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Balancing the Need for Enhanced Sentences for Perjury at Trial Under Section 3C1.1 of the Sentencing Guidelines and the Defendant's Right to Testify

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BALANCING THE NEED FOR ENHANCED SENTENCES FOR PERJURY AT TRIAL UNDER SECTION 3C1.1 OF THE SENTENCING GUIDELINES AND THE DEFENDANT'S RIGHT TO TESTIFY

Peter J. Henning*

The critical question facing most defendants in criminal trials is whether to testify on their own behalf. Despite the platitudinous instruction given to jurors that a defendant's choice not to testify at trial should not affect their deliberations,[1] the defendant's failure to testify can seriously undermine his

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1. *See, e.g.*, Carter v. Kentucky, 450 U.S. 288, 300 (1981) (judge must give "no-adverse-inference" instruction concerning defendant's failure to testify upon defendant's request); Lakeside v. Oregon, 435 U.S. 333, 339-40 (1978) (judge's instruction to jury not to draw adverse inference about defendant not testifying does not violate due process right). One pattern jury instruction states:

> The defendant did not testify in this case. Under our Constitution, he has no obligation to testify or to present any other evidence because it is the prosecution's burden to prove the defendant guilty beyond a reasonable doubt. That burden remains with the prosecu-

or her defense. This is because jurors will question why the defendant does not take the stand to fight the charge.[2] At the same time, however, defendants who testify face the prospect of impeachment by prior convictions or relevant bad acts. Further, the threat of close cross-examination while trying to explain questionable conduct can shake even the most confident of witnesses. The Sentencing Guidelines,[3] enacted by Congress to govern all sentences in federal courts, have now injected a new element into the defendant's dilemma of whether to testify.[4]

The Guidelines require the trial court to increase the defendant's sentence if it determines that the defendant obstructed justice, which includes the commission of perjury at trial.[5] This enhancement for perjury could permit courts to increase automatically the sentences of defendants who testify and are convicted.[6] The rationale for this approach is that the jury disbelieved the defendant's testimony, otherwise it would not have voted to convict; therefore, the district court may properly find that a defendant committed perjury based on the jury's verdict and increase the sentence. Accordingly, under the Guidelines, defendants must now weigh whether testifying will result in an even greater sentence than choosing to remain silent.

Most circuit courts have relied on *United States v. Grayson*[7] to uphold sentence enhancements based on the defendant's testimony at trial. In *Grayson*, a pre-Guidelines decision, the Supreme Court held that the defendant's right to testify is limited to testifying truthfully,[8] and therefore increasing a sentence based on material falsehoods in the defendant's testi-

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> tion throughout the entire trial and never shifts to the defendant. The defendant is never required to prove that he is innocent.
>
> You may not attach any significance to the fact that the defendant did not testify. No adverse inference against him may be drawn by you because he did not take the witness stand. You may not consider this against the defendant in any way in your deliberations in the jury room.

1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS (CRIMINAL) ¶ 5.07 at 5-49 (1988); *see also* EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 15.31 (1991 Cumulative Supp.) (containing similar instruction).

2. *See* F. LEE BAILEY & HENRY B. ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS § 16:1 (2d ed. 1985) ("In spite of any instructions [to the contrary], the majority of jurors will assume that a defendant has something to hide, if he does not take the witness stand in his own behalf.").

3. UNITED STATES SENTENCING COMM'N FEDERAL SENTENCING GUIDELINES MANUAL (West 1991) [hereinafter GUIDELINES].

4. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, §§ 211-239, 98 Stat. 1837, 1976, 1987-2040 (codified principally at 18 U.S.C. §§ 3551-3742 (1988) and 28 U.S.C. §§ 991-998 (1988)).

5. GUIDELINES, *supra* note 3, § 3C1.1.

6. *See, e.g.*, United States v. Bonds, 933 F.2d 152 (2d Cir. 1991) (affirming two-level obstruction of justice upgrade under § 3C1.1).

7. 438 U.S. 41 (1978).

8. *Id.* at 54.

mony at trial does not violate due process or unconstitutionally inhibit the right to testify at trial.[9] The Court noted, however, that "[n]othing we say today requires a sentencing judge to enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false."[10]

The analysis of the interplay between the Guidelines and the defendant's constitutional rights by the circuit courts has frequently been superficial and inconsistent, resulting in sentences that appear to apply the perjury enhancement reflexively. While some decisions closely analyze the district court's basis for increasing the sentence in order to determine whether there is an adequate basis for the enhancement, many appellate courts uphold lower courts' decisions to enhance sentences almost automatically based solely on the defendant's conviction. For example, in *United States v. Bonds*,[11] the Second Circuit accepted the proposition that if a defendant's testimony relates to issues involving the elements of the crime and if the defendant is convicted, then the sentencing enhancement must be applied because the jury disbelieved the defendant and therefore the defendant must have committed perjury.[12] The court never considered whether its analysis of the Guidelines could be reconciled with *Grayson*'s admonition against "wooden or reflex" increases in sentences.

The Guidelines state explicitly that the obstruction enhancement is not intended to punish defendants for exercising their constitutional rights.[13] There is, however, a substantial question whether the current Guidelines approach to increasing sentences based on testimony at trial unfairly inhibits defendants from testifying and thus unconstitutionally denies them the right to mount a complete defense to the charges.[14] It was precisely this issue that led the Fourth Circuit to conclude that enhancing the defendant's sentence for perjury at trial under the Guidelines because the defendant denied all involvement in the crimes charged by the government and was subsequently convicted constituted an "intolerable burden upon the defendant's right to testify in his [sic] own behalf."[15] The circuit court found that the Guidelines create the "wooden or reflex" approach rejected by the Supreme Court in *Grayson* because they allow judges to enhance sentences

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9. *Id.* at 53, 55.

10. *Id.* at 55.

11. 933 F.2d 152 (2d Cir. 1991).

12. *Id.* at 155.

13. GUIDELINES, *supra* note 3, § 3C1.1, commentary (n.1).

14. *See* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 223 (1991) ("*Grayson* not only fails to support enhancing a sentence for false testimony at trial, it emphatically rejects the practice as unconstitutional.").

15. United States v. Dunnigan, 944 F.2d 178, 185 (4th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3798 (U.S. May 26, 1992) (No. 91-1300). The circuit court also stated, "It disturbs us that testimony by an accused in his own defense, so basic to justice, is deemed to 'obstruct' justice unless the accused convinces the jury." *Id.* at 183.

based solely on the jury's vote to convict, which generally entails disbelief of the defendant's testimony, without requiring some greater protection for the defendant.[16]

In applying the Guidelines, courts are struggling to approach cases consistently. This Article reviews recent decisions concerning sentence adjustments based on the defendant's perjury at trial and the different approaches the circuit courts have adopted. The Article analyzes the rationale for enhancing a sentence based on a defendant's testimony at trial. The Article then argues that the Sentencing Commission should provide greater guidance concerning specific types of circumstances to which adjustments should be applied and when sentencing courts should be more circumspect in increasing sentences in order to avoid creating excessive burdens on defendants' right to testify.

I. BACKGROUND: THE SENTENCING GUIDELINES

Congress established the Federal Sentencing Commission in 1984 to promulgate a system of mandatory sentencing guidelines for all federal crimes.[17] The basic objective of the system of mandatory guidelines is to ensure honesty, uniformity, and proportionality in sentencing.[18] After extensive debate on the best approach for achieving those goals, the Commission adopted the Guidelines, which became effective for all crimes committed after November 1, 1987.[19] The Commission has a continuing mandate to refine the Guidelines, and it submits amendments to Congress each year that take effect 180 days after submission unless Congress passes a law blocking their promulgation.[20]

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16. *Id.* at 184. *Compare* United States v. Ogbeifun, 949 F.2d 1013 (8th Cir. 1991) (rejecting *Dunnigan* as foreclosed by *Grayson*) *with* United States v. Dunnigan, 944 F.2d at 1015 (Heaney, J., concurring) (calling for en banc consideration of constitutionality of § 3C1.1 in light of *Dunnigan*'s analysis).

17. 28 U.S.C. § 991(a) (1988). The Sentencing Commission is comprised of seven voting members appointed by the President, of which at least three must be Article III judges, and two non-voting ex-officio members, the Attorney General (or an authorized representative) and the chairperson of the United States Parole Commission. *Id.*

18. GUIDELINES, *supra* note 3, at 2 (West 1991). The Guidelines replace the system under which the sentencing judge had broad discretion to select a sentence within the range provided by statute, and a prisoner could be released long before completion of the term of incarceration by the Parole Commission. Congress, among others, perceived the pre-Guidelines system as allowing for wide disparity in sentences for similar crimes, depending on the whim of the sentencing judge. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988) (discussing Commission's work outlining such disparities); Kathryn A. Walton, *The Federal Sentencing Guidelines: Miracle Cure for Sentencing Disparity (Caution: Apply Only as Directed)*, 79 KY. L.J. 385, 390 (1991).

19. 18 U.S.C. § 3551 (1988).

20. 28 U.S.C. § 994(p) (1988); *see* GUIDELINES, *supra* note 3, at 2 (Commission "expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress.").

