OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner v.

SHARON DUNNIGAN

CASE NO: 91-1300

PLACE: Washington, D.C.

DATE: Wednesday, December 2, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 91-1300

SHARON DUNNIGAN :

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Washington, D.C.

Wednesday, December 2, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

PAUL J. LARKIN, JR., ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

BRENT E. BEVERIDGE, ESQ., Fairmont, West Virginia; on behalf of the Respondent.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 91-1300, United States against Sharon Dunnigan. Mr. Larkin.

ORAL ARGUMENT OF PAUL J. LARKIN, JR.

ON BEHALF OF THE PETITIONER

MR. LARKIN: Thank you, Mr. Chief Justice, and may it please the Court:

The question in this case is whether the Constitution prohibits a district court from enhancing a defendant's sentence under the sentencing guidelines if the Court finds that the defendant committed perjury when he testified at trial. The court of appeals held that the Constitution forbids a district court from applying the guidelines in that manner, and we disagree.

Long before the sentencing guidelines went into effect, a district court at sentencing could take into account its belief that the defendant committed perjury when he testified. Nothing in the sentencing guidelines alters that long-settled rule or justifies the conclusion that the Constitution now demands that a different balance must be struck.

Respondent was a member of an organization responsible for distributing cocaine in Charleston, West

Virginia. The Government's evidence, which consisted largely of the eyewitness testimony of respondent's former confederates, showed that respondent was responsible for purchasing powdered cocaine, manufacturing it into crack cocaine, and then selling the crack. Respondent's defense at trial was simple. As the court of appeals put it, respondent took the stand and denied everything.

The district court, however, credited the Government's evidence and convicted respondent of conspiracy to traffic in drugs. At sentencing the district court found that respondent had committed perjury when she testified at trial. The district court's finding is at page 29 of the joint appendix.

Based on that finding, the district court concluded that sentencing guidelines section 3C1.1 required a two-point enhancement to the base offense level.

QUESTION: Does perjury imply a finding of willfulness?

MR. LARKIN: Yes, Your Honor. The case law makes that point so that a person who perjures herself at trial has willfully obstructed or attempted to obstruct justice.

QUESTION: Because he didn't say that she was convicted of -- that she committed perjury in so many

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words, did he? He said she should be assessed with a two-point addition for obstruction of justice by reason of her trial testimony, she was untruthful at trial. He doesn't anywhere say that she committed perjury, did he?

MR. LARKIN: He doesn't. He doesn't, I think, use that precise term at page 29. But he does assess her the two point enhancement because he found that she was untruthful at trial with respect to material matters in this case. And that, we think, is a sufficient finding to justify the enhancement under that guideline.

QUESTION: I think it would be rather difficult to say that it wasn't willful, given the circumstances of this case.

MR. LARKIN: But --

QUESTION: In some cases the defendant might not be believed, but her testimony might not be willfully -- willfully.

MR. LARKIN: Correct -- correct, Your Honor. And I would like to make that point very clear. It's not our position that a district court either should or can enhance a defendant's sentence simply because the defendant was convicted after testifying. The district court must make a finding that the defendant committed perjury. That finding cannot be based simply on the jury's verdict of conviction.

The court, under this guideline as under the other guidelines that are now in place in the Federal system, has the fact-finding responsibility to decide whether enhancements are appropriate once the court calculates the base offense level.

In making that finding, the district court is entitled to consider all of the evidence, since both the Sentencing Reform Act and the sentencing guidelines direct district courts to consider all of the evidence. But the district court must make an independent finding in this regard and that, we think, is an adequate response to many of the concerns that otherwise might be raised about this guideline.

The court of appeals believed that the application of the guideline and the way the district court conducted it rendered the guideline unconstitutional. The court of appeals therefore held that the sentence had to be set aside and the case vacated and remanded.

In the course of its ruling, the court of appeals expressly rejected the contrary conclusion that had been adopted by numerous other courts of appeals, eight in number now, and we believe that in so doing the Fourth Circuit erred.

Historically, the criminal law found it

important to allow a sentencing judge to consider a broad range of information, including prior misconduct by the defendant. In fact, prior misconduct was deemed so probative and so weighty that a district court at sentencing was entitled to consider such evidence even in the absence of a conviction.

Among the types of misconduct that a court could consider at sentencing was the defendant's perjury at trial. In 1978 in the case of United States v. Grayson, this Court endorsed that practice. The Court at the same time also rejected the argument that allowing a trial judge to consider his firsthand observations of the defendant's perjury would amount to punishing the defendant for an uncharged crime or would deter other defendants from taking the stand.

The background principles of law against which Grayson was decided are still vital today. When the guidelines went into effect on November 1 of 1987, those principles were not changed. In fact, the Court in cases has made clear that those principles are still valid.

For example, in the last two terms in the Payne and Dawson cases, the Court has made clear that a district court at sentencing is entitled to consider a broad range of information. In addition, in the case of Nix v. Whiteside the Court has made clear the defendant's right

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to testify does not include the right to give false testimony.

