

# Case o' the Week

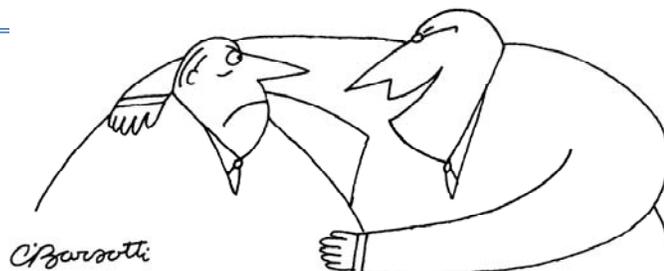
*A little memo on a big case.*

From: Steven Kalar, Federal Public Defender ND Cal      Date: Monday, Feb. 8, 2016  
Re: *United States v. Stephen Johnson*, No. 14-10113 (9th Cir. Feb. 5, 2016): **Perjury / Obstruction:**  
Ninth case of first impression finds obstruction possible for perjury while fighting perjury charges

**Players:** Decision by District Judge Rosenthal, joined by Judges Kozinski and Tallman.

**Facts:** Johnson was a retired law enforcement officer. *Id.* at 5. **[Ed. Note:** Five of the eleven defendants in this case had law enforcement backgrounds! *See*

<http://www.modbee.com/news/local/article3111146.html> ] Johnson lied while speaking with federal agents, then lied while testifying before the grand jury, and was ultimately indicted for false statements ( § 1001) and perjury before the grand jury ( § 1623). *Id.* At the trial on these charges, Johnson lied to the petit jury – in *different ways* than his grand jury lies. *Id.* at 7 (describing Johnson’s different explanations before the grand and petit juries). He was convicted. At sentencing, the district court grouped the counts and added a two-level bump for obstruction of justice under U.S.S.G. § 3C1.1. *Id.* at \*7. The district court did not make a finding that the trial testimony was willfully and materially false before imposing the two-level obstruction hit. *See Castro-Ponce*, 770 F.3d at 822. Johnson appealed the sentence.



“Now, now, it wasn’t a lie – it was a one-eighty.”

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**Issue(s):** “The question is whether we should remand for the district court to decide whether the trial testimony was willfully and materially false, or whether we should instruct the district court that it cannot apply the enhancement as a matter of law. This in turn requires us to address Johnson’s arguments that the sentencing enhancement is precluded because his allegedly perjurious trial testimony was not a ‘significant further obstruction’ under Application Note 7 to U.S.S.G. § 3C1.1. Johnson claims that the trial testimony did not actually hinder or impede the government’s investigation or prosecution of the underlying obstruction offense and that enhancing the sentence for the underlying grand-jury perjury conviction based on the later trial perjury is impermissible double counting.” *Id.* at 4-5.

**Held:** “We vacate the sentence and remand for resentencing without the limiting instructions Johnson seeks . . . *Id.* at 5. “Applying the obstruction enhancement to Johnson’s false trial testimony does not impermissibly penalize him twice for the same conduct if the district court finds that his trial testimony was false, willful, and material.” *Id.* at 5.

**Of Note:** You’ll search in vain for the government’s arguments on the obstruction enhancement in its answering brief. The government whiffed, those arguments aren’t there. *Id.* at 9 & n.1. So this is waiver by the Feds, and a win for Mr. Johnson, yes? No. The Ninth ordered additional briefing and then reaches (late) government arguments. *Id.* Sauce for the goose, sauce for the gander: waiver was waived for the government in *Johnson*, so invoke footnote one when that defense argument didn’t quite make it into the appellate briefs.

**How to Use:** It is a disappointing (albeit not surprising) new rule that if one lies in a trial, about allegations of previously lying to agents or a grand jury, a hit with the obstruction guideline isn’t double-counting. *Id.* at 13. However, note that Johnson here managed to lie in *new and novel* ways before the petit jury – *different* lies than those given to the grand jury and agents. If Johnson had simply repeated the identical lies before the grand and petit juries, would the obstruction of justice enhancement be available? That remains an unresolved question: the Ninth specifically dodges the issue in *Johnson*. *See id.* at 10 & n. 2. For our clients who to lie more consistently and less creatively than Johnson, footnote two may help avoid a two offense-level hit at sentencing.

**For Further Reading:** In 2007, former vice-presidential aide “Scooter” Libby was convicted of perjury, false statements, and obstruction of justice. Do you know the difference between these different ways of lying? For a short and accessible explanation for the differences between these federal crimes of dishonesty, see Daniel Engber, *How Many Ways Can you Say ‘Lie?’*, available here: [http://www.slate.com/articles/news\\_and\\_politics/recycled/2007/03/how\\_many\\_ways\\_can\\_you\\_say\\_lie.html](http://www.slate.com/articles/news_and_politics/recycled/2007/03/how_many_ways_can_you_say_lie.html)