

1 distribute and possess with intent to distribute a controlled substance, in
2 violation of 21 U.S.C. § 846. Specifically, Pena challenges the district court’s
3 application of the sentencing enhancement for obstruction of justice, pursuant to
4 U.S.S.G. § 3C1.1. For the following reasons, we vacate the district court’s
5 judgment and remand for resentencing consistent with this opinion.

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16 PER CURIAM:

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18 Oneil Pena was convicted of one count of conspiracy to distribute and
19 possess with intent to distribute at least 500 grams of cocaine, in violation of 21
20 U.S.C. § 846. At sentencing, the district court applied a two-level enhancement to
21 Pena’s offense level for obstruction of justice, pursuant to U.S.S.G. § 3C1.1, based
22 on written statements made in support of his motion to suppress. On appeal,
23 Pena challenges the applicability of the enhancement on the ground that the
24 relevant statements do not demonstrate a willful intent to commit perjury. For

1 the following reasons, we vacate the district court's judgment and remand for
2 resentencing consistent with this opinion.

4 BACKGROUND

5 Prior to boarding a plane from the Dominican Republic to New York in
6 April 2012, Pena ingested 57 pellets containing a total of 534 grams of cocaine.
7 Upon his arrival at John F. Kennedy International Airport, customs officials acted
8 on a tip that he was smuggling drugs, stopped him and conducted a private
9 patdown, without result. Pena consented to an x-ray, which revealed the pellets.
10 After his arrest, he was interviewed by an agent of the Drug Enforcement
11 Administration ("DEA"), and confessed.

12 Pena was indicted on one count of conspiracy to distribute and possess
13 with intent to distribute at least 500 grams of cocaine, in violation of 21 U.S.C. §
14 846. On August 6, 2012, Pena moved to suppress the pellets as evidence on the
15 grounds that: the officers lacked reasonable suspicion; the x-ray consent was
16 made under duress; and the confession was the result of an improper two-step
17 interrogation under the rationale set forth in Missouri v. Seibert, 542 U.S. 600
18 (2004).

1 Pena’s written declaration in support of his motion contained the following
2 four statements relevant to this appeal: 1) prior to giving consent for the x-ray, he
3 requested a lawyer at least seven times; 2) the officers extracted the consent by
4 threatening physical force; 3) he confessed after the x-ray in response to
5 questioning by *customs officers* (as opposed to confessing *later*, after questioning
6 by *DEA agents*); and 4) he did not fully comprehend the import of a Miranda
7 waiver form.

8 The parties disputed these events at the hearings on Pena’s motion,
9 conducted in September and October 2012.

10 As to seeking counsel: Pena claimed that his (at least) seven requests for an
11 attorney were made after the patdown yielded no contraband and the customs
12 officers presented Pena with an x-ray consent form. Officer Sanchez testified that
13 Pena never requested an attorney; Officers Saleh and Dillon stated that Pena did
14 seek assistance of counsel. Officer Dillon could not recall how many times Pena
15 requested counsel, and Officer Saleh was never asked.

16 As to the threat of force: Officer Dillon testified that at least one of the
17 officers told Pena that if he did not sign the consent form, they had “other ways”
18 to “make this happen.” *Suppression Hr’g Tr., App. at 196-97.* Pena then signed
19 the consent form, and the x-ray revealed the pellets inside Pena’s digestive tract.

1 As to who posed questions, and when: After the x-ray, Pena was
2 handcuffed to a medical bed while he expelled the pellets in the presence of the
3 customs officers and medical personnel. The customs officers testified that they
4 never asked Pena anything more than whether he had ingested the narcotics;
5 they never questioned him about who gave him the drugs or to whom he was
6 delivering them. The officers cited a policy against asking such questions, but no
7 copy of the policy was produced (and the prosecutor believed no such policy
8 existed). Pena claimed that the customs officers' questions went beyond this
9 limited scope. Nevertheless, it is at least clear that Pena confessed to the customs
10 officers that he had swallowed the pellets.

11 As to the Miranda waiver: Later that day, Special Agent Martinez of the
12 DEA arrived to speak with Pena. He presented Pena with a Miranda waiver
13 form, which Pena signed. Pena then provided a detailed confession to Agent
14 Martinez.

