPENDIX 2
Oral ruling at Sentencing of United States District Court for the District of Maine ..	APPENDIX 8

United States v. Colby, 882 F.3d 267 (2018)

882 F.3d 267

United States Court of Appeals, First Circuit.

UNITED STATES of America, Appellee,

v.

Daniel COLBY, Jr., Defendant, Appellant.

No. 17-1031

|

February 14, 2018

Synopsis

Background: Defendant was convicted in the United States District Court for the District of Maine, [George Z. Singal, J.](#), of possession of firearm by prohibited person, and he appealed.

Holdings: The Court of Appeals, [Stahl](#), Circuit Judge, held that:

[1] district court did not clearly err in finding that defendant possessed stolen gun;

[2] district court did not clearly err in finding that defendant possessed firearm in connection with another felony offense; and

[3] district court did not clearly err in finding that defendant willfully presented false testimony during trial.

Affirmed.

West Headnotes (10)

[1] Criminal Law

🔑 [Review De Novo](#)

Criminal Law

🔑 [Sentencing](#)

Court of Appeals reviews district court's legal interpretations of sentencing guidelines

de novo, and reviews its subsidiary factual findings for clear error.

[Cases that cite this headnote](#)

[2] Criminal Law

🔑 [Sentencing](#)

When defendant challenges factual predicate supporting district court's application of sentencing enhancement, Court of Appeals asks only whether court clearly erred in finding that government proved disputed fact by preponderance of evidence.

[Cases that cite this headnote](#)

[3] Sentencing and Punishment

🔑 [Construction in general](#)

Sentencing Guideline terms that are not specifically defined therein generally should be given their common usage.

[Cases that cite this headnote](#)

[4] Sentencing and Punishment

🔑 [Construction in general](#)

Federal court is not bound to any particular state's definition of legal term when construing terms used in Sentencing Guidelines.

[Cases that cite this headnote](#)

[5] Sentencing and Punishment

🔑 [Weapons and explosives](#)

Term "stolen," as used in Sentencing Guideline permitting two-level enhancement for possession of stolen gun, encompasses all felonious or wrongful takings with intent to deprive owner of rights and benefits of ownership, regardless of whether or not theft constitutes common-law larceny. [U.S.S.G. § 2K2.1\(b\)\(4\)](#).

[Cases that cite this headnote](#)

United States v. Colby, 882 F.3d 267 (2018)

[6] **Sentencing and Punishment**

🔑 **Matters related to firearms and destructive devices**

District court did not clearly err in finding that defendant possessed stolen gun, thus warranting two-level enhancement for possession of stolen gun in sentencing defendant for possession of firearm by prohibited person, in light of evidence that defendant's friend had taken gun from her mother's closet without her permission, that another friend had taken gun from first friend's closet without her permission, and that defendant used gun to threaten neighbor and later hid it in snow bank. [U.S.S.G. § 2K2.1\(b\)\(4\)](#).

[Cases that cite this headnote](#)

[7] **Sentencing and Punishment**

🔑 **Matters related to firearms and destructive devices**

District court did not clearly err in finding that defendant possessed firearm in connection with another felony offense, thus warranting four-level enhancement in sentencing defendant for possession of firearm by prohibited person, in light of victim's testimony that defendant used gun to threaten him. [U.S.S.G. § 2K2.1\(b\)\(6\)\(B\)](#).

[Cases that cite this headnote](#)

[8] **Sentencing and Punishment**

🔑 **Sufficiency**

In order to impose sentencing enhancement for obstruction of justice, district court must make factual findings that encompass all elements of perjury—falsity, materiality, and willfulness. [U.S.S.G. § 3C1.1](#).

[Cases that cite this headnote](#)

[9] **Sentencing and Punishment**

🔑 **Sufficiency**

In reviewing district court's decision to impose sentencing enhancement for obstruction of justice, Court of Appeals generally does not require district court to address each element of perjury in separate and clear finding; rather, it examines whether sentencing court's findings encompass all factual predicates for finding of perjury. [U.S.S.G. § 3C1.1](#).

[Cases that cite this headnote](#)

[10] **Sentencing and Punishment**

🔑 **Obstruction of justice**

District court did not clearly err in finding that defendant willfully presented false testimony during trial, thus warranting imposition of obstruction of justice enhancement in sentencing defendant for possession of firearm by prohibited person, where defendant testified that he had never touched gun or threatened neighbor with it, but jury found him guilty of possessing gun, and district court permissibly concluded that his completely contradictory accounts of those key facts were not result of confusion, mistake, or faulty memory. [U.S.S.G. § 3C1.1](#).

[Cases that cite this headnote](#)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE [Hon. [George Z. Singal](#), [U.S. District Judge](#)]

Attorneys and Law Firms

[John L. Calcagni, III](#), Providence, RI, with whom Larry J. Ritchie was on brief, for appellant.

[Benjamin M. Block](#), Assistant U.S. Attorney, with whom [Halsey B. Frank](#), U.S. Attorney, and [Julia M. Lipez](#), Assistant U.S. Attorney, were on brief, for appellee.

Before [Kayatta](#), [Stahl](#), and [Barron](#), Circuit Judges.

