

1 UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF NEW HAMPSHIRE

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STUART and CATHIE TULCHINSKY \*  
vs. \* C. 96-99-B  
\* April 26, 1996  
UNITED STATES OF AMERICA \*  
\* \* \* \* \*

TESTIMONY OF WILLIAM A. COHAN  
BEFORE THE HONORABLE PAUL A. BARBADORO

Appearances:

For the Plaintiffs: Marcia Shein, Esq.  
Pam Green, Esq.

For the Government: Seth Uram, Esq.

Court Reporter: Diane Wildfeuer, CSR-RDR-FCRR  
Official Court Reporter  
U.S. District Court  
55 Pleasant Street  
Concord, NH 03301

COPY

1 THE COURT: Come on up, Mr. Cohan. How  
2 are you?

3 THE WITNESS: Very well, thank you, your  
4 Honor.

5 WILLIAM A. COHAN

6 having been duly sworn, testified as follows:

7 THE CLERK: Please be seated. And please  
8 state your full name and spell your last name for  
9 the court record.

10 THE WITNESS: My name is William Allan  
11 Cohan, C O H A N.

12 MR. URAM: Your Honor, if I may, just to  
13 save some time, I'd like to lead Mr. Cohan through a  
14 brief recitation of his professional credentials.  
15 Is that all right?

16 THE COURT: That's fine. Although I have  
17 to say, Mr. Cohan, I, as I said to counsel in  
18 chambers, find it somewhat ironic that the  
19 government lawyer is going to be extolling your  
20 virtues as an accomplished trial lawyer given the  
21 position the government has taken in the past with  
22 respect to you.

23 THE WITNESS: They just got me excluded  
24 from representing somebody in Las Vegas on the  
25 grounds I'm not ethically fit. So they're

1 congratulated on their flexibility. They're very  
2 flexible.

3 THE COURT: All right. Go ahead.

4 MR. URAM: Well, my hope is Mr. Cohan will  
5 extol his virtues and I will remain silent.

6 DIRECT EXAMINATION

7 BY MR. URAM:

8 Q. Mr. Cohan, are you currently a member in  
9 good standing of the state bars of Colorado and  
10 California?

11 A. Well, there's an issue whether I'm really  
12 in good standing or not. I claim I'm in good  
13 standing, but people in the Department of Justice  
14 don't think so because of the sanction that was  
15 imposed upon me in United States District Court in  
16 the Western District of Washington.

17 Q. Okay.

18 A. But I'm still permitted to practice.

19 Q. All right.

20 A. So pretty good standing I guess.

21 Q. Are you, in your opinion, a member in good  
22 standing in the United States District Courts of  
23 Michigan and the Southern, Central, Northern and  
24 Eastern Districts of California?

25 A. That would be the Western District of

1 Michigan.

2 Q. Okay.

3 A. And yes, all the federal courts in  
4 California.

5 Q. All right. Are you also admitted to  
6 practice before the United States Supreme Court?

7 A. Yes, sir, I am.

8 Q. And the United States Tax Court?

9 A. Yes, sir.

10 Q. And most of the U.S. Circuit Courts of  
11 Appeal?

12 A. All of them except the Second and the  
13 Federal.

14 Q. Okay. And have you been admitted pro hac  
15 vice to handle cases in about 33 federal districts?

16 A. That sounds about right. Notwithstanding  
17 the Department of Justice's efforts to prevent that.

18 Q. Understood. Is it fair to say that for  
19 the last 20 years most of your practice has been  
20 devoted to defending federal criminal tax cases?

21 A. Yes, it would be fair to say that.

22 Q. Is it fair to say that many of the  
23 defendants in those cases are what the government  
24 calls tax protesters?

25 A. It would be fair to say that the

1 government says that, yes.

2 Q. Okay. And is it fair to say that you have  
3 achieved dismissals or acquittals of all or  
4 substantially all charges in 34 of 64 cases which  
5 you have handled?

6 A. Yes, sir.

7 Q. Are you aware that the government has --

8 THE COURT: You've won half of your  
9 criminal tax cases?

10 THE WITNESS: More than half. And I'm  
11 about to add a few more.

12 Q. BY MR. URAM: Are you aware that the  
13 government has an approximately 95 percent  
14 conviction rate countrywide in tax cases?