The Guidelines create a charge-based system under which a sentence is based "upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted."[21] The court first determines the defendant's "relevant conduct" with respect to the crimes charged,[22] which requires the calculation of a numeric "base offense level" ranging from 1 to 43. The court also reviews "specific offense characteristics" detailing certain acts or factors related to the offense, such as the amount of drugs, that will increase or decrease the corresponding calculation of the offense level.[23] The court then makes "adjustments" to the offense level based on certain factors described in the Guidelines. Once the offense level is calculated, the court next reviews the defendant's past criminal conduct to determine the "criminal history category."[24] The Sentencing Table provides the applicable range of sentences, calculated in months, based on a mechanical application of the offense level and criminal history. The higher the offense level and the greater the criminal history category, the more prison time a defendant must serve under the Guidelines.[25] A court may depart from the sentence provided by the Guidelines if it finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . ."[26]

The determination of the appropriate offense level and criminal history category, and decisions regarding adjustments and departures, are generally based on findings of fact made by the sentencing judge. The presentence investigation report (PSI), which contains information about the defendant's criminal history and relevant conduct, is used by the probation officer to determine the offense level and criminal history category.[27]

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21. GUIDELINES, *supra* note 3, at 4. The Guidelines also incorporate certain elements of a real offense system by allowing the court to enhance a sentence based, for example, on the defendant's role in the offense, the amount of loss from the criminal conduct, and other acts specifically related to the defendant. *Id.* at 5. The Sentencing Commission rejected a pure real offense system, which would base sentences on all of the defendant's conduct and not just that charged by the government, because such an approach was impractical and would not have cured the problem of unpredictability in sentencing present in the pre-Guidelines regime. *Id.*

22. GUIDELINES, *supra* note 3, § 1B1.3.

23. *Id.* § 2 (Offense Conduct).

24. *Id.* §§ 3, 4 (Adjustments, Criminal History and Criminal Livelihood).

25. *Id.* § 5, part A (Sentencing Table). The Guidelines provide a range of months that a defendant can be sentenced to by the court. The judge has discretion to choose the exact sentence within the range provided in the Sentencing Table. The Guidelines permit a combination of imprisonment, probation, home detention or other alternatives to prison for crimes with lower offense levels and criminal history categories that have maximum sentences of not more than ten months. *Id.* § 5C1.1.

26. 18 U.S.C. § 3553(b) (1988). The Sentencing Commission has identified certain aggravating and mitigating factors that it has not been able to incorporate fully in the Guidelines, *e.g.*, if death or physical injury resulted from the crime or if the victim's unlawful conduct contributed significantly to provoking the offense. GUIDELINES, *supra* note 4, § 5, Part K.

27. FED. R. CRIM. P. 32(c)(2)(A) (effective Dec. 1, 1991).

The PSI and probation officer determinations of the applicable sentence range carry great weight with the district court.[28] Both the defendant and the government may appeal a sentence that "was imposed as a result of an incorrect application of the sentencing guidelines,"[29] and if the appellate court overturns the original sentence, the case is remanded to the district court for resentencing.[30]

The standard of review for sentencing decisions depends on whether the alleged error relates to a finding of fact, in which case the appellate court applies the "clearly erroneous" standard, or relates to an incorrect legal interpretation of the Sentencing Guidelines, which is a decision of law reviewed de novo.[31] Although the circuit courts generally defer to the decisions of the district judges by applying the more generous "clearly erroneous" standard, some circuit courts interpret the lower court's findings to be an application of the Guidelines to the facts, subject to much closer review under the de novo standard.[32] The government must prove the facts that affect the sentence by a preponderance of the evidence and not by the higher reasonable doubt standard required to convict the defendant.[33]

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28. *See* Keith A. Findley & Meredith J. Ross, *Access, Accuracy and Fairness: The Federal Presentence Investigation Report under* Julian *and the Sentencing Guidelines*, 1989 WIS. L. REV. 837, 843 (especially in sentencing after guilty plea, PSI is primary tool for determining sentence under Guidelines).

29. 18 U.S.C. § 3742 (1988).

30. FED. R. CRIM. P. 35(a) (effective Dec. 1, 1991).

31. *See* Braxton v. United States, 111 S. Ct. 1854, 1858 (1991) (effect of defendant's stipulation not factual finding; reviewed as if "contract, or consent decree, or proffer for summary judgement").

32. *See, e.g.*, United States v. Perdomo, 927 F.2d 111 (2d Cir. 1991). In *Perdomo*, the Second Circuit reviewed an adjustment to the defendant's sentence based on obstructive conduct during commission of the offense. The court stated that "[o]ur review of whether the facts set out in the presentence report constitute obstruction of justice under the Guidelines is a matter of legal interpretation, and is subject to *de novo* review." *Id.* at 118. The court adopted the higher standard of review to justify its close analysis of the district court's decision and substituted its own judgment that the facts in the case do not "necessarily lead to a finding of obstruction." *Id. See also* United States v. Lozoya-Morales, 931 F.2d 1216, 1218 (7th Cir. 1991) (discussed *infra* notes 95-101).

33. United States v. Restrepo, 946 F.2d 654 (9th Cir. 1991) (en banc), *rev'g* 883 F.2d 781 (9th Cir. 1989). All of the circuit courts that have considered the issue of the proper standard of proof for factual issues affecting sentencing have followed the Supreme Court's decision in McMillan v. Pennsylvania, 477 U.S. 79 (1986), which upheld a state sentencing provision that permitted proof by a preponderance of the evidence of possession of a weapon that resulted in an increased sentence as consistent with the due process clause. *See* United States v. Restrepo, 946 F.2d at 655-56 ("Every circuit that has considered the question" adopts the preponderance of the evidence standard, citing cases); United States v. Rafferty, 911 F.2d 227, 231 (9th Cir. 1990) (citing cases); *cf.* GUIDELINES, *supra* note 3, § 6A1.3, comment (Sentencing Commission believes preponderance standard appropriate to meet due process requirements and policy concerns for resolving factual disputes in sentencing).

II. THE SECTION 3C1.1 ADJUSTMENT FOR PERJURY AT TRIAL

A. The Mechanics of Section 3C1.1

The Sentencing Guidelines provide five categories of adjustments to the defendant's sentence: victim-related adjustments, role in the offense, obstruction, multiple counts, and acceptance of responsibility. The adjustments require the court to increase or decrease the offense level if the judge finds that the defendant engaged in certain conduct related to the commission of the crime or the subsequent prosecution of the offense, even though conduct is not directly encompassed by the charges on which the defendant was convicted or pled guilty. The adjustment for conduct affecting the administration of justice (i.e., obstruction), section 3C1.1 of the Guidelines, requires a two-level sentence enhancement "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense . . . ."[34]

The types of conduct that the adjustment reaches fall into four basic categories: 1) acts undertaken in connection with investigation of the crime and arrest; 2) pretrial and post-trial statements made in court; 3) statements outside of court in connection with sentencing; and 4) trial testimony.[35] The Application Notes to section 3C1.1 call for increased punishment of a defendant for "committing, suborning, or attempting to suborn perjury," although the Sentencing Commission states that the defendant's testimony "should be evaluated in a light most favorable to the defendant."[36] The Guidelines set out the general approach for enhancing a de-

34. GUIDELINES, *supra* note 3, § 3C1.1. The other obstruction adjustment applies to reckless endangerment during flight from a law enforcement officer. *Id.* § 3C1.2. The two-level enhancement can substantially increase the sentence for defendants with higher offense levels and greater criminal history categories. For example, a two-level increase from offense level 20 to 22 for a defendant with a criminal history category of I raises the minimum sentence from 33 months to 41 months, while an increased offense level from 35 to 37, with a criminal history category of III, enhances the minimum sentence over four years, from 210 months to 262 months. *Id.* at ch. 5 (Sentencing Table).

35. The Sentencing Guidelines provide non-exhaustive lists of conduct to which the adjustment should and should not apply. *See* GUIDELINES, *supra* note 3, § 3C1.1, comment (nn. 3, 4). The lists describe different degrees of conduct, but are so broad that they are open to almost any interpretation by the sentencing court about whether particular conduct permits enhancement of the sentence. Moreover, in one instance, the lists cover the same conduct by recommending an upward adjustment for "providing materially false information to a probation officer in respect to a presentence or other investigation for the court," and recommending against an adjustment for "providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation." *Id.* § 3C1.1 comment (nn. 3(h), 4(c)).

36. GUIDELINES, *supra* note 3, § 3C1.1, comment (n. 1, 3(b)). The initial version of the Application Note required an enhancement for "testifying untruthfully . . . concerning a material fact." GUIDELINES, *supra* note 3, at App. C, Amend. 347. The First Circuit held that the change from "testifying untruthfully" to "perjury" is a "distinction without a difference." United States v. Rojo-Alvarez, 944 F.2d 959, 967 (1st Cir. 1991).

fendant's sentence based on testimony under oath:

> 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, such testimony or statements should be evaluated in a light most favorable to the defendant.[37]

The Sentencing Commission extensively amended the application notes in 1989 to clarify the operation of the section by specifying that a denial of guilt and a refusal to admit guilt do not constitute obstruction requiring an enhanced sentence.[38] Nevertheless, a denial of guilt at trial that the court determines reaches the level of perjury can be the basis for enhancing a sentence, and the Guidelines do not clearly state where the line is drawn between a permissible denial of guilt and a denial that rises to the level of perjury. One possible interpretation of section 3C1.1 is that a defendant may enter a plea of not guilty, which is not under oath, but once the defendant takes the stand, then she is subject to an enhanced sentence for perjury. Once the oath is invoked, the defendant no longer merely denies guilt but enters the realm of perjury.

