

No. _____

In the Supreme Court of the United States

JACOBY WALKER, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court may find that a criminal defendant participated in a particular conspiracy solely on the basis of the defendant's membership in a different conspiracy that had dealings with the conspiracy in question.

2. Whether a criminal defendant may be subject to a sentence enhancement for obstruction of justice when neither the district court nor the court of appeals made any finding that the defendant's allegedly false statements were material or willful.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jacoby Walker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a, *infra*) is reported at 213 F.3d 409. The judgment of the district court is unreported.

JURISDICTION

The judgment of the court of appeals affirming petitioner's conviction and sentence was entered on May 23, 2000. Pet. App. 20a-21a, *infra*. Petitioner's petition for rehearing and for rehearing *en banc* in the court of appeals was denied on June 30, 2000. Pet. App. 22a-23a, *infra*. On September 7, 2000, Justice Stevens extended the time for filing the petition for certiorari to and including October 30, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF THE SENTENCING GUIDELINES INVOLVED

Relevant provisions of U.S.S.G. § 3C1.1 are reproduced at Pet. App. 24a-26a, *infra*.

STATEMENT

Petitioner Jacoby Walker is serving a prison sentence of life plus thirty years following his conviction on federal drug and firearm charges. In affirming petitioner's conviction and sentence, the court of appeals applied dangerously over-expansive views of both the federal law of conspiracy and the Sentencing Guidelines' provision regarding obstruction of

justice. This Court should grant review in order to resolve serious and intolerable confusion in the lower courts in these important areas of federal criminal law—a confusion that results in non-violent offenders such as petitioner serving draconian sentences on the basis of principles that conflict with the governing law as articulated by this Court.

1. The Government’s Trial Evidence

a. Petitioner was tried in the United States District Court for the Northern District of Indiana for allegedly violating federal drug and firearm laws. Petitioner went to trial with two codefendants, Michael Mason and Mason’s girlfriend, Monique Linear. The government’s theory was that beginning in 1993 or earlier, Mason was the “kingpin” of a drug distribution organization in Gary, Indiana, and that Mason had “delegated his authority to distribute cocaine” to “several people,” including petitioner. Tr. 53.¹

Although the government presented evidence that petitioner had sold drugs on two occasions, its evidence concerning petitioner’s involvement in the alleged conspiracy and his place in any chain of command was inconsistent. Former members of the Mason organization, all testifying pursuant to plea agreements, claimed that Mason directed potential drug buyers to deal with petitioner and others (Tr. 411), that petitioner and others sometimes received drugs from other members of the organization (Tr. 414-415), that petitioner and others sometimes delivered drugs to Mason’s crack houses (Tr. 521), and that petitioner sometimes provided drugs to other members of the organization. Tr. 518.

¹ “Tr. ___” refers to the transcript of petitioner’s trial. “3/10/99 Sent. Tr. ___” and “3/12/99 Sent. Tr. ___” refer to the transcripts of petitioner’s sentencing hearing.

b. Much of the government's evidence at trial did not concern the Mason conspiracy at all, but rather a different conspiracy run by a man named John Allen. The indictment naming petitioner charged a conspiracy only among members of the Mason organization. The government brought a separate prosecution, naming none of the alleged members of the Mason conspiracy, against Allen and his coconspirators. The government explained to the jury in its opening statement that these were two different organizations (*e.g.*, Tr. 48), and it argued consistently to the jury that the Mason conspiracy and the Allen conspiracy were distinct conspiracies. See, *e.g.*, Tr. 48, 52, 1238, 1240.

Allen and his organization functioned as wholesalers, buying drugs in very large quantities and reselling them to retail-level operations like the Mason organization. As the government told the jury in its closing argument, members of the Allen conspiracy "deal[t] with select people. They [were] not street dealers." Tr. 1240. On the other hand, "Michael Mason's organization went all the way to the streets." Tr. 1240. Allen was one of several sources of the drugs that Mason sold (Tr. 373), and Mason was just one of Allen's many customers. Tr. 625-627, 774-775, 921-922.