Opinion

STAHL, Circuit Judge.

Following a two-day jury trial, Defendant Daniel Colby, Jr. was convicted of a single count of possession of a firearm by a prohibited person in violation of 18 U.S.C. § 922(g)(1). In calculating Colby's sentence, the district court applied a two-level enhancement for possession of a stolen gun, a four-level enhancement for using a gun in connection with another felony, and a two-level enhancement for obstructing justice by committing perjury at trial, which resulted in a guideline range of 84 to 105 months. The district court sentenced Colby to 95 months in prison. On appeal, Colby challenges the district court's application of these three enhancements. After careful consideration, we affirm.

I.

In March 2015, Colby was living in a camper in Wiscasset, Maine on property owned by his father. Forrest J. Smith was a friend of Colby's father who lived nearby on Mountain Road in Woolwich, Maine. Smith had occasionally worked for Colby's father prior to Colby taking up residence on his father's land. A few days before March 17, 2015, Smith was walking home from Colby's father's house when he encountered Colby on the road. Colby threw an M-80 firecracker at Smith and said “if you turn around right now I'll shoot ya.” Smith continued walking back to his trailer.

On March 17, 2015, at approximately 3:00 PM, Smith heard someone knocking on the door to his trailer claiming to be from the power company. According to Smith's later testimony, Colby burst into the trailer, breaking the lock on the door. In response, Smith told Colby that he had called the cops about the firecracker incident. Colby stuck a gun in Smith's face and said “I ought to shoot you right now for calling the f-ing cops on me.” Smith told Colby that he should leave, and Colby left the trailer still carrying the gun. Shortly thereafter, Smith called the police and reported that Colby had threatened him with a gun. Smith later described the gun as having “a short barrel” with “a brown, wooden handle.”

Joey Rogers, who also lived on Mountain Road, testified at trial to the following. On March 17, 2015, he saw Colby walking up the road towards Smith's trailer at around 3:00 PM and, thirty to forty minutes later, he heard someone in his driveway trying to open the door to his truck. Looking over, Rogers saw Colby standing by his truck. According to Rogers, when he asked Colby what he was doing, Colby mumbled and started “pulling something from his sweatshirt pocket.” Rogers could not see *270 exactly what the object in Colby's pocket was, but he did see that it had a handle. As Colby walked towards Rogers, Rogers' dog ran at Colby. Colby took off running across the road, through a ditch, and into the woods.

Three days earlier, on March 14, 2015, Colby had visited Gregory Doray at his mother Stacey Doray's house. Jyllian York, Gregory's sister who was nine months pregnant and on bedrest at the time, also lived with Stacey. At some point that day, Jyllian took Stacey's gun from Stacey's bedroom closet and hid it in her own bedroom closet. According to Jyllian's later testimony, she took the gun to give it to Gregory because she thought Gregory was in trouble with “bad people” and might need it. Colby, Gregory, and Gregory's girlfriend all ended up sleeping in the living room at Stacey's house that night.

The next morning, on March 15, 2015, Jyllian's boyfriend Cody Wyman discovered that the gun was missing from Jyllian's closet. Jyllian was scared that her mother would find out that she had taken the gun and did not, at that point, tell her mother that the gun was missing. After searching her room for about two hours, Jyllian asked everyone who had spent the night, including Colby, if they had the gun or knew where it was. No one would admit they had it.

On the evening of March 17, 2015, Jyllian texted and called Colby to ask him again if he had the gun or knew where it was. According to Jyllian, Colby told her that he had taken the gun and left it in a snowbank in the woods near Mountain Road. Jyllian and Wyman went out that night to look for the gun in the woods. In a series of text messages and phone calls, Colby tried to explain where he had put the gun, telling them that it was “stashed in snow ... [a]t the end of the tracks.” When Jyllian and Wyman still could not find the gun, Colby texted that he

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would “run in the woods with Cody and get it” in the morning.

The next day, Jyllian and her younger sister returned to the woods to look for the gun. While they were searching, Officer James Read of the Wiscasset Police Department, who was out on patrol, saw their car parked on the side of the road and stopped. When Officer Read asked them what they were doing, Jyllian told him they were looking for a gun. At that point, the police took over the search for the gun. Some time later, after the snow had melted, the police recovered the gun at that location in the woods.

At trial, Colby testified in his own defense. He admitted that he had thrown the firecracker at Smith, but that he “thought it was kind of a joke” and he “wasn't intending to hurt him or nothing.” He denied being at Smith's trailer on March 17, 2015, and claimed that he did not recall encountering Rogers that day.¹

Colby also denied ever touching Stacey's gun. Colby claimed that Gregory had taken the gun and brought it to his girlfriend's home in Gardiner. According to Colby, he and Gregory then arranged to have a mutual friend place the gun in the woods so that they could return it to Stacey. Colby explained that he texted Jyllian directions to where he thought the mutual friend had left the gun.