The Sentencing Reform Act of 1984 and the sentencing guidelines embrace those principles. As I mentioned to Justice Kennedy, both the act and the guidelines direct the district courts to consider a broad range of evidence at sentencing.

And in particular, the guideline they were concerned with here today, section 3(c)1.1, directs the district courts to enhance a defendant's sentence if the court finds that the defendant committed perjury. That guideline therefore serves as the vehicle through which the Sentencing Commission and, in each case, the district court can implement the principle that this Court approved in Grayson.

Now, the Fourth Circuit held that that guideline unconstitutionally infringed on the defendant's right to testify and gave several reasons. We think none of those reasons are sufficient. To begin with, the court of appeals was troubled by the fact that section 3(c)1.1 classifies a defendant's false trial testimony as the obstruction of justice rather than as simply one factor that a district court can consider or ignore in the exercise of its sentencing discretion.

The label used to describe this factor, however,

should be immaterial because the label has no independent effect. In addition, the guideline is not a disguised means of punishing the defendant for a crime not charged against him.

A defendant who testifies perjuriously at trial thereby indicates his willingness to break the law when he finds it in his interest to do so. That factor therefore shows the defendant is a greater danger to the community than might otherwise be the case, and therefore in turn is relevant to the question of what period of incarceration is necessary to incapacitate him for the protection of society.

The court of appeals also believed that because this guideline is mandatory, it amounts to the type of wooden or reflex enhancement that this Court criticized in Grayson. While it is true that Grayson did not direct the district courts in every case to enhance a defendant's sentence if the court found that the defendant committed perjury, Grayson at the same time did not prohibit Congress or the Sentencing Commission from making the judgment across the board that a defendant's trial perjury is an aggravating factor and should be treated as such in every case. That is precisely what section 3(c)1.1 does.

There is also nothing unusual about codifying this rule or others like it. The sentencing guidelines

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codify numerous sentencing factors that prior law had left to the individual discretion of district court judges in each case.

The new mandatory nature of these rules is just the inevitable result of making the choice to target a district court's attention to certain matters deemed aggravating or mitigating and to guide the district court by giving weight to those factors, instead of leaving to each court in each case the authority to make that decision for himself or herself. If a district court, however, can consider defendant's perjury at trial, and we know from Grayson that it can, a district court then can be channeled in the exercise of that discretion by Congress or the sentencing commission.

The court of appeals also believed that, again, because this guideline is mandatory, it would deter innocent defendants from testifying, especially defendants with prior convictions. We think that's unlikely. A defendant who goes to trial has as his overriding concern avoiding a conviction. A defendant therefore will decide whether to testify based on his assessment of the likelihood that his testimony will increase the prospects of his acquittal.

In making that judgment a defendant will rely on various factors, such as the strength of the Government's

case, the strength of the other defense evidence available, the defendant's prior record or other factors that may be used to impeach him, his credibility as a witness, and his ability to withstand cross-examination.

We think it would be a rare case in which a defendant, after balancing all those factors, concludes that he should testify in order to increase his chances of an acquittal, but then nonetheless decides against doing so because of his fear that the jury would erroneously believe he is committing perjury, would therefore erroneously convict him, and that the district court then erroneously would make the same conclusion and enhance his sentence under this guideline.

The Fourth Circuit expressed skepticism that the district courts could or would apply this guideline properly and that courts of appeals could or would police the actions of the district courts. We see no reason to be pessimistic in this regard.

As I mentioned before, the guideline requires that a defendant's sentence be enhanced if the court makes the finding, independent of the jury's verdict, that the defendant committed perjury. The district court, therefore, has this responsibility at sentencing, like many of the other responsibilities district courts now have under the guidelines.

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We have no fear that the district courts and the courts of appeals will not be able to apply this guideline in the correct manner. In fact, this Court in Grayson expressed no fear that district courts would misuse the sentencing authority that was recognized in that case.

In Grayson the Court recognized that a judge's oath of office and a judge's integrity would be a sufficient guarantee that district courts may not misuse this factor. We see no reason today, now, simply because the guidelines are in -- in effect, to have any less confidence in the ability of district courts properly to conduct the sentencing proceedings than this Court did back in 1978.

I'd like to reserve the balance of --

QUESTION: Mr. Larkin, what -- what do you say is the level of the burden of proof to satisfy this guideline? Some -- at least one court has held that it's some higher level than a mere preponderance. Have you examined that question?

MR. LARKIN: Yes, Your Honor.

QUESTION: Uh-huh.

MR. LARKIN: It -- it has been our position that the preponderance standard is the correct standard. The Sentencing Commission also takes that view. The one court you're referring to is a Third Circuit case called

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In that case what in essence happened was a defendant's sentence was increased from a guidelines range of 30 months to up within the statutory range of about 30 years. And what the Third Circuit said was when you have a situation where the increase is that great, it would be appropriate to apply a greater standard to ensure that the facts are found in a proper manner.

Now we don't have any type of increase in this case that remotely approaches that one, and we have rarely, rarely seen that sort of large increase in other cases. The Third Circuit, in fact, mentioned in that case that it hadn't seen it in other cases, I believe, and certainly no other court since then has applied that more stringent standard. So we believe that in accordance with the Court's jurisprudence, the preponderance standard is sufficient.