Inexplicably, the government's evidence concerning the Allen conspiracy was not limited to its drug sales to Mason. The government introduced extensive evidence—including a great deal of hearsay admitted under the exception for statements of coconspirators (Fed. R. Evid. 801(d)(2)(E))—about all aspects of the Allen organization, which was far more highly organized and much more dangerous than the Mason group. The government's evidence about the Allen conspiracy, which had nothing to do with the Mason conspiracy, included testimony about sales of vast amounts of cocaine to undercover informants and various other buyers besides Mason (Tr. 80-84, 178-180, 384, 625-627, 685, 774-775, 921-922); a network of

“stash houses” used to store the Allen organization’s huge drug inventory (Tr. 95-96, 647-649, 929, 930); cars equipped with secret compartments for transporting drugs (Tr. 634, 657, 940); the sources of the Allen organization’s drugs (Tr. 791, 926-927, 932, 1051-1052); the Allen organization’s use of semiautomatic assault weapons (Tr. 779); and a scheme for laundering drug money that successfully deceived Allen’s bank and his accountants (Tr. 952-953).

The government emphasized the sheer volume of drugs involved in the Allen conspiracy, presenting evidence that Allen purchased fifty kilograms of cocaine every month from just one of his sources (Tr. 791, 926-927), and evidence about one of Allen’s several “stash houses,” which received shipments of twenty and fifty kilograms of cocaine and stored a total of 200 kilograms of cocaine. Tr. 83-84, 180, 915-917, 928, 930-932. The most prominent feature of the government’s evidence regarding the Allen conspiracy, which the government stressed during both its opening statement and its closing argument (see Tr. 51-52, 1281), was a police raid on an apartment where Allen stored cocaine. Tr. 84-85, 180-181, 651-653, 933-934, 1041-1046. Over objection, the district court admitted all thirty-one kilograms of the seized Allen cocaine into evidence—a pile of cocaine so large that it obstructed the jury’s view of witnesses. Tr. 1054.

Although witnesses testified that Mason purchased some of his cocaine from the Allen organization, no evidence connected petitioner or any other alleged member of the Mason organization to the Allen conspiracy.

c. Following a five-day trial, the jury returned a verdict of guilty on all counts against petitioner, although the district court was forced to vacate one of the firearm counts as unsupported by any evidence at all.

2. Petitioner's Sentence

a. The district court sentenced petitioner under the Sentencing Guidelines to concurrent terms of life imprisonment for his convictions under 21 U.S.C. §§ 841(a)(1) (distribution of crack cocaine), 846 (conspiracy to possess with intent to distribute crack cocaine), and 861(a)(1) (use of a minor to distribute crack cocaine), which run concurrently with a ten-year sentence under 26 U.S.C. § 5861(d) for possessing an unregistered firearm. This life sentence is followed by a consecutive thirty-year sentence for petitioner's conviction under 18 U.S.C. § 924(c)(1) for allegedly carrying a silencer-equipped gun "during and in relation to" the charged drug conspiracy.²

In arriving at a life sentence under the Guidelines, the district court first assigned petitioner a base offense level of thirty-eight, using the total quantity of drugs involved in the Mason conspiracy. 3/12/99 Sent. Tr. 19; see U.S.S.G. § 2D1.1. The district court then applied a two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1 (3/12/99 Sent. Tr. 19), and a three-level enhancement for an "[a]ggravating[r]ole" as a "manager or supervisor" of criminal activity under U.S.S.G. § 3B1.1(b). 3/12/99 Sent. Tr. 20. This adjusted offense level of forty-three, in conjunction with a criminal history category of III, required a life sentence. 3/12/99 Sent. Tr. 20; see U.S.S.G. Ch. 5, Pt. A.³

² Petitioner's conviction under section 924(c)(1) depended entirely on the theory that he is criminally liable for his coconspirator's use of a firearm under the rule of *Pinkerton v. United States*, 328 U.S. 640 (1946). There was no evidence that petitioner himself ever used or carried any weapon in connection with the alleged conspiracy or was otherwise involved in any violent criminal activity. See Pet. App. 10a-11a, *infra*.