The consequences of a determination that section 3C1.1 applies based on perjury are quite severe. The trend in the circuits is that section 3C1.1 does not give the judge any discretion in imposing the two-level adjustment once the court makes the requisite finding of perjury by the defendant. In *United States v. Austin*,[39] the lower court found that the defendant's testimony at an evidentiary hearing relating to withdrawal of a guilty plea was

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37. GUIDELINES, *supra* note 3, § 3C1.1, comment. (n. 1).

38. GUIDELINES, *supra* note 3, at App. C, Amend. 347 (Nov. 1, 1989). Amendment 347 also reorganized the application notes to section 3C1.1 by, among other things, combining two notes concerning the defendant's right to exercise constitutional rights and to have testimony and statements considered in the light most favorable to the defendant. *Id.* Application Note 1 was further amended in 1991 to clarify that the presumption in favor of the defendant applies to the "alleged false testimony and statements." *Id.* at App. C., Amend. 415 (Nov. 1, 1991).

The Sentencing Commission's approach in this area is similar to the recognition by some circuit courts of the "exculpatory no" defense to a false statement charge under 18 U.S.C. § 1001, that a defendant who denies involvement in criminal activity in response to government inquiries should not be punished for failing to provide inculpatory evidence. *See* United States v. Medina de Perez, 799 F.2d 540, 544 & n.5 (9th Cir. 1986) (adopting five-part test to determine whether "exculpatory no" defense applies to § 1001 prosecution); OTTO G. OBERMAIER & ROBERT G. MORVILLO, WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES § 10.02[2] at 10-42 (defense is "exceedingly difficult to define and apply.")

39. 848 F.2d 783 (1st Cir. 1991).

"a hopelessly transparent, naive and misguided effort to mislead the court which stood no chance of success before the judge."[40] The district court refused to enhance the sentence because of the futility of the perjury and because the testimony was before a judge and not a jury. The circuit court reversed the sentence, holding that "where a defendant perjures himself before the court, the court is without discretion in imposing the two point base offense level enhancement . . . ."[41]

Section 3C1.1 protects a defendant's Fifth Amendment right against self-incrimination by allowing a denial of guilt and a refusal to provide other incriminating evidence to a probation officer.[42] Similarly, three circuit courts have interpreted the acceptance of responsibility adjustment,[43] which allows a sentencing court to make a two-level downward adjustment in the offense level, as barring the sentencing court from requiring a defendant to accept responsibility for crimes beyond those charged by the government because to do otherwise would violate the Fifth Amendment.[44] If the de-

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40. *Id.* at 788.

41. *Id.* The court noted that if the sentencing court need not enhance the sentence if the perjury was unsuccessful, then the adjustment would only apply to successful attempts at perjury, which "makes no sense. How would a sentencing court know whether perjury had been committed if the false testimony were not discovered?" *Id.* at 789 n.10.

The requirement that the court enhance the sentence appears to apply only if the sentencing judge makes a separate finding that the defendant committed perjury, rather than on the basis of a guilty verdict by a jury. *See* United States v. Alvarez, 927 F.2d 300, 303 (6th Cir.) ("having made the finding that Alvarez testified untruthfully as to a material fact while under oath, the district court had no discretion under the Sentencing Guidelines in applying § 3C1.1."), *cert. denied*, 111 S. Ct. 2246 (1991); United States v. Batista-Polanco, 927 F.2d 14, 21 ("Section 3C1.1 of the Sentencing Guidelines requires the sentencing court to increase the base offense level by two points" if the defendant obstructs justice); *cf.* United States v. Fuentes, Nos. 89-5198, 89-5217, 89-5240, 1991 U.S. App. LEXIS 1474, *21-23 (4th Cir. Feb. 4, 1991) ("decision of whether particular perjury actually constitutes obstruction of justice, however, is left to the discretion of the trial court judge.") The Fourth Circuit remanded the sentencing in *Fuentes* for the district court to determine whether the defendant's perjury reached the level of obstruction of justice, and the court broadly hinted that it believes her false testimony calls for an enhanced sentence. *See id.* at *23-24 ("we believe that the desire to balance the sentences of the co-defendants does not constitute a basis for finding that perjury did not amount to obstruction of justice.") Ironically, the district court's subsequent enhancement of the defendant's sentence for perjury was later reversed by the Fourth Circuit because of the holding in *Dunnigan* that § 3C1.1 is unconstitutional as applied to defendants who testify. *See infra* note 94.

42. *See* United States v. Thompson, 944 F.2d 1331, 1347-48 (7th Cir. 1991) (Application Note 1 provides additional guidance distinguishing between defendants who affirmatively mislead authorities and those who "simply exercise their constitutional right to refrain from incriminating themselves to authorities by denying wrongdoing."). In *Thompson*, the defendants denied using cocaine while on bail, but tested positive for the drug. The district court enhanced the sentences under section 3C1.1 for lying to the probation officer about the drug use, and the circuit court reversed the adjustment. *Id.*

43. GUIDELINES, *supra* note 3, § 3E1.1. "If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels." *Id.*

44. United States v. Oliveras, 905 F.2d 623 (2d Cir. 1990) (per curiam); United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989). In *Oliveras*, the Second Circuit stated:

> So long as the defendant's statements are not immunized against use in subsequent crimi-

fendant testifies at trial and is found to have committed perjury, however, there is no Fifth Amendment violation if the sentencing court denies a downward adjustment for acceptance of responsibility because the defendant did not admit to the perjury.[45]

B. The Haphazard Approach to Section 3C1.1 for Perjury at Trial

While defendants in federal criminal trials have a constitutional and statutory right to testify,[46] the Supreme Court in *Grayson* held that there is no license to commit perjury.[47] The key to allowing the sentencing court to increase the defendant's sentence in *Grayson* was the judge's unique perspective on the defendant's demeanor and credibility, a judicial prerogative the Supreme Court was unwilling to constrict or second guess.[48] The Guidelines have applied *Grayson* through section 3C1.1 by allowing courts to enhance a sentence for "committing, suborning, or attempting to suborn

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> nal prosecutions, the effect of requiring a defendant to accept responsibility for crimes other than those to which he pled guilty or of which he has been found guilty is to penalize him for refusing to incriminate himself. This runs afoul of the fifth amendment.

905 F.2d at 626.

The Third Circuit took a more restrictive approach to determining whether denial of the adjustment violates the Fifth Amendment, stating that "when the defendant has consistently asserted the privilege as to acts beyond those of the offense of conviction, the judge cannot rely on the defendant's failure to admit to such acts as a basis for denying the two-level reduction." United States v. Frierson, 945 F.2d 650, 663 (3d Cir. 1991). The court advised lower courts that the sentencing judge could consider all other evidence in the record to determine whether the section 3E1.1 adjustment should be applied, and that the reduction for defendants asserting their Fifth Amendment privilege is not automatic. *Id.* Other circuits have held that defendants can be required to accept responsibility for conduct beyond that charged by the government. *See, e.g.*, United States v. Mourning, 914 F.2d 699, 705 (5th Cir. 1990) (requiring defendant to accept responsibility for "all relevant criminal conduct"); United States v. Gordon, 895 F.2d 932, 936-37 (4th Cir.) (denying reduction where defendant admitted to simple possession of cocaine but not to intent to distribute since defendant must accept "all" criminal conduct), *cert. denied*, 111 S. Ct. 131 (1990).

45. United States v. Henry, 883 F.2d 1010 (11th Cir. 1989). The Sentencing Guidelines originally barred an Acceptance of Responsibility adjustment if the court enhanced a sentence under section 3C1.1. *See* United States v. Reynolds, 900 F.2d 1000, 1005 (7th Cir. 1990) (finding courts unanimously agree that prior to amendment of section 3E1.1 dual findings of obstruction of justice and acceptance of responsibility were precluded). In 1989, the Sentencing Commission amended Application Note 4 to provide that "[c]onduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply." GUIDELINES, *supra* note 3, at App. C, Amend. 258 (Nov. 1, 1989).

46. 18 U.S.C. § 3841 (1986). The statute provides that criminal defendants are competent witnesses at trial, rejecting the common law presumption that defendants were not competent to testify. Carter v. Kentucky, 450 U.S. 288, 296 n.9 (1981).

47. United States v. Grayson, 438 U.S. at 54.

48. "No rule of law, even one garbed in constitutional terms, can prevent improper use of firsthand observations of perjury. The integrity of the judges, and their fidelity to their oaths of office, necessarily provide the only, and in our view adequate, assurance against that." *Id.* at 53.

perjury." Some district courts state the factual basis for imposing the section 3C1.1 adjustment for perjury,[49] similar to the findings of the district court upheld in *Grayson*. In most instances, however, the sentencing judge does not go beyond a cursory statement at a hearing that since the defendant's testimony amounted to perjury, it served as the basis for applying the enhancement.[50]

Despite the consequences of a finding of perjury, the Guidelines do not provide any standard by which the judge should determine whether the defendant has committed perjury. Nor do they dictate what findings, if any, should be made on the record to support an adjustment based on the defendant's trial testimony. This indeterminacy in the Guidelines has led district courts to take a haphazard approach to determining whether the defendant has committed perjury. In some cases, it has forced the circuit courts to scour trial court records for some colorable basis to uphold adjustments.