QUESTION: I suppose that allocution, if the defendant makes a statement that's not sworn -- well, suppose the defendant said everything that was said on cross -- on -- on -- on -- at trial at allocution, and did not take the stand at trial, could the sentence then be enhanced? If the defendant said I didn't do it, I wasn't there.

MR. LARKIN: I believe so, Your Honor, because I

believe that the defendant would have been sworn. And --

QUESTION: Are you sworn for allocution?

MR. LARKIN: I believe so, Your Honor. So that when the defendant expresses opinions, for example, as to the quantity of drugs that would be involved in a particular case, since the judge at sentencing has to make findings in that regard, it would be important for the district court to know that it can rely on what the defendant says if the defendant is sworn.

QUESTION: Allocution.

MR. LARKIN: Well, I thought so, Your Honor, but I was just advised by my cocounsel that the defendant is not. If that were --

QUESTION: All right, yeah.

MR. LARKIN: -- True, the defendant were not sworn, then the judge would know from the outset that he would -- should take the defendant's statements with far more caution. So in that circumstance, it would probably not be appropriate, I think.

But I have not seen that precise circumstance arise. There are situations in which a defendant, for example, could make perjurious statements at a suppression hearing. He wouldn't be at trial, but it would be at another type of hearing.

And in cases like that, it would be appropriate

to consider applying this enhancement, because in many cases if the defendant loses at the suppression hearing, you'll thereafter not have a trial, you may just have a guilty plea. But that is an impediment to the effective administration of justice.

So there are circumstances where the perjury can occur other than at trial. And if it does, then it would be proper basis for the enhancement.

QUESTION: Thank you, Mr. Larkin. Mr. Beveridge, we'll hear from you.

ORAL ARGUMENT OF BRENT E. BEVERIDGE

ON BEHALF OF THE RESPONDENT

MR. BEVERIDGE: Thank you, Mr. Chief Justice, and may it please the Court:

The purpose of me being here today is to assert that the Fourth Circuit Court of Appeals properly decided that there was a chilling effect on the Fifth Amendment right to testify on one's own behalf. And the Fourth Circuit in this instance basically said why it had a chilling effect, and -- when you consider all the factors that are involved in determining whether a defendant should testify.

Basically, I'm here to assert and tell you why the -- or how the chilling effect takes place. And if you look at Grayson, which is the key case originally decided

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on the right of the court to consider those as an aggravating factor, the defendant's perjured testimony at trial, you can see in there that there is a reference to the case of Hummelway v. Arkansas.

Which basically says -- in a footnote in Hummelway v. Arkansas, is that the counsel for the defendant has an obligation to court -- to the court, to present testimony that is true or accurate or reasonable, and counsel has made an effort to determine whether or not the defendant is testifying to perjurious events.

And in this instance, what we have is a case where the burden on counsel in this instance -- and this goes to the very roots of effective assistance of counsel. Counsel presents testimony at trial and before your client testifies you go to your client and basically say, you know, these are the things that you should consider before you testify.

And under the guideline in this instance, that if it's applied with an automatic enhancement, as it was in this case, for perjured testimony, you're going to have to advise your client that if you take the stand and you lose, effectively you're going to get a two-level enhancement.

QUESTION: What was the situation before the guideline?

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MR. BEVERIDGE: Before the guidelines you would advise him that the judge has discretion. And if you get on the stand and you give a cock-and-bull story, the judge can come up with an aggravated circumstance such as in Grayson that could apply.

QUESTION: But so you --

MR. BEVERIDGE: Now you've reached a level of automatic enhancement, and so you --

QUESTION: Well, isn't that -- that, then, is your point, that the enhancement is automatic and it wasn't automatic in Grayson.

MR. BEVERIDGE: Right. So then and in Grayson --

QUESTION: And you say -- excuse me. You say it's automatic because it follows simply from the fact of testimony followed by a conviction.

MR. BEVERIDGE: And in the -- in the court of appeals, and if there was ever oral argument in a case that had an impact on the ultimate outcome, the oral argument in the Fourth Circuit, at which time the Government basically stated that every guilty verdict in which a defendant testifies, it's going to result in an automatic enhancement.

QUESTION: Well, maybe -- maybe the -- I don't dispute that the Government may have said that, but that

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was not the facts of this case, was it?

MR. BEVERIDGE: The -- the facts of this case involved a finding and the question was posed as to what the finding was. And the finding in this instance, there were not specific findings such as have been recommended in the Eighth and Tenth Circuits and followed where, you know, you testified that you were not in the apartment, there is substantial evidence on the record that you had an apartment key, three Government agents were standing there and saw you in the apartment. There were no findings such as that.

QUESTION: Well, there may not have been, but I'm looking at findings as you quote them in your brief and the trial judge is saying the defendant denied her involvement when it is clear from the evidence in the case, as the jury found beyond a reasonable doubt, that she was involved in the conspiracy and so on. Doesn't that make it reasonably clear that he's making the finding himself?