³ On appeal, the government conceded that the district court had incorrectly calculated petitioner's criminal history category, although

b. One of the questions presented concerns the sentence enhancement for obstruction of justice. The district court applied this enhancement even though the Presentence Investigation Report (“PSR”) had recommended no such enhancement for obstruction of justice (PSR 4, 5), and the government filed no objections to the report. The government raised the issue for the first time with an oral request at petitioner’s sentencing. 3/10/99 Sent. Tr. 9-10. The basis for the government’s request was petitioner’s testimony at a suppression hearing held during petitioner’s trial. 3/12/99 Sent. Tr. 8-9.

On the final day of trial, petitioner objected to testimony about statements that he made to federal agents after his arrest. Tr. 1143-1145. The district court held a suppression hearing at which petitioner testified that his requests for an attorney had been ignored and that he only made a statement to the agents because the agents were threatening his mother. Tr. 1153, 1156-1157. Two agents testified that they made no threats concerning petitioner’s mother and that petitioner never asked for a lawyer. Tr. 1150, 1163-1164. The district court denied petitioner’s motion, holding that it had been “waiv[ed]” under Federal Rule of Criminal Procedure 12(b)(3), which requires that a motion to suppress “be raised prior to trial.” Tr. 1188; see Fed. R. Crim. P. 12(f) (“Failure by a party to raise defenses or objections or to make requests which must be made prior to trial . . . shall constitute waiver thereof”). The district court went on to say: “Even without that, however, I find that the statements were voluntarily made.” Tr. 1188.

At petitioner’s sentencing, the district court “adopt[ed] the Government’s position” and assessed a two-level enhancement for obstruction of justice “based on the testimony of the agents, which the Court believed, contrasted with the defendant’s

that error, standing alone, had no effect on petitioner’s sentence. See Pet. App. 15a, *infra*.

testimony, which the Court did not believe.” 3/12/99 Sent. Tr. 19. The entirety of the district court’s findings in support of the enhancement was “that the Defendant lied under oath at the suppression hearing claiming that he requested a lawyer.” 3/12/99 Sent. Tr. 19.

3. Petitioner’s Appeal

On appeal to the Seventh Circuit, petitioner contested his conviction and sentence on numerous grounds, two of which are relevant here: (i) petitioner argued that the district court erred in admitting extensive and highly prejudicial, yet irrelevant, evidence concerning the Allen conspiracy, and (ii) petitioner argued that the district court failed to make—and could not have made—the findings necessary to support its imposition of a sentence enhancement for obstruction of justice.

a. Petitioner argued before the court of appeals that because there was no evidence in the record that could show that petitioner was a member of the Allen conspiracy, it was error for the district court to admit against petitioner the government’s extensive evidence regarding the Allen conspiracy. Much of the government’s Allen conspiracy evidence was hearsay ostensibly admitted under the exception for statements of coconspirators. But because petitioner was not a member of the Allen conspiracy, hearsay statements by members of that conspiracy were not admissible against petitioner under Fed. R. Evid. 801(d)(2)(E). And *all* of the government’s Allen conspiracy evidence (whether hearsay or not) was simply irrelevant to its case against petitioner, as there was no evidence tending to show that petitioner was a member of that conspiracy. To the contrary, the government’s theory of its case, as it argued to the jury, was that petitioner was a member of the much more limited Mason conspiracy and not the much broader and more dangerous Allen conspiracy, which the government consistently distinguished from the Mason

organization in its jury arguments. See Pet. C.A. Br. 17-24; Pet. C.A. Reply Br. 5-11.

The court of appeals rejected these arguments, concluding that “[t]he government presented sufficient evidence to establish that Allen and Mason’s organizations were linked and part of a single conspiracy.” Pet. App. 9a, *infra*. In support of this conclusion, the court of appeals cited *no* evidence of any agreement by petitioner himself to participate in the Allen conspiracy (and no such evidence exists). Rather, the court of appeals recited evidence regarding, at most, the relationship and interactions between the two conspiracies or between the Allen conspiracy and Mason personally—including evidence that Mason purchased cocaine from Allen, occasionally on credit; that Allen employed Mason’s girlfriend; and that Mason purchased pagers for his organization from Allen’s legitimate pager business. *Ibid*. None of this evidence showed anything about any claimed involvement of petitioner in the Allen organization.