Some district courts have characterized defendants' testimony as unbelievable without identifying whether a specific aspect of the testimony amounted to perjury, or whether the court based its determination on its own observation of the witness's demeanor. In applying the section 3C1.1 adjustment for perjury, judges have described defendants' testimony as a "cock and bull story,"[51] a "batch of lies,"[52] "pure fantasy,"[53] and as "the third most incredible statement offered by a defendant in a proceeding which has come before" the court.[54] Courts have also enhanced sentences for perjury for defendants who baldly asserted that they were not involved in the illegal activity,[55] or who testified to highly suspect alibis to explain their presence at the crime scene or involvement in the transaction.[56]

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49. *See* United States v. Head, 927 F.2d 1361, 1372 (6th Cir.) (comparing testimony of defendant with physical evidence and other testimony to support conclusion that defendant lied under oath), *cert. denied*, 112 S. Ct. 144 (1991).

50. *See* Heaney, *supra* note 14, at 164 ("[u]nless a sentencing court has departed from the guidelines range or imposed a sentence other than that recommended by the probation office, the reasons given often are stated in conclusory terms that parrot the language of the presentence report").

51. United States v. Akitoye, 923 F.2d 221, 228 (1st Cir. 1991).

52. United States v. Contreras, 937 F.2d 1191, 1194 (7th Cir. 1991).

53. United States v. Barbosa, 906 F.2d 1366, 1369 (9th Cir.), *cert. denied*, 111 S. Ct. 394 (1990).

54. United States v. Welch, 945 F.2d 1378, 1386 (7th Cir. 1991).

55. United States v. Torres-Rodriguez, 930 F.2d 1375, 1390 (9th Cir. 1991) (defendant convicted of drug trafficking testified he was unaware of presence of drugs and not involved in conspiracy); United States v. Beaulieu, 900 F.2d 1537 (10th Cir.) (defendant convicted of conspiracy to manufacture amphetamines denied all involvement in drug operation), *cert. denied*, 110 S. Ct. 3252 (1990). United States v. Wagner, 884 F.2d 1090 (8th Cir. 1989) (defendant convicted of manufacturing methamphetamine denied having key to footlocker, ever having seen footlocker, or knowing chemicals required to manufacture drugs were in footlocker), *cert. denied*, 494 U.S. 1088 (1990).

56. *See* United States v. Brum, 948 F.2d 817 (1st Cir. 1991) (defendant convicted of cocaine possession testified that cash found on husband was being held from her mother's fiftieth anniversary party, but anniversary was after arrest); United States v. Welch, 945 F.2d at 1385 (defendant convicted of

The circuit courts are generally unwilling to overturn a district court's decision to enhance the sentence based on the defendant's untruthful testimony at trial. The courts rely on the clearly erroneous standard of review to uphold sentences in which the judge makes only a minimal finding of fact as to perjury.[57] In *United States v. Wallace*,[58] the court stated "[a]lthough the district court did not specifically identify which portions of Wallace's testimony it believed to be false, this does not preclude our affirming the district court's enhancement under section 3C1.1."[59] The circuit court then reviewed the defendant's testimony to find internal contradictions and inconsistent statements to demonstrate perjury in support of the enhanced sentence. Similarly, in *United States v. Akitoye*,[60] the First Circuit stated "[a]lthough it would have been better practice had the district court specifically identified the segments of Akitoye's testimony it found to be false, this omission does not preclude affirmance of its finding in an instance where, as here, the record speaks eloquently for itself."[61]

The best explanation for upholding sentencing enhancements for perjury where the district court makes only minimal findings is that the alternative available to the circuit court, remanding the case for more particular findings, will rarely if ever alter the outcome. If a sentencing judge concluded

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conspiracy to distribute cocaine testified he gave coconspirator money to purchase car, was repaid with profit on same day after car was sold); United States v. Head, 927 F.2d 1361 (6th Cir.) (defendant convicted of crack distribution testified he was in kitchen of small apartment playing craps, won marked money in game), *cert. denied*, 112 S. Ct. 144 (1991). United States v. Batista-Polanco, 927 F.2d 14 (1st Cir. 1991) (defendant convicted of possession of heroin testified he was only in apartment used to package drugs to borrow cousin's car); United States v. Acosta-Cazares, 878 F.2d 945 (6th Cir.) (defendant convicted of conspiracy to distribute cocaine testified that coconspirators lied about his involvement and that he was in apartment containing drugs and weapons to feed coconspirator's dog), *cert. denied*, 493 U.S. 899 (1989).

57. Appellate courts have upheld decisions refusing to enhance the defendant's sentence despite evidence in the record that would support a finding of perjury. In United States v. McDonald, 935 F.2d 1212 (11th Cir. 1991), the circuit court stated that:

> [a]lthough the district court found that portions of [defendant]'s testimony were severely compromised by the testimony of more credible witnesses, it found that these inconsistencies did not rise to such a level as to require an upward adjustment of his sentence. After reviewing the record, we cannot conclude that this determination was clearly erroneous.

Id. at 1219. The Eleventh Circuit in *McDonald* was clearly uncomfortable with the failure to enhance the sentence, and with granting an Acceptance of Responsibility downward adjustment, but it adhered to the policy of deferring to the district court's judgment. *See also* United States v. Stubbs, 944 F.2d 828, 836 (11th Cir. 1991) ("[w]hile the government points out apparent contradictions in defendant's trial testimony, we are unconvinced that the examples offered justify" reversing district court's refusal to enhance sentence for perjury).

58. 904 F.2d 603 (11th Cir. 1990).

59. *Id.* at 605.

60. 923 F.2d 221 (1st Cir. 1991).

61. *Id.* at 229. The court went on to find that the defendant's testimony "can most charitably be described as fanciful." *Id.*; *see also* United States v. Beaulieu, 900 F.2d at 1541 (reviewing record to determine factual basis for adjustment based on perjury).

there was perjury without specifically identifying the basis for the enhancement, then requiring another hearing will only prolong the process without any real prospect that the judge will reach a different conclusion.

That rationale obscures a deeper problem with upholding district courts that do not make a genuine attempt to describe the factual basis for deciding the defendant committed perjury during his trial. A district court's conclusion that the defendant committed perjury may be grounded primarily on the jury's disbelief of the defendant's witness stand denial of knowledge or involvement in the criminal activity, rather than on an independent appraisal of the facts and circumstances of the defendant's testimony based on the judge's observation of the defendant. The court's independent judgment is the key to protecting a defendant's right to deny charges without risking retribution solely because he forced the government to meet its burden of proof: guilt beyond a reasonable doubt.

Circuit courts, however, have supported the approach of relying on the jury's verdict as the basis for enhancing sentences. In *United States v. Wagner*,[62] the Eighth Circuit stated that the district court's conclusion that the defendant's testimony was untruthful was "in keeping with the jury verdict," and upheld the enhancement.[63] In *United States v. Barbosa*,[64] the Ninth Circuit never referred to any independent finding of the district court, stating only that it found an adjustment for perjury was not clear error where the defendant's "story at trial and the government's presentation of circumstantial evidence contradicted his claimed lack of knowledge about the cocaine . . . ."[65] In *United States v. Bafia*[66] the Seventh Circuit upheld the enhancement by noting tersely that "[g]iven the verdict of the jury, the district court could only find that Bafia lied."[67]

In *Wagner*, *Barbosa*, and *Bafia*, the circuit courts relied on the jury's verdict alone to justify enhancing a sentence. These courts made no effort to ascertain whether the testimony amounted to perjury or whether the sentencing court had based the enhancement on an independent determination of the defendant's testimony. Simply relying on the jury verdict undercuts the admonition in *Grayson* that increasing a defendant's sentence based on untruthful testimony must not be applied in a "wooden or reflex fashion."[68] The net effect is to eliminate an important safeguard to protecting a defendant's right to go to trial and testify.[69]

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62. 884 F.2d 1090 (8th Cir. 1989), *cert. denied*, 494 U.S. 1088 (1990).
63. *Id.* at 1098.
64. 906 F.2d 1366 (9th Cir.), *cert. denied*, 111 S. Ct. 394 (1990).
65. *Id.* at 1370.
66. 949 F.2d 1465 (7th Cir. 1991).
67. *Id.* at 1477.
68. United States v. Grayson, 438 U.S. at 55.
69. A similar problem arises when a defendant testifies at a bench trial and is convicted. In United

III. CONFLICTING APPROACHES TO ENHANCEMENTS UNDER SECTION 3C1.1 FOR PERJURY AT TRIAL

The jury's role in a criminal trial is to weigh the evidence to determine whether the government has met its burden of proving guilt beyond a reasonable doubt. When the defendant testifies, her statements are usually (but not always) exculpatory, such that if the jury believed her it would have a reasonable doubt. When the court assesses whether the defendant's testimony constitutes perjury, the jury's decision to reject the testimony and thus convict the defendant will never be completely divorced from the judge's decision on sentencing. A fundamental issue that the Guidelines do not address, however, is whether the jury's verdict can be the sole basis for enhancing the defendant's sentence under section 3C1.1, and what findings the court should make in determining whether the defendant's testimony constitutes perjury requiring an enhanced sentence.