MR. BEVERIDGE: If they can -- it has been, and that's one of the inconsistencies of the guidelines themselves. One circuit basically says that findings mean more than just simply finding inconsistencies.

QUESTION: Well, maybe so, but don't we -- aren't we entitled to say as a threshold matter that what

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the court in this case did was to make his own finding? He may not have made it with the kind of tomey and detail that some of the other circuits require, but this is a finding of the court, it's not merely a recitation of what the jury found, isn't it?

MR. BEVERIDGE: Well, the Fourth Circuit addressed this and basically says we have no reviewable findings in this instance. The only thing we have --

QUESTION: Well, don't you think what I -- don't you think what I just quoted to you is a reviewable finding?

MR. BEVERIDGE: Not according to what has been recommended, what has been followed in --

QUESTION: Well, let's forget what had been recommended. Isn't it a reviewable finding? Can't we look to the record to decide whether it is clear from the evidence or whether -- whether, indeed, a trial court could so have found on the record?

MR. BEVERIDGE: Well, and if you follow in the cases the Eighth Circuit has decided --

QUESTION: No, but that isn't --

QUESTION: Justice Souter asked you a question. I think you should answer it and then perhaps explain that.

MR. BEVERIDGE: Yes. Yes, sir, Your Honor.

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QUESTION: Okay.

MR. BEVERIDGE: And one of the problems exists with the inconsistencies among the various circuits in their treating what constitutes a finding. Within one circuit it requires a specific finding that an apartment, a key, a license plate, a vehicle belonged to a specific defendant, while in other circuits it basically says we will look to the record and review the record as to the facts, whether she went -- in this instance, whether she went to Cleveland, whether she sold the crack to Mr. Dickerson, so on and so forth.

And in other circuits it's basically we will just simply rubberstamp under the clearly erroneous standard, we will rubberstamp an independent finding.

QUESTION: Well now, are you paraphrasing the language of the courts of appeals here? Did they say we will rubberstamp under the clearly erroneous standard what the district court has done?

MR. BEVERIDGE: They would not say rubberstamp. We will look at this and we --

QUESTION: Well, you should be careful, Mr. Beveridge. If you're describing a holding of a court, you should not put words in the mouth of the court that weren't there. If you're characterizing it yourself, that's another thing.

MR. BEVERIDGE: I'm characterizing, Your Honor. And, as I -- as I indicated in this instance, the counsel and the burden that is placed upon counsel for self-protection purposes, it involves telling your client I do not know what your -- whether you are perjuring yourself, but I am telling you, basically, that if the court hears your testimony and you are found guilty, then you will be subjected to an automatic enhancement.

QUESTION: Well now, would that be sound advice in view of the position that the Government and other courts of appeals have taken, that it is not automatic and the mere fact that the jury finds a defendant who has testified guilty does not mean it's -- it's an automatic enhancement of justice, an obstruction of justice?

MR. BEVERIDGE: Well, the Government has taken that position before the Fourth Circuit Court of Appeals.

QUESTION: It doesn't take -- it certainly doesn't take that position here.

MR. BEVERIDGE: The -- the problem with -- with that is that ultimately counsel is going to have an influence upon his client. And in this instance, it sure would have resulted, or what the Fourth Circuit found as a potential chilling effect in this instance, that counsel is going to advise the client that perjury could be and will be found.

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QUESTION: Well, but the counsel would be obliged to have advised that before the sentencing guidelines that perjury could be found under our Grayson opinion. It's just possibly a question of slightly increased degree.

MR. BEVERIDGE: Well, more than an increased degree, as we have found throughout the -- the various circuits that have decided and basically have said that as long as the court makes a simple finding of perjury and as long as it's not solely based upon the jury verdict, that it will be found. It's a much greater degree.

QUESTION: Well, why is that somehow greater than it was under -- under Grayson, so far as the reviewability or the ability of the trial judge to make that sort of finding?

MR. BEVERIDGE: Well, it becomes -- and as we've found, the critics of the guidelines have pointed out that basically the rule of lenity has been ignored and that -- that covered --

QUESTION: Well, you're -- you're not answering my -- I asked you a rather specific question, Mr. Beveridge, and I'd appreciate your answering it. My question was why is the action of the district court prior to the sentencing guidelines that might have taken place under our Grayson opinion any more reviewable than the

action of a district court following the sentencing guidelines in this case?

MR. BEVERIDGE: One is the standard of review, Your Honor, which is the clearly wrong standard of review as it relates to the sentencing guidelines. Two is the mandatory nature of the sentencing guidelines when it comes to the application of the enhancements that exist under the sentencing guidelines.

QUESTION: Well, you mean if a -- if a district court finds there was obstruction of justice, it must enhance.

MR. BEVERIDGE: Right.

QUESTION: Not that if a defendant testifies at trial and loses, it must find obstruction of justice.

MR. BEVERIDGE: Well, Your Honor, in response to what obstruction of justice means, and in this instance the obstruction of justice is equated to a finding of perjury. And regardless whether or not obstruction of the judicial system actually occurs, essentially it's flaunting the court's authority or punishing actions in front of the court. And it's -- which have -- being an aggravating circumstance.