b. Petitioner also objected on appeal to the district court’s imposition of a sentence enhancement for obstruction of justice. In *United States v. Dunnigan*, 507 U.S. 87, 94-95 (1993), this Court held that a district court may enhance a defendant’s sentence for obstruction of justice only after “mak[ing] independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition we have set out”—*i.e.*, “giv[ing] false testimony concerning a material matter with the willful intent to provide false testimony.” Petitioner argued that the district court’s minimal finding that petitioner “had lied under oath” could not constitute the “independent finding” of the elements of perjury required by this Court in *Dunnigan*. See Pet. C.A. Br. 27-28; Pet. C.A. Reply Br. 13-14.⁴

⁴ Petitioner further argued that even if the district court had attempted to make the required findings, it could not, as a matter of law, have

The court of appeals rejected petitioner's argument on these grounds (Pet. App. 13a, *infra*):

After listening to the testimony, the district court found that . . . Walker lied under oath. Therefore, the obstruction of justice enhancement was not clearly erroneous. The district court believed the agents and determined that . . . Walker had lied under oath and therefore an obstruction of justice enhancement was properly made.

REASONS FOR GRANTING THE PETITION

This case presents an opportunity for the Court to decide two important questions of federal criminal law and to supply much-needed guidance for lower courts on the scope and limits of the federal law of conspiracy and on the findings required by this Court's decision in *Dunnigan* before a defendant's sentence may be enhanced for obstruction of justice.

found that petitioner's testimony at the suppression hearing was material. The Sentencing Guidelines define a "material" statement as one that, "if believed, would tend to influence or affect the issue under determination." U.S.S.G. § 3C1.1 Application Note 6. Because the district court was required to, and did, deny petitioner's motion to suppress as untimely and "waived" under Rule 12 (see Tr. 1188), petitioner's testimony could not "tend to influence" the district court's ruling on the motion. His testimony was, therefore, necessarily immaterial. See Pet. C.A. Br. 27-29; Pet. C.A. Reply Br. 13-17. The court of appeals did not address this argument.

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE EXTENT TO WHICH INTER-CONSPIRACY RELATIONS CAN BE USED TO SHOW A DEFENDANT'S PARTICIPATION IN A CRIMINAL CONSPIRACY.

The decision of the court of appeals in this case raises the important question whether evidence of a criminal defendant's participation in one conspiracy, combined with evidence linking that conspiracy to a separate conspiracy, is enough to establish the defendant's participation in the second conspiracy. This case presents an opportunity for this Court to establish clear limits in an area of law long thought to exemplify the "tendency of a principle to expand itself to the limit of its logic." *Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring) (quoting Benjamin Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921)).

In affirming the district court's decision to admit against petitioner the government's vast evidence concerning the Allen conspiracy, the court of appeals concluded that there was "sufficient evidence" connecting petitioner to the Allen conspiracy but never made any reference at all to evidence that petitioner himself entered into an agreement that reached as far as the Allen organization and its criminal activities. In fact, the record contains *no* evidence of any kind concerning a connection between petitioner and the Allen organization, whose members were indicted and tried in a separate prosecution. Instead, the court of appeals held that it was enough that the government presented evidence that "Allen and Mason's *organizations were linked* and part of a single conspiracy," and it cited only evidence of business dealings between the conspiracies themselves. Pet. App. 9a, *infra* (emphasis added). Thus, this case raises the critical issue whether a court may dispense with evidence regarding the scope of a criminal defendant's own agreement and may

instead find that the defendant is a member of a conspiracy solely on the basis of a finding that the defendant is a member of a *different* conspiracy that has itself conspired with the conspiracy in question.