15 A. I'm aware that they claim that.

16 Q. Okay. So you are well above the average  
17 that they claim; correct?

18 A. Yes, sir.

19 Q. Okay. Approximately how many appeals have  
20 you filed and argued on behalf of criminal tax  
21 defendants who have been convicted?

22 A. I haven't counted them, but certainly more  
23 than a dozen.

24 Q. About how many times have you obtained a  
25 reversal on appeal in a criminal tax case?

1 A. Several.

2 Q. How many does "several" mean to you?

3 A. Reversal on appeal in criminal tax cases.

4 Okay. For example, in the Engstroms, two people --

5 MS. SHEIN: Your Honor, we would stipulate  
6 that he is definitely qualified to say that he has  
7 had reversals on appeals. I don't think we have to  
8 go through each individual case, your Honor.

9 MR. URAM: I'll move on then.

10 THE COURT: I don't think -- at least no  
11 one is alleging that Mr. Cohan or Mr. Kenna are  
12 unqualified to defend people charged with the crimes  
13 Mr. Tulchinsky and Ms. Schneider were charged with.  
14 I understand the defendants' contention to be more  
15 narrow; that is, with respect to their understanding  
16 of their right to appeal did defendants' counsel  
17 render ineffective assistance by either failing to  
18 carry out their instructions to appeal or by giving  
19 them ineffective advice with respect to their right  
20 to appeal. That's really all that we're talking  
21 about here, isn't it, counsel?

22 MS. SHEIN: Yes, your Honor.

23 THE COURT: All right. So Mr. Cohan's  
24 qualifications I guess maybe have marginal relevance  
25 here, but it's really not what we're concerned with.

1           MR. URAM: Understood, although I think it  
2 is part of a package for the Court to consider when  
3 considering whether he is able to understand the  
4 issues in this case, whether he is able to  
5 effectively communicate them to the client, and  
6 whether his decisions fall within that minimal  
7 reasonable standard that we have to argue about at  
8 the conclusion of the testimony.

9           THE COURT: All right. Well, I'll say  
10 this. I'm enlightened now as to one of the reasons  
11 in the beginning -- I didn't realize that he got  
12 acquittals in half of his cases, and I can now  
13 understand why you pushed that motion so hard at the  
14 beginning of the trial.

15           MR. URAM: Well, I'll tell you that is not  
16 why we brought the information about Engstrom to the  
17 Court's attention.

18           THE COURT: And I'm not accusing you of  
19 bad faith. I want to be clear that.

20           MR. URAM: I understand.

21           THE COURT: But if you thought he was  
22 going to do a lousy job you might not have pushed  
23 the issue so hard, but the fact that he's beaten you  
24 in a number of cases gives force to an otherwise  
25 what you considered meritorious position.

1 Q. BY MR. URAM: All right. Mr. Cohan, when  
2 did the Tulchinskys first retain you?

3 A. I can't give you the exact date, but I  
4 remember the first time that I met with them was in  
5 September of 1990, and that was after telephone  
6 conversations. That would have been in Palm  
7 Springs, California.

8 Q. Is it fair to say that they had been  
9 contacted in the fall of 1989 by a special agent of  
10 the Internal Revenue Service?

11 A. I don't know whether that's true or not.  
12 It probably is true, but I don't know.

13 Q. The defendants in the case were indicted  
14 in November of 1994. When is the first time,  
15 whether it was before or after the indictment, that  
16 you did discuss the criminal appeals process with  
17 the defendants?

18 A. I cannot identify a specific date when I  
19 first discussed the criminal appeals process, but I  
20 know that I first discussed with them the criminal  
21 appeals process in the context of discussing the  
22 filing of pretrial motions.

23 Q. Well, what did you say to them about the  
24 appeals process in the context of pretrial motions?

25 A. That one of the reasons why pretrial

1 motions are filed is to generate issues on appeal,  
2 in addition to obtaining certain kinds of benefits  
3 prior to trial.

4 Q. Was it your practice to provide the  
5 defendants with copies of all the pleadings in this  
6 case?

7 A. Yes.

8 Q. Does that include the pretrial motions  
9 that you filed?

10 A. Yes.

11 Q. When you had your discussions about the  
12 pretrial motions were the -- how would you  
13 characterize the defendants in their relationship to  
14 you? And by that I mean, did they passively accept  
15 things you said or were they questioning and probing  
16 of you?