QUESTION: Mr. Beveridge, have any of the courts of appeals considered the question whether there is discretion as to the amount of the enhancement? This does

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speak indeed of -- of two levels, but have there been actually any holdings that a judge could say well, I'm only going to go one level?

MR. BEVERIDGE: No, Your Honor, there has not been.

QUESTION: Hum.

MR. BEVERIDGE: The -- the two-level enhancement is what's prescribed and specifically prescribed --

QUESTION: Uh-hum.

MR. BEVERIDGE: -- within the sentencing guideline, the 3(c)1.1. And --

QUESTION: May I go back to your -- to your chilling argument and ask you this. Even if there were no enhancement possible, even if Grayson had gone the other way and the guidelines did not provide as they provide, wouldn't it be good advice to a client in a criminal case, in anticipation of his decision to take the stand or not to take the stand, to tell that client that if he takes the stand and lies and the jury so concludes that he is lying, he is doing himself immense damage and that it would, in fact, be better for him not to take the stand and lie? Wouldn't that be good advice?

MR. BEVERIDGE: Your Honor, that is -- the advice would be good advice in all cases.

QUESTION: Okay.

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MR. BEVERIDGE: And that would be --

QUESTION: How much more chilling is it to tell him that not only is he going to be in serious trouble with the jury, but he's also going to be in serious trouble with the judge? If the one is chilling, the other's chilling, isn't it?

MR. BEVERIDGE: Your Honor, that's correct. And if I may explain, there you're talking about a jury finding of guility and you're finding a judicial -- a judge's finding of obstruction and perjury. The jury only makes the finding of guilty of the elements of the offense.

And in this instance Ms. Dunnigan was charged with a conspiracy to distribute crack cocaine. She got on the witness stand and denied distributing crack cocaine, denied going to Cleveland, denied being involved with these individuals who testified against her. And she -- the judge's finding, on the other hand, is a finding of obstruction of justice which basically is equated with perjury.

There is no real distinction between the two and the question that was asked to counsel here beforehand was if -- if you're -- if you're talking about obstruction, that it occurs at the time of allocution, then there is no enhancement. You can get up and say whatever you want at

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that time.

If you get on and testify at the time of trial, you could also say whatever you want to say if you're out there and the police come to your house and they say is this your apartment, is this your dog, is this your car? You can reply no. You can lie to them and do whatever you want to do and it is not an obstruction of justice, even though it may exist as over -- it may result in 200 more manhours from the police to have given that false information, that is not an obstruction of justice and cannot be considered for the enhancement.

But if you get on and testify at trial when your Fifth Amendment rights and your Sixth Amendment rights come into play, if you get on and testify at that time falsely and even though it results in no more witnesses being called, it results in no more additional manhours on the part of investigative officers, it makes no difference.

QUESTION: Well, all of this is true but I don't see what it's got to do with the chilling effect on honest witnesses. If an honest witness is not going to be chilled from testifying when the lawyer tells the witness in advance that the witness will be in trouble if he lies, I don't see why the witness who is otherwise honest is going to be chilled any further by telling him that he's

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not only going to be in trouble with the jury if he lies, but in trouble with the judge when he lies.

MR. BEVERIDGE: Well, Your Honor --

QUESTION: Why is the one substantially more chilling to the honest witness than the other?

MR. BEVERIDGE: When the -- Your Honor, as I tried to point out, and maybe perhaps inadequately, to the Court, the counsel is -- his license to practice law, basically, gets on the line, and much more so than what you speak of in a Grayson situation where the judge has discretion and an individual gets on and testifies and simply gets on, does not give a cock-and-bull story, does not go out far in left field and say that he was in Australia at the time that this offense happened. He gets on and simply says I did not go to Cleveland, I did not distribute crack, I did not do any of these things alleged in the -- in the Government's proof.

And in that instance, it still results in perjury and I can see the day coming, and if it's not here already, that the trial judge afterwards said Mr. Beveridge, you just put on Ms. Dunnigan to testify in this instance and she testified contrary. You knew that the Government had tapes of these telephone conversations or bus-trip tickets and you went ahead and put her on anyway. And now it's your turn to essentially be on the firing

line and be the one subjected.

And if you want to extend this, then there is a concern and a legitimate concern that it may be extended to the entire legal system as we know it. And why not in civil cases? What is the difference when an individual gets on and testifies that the light was red in an automobile accident case? The plaintiff gets on and testifies that it is green and the jury finds for the plaintiff. Why isn't there a finding of perjury for the 72-year-old lady who also -- who testified that the light was red? There's no diffference.

QUESTION: I assume -- I assume she is subjected. Are 72-year-old ladies exempt from the perjury laws?

MR. BEVERIDGE: Not --

QUESTION: You mean you cannot bring a perjury prosecution for -- for -- for perjury in a civil case?

MR. BEVERIDGE: No, there -- it can be brought, but not to the extent that it is brought now in these criminal proceedings. There -- everybody abhors perjury. An attorney who is representing a criminal defendant, the judiciary sits there and would like to choke people who get up there and testifies falsely in the face of all kind of substantial evidence in front of them.