A. United States v. Bonds: *Automatic Enhancement for Perjury at Trial*

In *United States v. Bonds*,[70] the Second Circuit adopted an analysis that allows courts to increase the sentences of defendants who testify, based on the jury's vote to convict. Bonds was convicted of three counts of knowingly passing counterfeit currency[71] after testifying that he did not know the money he distributed was counterfeit.[72] The district court found that Bonds lied in denying knowledge that the currency was counterfeit. However, the appellate court did not affirm on the basis that the enhancement was not clearly erroneous. Instead, it reviewed the adjustment de novo to determine whether the facts constituted obstruction of justice under the Guidelines.[73]

The appellate court held that "by finding Bonds guilty of *knowingly* distributing counterfeit money, the jury necessarily determined that the

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States v. Cherry, 938 F.2d 748 (7th Cir. 1991), the district court found the defendant guilty of sexual abuse, rejecting his testimony denying penile penetration and finding that the defendant did not testify truthfully. *Id.* at 752. In cases tried before the court in which a defendant's testimony goes beyond arguing a mistake, the judgment of conviction will automatically support a finding of perjury because the court's findings of fact require it to disbelieve the defendant. Defendants testifying in bench trials run a heightened risk of having their sentences enhanced for perjury because the judge's credibility determinations will affect both the guilt and sentencing phases. *See also* United States v. Batista-Polanco, 927 F.2d 14 (1st Cir. 1991) (defendant convicted after bench trial of conspiracy to distribute heroin in which judge characterized testimony denying knowledge of narcotics as "incredible").

70. 933 F.2d 152 (2d Cir. 1991).

71. *Id.* at 153.

72. *Id.* at 155.

73. *Id.* at 154-55. The district court also enhanced the sentence for obstruction of justice because the defendant had changed his appearance after receiving a grand jury subpoena for fingerprints and a photograph. The circuit court held that a change in appearance alone without evidence of an intent to deceive is an insufficient basis for an adjustment under § 3C1.1. *Id.*

money he had distributed was counterfeit."[74] The court stated that "because there is no indication that the judgment of conviction was invalid, it is clear that Bonds's testimony was objectively false."[75] Unless there was insufficient evidence to support the verdict, the conviction alone provided the necessary support for the enhancement. The Second Circuit went on to state that "[w]here, as here, the defendant's testimony relates to an essential element of his offense, such as his state of mind or his participation in the acts charged in the indictment, the judgment of conviction necessarily constitutes a finding that the contested testimony was false."[76] The court asserted that "[t]his holding, however, should not be interpreted as authorizing sentencing judges to impose obstruction of justice upgrades whenever a defendant has testified on his own behalf."[77] While the Second Circuit sought to soften the blow in *Bonds* by stating that the section 3C1.1 adjustment should not be applied automatically, it nevertheless determined that a jury verdict alone can support an enhanced sentence.

The analysis adopted in *Bonds* means that most jury verdicts can allow a district court to enhance the defendant's sentence without any independent evaluation of the testimony if the verdict can be supported by the evidence. This is a notoriously lenient standard. The *Bonds* court tried to limit the breadth of its opinion by stating that the defendant's testimony must relate to an essential element of the offense.[78] This limitation is not meaningful, however, because most testimony by the accused relates, at least in part, to knowledge, identity, or intent, which are elements of virtually every federal crime. Unless the testimony is completely inculpatory, a court would have little trouble finding that a defendant's testimony related to an essential element. Therefore, the judgment of conviction will usually support an enhanced sentence for perjury under the analysis in *Bonds*.

Notwithstanding its breadth, *Bonds* is a logical approach for appellate courts that review a large number of sentencing challenges in which the record is barren of factual findings regarding perjury. This is especially true where the likely effect of remanding a sentence is that the judge will make the necessary statements on the record to support the section 3C1.1 adjustment.[79] Focusing on the sufficiency of the jury verdict and the sub-

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74. *Id.* at 155 (emphasis in original).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* "Where, by contrast, the testimony relates to matters that do not, in themselves, determine the defendant's guilt or innocence, the jury could reasonably return a verdict of guilty even though it believes that the defendant's testimony was truthful. Under those circumstances, a judgment of conviction alone would ordinarily be an insufficient basis for imposing a section 3C1.1 upgrade." *Id.*

79. *See* Heaney, *supra* note 14, at 163-64 & n.11 (increasing number of appeals of sentencing decisions diverts judicial resources).

ject matter of the defendant's testimony permits the appellate court to supply on its own the necessary link to uphold the sentence without remanding the case for another hearing. The danger with the *Bonds* approach is that the conviction will make enhancement automatic, forcing defendants to choose between testifying, with the risk of an enhanced sentence, and remaining silent, with the risk that the jury will construe their silence to be a tacit admission of guilt.

B. United States v. Dunnigan: *Unconstitutional Application of Section 3C1.1 to Perjury at Trial*

In *United States v. Dunnigan*,[80] the Fourth Circuit went to the opposite extreme from *Bonds* in holding that section 3C1.1 imposes an intolerable burden on the defendant's right to testify. Dunnigan was convicted of one count of conspiracy to distribute cocaine after testifying at trial that she did not buy, sell, or use cocaine.[81] The district court enhanced her sentence under section 3C1.1 based on a finding that she testified untruthfully at trial.[82]

The circuit court stated that its "sense of justice" required the reversal of Dunnigan's sentence because the court feared "that this enhancement will become the commonplace punishment for a convicted defendant who has had the audacity to deny the charges against him."[83] The court noted that the Guidelines permit enhancement of a sentence based on hindsight that deems testimony disbelieved by the jury to be a lie.[84] That presents defendants with the dilemma of whether to run the risk of testifying and having the court find they committed perjury if they are convicted, or remaining silent and running the increased risk of conviction because of their silence.[85] In light of potential problems with testifying, such as impeachment by prior convictions, the court concluded that "[w]ith an automatic section 3C1.1 enhancement added to the ante, the defendant may not think testifying is worth the risk."[86]

The Court also held that the Guidelines did not meet *Grayson*'s requirement for flexibility because section 3C1.1 increased sentences in the "wooden or reflex fashion" rejected by the Supreme Court.[87] The Fourth Circuit found that the Guidelines do not provide sufficient protection

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80. 944 F.2d 178 (4th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3798 (U.S. May 26, 1992) (No. 91-1300).

81. *Id.* at 181.

82. *Id.*

83. *Id.* at 183.

84. *Id.*

85. *Id.*

86. *Id.* at 184 (footnote omitted).

87. *Id.*

against the automatic application of the adjustment based solely on the jury's verdict. The "clearly erroneous" standard of review applied by appellate courts means that "in light of the jury's verdict of guilt, the district court's findings will never be 'clearly erroneous' where the verdict is sustainable . . . Our review of these enhancements would therefore be an empty ritual."[88]

Dunnigan is important because the court clearly identifies the problem that section 3C1.1 may affect the rights of innocent defendants by forcing them to consider the effect of their testimony on sentencing. As the Supreme Court has recognized, there are reasons why innocent defendants may not wish to testify:

> It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand.[89]

All challenges to perjury enhancements involve a defendant who has been convicted. While there are many close cases in which a jury struggles to decide whose story to believe, once a defendant who took the stand is convicted, the presumption is that he told a bald-faced lie. The fact that a defendant has been convicted, however, does not negate the possibility that the defendant told the truth. At a minimum, the issue may be so close that one cannot always say with confidence that perjury was committed. While the Guidelines attempt to create a consistent system of sentences, the Fourth Circuit correctly identified the problem that automatic application of section 3C1.1 for perjury may infringe on an important right of defendants by causing them to forgo testifying at trial.

The result in *Dunnigan* is problematic, however, because, as the circuit court apparently acknowledges, the overwhelming weight of evidence in the case supported the conclusion that the defendant lied on the stand. Not only did five witnesses, all co-conspirators, testify against her, but after her testimony the government presented a "devastating rebuttal."[90] Dunnigan's position was similar to that of many other defendants in drug trials who

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88. *Id.* at 185. The court also found the Guidelines statement that the defendant's statments should be viewed "in a light most favorable to the defendant" to be almost meaningless because "[w]hatever light is held to it, a defendant's testimony that has been apparently rejected in material respects by a jury will almost always compel a finding of untruthfulness." *Id.*

89. Wilson v. United States, 149 U.S. 60, 66 (1893).

90. United States v. Dunnigan, 944 F.2d at 181.

testify that they were simply not involved in the illegal activity in question.[91] Since it is virtually impossible to refute the presence of illegal drugs or marked money at the scene of the crime, defendants in Dunnigan's position have few alternatives in presenting a defense but to take the witness stand and testify that they are completely innocent. While the Fourth Circuit makes an important point that automatic application of the perjury enhancement is both likely under the Guidelines and probably unconstitutionally applied in certain cases, the facts in *Dunnigan* support applying the section 3C1.1 adjustment as it is presently written to enhance the sentence.