17 A. If I have to choose between those two, I  
18 would choose the latter. We discussed things.

19 Q. Now, when do you recall, after pretrial  
20 motions, was the next occasion you had to discuss  
21 any criminal appeals issue with the defendants?

22 A. During the course of the trial in  
23 connection with the rulings by this Court.

24 Q. Okay. Before that, though, when was the  
25 first time you had any discussions with the

1 defendants about the Federal Sentencing Guidelines?

2 A. The first time that I recall discussing  
3 the Sentencing Guidelines was when Stuart and Cathie  
4 and I met with Nancy Silverman and Jim Chapman at  
5 the Department of Justice in Washington, D.C.

6 Q. What was the purpose of that meeting?

7 A. To try to settle the case.

8 Q. And about when did that take place?

9 A. Without looking at some documents, I  
10 couldn't tell you.

11 Q. Was it before the indictment or after the  
12 indictment?

13 A. Before the indictment.

14 Q. And what did you discuss about the  
15 Sentencing Guidelines with respect to the meeting  
16 you had in Washington?

17 A. Well, we talked about 2T4.1, which is the  
18 table that quantifies the levels based on the amount  
19 of tax loss, and we talked about the obstruction of  
20 justice enhancement that the government insisted  
21 should be imposed on Stuart based on the Department  
22 of Justice's misguided position that somehow Stuart  
23 had induced Lynn Beauregard Timmel to do something  
24 or say something that was false.

25 Q. Now, after the defendants were indicted in

11  
1 November of '94, when's the next time you had a  
2 discussion with them about the appeals process or  
3 appeals issues?

4 A. Well, I already answered that. In the  
5 context of filing pretrial motions. Pretrial  
6 motions hearing.

7 Q. Okay.

8 A. But we talked about it before the hearing  
9 that we had, the pretrial motions, because we talked  
10 about all the pleadings.

11 Q. All right. Did you at that time discuss  
12 how appeals actually were started?

13 A. I don't recall.

14 Q. Okay. How about after the pretrial  
15 motions were resolved? When's the next time you  
16 discussed appeals issues or the appeals process with  
17 the defendants?

18 A. The next time I discussed appeals issues  
19 or the appeals process after pretrial motions were  
20 resolved? Is that your question?

21 Q. Yes.

22 A. During the course of the trial and  
23 preparing for trial.

24 Q. Well, when you were preparing for trial  
25 what discussions did you have with the defendants

1 about appeals issues?

2 A. In such a general way I can't -- I don't  
3 know. I can't recall what discussions I had without  
4 being more specific about it. What.

5 Q. When you were preparing for trial, did you  
6 discuss with the defendants the procedure for  
7 appeals should they be convicted?

8 A. I have no recollection of discussing  
9 appellate procedure in preparation for trial, no.

10 Q. All right. After the trial began did you  
11 have discussions with the defendants about appeals  
12 issues in general?

13 A. Yes.

14 Q. What issues did you discuss with the  
15 defendants?

16 A. Well, every evidentiary ruling that the  
17 Court made. We talked about jury instructions. We  
18 may well have talked about jury instructions and  
19 appeals issues prior to trial.

20 Let me say this. I'm sure we discussed  
21 the jury instructions prior to trial, because they  
22 were submitted prior to trial. They were provided  
23 to Stuart and Cathie prior to trial and we discussed  
24 them prior to trial. We also discussed -- Stuart  
25 and Cathie and I discussed the instructions at or

1 about the time that we had our instructions  
2 conference.

3 Q. And you said you also discussed with them  
4 during the course of the trial evidentiary issues,  
5 as they might be appellate issues. What sorts of  
6 issues did you discuss with them during the course  
7 of the trial?

8 A. The rulings that the Court was making in  
9 connection with - this is just by way of example -  
10 evidence that the government sought to introduce to  
11 which I objected. And the judge's rulings on those  
12 objections.

13 Q. Well, what did you say to them about  
14 that? About those rulings?

15 A. Well, we discussed that those rulings were  
16 favorable in excluding evidence that you wanted to  
17 introduce that was prejudicial, but of course that  
18 that would negatively affect the appeals process.

19 Q. Did you explain to them why the judge  
20 ruling in their favor at trial would negatively  
21 affect the appeals process?

22 A. Yes.

23 Q. What did you tell them about that?

24 A. That appeals are about correcting errors  
25 of law. Mistakes that the Court makes. And to the

1 degree that the Court excludes evidence, you can't  
2 raise its admission as an appeal issue.