And the right to impose a penalty for that,

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there are perjury statutes that you can impose the penalties for and not impose it without the safeguards that are available. The little old lady who is accused of perjury would have all kind of safeguards before she is convicted of it. She would have the right --

QUESTION: But -- but we're not talking about simply augmenting her sentence, either. We're talking about a separate criminal prosecution for perjury itself, and -- which, you know, is not necessarily the -- simply an incident of -- of a criminal proceeding.

You're -- you're dealing with a situation in which historically the sentencing judges had a great deal of authority to consider other conduct in imposing a sentence. And that, I think, quite distinguishes it from a civil case in which a losing defendant is not sentenced to anything. The defendant simply is required to pay money.

MR. BEVERIDGE: But there -- that is specifically -- this is penal. And the absence -- the Fourth Circuit stepped forward and said there are inadequate safeguards to assure that, one, is the burden of proof -- whether it is applied properly.

And if you look at the circuits, the various circuits and what they've decided and the conflicts within them, the procedural safeguards are not there. You have

the mandatory nature of the sentencing guidelines themselves as opposed to little old ladies being stuck with perjury or even attorneys for little old ladies being stuck with Rule 11 sanctions or any kind of penalties involved.

QUESTION: Well, I -- I suppose you're right to give -- how many -- how many additional years did -- did your client get in this case?

MR. BEVERIDGE: My client got an additional -- if she would be sentenced at the bottom of the next --

QUESTION: Yeah.

MR. BEVERIDGE: -- two levels down, she would have gotten approximately 10 months. In the difference, in the sentence and what she had received, she received 51 months in this instance.

QUESTION: And she would have gotten 10 otherwise.

MR. BEVERIDGE: She would have gotten 60 -- 61 months if this didn't -- well, she would have gotten --

QUESTION: 61, 10 months.

MR. BEVERIDGE: 10 months.

QUESTION: But it could -- it could amount to much more than that, as we heard earlier, right?

MR. BEVERIDGE: 40 -- well --

QUESTION: Yeah.

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MR. BEVERIDGE: -- It depends on -- at what level you are and what your criminal history category is.

QUESTION: Well, let's say it's 5 years. Let's say somebody gets 5 additional years in jail because -- because a judge found that in the course of testifying in the criminal proceeding he perjured himself. I suppose you have a point that to get somebody for perjury, we would have to empanel a jury and find -- 12 people would have to find beyond a reasonable doubt that the person perjured himself.

And here we're giving this -- this person 5 years without -- without a jury, without a beyond a reasonable doubt finding, just a single judge finding that it's probable that the person -- I think you have a point. Unfortunately, it's always been done that way, and therefore does not seem to be unconstitutional.

MR. BEVERIDGE: I -- I hate to rely upon -- and in response to that there is a court opinion, basically, that echoes what you're saying about -- we have taken the sentencing guidelines, we have accepted them, we have accepted Grayson, which is -- is acceptable, and we're not arguing that Grayson is unacceptable.

But there is a dissent or a concurring opinion by Judge Edwards of the D.C. Circuit in U.S. v. Harrington in which he basically relies on a Hans Christian Anderson,

the emperor has new clothes, as the opening for what he says. And he says basically we have accepted the sentencing guidelines and we have found out after the sentencing guidelines are in place that there are many problems that exist.

And within those sentencing guidelines -- and as he points out, it's always the rule -- instead of the rule of lenity it's always the harshest result that could happen. The little old lady would receive, as a matter of equitable lenity, a break when she said the light was red. But the criminal defendants, under the sentencing guidelines, end up with the harsh result, basically because they say this is the cure-all for uniform sentences.

And as Judge Edwards points out, there are not uniform sentences because there are basically games that you play with the sentencing guidelines. And as we see, the Eighth Circuit has dealt with this issue. Of all the cases that are cited in both briefs, the Eighth Circuit has dealt with all the issues on at least nine or ten cases.

And our court of appeals are clogged up right now debating basically what standard should we use, whether these things are mandatory. We are spending millions of dollars per year on these sentencing

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guidelines arguing about these difficult, cumbersome, unfair, disproportionate -- and it does not cure what they were intended to do. If you read, there are -- and I've cited in my brief and cited in the Government's brief. And none of them have any consistency among them.

QUESTION: Well, you're right, there are an awful lot of judges who are very unhappy with the sentencing guidelines. But I'm afraid we don't have the power to repeal them.

MR. BEVERIDGE: But you have the right to declare unconstiutional the applications that are used in this instance where the judge is forced into implementing the sentencing guidelines.

QUESTION: May I got back to one thing you said earlier. You said that if a -- a person who is charged or being suspected of a crime lies to police officers during the course of the investigation and lies here and there and obstructs, that that's not obstruction of justice --

MR. BEVERIDGE: Not under 3(c)1.1.

QUESTION: I mean maybe it's not covered by --

MR. BEVERIDGE: It's only once -- once he gets -- he can step up afterwards, after --

QUESTION: But are there holdings that that would not qualify as obstruction of justice?