The *Dunnigan* decision is also unclear because it never states the exact reason for the sentence reversal. The court declares the application of section 3C1.1 offensive to its sense of justice, and states that automatic application of the enhancement cannot be supported by reference to *Grayson*, but it does not explain why the application of the Guidelines violates a defendant's constitutional rights. Although the decision refers to other circuits that have upheld the constitutionality of section 3C1.1,[92] it never explicitly states that the provision is (or is not) unconstitutional.[93] What guidance district courts can draw from *Dunnigan* is not readily apparent because the circuit court did not announce which procedures judges should follow to enhance a sentence for perjury.[94]

Bonds and *Dunnigan* represent the polar extremes in applying the section 3C1.1 adjustment to the defendant's testimony at trial. The sentencing court's determination of perjury may entail little more than a perfunctory statement on the record that masks an automatic application of an upward adjustment based solely on the jury's guilty verdict. The *Bonds* rationale allows appellate courts to validate enhanced sentences by using the jury as a substitute for an independent factual determination by the judge. *Dunnigan* exposes the problems with applying section 3C1.1 by rote, but it goes too far by attacking any use of the defendant's testimony as the basis for enhancing a sentence.

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91. *See supra* note 56 (citing cases).

92. United States v. Dunnigan, 944 F.2d at 183.

93. The circuit court also does not explain whether testimony that goes beyond denying any involvement in the alleged crimes, such as an alibi defense, can be the basis for an enhanced sentence, or if § 3C1.1 cannot be applied to any testimony by a defendant at trial.

94. In a recent Fourth Circuit case, the appellate court vacated a two level upward adjustment for obstruction of justice based on the court's previous decision in *Dunnigan*. United States v. Fuentes, No. 91-5810 (4th Cir. Jan. 29, 1992). The court did not discuss the reason for denying the enhancement other than the fact that "*Dunnigan* requires that we vacate the sentence imposed on Fuentes." *Id.* at 2. *See also* United States v. Smith, No. 91-5600 (4th Cir. Feb. 28, 1992) (reversing enhancement for perjury at trial based on *Dunnigan*); United States v. Copeland, No. 90-5849 (4th Cir. Feb. 28, 1992) (same).

C. United States v. Lozoya-Morales: *Is Requiring District Courts to Make Findings of Fact an Effective Solution?*

The Seventh Circuit addressed the issue of enhancing a defendant's sentence based solely on a guilty verdict in *United States v. Lozoya-Morales*.[95] Two defendants, Morales and Sanchez, were convicted of one count of distribution of cocaine and one count of conspiracy to distribute cocaine and acquitted of a second distribution count.[96] The key witness was a third coconspirator who had earlier pled guilty and cooperated with the government. The circuit court stated that the jury believed only part of the third coconspirator's story, as evidenced by the failure to convict the defendants on one distribution count. Both defendants testified at trial, denying their involvement in the drug transaction, and both received enhanced sentences under section 3C1.1. The court explicitly found that Morales had lied in his testimony, but made no specific finding about perjury by Sanchez.[97]

The district court based Sanchez's perjury adjustment solely on the basis of the jury's verdict. The court concluded that the jury must have rejected Sanchez's testimony because it convicted him. The Seventh Circuit held that an automatic enhancement for defendants who testify and are convicted, absent specific findings by the sentencing court, unconstitutionally impinges on the right to testify in cases where the jury's verdict does not necessarily mean that the defendant lied.[98] The circuit court "strongly urge[d] district courts in other cases where a sentence is to be increased because of a defendant's trial testimony to make the independent finding

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95. 931 F.2d 1216 (7th Cir. 1991).

96. *Id.* at 1217.

97. *Id.* With regard to Sanchez, the district judge stated, "[I]'m punishing him for testifying untruthfully. The jury found that he testified untruthfully because they believed that he had in fact been involved in the distribution of cocaine." *Id.* at 1218. Sanchez testified that he never handed anything to the third coconspirator, and the jury's acquittal on one count may have been based on believing Sanchez's testimony on that issue. *Id.* at 1218 n.2.

98. *Id.* at 1219. "In basing Sanchez's adjustment solely upon the jury verdict, the District Court acted in the 'wooden or reflex fashion' that is not authorized by *Grayson*. Sanchez testified and the jury found him guilty, but the jury's verdict in this case says nothing about whether Sanchez lied." *Id.*

The court used the de novo standard to review the district court's sentence, stating that "[t]he question before us involves a legal interpretation of the Sentencing Guidelines . . . ." *Id.* at 1218. That approach demonstrates how slippery the standard of review can be and how the circuit courts prefer not to overturn district courts under the "clearly erroneous" standard, but adopt the de novo standard to justify vacating a sentence. The district court in *Lozoya-Morales* made no factual finding, which could have allowed the circuit court to find that Sanchez's sentence involved clear error. Instead, the Seventh Circuit asserted that it was reviewing the district court's interpretation of the Guidelines. Given the district court's minimal attention to the reason for enhancing Sanchez's sentence, it is disingenuous to claim the lower court's legal interpretation is being reviewed when it made neither a legal interpretation nor a factual finding.

that we have required here."[99] Absent such a finding, the court stated that the record must "clearly demonstrate that the jury *must* have found such a falsehood."[100]

Despite the hortatory language used by the court, the specific finding urged by the Seventh Circuit can, in fact, be rather superficial. In considering Morales' sentence, the court held that the district judge's statement that "I believe that Mr. Morales did lie about his involvement" was a sufficient independent factual determination to support enhancing the sentence for perjury.[101]

The Seventh Circuit's solution in *Lozoya-Morales* to the question of automatic sentence enhancements for defendants who testify is an important step in the right direction because it requires sentencing judges to make at least a minimal statement on the record identifying the basis for the section 3C1.1 adjustment—a more formal structure than provided in the Guidelines. The decision does not, however, address the more fundamental questions of why the jury's verdict should ever serve as the basis for enhancing a defendant's sentence, and of whether the Guidelines are so broad that they allow both district and circuit courts to make perfunctory findings about perjury while actually relying on the jury's verdict to justify increasing the sentence.

The problem with increasing a defendant's sentence for lying under oath is that the Guidelines approach perjury as a simple conclusion that a judge can draw without distinguishing between the effects perjury can have on the outcome of a trial. Treating all instances of perjury equally allows district courts to use the jury's verdict as an automatic validation of the decision to enhance a sentence without necessarily furthering the goals of the Guidelines or protecting the rights of defendants. Moreover, on-the-record statements that the judge believes the defendant committed perjury will not necessarily prevent courts from automatically enhancing sentences based solely on the jury's verdict. Thus, there is a continuing tension between (1) section 3C1.1, which gives sentencing courts discretion to determine that a defendant committed perjury and thus to increase the sentence; and *(2)*

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99. *Id.* at 1219.

100. *Id.* at 1220 (emphasis in original).

101. *Id.* at 1220. *See also* United States v. Cochran, Nos. 90-2114 to 90-2116, 90-2176 and 90-2705, 1992 WL 15354, at *8 (7th Cir. Feb. 3, 1992) (upholding district court enhancement of sentence for perjury because defendant "did not simply deny his guilt, he chose to take the stand and tell his story"); United States v. Davis, 938 F.2d 744, 747 (7th Cir. 1991) (district court statement that defendant "attempted to mislead the jury as to his knowledge and participation . . . in the theft" sufficient to support enhancement for perjury under *Lozoya-Morales*); United States v. Contreras, 937 F.2d 1191, 1194 (7th Cir. 1991) (district court statement that defendant "not truthful on the witness stand" sufficient to support enhancing sentence for perjury under *Lozoya-Morales*); *cf.* Heaney, *supra* note 14, at 164 (statements by district judges in sentencing are in conclusory terms parroting presentence report).

Grayson's admonition that enhancing a sentence based on the defendant's testimony should not be applied in a "wooden or reflex fashion."[102] The next section analyzes the different effects perjury can have on the outcome of a trial and proposes a more precise approach the courts and the Sentencing Commission should take in enhancing sentences based on the defendant's testimony.

IV. A PROPOSED APPROACH FOR ENHANCING SENTENCES FOR PERJURY AT TRIAL UNDER THE GUIDELINES

The goal of the Obstruction provision of the Guidelines is to protect the truth-finding function of the court and thereby ensure the proper disposition of criminal charges by deterring conduct that interferes with the judicial process.[103] The Application Notes to section 3C1.1 describe a broad range of such conduct relating to the entire criminal process from the investigation through the sentencing of the defendant, including influencing witnesses, destroying or concealing evidence, escaping from custody, and providing materially false information.[104] The enhancement for perjury is not limited to testimony at trial, but also includes testimony at a suppression hearing, at sentencing, and on a motion to withdraw a guilty plea.[105] Adjustments for perjury at these pre- and post-trial hearings, however, do not present the problem of an automatic enhancement because there is no jury verdict. Moreover, there will be factual findings on the record because the judge usually states the reasons for concluding that the defendant's testimony is false as part of his decision.

The jury's role in reaching a verdict frequently involves deciding who is lying. Perjury by defendants at trial strikes directly at the court's fact-finding function because it can lead the judge and the jury into making an erroneous decision. Trials are not simple events, and therefore the defendant's perjury can have different effects on the determination of the facts

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102. United States v. Grayson, 438 U.S. at 55.