3 Q. And when you explained that to the  
4 defendants how did they respond?

5 A. I don't specifically recall their  
6 responses.

7 Q. Did you have any doubt that they  
8 understood what you were explaining when you  
9 explained that?

10 A. No.

11 Q. What was your perception generally of how  
12 Judge Barbadoro cut his rulings on close evidentiary  
13 issues?

14 A. As I told you, I recall specifically the  
15 remark that Judge Barbadoro made that he was calling  
16 the close ones against the government because he  
17 held the government to a higher standard. And I  
18 felt that was an accurate statement.

19 Q. All right. And did you relay the judge's  
20 statements to us to the defendants?

21 A. I'm sure I did.

22 Q. And how did they respond?

23 A. I don't recall their responses  
24 specifically. I reviewed the transcript of the  
25 sentencing hearing on the plane flying out here, and

1 I remember that I read just outside their statements  
2 in open court that they felt that they'd been given  
3 a very fair trial.

4 Q. All right. When you relayed the judge's  
5 statements to the defendants, did you explain to  
6 them how that -- how his statements and his rulings  
7 would affect their appellate prospects?

8 A. Well, I didn't relate that his statements  
9 would affect the appellate process and their  
10 prospects there, but his rulings I discussed with  
11 them, yes.

12 Q. What did you say?

13 A. At what point in time?

14 Q. Well, with respect to the statement.  
15 First of all, did you tell the defendants that it  
16 was your perception that the judge was in fact  
17 ruling in favor of them on close issues?

18 A. Yes, I did.

19 Q. And did you tell them how that would  
20 affect their appellate prospects?

21 A. Yes, I did.

22 Q. What did you tell them about it?

23 A. That it would negatively affect their  
24 appellate prospects, although I'm sure I didn't use  
25 those words.

1 Q. And how did they respond to that?

2 A. I don't recall what their response was to  
3 that.

4 Q. Now, after the verdict on April 14th of  
5 1995 did you have discussions with the defendants  
6 about possible appellate issues in the trial?

7 A. Yes.

8 Q. What did you tell the defendants about  
9 possible appellate issues in the trial?

10 A. I told them that I didn't think their  
11 prospects were very good.

12 Q. Why did you tell them that?

13 A. Because I didn't believe their prospects  
14 were very good.

15 Q. And how did the defendants respond?

16 A. I don't specifically recall what response  
17 I got to that statement.

18 Q. All right. Now, you're aware that the  
19 Probation Department issued its initial presentence  
20 report on June 9th of '95; correct?

21 A. You told me that.

22 Q. And as to each of the defendants in a  
23 separate report the Probation Department recommended  
24 an enhancement for obstruction of justice; correct?

25 A. Yes.

1 Q. Part of that recommendation was based on  
2 perjury at trial by each defendant; right?

3 A. Yes.

4 Q. Did you discuss the presentence  
5 investigation report with the defendants?

6 A. Yes.

7 Q. Where were you and where were they when  
8 you had these discussions?

9 A. I believe that these discussions were, if  
10 not all -- they were all by telephone except when I  
11 arrived before sentencing.

12 Q. Can you describe the level of detail of  
13 these discussions as you went through the  
14 presentence investigation report?

15 A. Yes, I can.

16 Q. What was it?

17 A. Well, we sent, my office sent copies of  
18 all pleadings. I said I'm including in this the  
19 presentence investigative report that was initially  
20 done by Ms. Serina. And I went over virtually line  
21 by line with both Stuart and Cathie, but more with  
22 Cathie than Stuart, the contents of the reports and  
23 the objections that they had to certain aspects of  
24 those reports.

25 Q. And did both of them object to the

1 obstruction of justice enhancement?

2 A. Absolutely.

3 Q. In preparation for filing your objections  
4 to the presentence investigation report did you  
5 conduct research into the law under the Sentencing  
6 Guidelines for obstruction of justice for perjury?

7 A. Yes.

8 Q. And did you incorporate that research in  
9 the obstructions you filed on June 20th?

10 A. Yes. I should say that I haven't  
11 refreshed my recollection as to any of these events  
12 other than to have read that sentencing transcript,  
13 so I can't recall all the details, nor have I even  
14 looked at the presentence reports or the objections  
15 to it.

16 Q. I understand. Well, perhaps it will help  
17 you remember if I show you a copy of the objections  
18 to the presentence report which you did file.