MR. BEVERIDGE: There is a specific holding,

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U.S. v. Faila, F-a-i-l-a, and I believe it's out of the Eighth Circuit, 929 Fed 2d 285, where it says that you get an enhancement once you get to trial and you lie about this under oath or at a supression hearing. But if you lie back here at the time they were trying to arrest you on the turnpike or wherever you were, about whose car this was and the time that they spent, hundreds of manhours, is not obstruction of justice.

QUESTION: That's interesting because for the Federal officer, it's a separate offense to lie to a Federal officer during an investigation.

MR. BEVERIDGE: So is perjury during trial. There's no rationality. And, you know, Judge Edwards points this out when he -- when he points to that, you know, we've accepted these Federal sentencing guidelines without question.

And there have been some, such as Judge Bright in the Eighth Circuit, who has advocated and has come up with -- and Judge Haney, Judge Haney in the Eighth Circuit, who have come up with a -- for example, they use an objective standard in determining whether or not the defendant lied. And basically is no reasonable jury would have believed him, which is what -- the standard that would be applied to the little old lady who ran the red light.

And the Eighth Circuit decided the objective standards and right after that the D.C. Circuit rejected it and said we'll -- we'll rely upon the judge's independent subjective finding that the defendant lied. We don't need any reasoning such as Judge Haney said in Willis, United States v. Willis, and said we're not going to use this objective standards.

And, of course, there's a dissent in U.S. v. Thompson. The D.C. Circuit case decided, rejecting Willis, rejecting Dunnigan. And the circuits go all over the place in each one of these cases and it does not result in uniformity of sentence and ease of application.

I have practiced for 20 years in the trial courts of the Northern and Southern Districts of West Virginia and I would much rather -- having a person sitting on a bench behind there deciding it than some numbers. And the judges, as they sit out there, need to have some of that discretion restored. This is not a discretionary thing in this instance. It becomes --

QUESTION: The guidelines say that before you get this enhancement you have to be guilty of obstructing justice, and I don't suppose that a -- that every judge would consider every piece of lying that he hears in the courtroom to obstruct justice, would you?

MR. BEVERIDGE: In this instance --

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QUESTION: I didn't say in this instance.

MR. BEVERIDGE: In --

QUESTION: I don't -- do you think the guidelines requires them to -- to hold that a testifying defendant is obstructing justice no matter what kind of a lie he tells?

MR. BEVERIDGE: Yes, Your Honor.

QUESTION: You do.

MR. BEVERIDGE: That's the way they are construed at -- at the present time and that's the way they are applied.

QUESTION: Well, that isn't -- that isn't what the guidelines say -- say to me anyway.

MR. BEVERIDGE: Well, the guidelines say that you should apply a standard most -- much the same as a directed verdict standard and much the same as what the Eighth Circuit has applied in United States v. Willis. The guidelines say that you should apply it and if this is sustained as being constitutional, then that is the standard that should be used, that if no reasonable jury would have believed this story or these facts. And to give the defendant the benefit of the doubt.

And that's essentially a legislated rule of lenity that exists under the note -- note 1 and note 3 of the sentencing guideline in question in this instance,

that it should be applied, and not every case where a defendant is convicted. And the courts have said, basically, that if you applied it, and much the same as in this instance, what -- as what the Fourth Circuit says, that it was an automatic enhancement.

That's what the Government argued and that's what the Government is arguing out there, whether it's in the Ninth Circuit, whether it's in the Eighth Circuit, or the D.C. Circuit. They're arguing that and telling the district court at the time of sentencing that the defendant was convicted, the defendant obviously lied, you've upheld the verdict in this case, you haven't set it aside when the defendant has testified, and it is mandatory.

And discretion has been transferred from the sentencing judge who was afforded all kind of discretion in Grayson. And I agree, United States v. Williams, I agree. Thank you, Your Honor.

QUESTION: Thank you, Mr. Beveridge. Mr. Larkin, you have 16 minutes remaining.

REBUTTAL ARGUMENT OF PAUL J. LARKIN, JR.

ON BEHALF OF THE PETITIONER

MR. LARKIN: Your Honor --

QUESTION: Mr. Larkin, can you tell us, is it the Government's position that if the trial judge is

convinced that there's been perjury, that he must enhance? He must, number one, go ahead and make the findings and then enhance?

MR. LARKIN: Yes, Your Honor, a judge does not have the discretion to refuse to enhance the sentence once he makes the requisite finding.

QUESTION: Does he have the discretion not to make the finding if he's convinced that there's a fair probability of perjury?

MR. LARKIN: Your Honor, if the judge, by a preponderance, finds that the defendant committed perjury, he must then go ahead and make the finding.

QUESTION: No, no, no. But does he have to -- to make the finding?

MR. LARKIN: Does he --

QUESTION: Does he have to proceed to make the inquiry --

MR. LARKIN: Well --

QUESTION: -- if, say, he's convinced or there's probably cause to believe there's perjury.