103. *See* United States v. Teta, 918 F.2d 1329, 1334 (7th Cir. 1990) (applying § 3C1.1 to both conduct that may affect the truth-finding function and conduct that may hinder progress of a case without the use of deceit); United States v. Stroud, 893 F.2d 504, 506 (2d Cir. 1990) (rejecting definition of obstruction that is limited to conduct only affecting truth-finding function).

104. GUIDELINES, *supra* note 3, § 3C1.1, comment (n.3). *See, e.g.*, United States v. Garcia, 902 F.2d 324 (5th Cir. 1990) (lying to probation officer about prior convictions); United States v. Shoulberg, 895 F.2d 882 (2d Cir. 1990) (threatening letter to codefendant about possible witness); United States v. Cain, 881 F.2d 980 (11th Cir. 1989) (attempting to destroy evidence); United States v. Franco-Torres, 869 F.2d 797 (5th Cir. 1989) (shooting at pursuing law enforcement officers).

105. *See, e.g.*, United States v. Austin, 948 F.2d 783 (1st Cir. 1991) (perjury at a Rule 32 hearing to withdraw guilty plea); United States v. Hamilton, 929 F.2d 1126 (6th Cir. 1991) (perjury at sentencing); United States v. Aymelek, 926 F.2d 64 (1st Cir. 1991) (perjury at hearing on motion to dismiss and at sentencing); United States v. Matos, 907 F.2d 274 (2d Cir. 1990) (perjury at suppression hearing); United States v. Christman, 894 F.2d 339 (9th Cir. 1990) (perjury at sentencing).

relating to guilt. If the defendant commits perjury at trial, there are five possible results:

1. The defendant is acquitted of all charges.
2. The defendant is acquitted of some charges but convicted of others.[106]
3. The defendant is convicted of all charges.
4. The defendant is convicted (of all or only some charges), but commits perjury to protect a codefendant who does not testify.
5. The jury cannot reach a unanimous verdict and a mistrial is declared.

The worst-case scenario is the first one listed above, in which the perjury has completely corrupted the fact-finding function by allowing the defendant to avoid conviction altogether. The Guidelines, however, cannot deter perjury that has this effect because the defendant will never be sentenced for the charges, and it is highly unlikely that a separate perjury prosecution could be mounted successfully. Similarly, the Guidelines have no direct application to the fifth scenario, because in order for there to be an effect, the government must decide whether to retry the defendant and the new jury must vote to convict. *United States v. Stout*,[107] however, presents a rare case in which the defendant was punished for perjury even though the jury was unable to reach a verdict. The district court enhanced the defendant's sentence when the defendant pled guilty to knowing possession of counterfeit currency after his testimony that he did not know the money was counterfeit led to a hung jury. The judge found that Stout perjured himself during the trial regarding his knowledge of the money, and the Ninth Circuit held that "the relevant issue of guilty knowledge was at issue in both charges and [Stout]'s perjury obstructed the government's attempt to prove that guilty knowledge."[108]

The second scenario, in which the defendant is convicted of some charges but acquitted of others, presents a clear circumstance in which the sentence should be enhanced if the court can determine that the acquittal was based, at least in part, on the perjured testimony. In *United States v.*

106. A variation on this scenario is when the defendant is convicted of some charges and the jury cannot reach a verdict on the other counts, requiring the court to declare a mistrial as to those charges.

107. 936 F.2d 433 (9th Cir. 1991).

108. *Id.* at 435. An interesting case would be if the defendant was convicted after retrial and did not testify in the second trial. Could the court, assuming it was the same judge for both trials, enhance the sentence for the perjury at the first trial when there was no perjury by the defendant in the trial that resulted in the conviction? The Guidelines do not limit the timing of the perjury, or require that it be limited to the trial that resulted in the conviction. The defendant could argue that the adjustment should not be applied because she saw the error of her ways and did not testify in the second trial to avoid corrupting the court's fact-finding function.

Rehal,[109] the defendant was charged with nine counts of cocaine distribution and one count of conspiracy to distribute cocaine. After the testimony of various witnesses describing Rehal's participation in a continuing distribution scheme, the defendant denied any involvement in drug trafficking, testifying that he never used, sold or shared cocaine and had never been involved with cocaine distribution "in any way, shape or form."[110] The jury convicted Rehal on three counts of cocaine distribution, and acquitted on the other distribution counts and the conspiracy count.[111] The district court enhanced the sentence based on the defendant's perjury at trial, although it never identified the specific instances of perjury and only made a generalized finding. The First Circuit affirmed the sentence without reviewing the record with any precision, noting that the sentencing court need not make particular findings of perjury and that the enhancement was not clearly erroneous.[112]

It is not clear in *Rehal* whether the district court enhanced the sentence because the jury convicted the defendant on three counts, thereby disbelieving at least part of his testimony, or whether the perjury caused the acquittal on the other counts. If the adjustment is based on the jury's verdict, then the sentence is the automatic application of section 3C1.1 described in *Dunnigan* as a violation of the defendant's right to testify. The better explanation for the enhancement is that the judge determined that the defendant's perjury resulted in his acquittal on some counts. The goal of deterring perjury embodied in section 3C1.1 is fully served when the defendant is punished for lying on the witness stand resulting in a miscarriage of justice.

In determining the sentence, the judge must weigh the testimony independently of the jury's decision, and cannot rely on a guilty verdict to validate the decision to enhance the sentence because the issue is whether the perjury led the jury to acquit the defendant. Moveover, there is no reasonable probability that applying the enhancement where the defendant's perjury leads to acquittal on some counts will create an intolerable burden on the defendant's right to testify. In that instance, the court is correcting the effect of the defendant's wrongdoing and is not simply enhancing the sentence in a "wooden or reflex fashion."[113] It is important for the district court to specifically identify the reason for the enhancement, and to identify both the basis for the conclusion that the defendant lied and that the

109. 940 F.2d 1 (1st Cir. 1991).

110. *Id.* at 6.

111. *Id.* at 3.

112. *Id.* at 6, 7. The district court also stated that it enhanced the sentence because it believed the defendant had encouraged other witnesses to lie, but the circuit court never reviewed that basis for the § 3C1.1 adjustment.

113. United States v. Grayson, 438 U.S. at 55.

perjury misled the jury, in order to allow the appellate court to review the reasonableness of the enhancement. Simply enhancing the sentence without any explanation, as the court did in *Rehal*, fails to alert the defendant and the circuit court that the judge is correcting a serious breach in the judicial process and not merely punishing a person for exercising a constitutional right.

The fourth scenario presents another situation supporting a sentence adjustment under section 3C1.1 similar to the case of acquittal on some counts. The rationale for enhancing the sentence is broader, however, because the perjury in this scenario need not be successful in order for the court to have a sound basis to punish the defendant. In *United States v. O'Meara*,[114] one defendant in a conspiracy to distribute cocaine implicated himself but testified that his codefendant had no knowledge of the drug transaction. The second defendant did not testify. After both were convicted, the second defendant admitted his involvement to the probation officer, but the first defendant maintained his story.[115] The court enhanced the sentence for perjury at trial, and the circuit court affirmed, noting that there was ample evidence independent of the jury verdict to support the finding of perjury.[116]

Even where both defendants are convicted, enhancement is justified to deter codefendants from using one member of the conspiracy, especially someone at a lower level, as a shield to take the blame and to attempt to exonerate the other conspirators. The enhanced sentence can deter that conduct by raising the stakes where a defendant tries to protect codefendants through perjury and punishing it where the court determines that this was the goal of the perjury.[117] A more egregious case was presented in *United States v. Fuentes*,[118] where the district court found that the perjury of one defendant in a drug conspiracy led to the acquittal on all charges of a codefendant. The district court did not enhance the convicted defendant's sentence because it believed that would be unfair when the other defendant was acquitted. The Fourth Circuit properly remanded the case for further consideration of whether an enhancement was appropriate.[119] When the judge makes an independent determination that the perjury affected the

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114. United States v. O'Meara, 895 F.2d 1216 (8th Cir.), *cert. denied*, 111 S. Ct. 352 (1990).

115. *Id.* at 1218.

116. *Id.* at 1220. *See also* United States v. Dyer, 910 F.2d 30 (8th Cir.) (following conviction of husband and wife, court enhances sentence of wife because wife admitted involvement in drug trafficking but asserted husband was innocent), *cert. denied*, 111 S. Ct. 276 (1990).

117. *See* United States v. Jones, Nos. 90-3498, 90-3541, 90-3602, 1991 U.S. App. LEXIS 29800, at *19 (7th Cir. Dec. 19, 1991) (upholding enhancement where defendant's testimony that codefendant not involved in conspiracy was contradicted by recorded statements of codefendant after bank robbery).

118. Nos. 89-5198, 89-5217, 89-5240, 1991 U.S. App. LEXIS 1474 (4th Cir. Feb. 4, 1991).

119. *Id.* at *22; *see supra* note 94 (vacating enhancement in light of *Dunnigan* holding).

jury's verdict and led to acquittal of a codefendant, then the enhancement is entirely appropriate because the court is using its own assessment of the defendant's credibility to correct, to a degree, the harm caused by the perjury.