1. The decision below is consistent with other opinions that take a similarly expansive view of conspiracy liability, agreeing that the government may rely on evidence of links between conspiracies themselves in order to show that a member of one conspiracy is also a member of any “linked” conspiracy. These courts have accordingly held that “if a person conspires with another knowing that the latter is conspiring with another person or persons to commit the same offense, he is guilty of conspiring with such other person or persons.” *United States v. Martinez*, 877 F.2d 1480, 1482 (10th Cir. 1989); see also, *e.g.*, *United States v. Daily*, 921 F.2d 994, 1007 (10th Cir. 1990) (“of principal concern is whether the activities of alleged co-conspirators in one aspect of the charged scheme were necessary or advantageous to the success of the activities of co-conspirators in another aspect of the charged scheme, or the success of the venture as a whole”); *Coates v. United States*, 59 F.2d 173 (9th Cir. 1932) (holding that when the defendant conspired with two men, supplying money for their illicit still, and, unknown to the defendant, they conspired with a fourth person, who ran a second still also financed with the defendant’s money, the defendant had unwittingly conspired with the fourth party).

However, the analysis of these cases and the court below is flatly inconsistent with other decisions recognizing that “[t]o join a conspiracy . . . is to join an agreement,” and thus “[t]he scope of a conspiracy” is necessarily “determined by the scope of the agreement” that the defendant is alleged to have entered into. *United States v. Townsend*, 924 F.2d 1385, 1390, 1392 (7th Cir. 1991). Thus, courts have held that “[t]he essence of any conspiracy is . . . agreement, and ‘in order to prove a single

conspiracy, the government must show that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal.” *United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1990) (quoting *United States v. Martino*, 664 F.2d 860, 876 (2d Cir. 1981)); see also, e.g., *United States v. Gibbs*, 182 F.3d 408, 422 (6th Cir.) (“Mere association with conspirators is not enough to establish participation in a conspiracy”) (internal quotation marks omitted), cert. denied, 120 S. Ct. 592 (1999); *United States v. Papa*, 533 F.2d 815, 821-822 (2d Cir. 1976) (defendant’s supervision of two unrelated drug distribution operations did not transform two separate conspiracies into one). According to the approach taken by these courts, the critical inquiry is always the scope of the individual defendant’s own agreement to further criminal activity, and a court may not substitute for that inquiry evidence that the defendant is a member of an organization that itself entered into agreements with others to violate the law. See, e.g., *United States v. Edwards*, 945 F.2d 1387, 1396 (7th Cir. 1991) (“conspiracy liability cannot exceed the scope of a defendant’s agreement to further criminal activity”).

The court should grant review to resolve the differences between these conflicting approaches to the federal law of conspiracy.

2. The latter view of criminal conspiracy—which insists on evidence of an individual defendant’s agreement to further criminal activity—is undoubtedly correct.

Under the so-called *Pinkerton* rule, every member of a conspiracy can be held criminally liable for the actions of every other member. See *Pinkerton v. United States*, 328 U.S. 640, 646 (1946). In light of this potentially very harsh rule, courts must distinguish carefully “between separate conspiracies, where certain parties are common to all and one overall

continuing conspiracy with various parties joining and terminating their relationship at different times.” *United States v. Varelli*, 407 F.2d 735, 742 (7th Cir. 1969). In making this determination, each defendant’s agreement “must be determined individually from what was proved as to him.” *Id.* at 743; see also *ibid.* (“If, in Judge Learned Hand’s well-known phrase, in order for a man to be held for joining others in a conspiracy, he ‘must in some sense promote their venture himself, make it his own,’ it becomes essential to determine just what he is promoting and making ‘his own’”) (citations omitted). Any other rule threatens to impose criminal liability for crimes that a defendant did not personally commit merely on the ground that they were committed by another member of a conspiracy which the defendant never agreed to join. Notions of justice and fair play do permit such a result, at least not without a very clear indication of legislative intent to expand criminal sanctions in such an unlikely manner.

Moreover, it is also critical, just as an evidentiary matter, to maintain clear lines between distinct conspiracies. Here, where the evidence concerning petitioner’s alleged participation in the loosely organized Mason conspiracy was tenuous at best, there was a clear danger of unfair prejudice from the government’s inflammatory evidence concerning the highly organized and extremely dangerous Allen conspiracy. Indeed, the government actively exploited its improper Allen conspiracy evidence, arguing to the jury that if the Mason organization under prosecution was not stopped, it would soon become as well-organized and threatening as the Allen conspiracy. See Pet. C.A. Br. 23. This Court has warned that where, as here, a trial court fails to take any “precaution to keep separate conspiracies separate,” “[t]he dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place.” *Kotteakos v. United States*, 328 U.S. 750, 772, 774 (1946).