19 A. Well, I remember it was very extensive  
20 objections that we had.

21 Q. Right. With respect to this obstruction  
22 of justice enhancement your objection begins on the  
23 bottom of page 6; correct?

24 A. That's what it says.

25 Q. All right. Now, at the bottom of page 7

1 you wrote that if the evidence at trial supported a  
2 finding that defendants gave false testimony at  
3 trial and/or that Stuart instructed an employee to  
4 lie to the IRS, the adjustment for obstruction of  
5 justice might well be appropriate. Correct?

6 A. That's what I wrote here, but I think that  
7 that was really a misstatement.

8 Q. Now, was that your understanding of the  
9 law based on your research?

10 A. Well, in reading this now the problem that  
11 I have with this language, which is mine, is I think  
12 it should have said, instead of if the evidence at  
13 trial supported a finding that the defendants gave  
14 false testimony at trial, it should have been that  
15 -- limited to knowingly and willfully gave false  
16 testimony at trial.

17 Q. Right.

18 THE COURT: That's certainly what you  
19 argued during the sentencing hearing. That was the  
20 key point of your argument as I recall it now; was  
21 that the defendants may have given false testimony,  
22 but did not do so willfully at the time that they  
23 made the statement, or that's the way you could  
24 reconcile what the jury did with me not giving an  
25 obstruction enhancement based on their testimony.

1 THE WITNESS: Yes. I'm not saying that I  
2 believe the defendants gave any false testimony, but  
3 even if they did, it wouldn't support the  
4 enhancement unless it was done willfully.

5 Q. BY MR. URAM: Right. Now, did you discuss  
6 this aspect of the law with the defendants?

7 A. I don't know whether I did or not.

8 Q. Well, did you give them a copy of your  
9 objections?

10 A. Yes.

11 Q. Did you go through it with them before you  
12 filed it?

13 A. Yes. Actually, it was prepared in draft  
14 form and I worked with the defendants in preparing  
15 our objections to each presentence investigative  
16 report. This is Cathie's. There were two separate  
17 ones; similar, if not identical, in many respects.

18 Q. And is it correct then that you gave each  
19 defendant a draft and you were working off the  
20 draft?

21 A. I believe that's correct.

22 Q. Okay. So if Mr. Tulchinsky testified  
23 earlier that he never received a draft and didn't  
24 really participate in this, that would be wrong;  
25 right?

1           A.    I'm not willing to agree with you on  
2 that.   I'm not sure.

3           Q.    Okay.

4           A.    What I mean by that is --

5           Q.    Well, you weren't here to hear his  
6 testimony --

7           A.    Assuming that's what he testified to, I  
8 specifically recall discussing some of these details  
9 with Cathie, but I don't have a particular  
10 recollection of discussing the presentence report  
11 with Stuart as I sit here.

12          Q.    Now, before the sentencing hearing the  
13 government filed a sentencing memorandum; correct?

14          A.    Yes, it did.   The government did.   I  
15 remember something about it being untimely.

16          Q.    Right.   I'm just handing you up a copy of  
17 that sentencing memorandum and asking you to turn to  
18 page 4, please.

19                MS. SHEIN:   Your Honor, I'm going to  
20 object to the relevancy of this.   We know about that  
21 memorandum.   We also know he was able to get it  
22 tossed out based on being untimely.   All of this is  
23 part of the record.

24                THE COURT:   What are you doing, Mr. Uram?

25                MR. URAM:   Well, this relates to the

1 research in our briefing of the obstruction of  
2 justice enhancement. The only aspect of the  
3 sentencing memorandum that the defendant challenged  
4 related to additional tax laws.

5 THE COURT: So what is -- I guess what I'm  
6 getting at here, the issue is what did he say to  
7 them about an appeal; what did they say to him. It  
8 shouldn't take ten minutes. And so I'm going to  
9 sustain the objection to this line of inquiry on the  
10 grounds of relevance.

11 MR. URAM: Okay.

12 THE COURT: Why don't you move on.

13 MR. URAM: Sure.

14 Q. BY MR. URAM: Mr. Cohan, the sentencing  
15 hearing took place on July 10th, 1995; correct?

16 A. That's what it says in the transcript.

17 Q. Did you meet with the defendants  
18 immediately before the hearing?

19 A. And the night before.

20 Q. What did you discuss with them when you  
21 met with them before the hearing?

22 A. Everything.

23 Q. What do you mean when you say everything?

24 A. Well, everything that we were going to be  
25 dealing with the following day the best of my

1 ability.