On June 2, 2016, the jury found Colby guilty. On December 27, 2016, the district court sentenced him to 95 months in prison. The court imposed a *271 two-level enhancement pursuant to [U.S.S.G. § 2K2.1\(b\)\(4\)\(A\)](#) for possessing a stolen firearm, a four-level enhancement pursuant to [U.S.S.G. § 2K2.1\(b\)\(6\)\(B\)](#) for possessing a firearm in connection with another felony offense, and a two-level enhancement pursuant to [U.S.S.G. § 3C1.1](#) for willfully obstructing, impeding, or attempting to impede the administration of justice. In applying the final enhancement, the court found that Colby “perjured himself during trial by denying possession of the gun and denying his activities vis-a-vis Forrest Smith.” The court found “all of those lies to be material” and found “that those lies, perjury, constitute obstruction.”

II.

[1] [2] We review the district court's legal interpretations of the sentencing guidelines de novo, and review its subsidiary factual findings for clear error. [United States v. Corbett](#), 870 F.3d 21, 31 (1st Cir. 2017). When a defendant “challenges the factual predicate supporting the district court's application of a sentencing enhancement, ‘we ask only whether the court clearly erred in finding that the government proved the disputed fact by a preponderance of the evidence.’” [United States v. Cannon](#), 589 F.3d 514, 517 (1st Cir. 2009) (quoting [United States v. Luciano](#), 414 F.3d 174, 180 (1st Cir. 2005)). We address each of Colby's challenges to the sentencing enhancements in turn.

A. Possession of a Stolen Firearm

Colby claims the district court's finding that Stacey's gun was stolen was clearly erroneous. Before we can evaluate the district court's factual findings, we must determine the meaning of “stolen” as used in this provision of the guidelines. [U.S.S.G. § 2K2.1\(b\)\(4\)\(A\)](#) calls for a two-level enhancement “[i]f any firearm ... was stolen.” The comment to this provision states that “[s]ubsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen.”

[3] [4] Because the events of this case occurred in Maine, Colby argues that we should define “stolen” in accordance with Maine's theft statute. See [Me. Rev. Stat. Ann. tit. 17-A § 353\(1\)\(A\)](#). This we will not do. Guideline terms are “federal in character” and must have “a single, invariant meaning, rather than a meaning that changes from state to state.” [United States v. DeLuca](#), 17 F.3d 6, 8 (1st Cir. 1994). Guideline terms that are “not specifically defined therein generally should be given their common usage.” [Id.](#) at 9. To ascertain a term's common usage, we may look to the laws of the various states, see, e.g., [United States v. Cruz-Santiago](#), 12 F.3d 1, 2-3 (1st Cir. 1993), as well as relevant federal law and other sources, [DeLuca](#), 17 F.3d at 9. However, we are not bound to any particular state's definition of a legal term when construing terms used in the sentencing guidelines.

We turn then to our task of divining the common usage of “stolen.” In [United States v. Turley](#), the Supreme Court

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addressed the term “stolen” as it was used in the National Motor Vehicle Theft Act. 352 U.S. 407, 408, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957). Finding that the term “has no accepted common-law meaning,” the Court looked to the legislative purpose behind the act. *Id.* at 411, 413, 77 S.Ct. 397. The Court concluded that because Congress sought to prevent “innumerable forms of theft,” the term should be read broadly to include “all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes *272 common-law larceny.” *Id.* at 416-17, 77 S.Ct. 397.

[5] We agree with the Eighth Circuit that “the context of § 2K2.1(b)(4) ... likewise requires a broad interpretation of ‘stolen.’ ” *United States v. Bates*, 584 F.3d 1105, 1109 (8th Cir. 2009); see also *United States v. Jackson*, 401 F.3d 747, 749-50 (6th Cir. 2005). As mentioned above, § 2K2.1(b)(4) has no scienter requirement, and “[t]he history of the Guideline itself confirms that the omission was intentional.” *United States v. González*, 857 F.3d 46, 56 (1st Cir. 2017). In *González*, we upheld the provision against a due process challenge, recognizing that “stolen firearms present special dangers, especially in the hands of convicted felons ... who cannot legally own any gun.” *Id.* at 57. Because a broader reading “is consistent with the guideline’s purpose to punish and deter the trade in stolen and altered firearms,” we define “stolen” to encompass “all felonious or wrongful takings with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny.” *Bates*, 584 F.3d at 1109; accord, *Turley*, 352 U.S. at 417, 77 S.Ct. 397.

[6] Turning to the facts of this case, the district court explicitly found that the gun was stolen and that the defendant knew it was stolen, even though such knowledge is irrelevant to whether the enhancement applies. The sentencing record supports these findings. Jyllian took the gun from her mother’s bedroom without permission with the intent to give the gun to her brother Gregory. Therefore, the gun could already be classified as “stolen” when she hid it in her closet. Of course, someone then took the gun from Jyllian’s closet. It was the government’s position that Gregory took the gun from Jyllian’s closet. Gregory slept at the house the night the gun disappeared from Jyllian’s closet and Jyllian testified

that Gregory was involved with “bad people” and may have needed the gun. Moreover, Colby himself testified that Gregory had stolen the gun.

Finally, the district court explicitly found that “the gun was hidden in the snow by the defendant and he did that to hide the gun.” This finding, which the record amply supports, provides another basis for concluding that the gun was stolen. Colby himself at some point took the gun and hid it in the woods, thereby evincing an intent to deprive Stacey of the benefits of ownership.²

As to whether Colby possessed Stacey’s gun, Smith testified that Colby threatened him with a gun that was similar in appearance, Rogers saw Colby holding something with a handle in his sweatshirt pocket, and Colby admitted that he had put the gun in the snow bank in the text messages and phone calls he had with Jyllian and Wyman.

