



# Fibbing to Get a Lawyer: Circuits Split on Punishment

**Charles Doyle**

Senior Specialist in American Public Law

November 27, 2017

The lower federal appellate courts do not agree on whether a defendant's sentence may be increased because he lied in order to become eligible for a court-appointed attorney. The United States Court of Appeals for the Fifth Circuit (Fifth Circuit) in *United States v. Iverson* recently joined the [Ninth](#) and [Eleventh](#) Circuits when it upheld a sentencing enhancement recommended in the U.S. Sentencing Guidelines. The [Second](#) Circuit has taken a different view.

Iverson was [charged](#) with failure to register as a sex offender. In the financial statement that he filed with the Pretrial Services office, Iverson estimated the value of his motorcycle and other vehicles at \$5,500. After his conviction, Iverson told the probation officer that he had estimated the value of his vehicles with an eye to qualifying for appointed counsel. The probation officer's presentence report valued the vehicles at \$18,500 and noted that Iverson "admitted to intentionally lying to U.S. Pretrial Services regarding the value of his assets with intentions to make himself appear more destitute." The probation officer recommended a sentencing enhancement under U.S.S.G. § [3C1.1](#), the Sentencing Guidelines' obstruction of justice provision. The district court agreed and sentenced Iverson to prison for three years. Iverson appealed.

The Fifth Circuit noted that Section [3C1.1](#) applies when the defendant (1) "willfully obstruct[s]... the administration of justice with respect to investigation, prosecution, or sentencing ... and (2) the obstructive conduct relate[s] to (A) the defendant's offense ... or (B) a closely relate offense." The [court](#) held that Iverson's conduct qualified because it obstructed the administration of criminal justice and related to the prosecution of the charges against him. It [declared](#) that "when a false statement seeking appointed counsel is exposed there is a more direct effect on the administrative of justice than occurs when a defendant lies about using drugs." The court reasoned that the "appointment of counsel affects the entirety of the case – discovery, plea or trial, sentencing, and notice of appeal – and, among other things, discovery of the false statement might cause delay if new counsel needs to be engaged." It affirmed the

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

LSB10031

district court's application of the enhancement.

The [Second](#) Circuit came to different conclusion on similar facts. It cited the list of examples that the Sentencing Guidelines supply to explain when Section [3C1.1](#) should and should not be applied. One of the examples states that the Section should not apply to “lying to a probation or pre-trial services officer about defendant’s drug use while on supervised release...” This, the Second Circuit [opined](#) “reaffirm[s] a common sense definition of what constitutes obstruction of justice – conduct that willfully interferes with ... the disposition of the criminal charges against the defendant.” In the mind of the Second Circuit, the defendant’s “swearing to a false financial affidavit in an effort to obtain court-appointed counsel could not affect the outcome of the case, and was therefore immaterial in the context of obstruction of justice.”

Iverson’s false statement might have been prosecuted as [perjury](#) or his want of candor might have warranted a sentencing adjustment enhancement on [other grounds](#). Nevertheless, the fact remains that punishment recommended under Section 3C1.1 turns on where the defendant happens to be tried.

The Supreme Court not infrequently agrees to hear cases in order to [resolve splits](#) in the circuits. Moreover, Congress may take steps to clarify uncertainty in the law in the face of disagreement among the lower federal courts. In this case, however, it seems more likely that the U.S. Sentencing Commission may resolve the dispute as part of its [annual cycle](#) of sentencing guideline amendments that become effective in the absence of congressional action.

---