3. In light of the confusion among the lower courts and the unacceptable consequences of the court of appeals' holding, this Court should grant review to clarify this important and far-reaching area of federal criminal law. In recent years the number of conspiracy cases brought by federal prosecutors has rapidly increased. See Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 8 (1992) ("what we see today is nothing short of a miracle in terms of the number of conspiracy prosecutions. The charge can be found everywhere"). While conspiracy law always "is complicated and full of pitfalls for even an experienced trial judge" (*United States v. Lam Lek Chong*, 544 F.2d 58, 68 (2d Cir. 1976)), this case concerns an area that poses particular difficulties. Courts and commentators have noted the lack of much-needed clear principles to use in drawing lines between related conspiracies. See *id.* at 65 (discussing the "vexing problem of determining when . . . parallel groups of suppliers operating through a central figure can justifiably be found to be members of one single conspiracy, rather than of two or more separate conspiracies"); 5 Jack B. Weinstein, *et al.*, WEINSTEIN'S FEDERAL EVIDENCE § 801.33[5] (2d ed. 1999) (existence of multiple conspiracies is "a recurring problem in narcotics cases").

This deficiency in the state of the law is doubly problematic in light of the special risks of unfairness that conspiracy prosecutions pose. "Mass" conspiracy trials "call for use of every safeguard to individualize each defendant in relation to the mass." *Kotteakos*, 328 U.S. at 773. However, while the law of conspiracy has long been the "darling of the modern prosecutor's nursery" (*Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (L. Hand, J.)), this Court and the lower courts have continued to express grave concerns about its misuse and overuse as an indiscriminate "dragnet." See, *e.g.*,

Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943) (“charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes”); *United States v. Martin*, 920 F.2d 345, 351 (6th Cir. 1990) (Jones, J., dissenting) (“I have a growing fear that casting a conspiracy net will become a catch-all method charging anyone caught in the vicinity of illegal drugs”). “The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid.” *Krulewitch*, 336 U.S. at 446-448 (Jackson, J., concurring); see also, e.g., *United States v. Martinez de Ortiz*, 883 F.2d 515, 524-525 (7th Cir. 1989) (Easterbrook, J., concurring) (“‘Conspiracy’ is a net in which prosecutors catch many little fish. We should not go out of our way to tighten the mesh.”), vacated on other grounds, 897 F.2d 220 (1990); *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 922, 922 (1959) (noting “serious danger of unfairness to the defendant” in conspiracy trials); J. Turner, KENNY’S OUTLINES OF CRIMINAL LAW ¶ 452 (19th ed. 1966) (quoting Fitzgerald, J., in the Irish State Trials of 1867) (conspiracy is a crime “‘to be narrowly watched, to be jealously regarded, and never to be pressed beyond its true limits’”). These difficulties plaguing conspiracy law generally make review by this Court especially appropriate in this case.

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE FINDINGS REQUIRED BY THIS COURT’S DECISION IN *DUNNIGAN* BEFORE IMPOSING A SENTENCE ENHANCEMENT FOR OBSTRUCTION OF JUSTICE.

In *United States v. Dunnigan*, 507 U.S. 87, 94-95 (1993), this Court held that before a district court may enhance a criminal defendant’s sentence for obstruction of justice under

section 3C1.1 of the Sentencing Guidelines on the basis of untruthful testimony, the court “must review the evidence and make independent findings” of each of the elements of perjury, including (i) a false statement (ii) concerning a material matter, (iii) made willfully rather than as a result of confusion, mistake, or faulty memory. It is “preferable” for a district court “to address each element of the alleged perjury in a separate and clear finding,” although it may be “sufficient” for the district court to make a different finding “that encompasses all of the factual predicates for a finding of perjury.” *Id.* at 95.

According to the court below, this Court’s mandate in *Dunnigan* was satisfied by the district court’s bare finding that petitioner “lied under oath.” This case presents an important opportunity for this Court to resolve a state of serious disarray in the lower courts and to clarify whether such a finding is sufficient under *Dunnigan*.