Based on the evidence before it, the district court did not clearly err in finding that Colby possessed a stolen gun and *273 therefore did not err in imposing the enhancement.

B. Possession of a Firearm in Connection With Another Felony Offense

Colby claims the district court should not have imposed the four-level enhancement for possession of a firearm in connection with another felony offense because its finding that Colby had threatened Smith with Stacey’s gun was clearly erroneous. U.S.S.G. § 2K2.1(b)(6)(B) provides for a four-level enhancement if a defendant “used or possessed any firearm or ammunition in connection with another felony offense.” The presentence report identified the other felony offense as criminal threatening with a dangerous weapon.

[7] We see no clear error. First, there was more than sufficient evidence for the district court to find that Colby had come to possess Stacey’s gun before March 17, 2015. Second, the district court found Smith’s account of the incident at his trailer largely credible. Although the district court acknowledged that there were some gaps in Smith’s memory, it concluded that “someone who is—has a gun pointed at his face may well disregard a memory of which way the door went in or out or even whether the

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gun had a wide barrel or a somewhat narrower barrel.” Having found Smith’s testimony credible, the district court concluded that Colby used Stacey’s gun to threaten Smith. We see no reason to disturb the district court’s credibility determination, and therefore find the district court did not err in imposing the enhancement.

C. Obstruction of Justice

[8] Finally, we consider Colby’s challenge to the district court’s application of the enhancement for obstruction of justice. U.S.S.G. § 3C1.1 calls for a two-level enhancement “[i]f (1) the defendant willfully obstructed or impeded ... the administration of justice with respect to the investigation, prosecution, or sentencing of the instance offense of conviction, and (2) the obstructive conduct related to ... the defendant’s offense of conviction and any relevant conduct.” “[C]ommitting perjury is an example of the type of conduct to which this enhancement applies.” [United States v. Matiz](#), 14 F.3d 79, 84 (1st Cir. 1994). In order to impose the enhancement, the district court must make factual findings that “encompass all the elements of perjury—falsity, materiality, and willfulness.” [Id.](#)

[9] Colby focuses on the willfulness element, arguing that the district court failed to make a particular finding as to whether Colby made false statements “with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.” [United States v. Dunnigan](#), 507 U.S. 87, 94, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993). We generally do not require the district court to “address each element of perjury in a separate and clear finding.” [Matiz](#), 14 F.3d at 84. Rather, we examine

whether “a sentencing court’s findings encompass all of the factual predicates for a finding of perjury.” [Id.](#) Here, the district court found that Colby “perjured himself during trial by denying possession of the gun and denying his activities vis-a-vis Forrest Smith” and further found “all of those lies to be material” and “that those lies, perjury, constitute obstruction.”

[10] In these circumstances, “[t]he nature of the material falsehood[s] ... is not one in which the willfulness of the falsehood[s] could reasonably be questioned.” [United States v. Mercer](#), 834 F.3d 39, 49 (1st Cir. 2016). Colby flatly denied that he went to Smith’s trailer on March 17, 2015 and threatened him. He testified that he never touched Stacey’s gun and that he *274 only saw the gun when Gregory had it. The district court permissibly concluded that Colby’s completely contradictory accounts of these key facts in his case were not the result of “confusion, mistake, or faulty memory.” [Dunnigan](#), 507 U.S. at 94, 113 S.Ct. 1111. We find no error in the district court’s imposition of the obstruction of justice enhancement.

III.

For the foregoing reasons, we affirm.

All Citations

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Footnotes

- 1 Colby admitted that he might have been walking back and forth near Rogers’ house to get cell phone reception.
- 2 We note that, even if we were to apply the law of Maine to define “stolen,” which we will not do, these acts would likely qualify as theft under Maine law. [See Me. Rev. Stat. Ann. tit. 17-A § 352\(3\)\(C\)](#) (“intent to deprive” necessary for theft occurs where one “use[s] or dispose[s] of the property under circumstances that make it unlikely that the owner will recover it or that manifest an indifference as to whether the owner will recover it”); [see also State v. Burns](#), 26 A.3d 817, 821 (Me. 2011) (“Although a person charged with theft may have intended to repay or otherwise restore the stolen property, that person may ‘nonetheless consciously use ... the money in a way which the jury could find made it unlikely that the [rightful owner] would recover it, in violation of [section 352\(3\)\(C\)](#).’ ” (quoting [State v. Moon](#), 755 A.2d 527, 531 (Me. 2000))).

1 you know, pointing at your face you would be hard
2 pressed particularly when you're close up against your
3 nose, which he testified, to know exactly how large
4 that barrel is.