The majority of the decisions reviewing enhancements for perjury at trial involve the third scenario, in which the defendant is convicted on all counts. Because the jury's verdict can provide the sole basis for enhancing the sentence, this scenario presents a greater problem in justifying application of the section 3C1.1 adjustment. Yet, assuming that the defendant committed perjury, which is not always the case, by convicting the defendant the jury (or the court) has not been misled by the perjury and the court's truth-finding function has been preserved by the verdict. While punishing the defendant for unsuccessfully lying on the witness stand may have some deterrent effect, allowing district courts to enhance sentences based on the jury's verdict with no requirement that the judge make specific findings of fact creates a burden on the rights of defendants. As the circuit courts adopt approaches similar to *Bonds*,[120] and the jury's verdict becomes sufficient to validate an enhancement for perjury, the Guidelines create the real possibility that the section 3C1.1 adjustment will be applied automatically when the defendant is convicted on all counts.[121]

If the Guidelines effectively permit automatic enhancement of sentences, then the burden on the defendant's constitutional and statutory right to testify must be weighed against the benefit gained from deterring or punishing perjured testimony. It is important to note that the jury's evaluation of the defendant's testimony may have the effect of strengthening the government's case: "[t]he consequence of a jury's disbelief of a defendant is so great that many guilty verdicts could never have been obtained without an assist from the poorly delivered testimony of the defendant."[122] The jury may decide to convict a defendant because of the perjury, or convict on certain counts that it otherwise might not have, in which case conviction punishes the defendant and the enhancement only piles on additional prison time. Where the defendant is punished despite his testimony, it is not clear how the judicial process has been seriously harmed by the allegedly false statement.

If, on the other hand, sentences are automatically enhanced based on the jury's verdict, this enhancement becomes an additional factor which the

120. United States v. Bonds, 933 F.2d 152 (2d Cir. 1991).

121. The vagueness of the Guidelines on the issue of what is required to support an enhancement has allowed the government to argue that every defendant who testifies and is convicted should have his or her sentence increased under § 3C1.1. The government's argument is not inconsistent with the Guidelines and is certainly supported by the reasoning of the Second Circuit in *Bonds*.

122. 4 PATRICK L. MCCLOSKEY & RONALD L. SCHOENBERG, CRIMINAL LAW ADVOCACY ¶ 8.04[1] at 8-42 (Matthew Bender 1991).

defendant must consider in deciding whether to exercise the right to testify. In addition to the question of whether the defendant can be an effective witness, the defense must consider the possibility of impeachment by prior convictions, other bad conduct under Federal Rule of Evidence 404(b), and the defendant's reluctance to implicate others.[123] As the burden grows, the possibility exists that an innocent defendant may decide against running the risk of testifying if such testimony will result in an increased sentence, which may limit the defense that can be put before the jury. In many cases, the defendant's testimony is the only direct evidence that can rebut the government's case. If defendants are discouraged from testifying, innocent defendants may be convicted because of the strategic decision not to testify.

The question, therefore, is how to balance the burden that potential enhanced sentences place on the defendant's right to testify with the need to protect the integrity of the court's truth-finding function. While it is possible to eliminate the adjustment entirely as it applies to the defendant's trial testimony, this goes too far, giving defendants a license to commit perjury. As presently drafted, however, the Guidelines are too vague because they permit courts to apply the section 3C1.1 adjustment automatically, an effect that cannot be accepted under *Grayson*'s conclusion that sentences must not be enhanced in a "wooden or reflex fashion."[124]

The Sentencing Commission should refine the Guidelines to direct the district courts' attention to the different ways in which perjury can affect the outcome of a trial and to the fact that the defendant's right to testify is a vital issue that must be considered in deciding whether to enhance a sentence where a defendant has been convicted on all counts. Although the Guidelines currently state that section 3C1.1 is not intended to punish a defendant for exercising a constitutional right, and that the testimony "should be evaluated in a light most favorable to the defendant,"[125] those admonitions have not prevented courts from using the jury's verdict to support a finding that the defendant committed perjury.[126]

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123. *See* Carter v. Kentucky, 450 U.S. 288, 301 n.15 (1981)(citing Lakeside v. Oregon, 435 U.S. 333, 344 n.2 (1977)(Stevens, J. dissenting)) (giving reasons why a defendant may decide not to testify); Griffin v. California, 380 U.S. 609, 615 (1965) (same); Wilson v. United States, 149 U.S. 60, 66 (1892) (same).

124. United States v. Grayson, 438 U.S. at 55.

125. GUIDELINES, *supra* note 3, § 3C1.1.

126. The courts have interpreted the Sentencing Commission's statement as to the weight to be given the defendant's testimony to mean that "the sentencing judge [should] resolve in favor of the defendant those conflicts about which the judge, after weighing the evidence, has no firm conviction." United States v. Franco-Torres, 869 F.2d 797, 801 (5th Cir. 1989). If the judge entertained any serious doubts that the defendant's testimony was truthful, it is more likely that the court would order a new trial rather than decide not to enhance the sentence for perjury. The jury's verdict can resolve any conflict and supply the necessary certitude to apply the § 3C1.1 adjustment, and defendants have been wholly

At a minimum, the Commission should adopt the position enunciated by the Seventh Circuit in *Lozoya-Morales*[127] that the district courts make specific, independent factual findings that do not rely solely on the jury's implicit rejection of the defendant's testimony in its decision to convict.[128] Requiring courts to make a statement on the record will diminish, although not eliminate, the possibility that they will simply adopt the conviction as the basis for a section 3C1.1 adjustment. The Sentencing Commission can go one step further by stating explicitly that sentences should not be enhanced by the district court based solely on the jury's verdict, and should only be based on the judge's independent evaluation of the evidence presented at trial and the defendant's testimony and demeanor.

A second step to ensure that the enhancement has its greatest deterrent effect is to specify that the section 3C1.1 adjustment is most appropriate in cases where the perjury resulted in a corruption of the court's truth-finding function by leading to acquittal on some counts or was designed to protect a non-testifying codefendant. The Sentencing Commission can expand the Application Notes beyond the rather terse statement that "committing, suborning, or attempting to suborn perjury" merits an adjustment. Suborning perjury goes to acts meant to influence the testimony of other witnesses, a clear interference with the truth-finding function. That conduct should not be lumped together with the defendant's alleged perjury at trial because suborning perjury does not implicate the defendant's constitutional rights. Instead, the Commission should treat the issue of the defendant's testimony separately.

In discussing the circumstances under which a court can enhance the sentence for perjury, the Commission should counsel judges that the Guidelines reflect a balance between protecting both the judicial process and defendants' right to testify, and the Commission should stress that enhancement should only be applied in clear cases of perjury. District Courts need a degree of discretion in applying section 3C1.1, because they are the most familiar with the particular facts of each case, yet the need to protect defendants' rights suggests that the enhancement should only be applied in egregious cases. Without unnecessarily constraining the courts' discretion, the Sentencing Commission could state that the perjury should be clear on the record, and that a court should identify the need to increase the pun-

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unsuccessful in using the statement in the Guidelines to argue that their testimony should be considered in their favor.

127. United States v. Lozoya-Morales, 931 F.2d 1216 (7th Cir. 1991).

128. This requirement is not particularly burdensome because the district court's statement need not be detailed under *Lozoya-Morales*. Moreover, district courts are required to make findings of fact concerning the defendant's relevant conduct and criminal history, and additional findings on the enhancement will not significantly diminish judicial resources. *Cf.* United States v. Giles, 768 F. Supp. 101 (S.D.N.Y. 1991) (published district court opinion reviewing basis for enhancement).

ishment of the particular defendant to protect the court's truth-finding function.[129] Such a description of the circumstances under which a district court can enhance the sentence will go a long way toward eliminating the automatic application of section 3C1.1 based on the jury's verdict.

V. CONCLUSION

The Sentencing Commission needs to refine the Guidelines to avoid extreme interpretations of the scope of section 3C1.1 such as those in *Bonds* and *Dunnigan*. Automatic sentence enhancement based solely on the jury's verdict cannot be justified under the Supreme Court's holding in *Grayson*, specifying that the sentencing court should not increase the defendant's sentence for perjury at trial in some "wooden or reflex fashion."[130] The Guideline's sparse treatment of the issue of the defendant's testimony allows circuit courts to uphold sentencing decisions that reflect little, if any, thought by the district court about whether the defendant's testimony amounted to perjury and whether increased punishment is appropriate. Yet the enhancement serves an important purpose in giving the judge discretion to protect the judicial process by punishing defendants who lie on the witness stand to avoid answering for their criminal conduct or the conduct of co-conspirators. The Sentencing Commission needs to expand its analysis by focusing on the effects perjury can have on the court's truth-finding function and on how to best protect the rights of defendants. This balancing requires the Commission to give greater guidance to courts sentencing defendants by explaining the need for specific factual findings and the importance of not automatically applying the section 3C1.1 adjustment.

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129. The Commission may consider recommending that judges only apply the § 3C1.1 enhancement in egregious cases when the defendant is convicted on all counts. If the court determines that the perjury does not rise to the level justifying an enhancement, then it can sentence the defendant to a higher term of imprisonment within the range of sentences provided in the Guidelines. The court could explain that it is increasing the sentence because the defendant's testimony was likely perjury but does not meet the requirements for an enhancement, without having to make any additional findings or risking reversal of the sentence on appeal.

130. United States v. Grayson, 438 U.S. at 55.