1. Despite this Court’s attempt in *Dunnigan* to bring a measure of national uniformity to the application of the Sentencing Guidelines’ obstruction of justice provision, there remains a “variety of approaches taken by the circuits” in reviewing sentence enhancements under section 3C1.1. *United States v. Massey*, 48 F.3d 1560, 1574 n.13 (10th Cir. 1995); Kevin J. Kelley, Note, *To Enhance or Not to Enhance: A Guide to Uniformity in Applying Perjury Enhancements Under Section 3C1.1 of the United States Sentencing Guidelines*: *United States v. Dunnigan*, 27 CREIGHTON L. REV. 585, 599 (1994) (“One of the greatest difficulties facing trial courts in determining whether to apply [a section 3C1.1] enhancement is ascertaining what factual findings are necessary to sustain a perjury enhancement”). The lower courts are in urgent “need [of] clarification” regarding the meaning of the language of section 3C1.1 and for “assistance in its application.” *Massey*, 48 F.3d at 1574 n.13.

In reviewing district court decisions to enhance sentences under section 3C1.1, some courts of appeals have straightforwardly insisted upon a district court finding of all three of the “factual predicates for a finding of perjury” as contemplated by this Court in *Dunnigan*. See, e.g., *United States v. Fiorelli*, 133 F.3d 218, 221-225 (3d Cir. 1998) (summarizing Third Circuit’s stringent approach and remanding for more specific findings); *United States v. Buchannan*, 115 F.3d 445, 451 (7th Cir. 1997) (remanding for requisite findings); *United States v. Smith*, 62 F.3d 641, 646-647 (4th Cir. 1995) (remanding for resentencing where the district court “did not specifically find each of the three elements of perjury” and did not “make a single global finding that encompassed the three essential elements”). The Tenth Circuit has gone beyond the explicit requirements of *Dunnigan*, remanding for resentencing when district courts fail to “adequately identify the specific statements” they believe to be false. *United States v. Owens*, 70 F.3d 1118, 1132 (10th Cir. 1995); see also, e.g., *Massey*, 48 F.3d at 1573 (noting that, “although *Dunnigan* did not require sentencing judges specifically to identify the perjurious statement, it has long been a requirement in the Tenth Circuit that the perjurious statement be identified, at least in substance”).

In numerous other decisions, however, appellate panels have not required district courts to make factual findings with respect to all three elements of perjury. Thus, some courts have affirmed enhancements under section 3C1.1 even though the district court never found that the defendant’s statement was material. See, e.g., *United States v. Craig*, 178 F.3d 891, 901-902 (7th Cir. 1999); *United States v. Storm*, 36 F.3d 1289, 1295-1297 (5th Cir. 1994); *United States v. Matiz*, 14 F.3d 79, 83-84 (1st Cir. 1994); *United States v. Arias-Villanueva*, 998 F.2d 1491, 1512-1513 (9th Cir. 1993). Other courts have not required that district courts express any conclusion regarding the willfulness of the defendant’s statement. See, e.g., *United*

States v. Lewis, 115 F.3d 1531, 1537-1538 (11th Cir. 1997); *United States v. Woody*, 55 F.3d 1257, 1273 (7th Cir. 1995); *United States v. Castner*, 50 F.3d 1267, 1278-1279 (4th Cir. 1995). And still other decisions uphold obstruction of justice enhancements despite the absence of district court findings encompassing either materiality or willfulness. See, e.g., *United States v. Cook*, 76 F.3d 596, 605-606 (4th Cir. 1996) (district court found only that defendant “had ‘not testif[ied] truthfully at trial’” and that his testimony was “strained”); *United States v. Mustread*, 42 F.3d 1097, 1105-1106 (7th Cir. 1994) (district court found only that defendant “lied”).