2 Q. Did you specifically discuss the  
3 possibility the judge would impose an obstruction of  
4 justice enhancement?

5 A. Yes.

6 Q. Did you discuss the arguments you were  
7 going to make objecting to that?

8 A. Yes.

9 Q. And did you discuss the prospects of your  
10 success in convincing the judge not to do it?

11 A. Probably, but I couldn't swear that I  
12 discussed with them the likelihood of persuading the  
13 judge on that. I don't specifically recall it.

14 Q. Okay. Now, did the defendants make any  
15 statements to you before the hearing about their  
16 intention to appeal? To file any Notice of Appeal  
17 about the trial?

18 A. Yes.

19 Q. What did they say?

20 A. They did not intend to appeal.

21 Q. Did they explain why not?

22 A. Well, we had a discussion about it.

23 Q. And what did they say?

24 A. Based on lots of discussions that were had  
25 about the likelihood of success, or more

1 appropriately stated the lack of likelihood of  
2 success, they didn't wish to pursue an appeal.

3 Q. Well, what is it that you told them about  
4 the likelihood of success of an appeal?

5 A. I can't specifically recall all of the  
6 details, but we went through issues and what issues  
7 were likely to at least attract some interest from  
8 an appeals court. And I told them that I didn't  
9 think there was any realistic likelihood that there  
10 would be a reversal on appeal.

11 Q. All right. Did the defendants make any  
12 statement to you about not wanting to pay the money  
13 for an appeal?

14 A. Well, they didn't want to waste money on  
15 an appeal, but I don't think that money was the  
16 primary issue.

17 Q. Okay. Now, at the sentencing hearing you  
18 made a lengthy argument against the Court imposing  
19 an obstruction of justice enhancement for perjury;  
20 right?

21 A. Well, if you want to say it's a lengthy  
22 argument, I guess you could characterize it as  
23 that. It was the best I could do.

24 Q. But you did not prevail on the Court, and  
25 Judge Barbadoro informed you he intended to impose

1 that enhancement; correct?

2 A. He not only informed me, he did it.

3 Q. Right. Now, on page 80, 81 and 82 of the  
4 sentencing transcript the judge goes through a  
5 detailed description on the record of his bases for  
6 finding that it is appropriate, including that both  
7 defendants gave willfully false testimony. The  
8 judge identified the false material matters, he  
9 explained why they were false, he identified why he  
10 believed it was willful, and then he asked me if he  
11 had put sufficient facts on the record under the  
12 Supreme Court case, which he did not mention by name  
13 but which is Donovan. Do you recall that?

14 A. Well, I read the transcript. I recall  
15 from reading it yesterday.

16 Q. And so after the judge made those findings  
17 on the record, according to the Donovan case what  
18 was your belief about the likelihood of successful  
19 appeal on that issue?

20 A. That there was no likelihood of success;  
21 and furthermore, that he'd sentenced them to 18  
22 months, which was at the bottom of the 18 to 24  
23 month range. And even in the extremely unlikely  
24 event that we prevailed, it wouldn't help.

25 Q. Did you explain that to the defendants?

1           A.    Yes, I did.

2           Q.    When during that day did you explain that  
3 to the defendants?

4           A.    I don't know.

5           Q.    But you have a specific recollection of  
6 making that explanation to the defendants.

7           A.    Yes.

8           THE COURT:   Excuse me a second, Mr.  
9 Cohan.   Just to clarify something.   You were very  
10 clear in stating on the record that you thought my  
11 decision was wrong; isn't that right?

12           THE WITNESS:   Yes, your Honor, I was, with  
13 all due respect.

14           THE COURT:   And you still think my  
15 decision was wrong; right?

16           THE WITNESS:   What you said is correct,  
17 your Honor.   I do believe it was wrong.

18           THE COURT:   But simply because the  
19 decision was wrong does not mean that the defendants  
20 would have any likelihood of success on appeal.  
21 Would you agree with that?

22           THE WITNESS:   Most definitely.

23           THE COURT:   And that's because if my  
24 decision was wrong, it was wrong fact-finding that I  
25 made; isn't that right?