15 The court denied Pena's suppression motion in October 2012. In her oral
16 ruling, Judge Jones found the government's evidence to be more credible. In two
17 respects, the court observed that its findings were "contrary" to the statements in
18 Pena's supporting declaration: Pena requested an attorney just once, and he was

1 not threatened with physical force. Suppression Hr'g Tr., App. at 340, 342. In
2 light of this ruling, Pena pled guilty in December 2012.

3 After Judge Jones retired from the bench, the case was transferred to Chief
4 Judge Preska for sentencing. Citing the supposedly false statements in Pena's
5 declaration, the government requested a two-level sentencing enhancement for
6 obstruction of justice, pursuant to U.S.S.G. § 3C1.1. Chief Judge Preska reviewed
7 the record of the suppression motion and noted the findings of falsity that Judge
8 Jones had made. The enhancement was applied, which raised the Guidelines
9 range to 37-46 months from 30-37 months. Pena was sentenced to 37 months'
10 imprisonment.

11 12 DISCUSSION

13 The Sentencing Guidelines provide for a two-level enhancement of a
14 defendant's offense level if:

15 (1) the defendant willfully obstructed or impeded, or attempted to obstruct
16 or impede, the administration of justice with respect to the investigation,
17 prosecution, or sentencing of the instant offense of conviction, and (2) the
18 obstructive conduct related to (A) the defendant's offense of conviction
19 and any relevant conduct; or (B) a closely related offense.

20
21 U.S.S.G. § 3C1.1. "[T]o base a § 3C1.1 enhancement . . . upon the giving of

1 perjured testimony, a sentencing court must find that the defendant 1) willfully
2 2) and materially 3) committed perjury, which is (a) the intentional (b) giving of
3 false testimony (c) as to a material matter.” United States v. Salim, 549 F.3d 67,
4 73 (2d Cir. 2008) (alteration in original) (quoting United States v. Zagari, 111 F.3d
5 307, 329 (2d Cir. 1997)). “In other words, ‘[b]efore imposing the adjustment, the
6 district court must find that the defendant consciously act[ed] with the purpose
7 of obstructing justice.” United States v. Agudelo, 414 F.3d 345, 349 (2d Cir. 2005)
8 (alteration in original) (quoting United States v. Lincecum, 220 F.3d 77, 80 (2d Cir.
9 2000) (per curiam) (quotation marks omitted)). The intent to obstruct must be
10 unambiguous. United States v. Kelly, 147 F.3d 172, 178 (2d Cir. 1998). The
11 enhancement may not be imposed if the false testimony may have been “a result
12 of confusion, mistake, or faulty memory.” Agudelo, 414 F.3d at 349 (quoting
13 United States v. Dunnigan, 507 U.S. 87, 94 (1993)).

14 “On review of a district court’s decision to enhance a defendant’s sentence
15 for obstruction of justice, we accept the court’s findings of facts unless they are
16 clearly erroneous.” Id. at 348. “We review *de novo* a ruling that the established
17 facts constitute obstruction of justice, giving ‘due deference to the district court’s
18 application of the guidelines to the facts.” Id. (quoting Lincecum, 220 F.3d at 80).

1 “[A] ruling that those facts constitute obstruction or attempted obstruction under
2 the Guidelines . . . is a matter of legal interpretation and is to be reviewed *de*
3 *novo*.” United States v. Brown, 321 F.3d 347, 351 (2d Cir. 2003)(quotation marks
4 omitted).

5

6

I

7 Pena averred that, when asked to sign the x-ray consent form, he requested
8 the assistance of an attorney at least seven times. The district court’s credibility-
9 based finding is that Pena requested an attorney just once. However, if such a
10 credibility determination, without more, automatically amounted to a finding of
11 willful intent to mislead, nearly every denial of a motion to suppress would
12 support an enhancement for obstruction of justice. The Agudelo Court, 414 F.3d
13 at 350, recognized the substantial risks stemming from using the obstruction-of-
14 justice enhancement in these circumstances.¹

¹ The risks inherent in extending Lincecum even to Agudelo’s vague affidavit are significant. First, any time a defendant like Agudelo submits an affidavit that is sufficient to justify a suppression hearing, he would automatically be subject to an enhancement for obstruction of justice if the suppression motion is denied. Such a rule effaces Dunnigan, where the Supreme Court held that an enhancement is appropriate only where the defendant acts “with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory.” Dunnigan, 507 U.S. at 94, 113 S. Ct. 1111. Extending Lincecum to these facts would also raise the troubling prospect that future defendants might either be deterred from pressing arguably meritorious Fourth

1 The circumstances here walk a line between Agudelo and Lincecum. The
2 defendant’s affidavit in Lincecum described in “careful detail” three requests he
3 made for an attorney. Agudelo, 414 F.3d at 349. The Court ruled that the
4 enhancement was available because “Lincecum’s three detailed statements
5 reeked of fabrication because he could not have simply misremembered so much
6 detail.” Id. at 350. In Agudelo, we distinguished Lincecum on the ground that
7 the defendant’s written statements “were far more vague” and “Agudelo may
8 well have simply misunderstood the agent’s comments or misremembered the
9 chronology of the conversation.” Id.