In many of these decisions, while the court of appeals did not demand that the district court itself make the findings required by *Dunnigan*, there was at least a finding by the court of appeals (one not authorized by anything this Court said in *Dunnigan*) that the materiality and willfulness elements of perjury were in fact satisfied. See, e.g., *Matiz*, 14 F.3d at 84 (“we can make the determination of materiality on our own without remanding to the district court”). Other courts, however, have permitted a sentence enhancement under section 3C1.1 without even that much. Thus, for example, neither the district court nor the court of appeals in *United States v. Lang*, 81 F.3d 955 (10th Cir. 1996), even discussed the issue of materiality. See *id.* at 968-969 (concluding simply that defendants “knowingly lied on the witness stand during their trial”). Other decisions make no mention whatsoever of the element of willfulness. See, e.g., *Craig*, 178 F.3d at 901-902; *United States v. Oplinger*, 150 F.3d 1061, 1070-1071 (9th Cir. 1998); *United States v. Dillard*, 43 F.3d 299, 308-309 (7th Cir. 1994); *United States v. Laury*, 985 F.2d 1293, 1307-1309 (5th Cir. 1993). And finally, there are decisions—like the one below—in which neither the district court nor the court of appeals makes any mention of either materiality or willfulness. See, e.g., *United States v. Denetclaw*, 96 F.3d 454, 458 (10th Cir. 1996) (insisting that district court specifically identify

perjurious statements, but making no mention of the materiality or willfulness requirements); *United States v. Garin*, 103 F.3d 687, 689 (8th Cir. 1996) (enhancement for obstruction of justice not clearly erroneous where district court's finding that defendant "lied" was supported by the record); *United States v. Lowder*, 5 F.3d 467, 471-472 (10th Cir. 1993) (district court's determination "that portions of Defendant's testimony were untruthful" was "sufficient to establish specific instances of perjury and support an enhancement for obstruction of justice").

This widespread confusion among the lower courts regarding the proper application of such an important and widely used sentence enhancement and regarding the meaning of a decision of this Court is intolerable and warrants this Court's review.

2. By resting its affirmance of the enhancement of petitioner's sentence for obstruction of justice solely on a district court finding that petitioner "lied under oath," the court below completely ignored the analysis required by this Court's decision in *Dunnigan*, under which a district court must make findings of a false statement, willfulness, and materiality.

Neither the district court nor the court of appeals in this case "ma[de] findings" that could "support all the elements of a perjury violation." *Dunnigan*, 507 U.S. at 96-97. Although *Dunnigan* stated that it is only "preferable," not required, for district courts making this inquiry "to address each element of the alleged perjury in a separate and clear finding" (*id.* at 95), district courts are nonetheless obliged, at a minimum, to make a general finding that "encompasses all of the factual predicates for a finding of perjury." *Ibid.* Nothing even remotely resembling such an "independent" inquiry occurred in this case.

It is doubtful that the findings required by *Dunnigan* can properly be supplied in the first instance by a court of appeals.⁵ Here, however, there has never been a judicial finding by any court that petitioner’s allegedly false testimony at his suppression hearing was either material or willful, and *no court* has ever had occasion to consider petitioner’s argument that this testimony was immaterial as a matter of law. See note 4, *supra*.

This Court has long recognized the critical importance of carefully evaluating allegedly perjurious testimony in the sentencing enhancement context. See *United States v. Grayson*, 438 U.S. 41, 55 (1978) (district judge must “evaluate carefully a defendant’s testimony on the stand, to determine—with a consciousness of the frailty of human judgment—whether that testimony contained willful and material falsehoods”). But decisions like that of the court of appeals in this case render this Court’s pronouncements in cases like *Grayson* and *Dunnigan* a dead letter. The sentence enhancement for obstruction of justice erroneously imposed on petitioner, merely because the district court thought that he “lied,” aptly illustrates the confusion that permeates this area of the law and the loose treatment that lower courts have accorded this Court’s opinion in *Dunnigan*. The Sentencing Commission has not acted to resolve this unacceptable state of affairs, and this Court should grant the petition to bring much-needed clarity to this significant area of federal sentencing law.

⁵ The fundamental problem with this approach is that “[w]ith only a cold, paper record before it, an appellate court is severely hindered in evaluating whether a defendant perjured himself at trial.” *United States v. McDonald*, 935 F.2d 1212, 1219 (11th Cir. 1991). It is for good reason that the Sentencing Guidelines and this Court’s decision in *Dunnigan* contemplate that the required fact-finding should be entrusted to the trial court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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