5 Mr. Smith was honest that he wasn't sure. His 911
6 call reflected that he thought it was a different
7 caliber than it actually was. But I would ask the
8 Court to consider his testimony, and based on his
9 testimony alone we have no motivation whatsoever to
10 come in and lie about Mr. Colby. His testimony was
11 that he was surprised and scared. And the neighbor
12 down the road corroborated Mr. Colby's going down in
13 the direction of Mr. Smith's home as well as returning
14 from that direction at the right time and hiding in the
15 area of his vehicle and then fleeing into the woods,
16 which the timing is corroborative of Mr. Smith as well
17 as the 911 call.

18 And so for that reason it is the Government's
19 position that we have shown by a preponderance that he
20 was in fact in possession of the gun at the time he
21 entered Mr. Smith's residence.

22 THE COURT: Would you please deal with the
23 issue that -- his argument that the gun was not hidden
24 by him nor that he committed perjury during the trial?

25 MS. MCELWEE: Yes. It's obviously our

1 position, Judge, that upon returning from Mr. Smith's
2 home and hanging out in the area of the neighbor's
3 home, he then fled in the woods, which is the precise
4 location that the firearm was found later. We -- our
5 theory of the case is that he in fact ditched the gun
6 in the snow at that point, which is consistent with the
7 text messages that were presented at trial, given the
8 dialogue that he was having with Ms. York and
9 Mr. Wyman.

10 I would ask that the Court find incredible the
11 defendant's statements that he merely was just engaging
12 in text messaging with these folks and attempting to
13 help them get the gun back and that that's why he was
14 saying exactly where the gun could be located and where
15 it could be found with such precision.

16 All along, the local police believed or at least
17 put forward the theory that Mr. Colby was responsible
18 for removing the gun from Ms. Doray's home. My
19 investigation and the ATF's investigation did not
20 reveal that to be sure or certain, and so he was not
21 charged with that as far as we were concerned. We
22 could not through the testimony of the witnesses prove
23 that Mr. Colby took the gun from Ms. Doray's home, and
24 I have to concede that at the time he was at the house
25 I can't prove that he, by a preponderance of the

1 evidence or reasonable doubt, that he actually took the
2 gun from Ms. Doray's home. Our investigation revealed
3 more likely that Mr. Doray, Greg Doray, removed the gun
4 from the home and then gave it to Mr. Colby. That was
5 consistent with witness statements in our case.

6 But I think more sure is the fact that he was in
7 possession of it at a time when he knew it was stolen,
8 which is not required by the guideline, but certainly
9 the text messages would reveal that, even if he wasn't
10 the person that removed it from the house, he certainly
11 was in possession of it as far as we're concerned when
12 he goes to Mr. Smith's, and it's after that that he
13 begins conversing by text message with Jyllian York and
14 Mr. Wyman about its location; it's the precise place
15 that the police later find it in the snow. And so that
16 would reflect knowledge on the defendant's part and an
17 intent to get it back to them but not to Ms. Doray, the
18 owner from whom it was stolen, and albeit perhaps by
19 her own children.

20 But there isn't any evidence to suggest that
21 Mr. Colby was taking it from the house but, rather, my
22 theory is that he was in possession of it
23 constructively on his property after he used it to
24 assault Mr. Smith. And certainly someone who has it in
25 that possession is not intending to return it to

1 Ms. Doray. And for those reasons I think the Court can
2 find it was stolen, even if you don't find he removed
3 it from Ms. Doray's home.

4 THE COURT: And the obstruction and perjury
5 enhancement?

6 MS. MCELWEE: Again, the testimony of the
7 defendant was simply that he was just making those text
8 messages communications in order to help these people,
9 and I just did not find that to be truthful. The
10 testimony of the other witnesses didn't reflect that.
11 The testimony -- the evidence of the text messages
12 themselves doesn't reflect that. And so his testimony
13 that he wasn't in possession of the gun, that he was
14 merely just trying to help some people and he was
15 innocent in all this I think is worthy of the perjury
16 enhancement.

17 THE COURT: Thank you.

18 MS. MCELWEE: Thank you, Judge.

19 THE COURT: Mr. Rodway, your position?

20 MR. RODWAY: I have some exhibits that I want
21 to submit by agreement. And I've marked these S1
22 through S5.

23 The first is S1, I'm going to hand it up, and it's
24 an affidavit from a carpenter and it's about whether a
25 door can be pushed in. There was testimony at the

1 trial that my client forced the door in on Forrest
2 Smith's house when there was also evidence that the
3 door could not have been pushed in. It opens out and
4 there's a lip, so it couldn't have been pushed in. The
5 import of that is that Mr. Forrest obviously has that
6 fact wrong. If he's got that fact wrong, that goes to
7 his credibility. So I marked that as S1.

8 The second one is an affidavit from a dog expert
9 who -- who opines that -- and I marked this S2 for
10 Sentencing 2 -- that if a dog was brought by the area
11 where the gun allegedly was a dog would have found the
12 gun. And that's evidence that perhaps on the 17th and
13 the week after where the police were looking for the
14 gun that it actually wasn't there.

15 And that sort of feeds into the argument that I
16 wrote about in my sentencing memorandum about the
17 testimony of Jamie Simmons, which the Court has as an
18 exhibit, who says that she had the gun at her house a
19 month after March 17th, and she claims that Mr. Colby
20 came and got it a month after March 17th. So -- and by
21 the way, the -- the gun wasn't reported stolen until a
22 month after March 17th, and it wasn't found until
23 April 15th or so.