MR. LARKIN: Right. I think the best way to answer that is if someone asks him to make the finding, a judge is required to go ahead and decide whether or not the evidence satisfies that standard.

QUESTION: That someone being the Government, of

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course.

MR. LARKIN: Or the probation officer which has to prepare a probation report for the trial judge. And if the judge honestly makes the finding, then he must go ahead and make the enhancement. Because otherwise, Your Honor, you don't have the guidance that Congress and the Sentencing Commission believed was necessary.

QUESTION: But -- but one step anterior to that he also must make the inquiry, at the request of the Government, if there's plausible ground for believing that perjury was committed.

MR. LARKIN: That's right.

QUESTION: Mr. Larkin, why must the Government make a request? As I read the guidelines it says if the defendant wilfully obstructed, blah, blah, blah, blah, increase. If the defendant willfully obstructed, increase the offense level by two levels.

MR. LARKIN: Well, I think in any case where a district court does not make a finding and the Government then tries to say that the district court was wrong in not going ahead and making that finding, the courts of appeals have said the obligation is on the Government to urge the judge to make the finding. And therefore unless the Government can satisfy the plain error standard, the judgment that was imposed by the district court shouldn't

be reversed.

So the courts of appeals have said that the parties --

QUESTION: Well --

MR. LARKIN: -- must present their arguments --

QUESTION: -- but that's quite different. You're saying he won't be reversed for not having made it unless the Government asks him to make it. But that's a little separate question, I think, from whether he ought to make it, whether the Government asks him or not.

MR. LARKIN: Well, whether a judge, when he's presented with the presentence report and is reviewing all the facts of the trial, should independently make various calculations under the guidelines --

QUESTION: I don't see why this is different from any of the other ones that he -- that he ought to make --

MR. LARKIN: Well, I mean it may be a matter that a judge on his own should inquire about. But from the point of view of whether there is an appellate reversal for not doing so --

QUESTION: Right.

MR. LARKIN: -- the courts have applied a plain error rule.

QUESTION: I understand.

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MR. LARKIN: I would like to make just two points. One is I would like to correct an answer I gave to Justice Kennedy. Justice Kennedy asked me would the enhancement be applicable at allocution because the defendant would normally not be sworn. And it's true the defendant normally would not be sworn at allocution. In this case, however, if you look at page 6 of the joint appendix you'll see that the defendant was sworn at the outset of the sentencing proceeding.

Plus, under the 1992 version of the guidelines, if you look to page 248, you will see that one of the comments by the Sentencing Commission gives as an example of instances in which the -- the guideline could be applied, quote, providing materially false information to a judge or magistrate. And that is -- does not exclude the allocution stage.

And secondly, in response to Justice Stevens' question, it can be the case that a false statement to a police officer could lead to this enhancement. Again, if you look to the same volume as the 1992 edition and again to page 248, you'll see that another comment by the Sentencing Commission reads as follows. Another example would be providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the

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instant offense.

Now that doesn't mean every false statement; there are the qualifications, material and significant. But with those two qualifications it could apply in that circumstance.

QUESTION: Thank you. I was just going to say that I wonder if in the actual perjorative trial it would have be more precise to say attempted obstruction of justice because presumably he didn't -- he wasn't very successful in his attempt.

MR. LARKIN: Perhaps, Your Honor. Thank you.

QUESTION: Mr. Larkin, I have one question. Do you agree with your brother that if there is an -- an enhancement it must be the two-level enhancement, that there's no discretion to make it a one-level enhancment?

MR. LARKIN: That's right. Within that second level of range the district court can take into account the concern that --

QUESTION: That's where the discretion comes.

MR. LARKIN: Right. It's within a range. But an enhancement that is two levels up has to be two levels up.

QUESTION: Well, do you think every -- every -- every piece of perjury or lying on the stand by a testifying defendant obstructs justice?

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MR. LARKIN: No. It has to be material.

QUESTION: Well, so there is --

MR. LARKIN: If a defendant, for example, were to give, you know, a false statement about his weight --

QUESTION: Sure -- sure -- so a judge then -- and I suppose a judge could say how material is it.

MR. LARKIN: Well, I think it would be the -- a matter that generally might affect the outcome of the proceeding.

QUESTION: So there are some perjuries that will obstruct justice and some that wouldn't.

MR. LARKIN: Perhaps. If you --

QUESTION: Well, perhaps --

MR. LARKIN: If you define --

QUESTION: You just said that's true.

MR. LARKIN: Well, if you define perjury to mean -- to always require that the statement be material --

QUESTION: Which is how it's defined.

MR. LARKIN: Then you wouldn't have perjury --

QUESTION: Yes.

MR. LARKIN: -- without there being material -- a material statement. But if you define perjury to mean any false statement, then a false statement that wouldn't affect the outcome would fall outside that.

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CHIEF JUSTICE REHNQUIST: Thank you, Mr. Larkin. The case is submitted.

(Whereupon, at 1:48 p.m., the case in the above-entitled matter was submitted.)

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United States V Sharon Dunnigan

Case #91-1300 December 2, 1992

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BY Ann-Marie Federico

(REPORTER)