10 Pena’s case is more akin to Agudelo than to Lincecum. The verisimilitude
11 in the Lincecum statements (describing the when, where, and the response of the
12 police) supported an inference that the affiant must either be telling the truth or
13 committing perjury. See Lincecum, 220 F.3d at 79. Pena’s claim of (at least)
14 seven requests does not support such an inference. There are no details; multiple
15 requests could have been made to different persons; and he had plenty on his

Amendment claims or unfairly punished when they do. The commentary to § 3C1.1 highlights this possibility. It states, “[t]his provision is not intended to punish a defendant for the exercise of a constitutional right,” and cautions that “not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.” U.S.S.G. § 3C1.1 comment. (n.2).

414 F.3d at 350 (alteration in original).

1 mind other than counting his requests for counsel. Without details, there is
2 nothing here that could be categorically contradicted by the police. Indeed, two
3 of the officers at the suppression hearing were never asked or did not recall how
4 many times Pena requested an attorney, and a third officer's testimony was
5 contradicted by the other two. We conclude the district court committed clear
6 error in determining that Pena willfully made false statements regarding his
7 request for an attorney.

8 9 II

10 Pena averred that the officers threatened physical force to procure his
11 consent to the x-ray. The finding to the contrary is not clear error. On the other
12 hand, the record is just as clear that Pena could have interpreted the
13 circumstances in that way. One of the officers told him that if he did not consent
14 to the X-ray, there were other ways to "make this happen." Pena, who was
15 isolated, surrounded by customs officers, and without counsel, could reasonably
16 put a sinister and threatening cast on this statement. Because it is possible that
17 Pena "simply misunderstood the agent's comments," Agudelo, 414 F.3d at 350, it
18 was clear error to find Pena committed perjury with regard to this statement.

1 **III**

2 Pena averred that, for several hours prior to a Mirandized interrogation
3 with a DEA agent, he was subjected to off-and-on questioning by customs
4 officers; but the customs officers all denied asking him any questions regarding
5 the drugs. The district court found that “at most the defendant may have made
6 the statement to medical clinic personnel that he had swallowed 57 pellets.”
7 Suppression Hr’g Tr., App. at 343.

8 Under the undisputed circumstances, Pena may have reasonably believed
9 that his statement was true. Pena was handcuffed to the medical center’s bed
10 and the customs officers frequently came in and out of the room. It may well be,
11 as the district court found, that Pena was responding to questions put by the
12 medical personnel; at the same time, however, Pena had sufficient reason to
13 believe they were connected in some capacity to the customs officers who were
14 also present. Therefore, Pena’s statement does not support the finding of willful
15 intent to mislead.

1 IV

2 Whether or not Pena understood the Miranda waiver form (he averred he
3 did not) was immaterial to the motion to suppress. Pena’s motion was never
4 based on a theory that he was coerced into signing the Miranda form, or that his
5 waiver was involuntary. His motion argued that law enforcement conducted an
6 improper two-step interrogation, a technique in which the warnings are given in
7 the middle of an interrogation after procuring an unwarned confession. See
8 Missouri v. Seibert, 542 U.S. 600, 611-17 (2004). Under that theory, Pena accepted
9 that he was properly given a Miranda warning. Whether he understood the
10 waiver form is, therefore, immaterial. Because the obstruction-of-justice
11 enhancement only applies to material statements, see Salim, 549 F.3d at 73, the
12 district court erred in applying the enhancement based on this statement.

13
14 CONCLUSION

15 For the foregoing reasons, we vacate the judgment of the district court and
16 remand for resentencing consistent with this opinion. While we hold that the
17 four statements discussed above do not show a willful intent to provide false
18 testimony, this opinion does not foreclose the district court from considering
19 whether other statements warrant an enhancement for obstruction of justice.