24 The third exhibit, S3, is a firearms expert who
25 talks about the difference between a .22 and a .38.

1 And the -- S4 is from a different firearms expert who
2 also talks about that. So I want to hand those up at
3 this time.

4 THE COURT: And those are in by agreement?

5 MS. MCELWEE: No objection.

6 THE COURT: All right. They're all admitted.
7 Give me a moment, I just want to look through them.

8 What's a PSD?

9 MR. RODWAY: It's a powder sniffing dog, I'm
10 sorry.

11 THE COURT: All right, I've reviewed S1
12 through S4. Go ahead.

13 MR. RODWAY: Judge, I have written about
14 problems with Mr. Smith's credibility. I've got a
15 couple of other points --

16 THE COURT: Go right ahead.

17 MR. RODWAY: -- that my client wanted me to
18 raise that I agree are relevant.

19 One, on Page 89 of the transcript, Mr. Forrest
20 says that my client was wearing a plaid T shirt and
21 jeans, whereas Mr. Rogers says that my client was
22 wearing a hooded sweatshirt. And that's on Page 121 of
23 the transcript. On Page 72 of the transcript,
24 Mr. Forrest says that my client was there at his place
25 for a minute, and on Page -- Pages 111 through 113

1 Mr. Rogers says that my client was there for 45
2 minutes.

3 So all of these things that I wrote about, coupled
4 with these issues, these factual issues, you know, the
5 Court -- just because my client got found guilty
6 doesn't -- it doesn't mean that he actually did what
7 Mr. Forrest said he did. And there was -- there was
8 motivation to fabricate developed I thought very well
9 by Mr. -- by Hilary Billings during the trial. And so
10 the Court here has got to find by a preponderance that
11 my client did what Mr. Smith said he did, and I would
12 suggest that the evidence is not sufficient to do that.

13 Did the Court want me to talk about the stolen --

14 THE COURT: Yes, let's deal with them all.

15 MR. RODWAY: All right, I have another exhibit
16 on that issue, and it's Defendant's S5.

17 THE COURT: I'll take a look at it. Are you
18 able to tell me what this is, Mr. Rodway?

19 MR. RODWAY: That's a text message from Greg
20 Doray.

21 THE COURT: From who?

22 MR. RODWAY: Greg Doray?

23 THE COURT: To?

24 MR. RODWAY: To my client. And in it -- the
25 importance of it is that -- in it he says, I need to

1 give it back though, bro. I've written in my
2 sentencing memorandum about whether the gun was stolen.
3 For it to be stolen, to commit theft, you have to have
4 the intent to deprive the owner of it.

5 So the facts of the case, as I understand it to
6 be, are that Jyllian York takes the gun out of her
7 mother's closet, gives it to Greg Doray so that he can
8 protect himself. There was some misunderstanding about
9 him being in trouble with some drug dealers from New
10 York or something along those lines.

11 So they take the gun for protection, and this
12 is -- this is about -- you know, it's leading up to
13 March 15th. And then on March 17th you have all of
14 this activity where these people are texting back and
15 forth, where you can find the gun, I'm going to look at
16 the gun, and then they go look for the gun. So where
17 is the intent to deprive the owner of it? Whether --
18 whether the Government thinks my client stole it or
19 Greg Doray stole it, clearly they're trying to get it
20 back to the owner. And so from our standpoint the gun
21 just wasn't stolen. Maybe it was borrowed, maybe it
22 was borrowed without permission, but if you look at the
23 definition of theft, it's not stolen. So what happens
24 is --

25 THE COURT: If the jury believes your client

1 buried it, that runs counter to your argument; does it
2 not?

3 MR. RODWAY: I don't think that there was
4 evidence that he buried it.

5 THE COURT: Put it in the snow.

6 MR. RODWAY: Put it in the snow, and -- I'm
7 not conceding that he even did that. He may have known
8 that it was --

9 THE COURT: I understand, but if the jury
10 believed that --

11 MR. RODWAY: If the jury believed that my
12 client texted where they could find it? No intent to
13 steal, no intent to deprive the owner of it. All of
14 the evidence says we're trying to get it back to the
15 owner of it, not that we're trying to deprive her of
16 it.

17 And then what do you make -- what should we make
18 of the testimony of Jamie Simmons, who says she had the
19 gun a month later? It's not consistent. And the
20 police find it a month later. So where is it during
21 that time period? Jamie Simmons was never called as a
22 witness during the trial, but it's certainly what she
23 said during her grand jury testimony.

24 So I would suggest that on the four-level
25 enhancement for Mr. Smith the facts are so murky that

1 the Court should not find by a preponderance of the
2 evidence that my client threatened him with this
3 firearm.

4 With respect to the stolen -- you know, the gun
5 being stolen, I would suggest that the evidence is even
6 weaker that the gun was stolen and so that my client
7 should not receive the four-level enhancement or the
8 two-level enhancement.

9 So you get to the -- the perjury issue. And I
10 don't really need to go into too much more than what
11 I've already written, but the jury certainly could have
12 found, and the Court instructed on constructive
13 possession, the jury could have found from the
14 testimony about the text messages, you can find it, you
15 know, where they did -- they did wind up finding it,
16 the jury could say, okay, he was in constructive
17 possession of it. And so for him to testify that he
18 was not in actual possession of it I would suggest is
19 not perjury.

20 THE COURT: I understand your position.

21 MR. RODWAY: I want to check with my client.

22 THE COURT: Of course, you go right ahead.

23 And Defendant's S5 is admitted without objection.

24 (Defendant conferred with counsel.)

25 MR. RODWAY: All right, my client just wanted

1 to make sure that the Court does understand the
2 arguments that I've written in my sentencing
3 memorandum.

4 THE COURT: Absolutely, I read it, actually I
5 read it twice, so I understand what your position is.
6 The Government -- I've also read the Government's
7 sentencing memorandum twice.

8 MR. RODWAY: There's a couple of sentencing
9 references that he wanted me to bring to the Court's
10 attention.

11 THE COURT: Go right ahead.

12 MR. RODWAY: James Read on Page 252 and 253
13 testified that the gun --

14 THE COURT: This is the transcript you're
15 referring to?

16 MR. RODWAY: The trial transcript, yes. That
17 the gun was ultimately found in the same exact spot
18 that the police had previously searched about a month
19 prior and never found it.

20 THE COURT: All right.

21 MR. RODWAY: And Officer Skolfield on Page 307
22 of the transcript said that as well.

23 THE COURT: Okay. Anything else?

24 MR. RODWAY: No, sir.

25 THE COURT: Do you want to add anything for

1 becomes like how do you expect anything different to
2 happen? And so again, more and more, I find myself
3 saying, oh, but we're going to the Bureau of Prisons,
4 we're with the federal government now. And it's the
5 biggest irony going, but that's a good thing. That's a
6 good thing. The federal government has the resources
7 to assist Mr. Colby and people like him through the
8 good people at U.S. Probation and the good people even
9 at the BOP. And so to give him a big, long sentence,
10 120 months or even 84 months, that is greater than is
11 necessary to achieve the goals of sentencing in this
12 case.

13 And so what I'm asking the Court to do is plan A,
14 22 months, followed by supervised release. Plan B is
15 Pharos House. Thank you, Your Honor.

16 THE COURT: Thank you. Anything else from the
17 Government?

18 MS. MCELWEE: No, thank you, Judge.

19 THE COURT: I have carefully reviewed the
20 contents of the revised presentence investigation
21 report, which I take into account. I also take into
22 account everything I've heard from counsel, the
23 evidence presented at the hearing, and the contents of
24 the allocution of this defendant.

25 With regard to defendant's objections, I do find

1 the four-level enhancement for violence and threat in
2 that he pointed the gun at Forrest Smith. I also find
3 that he threatened Mr. Smith with the gun. I also find
4 that the gun was stolen. I believe that this defendant
5 knew it was stolen, but under the guidelines it's
6 irrelevant. I find that the gun was hidden in the snow
7 by the defendant and he did that to hide the gun. And
8 I find that the defendant perjured himself during trial
9 by denying possession of the gun and denying his
10 activities vis-a-vis Forrest Smith. I find all of
11 those lies to be material. I also find that those
12 lies, perjury, constitute obstruction.

13 At this time I make the following guideline
14 findings -- and, for the record, I've also denied the
15 Government's objection, which they preserved for the
16 record.

17 MS. MCELWEE: Thank you.

18 THE COURT: I find the facts as set forth in
19 the presentence report as amended. I find that the
20 defendant has a prior conviction for a crime of
21 violence and was a prohibited person at the time he
22 committed the instant offense; the base offense level
23 is 14. The firearm involved in this case was stolen;
24 two levels are added to 16. I find this defendant
25 possessed the firearm in connection with another felony

1 offense, to wit, criminal threatening with a dangerous
2 weapon; four levels are added for an offense level of
3 20. I find that he willfully obstructed or impeded or
4 attempted to impede the administration of justice with
5 regard to his perjury at trial; two levels are added to
6 22. He has a criminal history category of VI, which
7 results in an advisory guideline range of 84 to 105
8 months. Supervised release here is one to three years.
9 Defendant is not eligible for probation. Fine range is
10 \$7,500 to \$75,000. Special assessment fee of \$100 is
11 mandatory.

12 I've determined the sentence I'm imposing is
13 sufficient but not greater than necessary to effectuate
14 the goals of 18 USC Section 3553(a). In setting the
15 sentence I've carefully considered the advisory
16 guideline range. I've taken into account all of the
17 factors set forth in 18 USC Section 3553(a), most
18 important the nature and circumstances of the offense,
19 the history and record of this defendant, the
20 seriousness of the offense, the need for just
21 punishment, and the need for deterrence.

22 Mr. Colby has done a remarkable job while in jail
23 awaiting sentencing. I probably have not encountered
24 anyone who has been as diligent as Mr. Colby has been
25 in trying to improve himself while incarcerated.

1 Mr. Colby is a person with obvious native intelligence.
2 Unfortunately, in many cases, he's used that native
3 intelligence to get himself into trouble because he
4 thinks he's smarter than everyone else. While in jail
5 he used that native intelligence to improve himself.
6 My concern is that without the structure of an
7 institution the native intelligence again starts to
8 wander. My concern continues to be in looking at a
9 criminal history category of VI for someone who is
10 still in his mid 30s that, without a structured
11 setting, he lets his temper and his anger get in front
12 of his intelligence.

13 I look back in 2002, an assault with two
14 violations of probation, an aggravated assault in '03
15 with multiple violations of probation, a resisting
16 arrest, a terrorizing, an illegal possession of a
17 dangerous weapon with one, two, three, four violations,
18 a resisting arrest, a threat to kill while he was in
19 jail, a refusal to submit to an arrest. All of these
20 are unfortunately indications of an individual who has
21 views that his conduct is to be determined not by
22 outside sources but by his own desires.

23 In this case I find that because of that desire he
24 went into the home of Forrest Smith, and I realize that
25 there was a dispute whether the door opened in or out.

1 In my view the jury and I came to the conclusion that
2 someone who is -- has a gun pointed at his face may
3 well disregard a memory of which way the door went in
4 or out or even whether the gun had a wide barrel or a
5 somewhat narrower barrel.

6 My initial inclination in this matter was a
7 sentence at the high end of the guideline range or at
8 the top of the guideline range, but in my view
9 Mr. Colby has earned through his activities at the jail
10 a reduction in that level. Defendant will rise for
11 sentence.

12 This defendant is hereby committed to the custody
13 of the United States Bureau of Prisons to be imprisoned
14 for a term of 95 months. I recommend that this
15 defendant be enrolled in the 500-hour Bureau of Prisons
16 residential drug abuse program.

17 Upon release from imprisonment this defendant
18 shall be on supervised release for a term of three
19 years. He shall report to the probation office in the
20 district to which he is released within 72 hours of
21 release from the custody of the Bureau of Prisons. He
22 shall not commit any other federal, state, or local
23 crime. He shall not possess illegally any controlled
24 substance. He shall cooperate in the collection of DNA
25 as directed by the officer. He shall not possess a

1 firearm, ammunition, destructive device, or other
2 dangerous weapon. He shall comply with the standard
3 conditions adopted by the Court. He shall also comply
4 with the following additional conditions:

5 He shall participate in mental health treatment as
6 directed by the officer until released from the program
7 by the officer. He shall pay or copay for the services
8 during the treatment to the officer's satisfaction.

9 He shall participate in a work force development
10 program and services as directed by the officer and if
11 not employed shall perform up to 20 hours of community
12 service per week. Work force development program may
13 include assessment and testing, educational
14 instructions, training classes, career guidance, and
15 job search and retention services.

16 He shall not use or possess any controlled
17 substance, alcohol, or other intoxicant, and shall
18 participate in a program of drug and alcohol abuse
19 therapy to the officer's satisfaction. This shall
20 include testing to determine if he's used drugs or
21 intoxicants. He shall submit to one test within
22 15 days of release from prison and at least two but not
23 more than 120 tests per calendar year thereafter as
24 directed by the officer. He shall pay or copay for
25 such services during the course of treatment to the

1 officer's satisfaction. He shall not obstruct or
2 tamper with or attempt to obstruct or tamper with in
3 any way such testing.

4 He shall not own or possess any firearm or other
5 dangerous weapon or knowingly be at any time in the
6 company of anyone known by him to possess a firearm or
7 dangerous weapon.

8 A United States probation officer may conduct a
9 search of the defendant and anything he owns, uses, or
10 possesses if the officer reasonably suspects that the
11 defendant has violated a condition of supervised
12 release and reasonably suspects that evidence of the
13 violation will be found in areas to be searched.
14 Searches must be conducted at a reasonable time and in
15 a reasonable manner. Failure to submit to the search
16 may be grounds for violation.

17 I'm imposing a mandatory \$100 assessment. I find
18 that this defendant does not have the ability to pay a
19 fine; I am waiving the fine in this case. The monetary
20 assessment is due in full immediately.

21 Does the Government have any objection to the
22 terms of supervised release?

23 MS. MCELWEE: No, but we would ask for an
24 additional condition, Judge, of no contact, direct or
25 indirect, with Forrest Smith.

1 THE COURT: Your position on that, Mr. Rodway?

2 MR. RODWAY: There's no objection to that.

3 Could I have a moment?

4 THE COURT: Of course.

5 (Defendant conferred with counsel.)

6 THE COURT: As an additional term of
7 supervised release I order the defendant to have no
8 contact, direct or indirect, with Forrest Smith.

9 MS. MCELWEE: Thank you.

10 THE COURT: The victim in this case.

11 (Defendant conferred with counsel.)

12 THE COURT: Mr. Rodway, do you have objection
13 to the terms of supervised release?

14 MR. RODWAY: There is no objections.

15 THE COURT: All right. Anything else for the
16 Government before I give him his rights of appeal?

17 MS. MCELWEE: No, not before that, thank you,
18 Judge.

19 MR. RODWAY: A couple of things. Mr. Colby
20 would ask that the Court recommend Berlin.

21 THE COURT: Any objection?

22 MS. MCELWEE: No.

23 THE COURT: So noted, it will be included in
24 the judgment. Anything else?

25 MR. RODWAY: And second, was the Court going