1 THE WITNESS: Yes.

2 THE COURT: And appellate court cannot  
3 overturn wrong fact-finding unless it is so clearly  
4 erroneous that a rational fact-finder couldn't make  
5 that fact-finding. Wouldn't you agree?

6 THE WITNESS: That depends.

7 THE COURT: Isn't that the ordinary  
8 standard by which fact-finding is reviewed when a  
9 judge makes fact-finding in connection with  
10 sentencing?

11 THE WITNESS: I don't know. I'm not sure  
12 what the standard of review is in that particular  
13 situation.

14 THE COURT: Well, what I want you to do --

15 THE WITNESS: I remember I looked at it at  
16 the time. I was convinced there was no way you were  
17 going to get reversed.

18 THE COURT: So Mr. Tulchinsky and Ms.  
19 Schneider understand your thinking, could you just  
20 explain to them -- to us now how is it that a judge  
21 could make a wrong decision and yet there would be  
22 no reasonable likelihood that that wrong decision  
23 would be corrected on appeal?

24 MR. URAM: Your Honor, before Mr. Cohan  
25 answers I'd just like to remind the Court that your

1 legal standard requires you not to engage in any  
2 hindsight, but you must take the circumstances as  
3 they existed at the time of the alleged ineffective  
4 assistance. So in that sense Mr. Cohan's  
5 explanation now, when he has not researched the  
6 issue, coming in cold, really has no bearing on the  
7 decision you have to make.

8 THE COURT: I'm doing this for reasons  
9 unrelated to the record for appeal. I just -- a lay  
10 person might not understand how it could be that  
11 someone could go into a sentencing hearing and say  
12 you're wrong, judge; I'm outraged by that decision,  
13 and yet come out of the sentencing hearing and say  
14 we don't have a shot in heck here of winning on  
15 appeal; it's hopeless; and how could somebody make  
16 those two kinds of statements.

17 Well, a lawyer knows why somebody could  
18 make those two kinds of statements, but a lay person  
19 may not, and I just would like -- and if you would  
20 rather do it then, Mr. Cohan, or you want me to do  
21 it, I'm happy to do it. It's just that I want the  
22 Tulchinskys to understand it's not inconsistent for  
23 a lawyer to say to a judge at a hearing you're  
24 wrong; I'm outraged; this is terrible, and then to  
25 turn around after the hearing and say it's hopeless;

1 he's done it now. And those two things are not  
2 inconsistent in any way. You know that, Mr. Cohan  
3 knows that, Ms. Shein knows that and any lawyer  
4 knows that, but the Tulchinskys may not. And I just  
5 want somebody to explain that to them.

6 Have you explained that to them, Ms.  
7 Shein?

8 MS. SHEIN: Your Honor, we have, but in  
9 that regard at the time this occurred that was not  
10 the explanation they were given that they could  
11 understand there was no inconsistent difference.  
12 You actually stated correctly that they understood  
13 why was this so wrong, but yet we can't appeal.  
14 That's really what they understood at that time.

15 THE COURT: All right. You don't have to  
16 answer this question, Mr. Cohan.

17 I just want to explain to you in the event  
18 that you don't understand this, Mr. Tulchinsky or  
19 Ms. Schneider, when I found you committed perjury  
20 and therefore gave you an obstruction enhancement. I  
21 applied a legal standard, which I don't think your  
22 current counsel is disputing was the correct legal  
23 standard. And using that legal standard I found  
24 certain facts.

25 And when a trial judge finds facts an

1 appellate court is not free to simply say we don't  
2 like the way the trial judge found those facts; we  
3 think he's wrong; therefore, we're going to reverse  
4 the judge's decision. The Court of Appeals is a  
5 court of law. They determine whether I made legally  
6 correct or legally incorrect decisions. There are  
7 rare instances where when I make a finding of fact  
8 they can overturn that, but only if my finding of  
9 fact is based on an incorrect legal standard or if  
10 it is so outrageously wrong that no person in my  
11 position could reasonably make that finding of  
12 fact.

13 And so there is nothing necessarily  
14 inconsistent about your lawyer passionately arguing  
15 to me that I'm wrong and then turning around right  
16 after the hearing and saying there's no hope. I  
17 just wanted you to understand from a lawyer's  
18 perspective how somebody could do that. But go  
19 ahead, Mr. Uram.

20 Q. BY MR. URAM: Well, Mr. Cohan, before the  
21 sentencing hearing did you explain to the  
22 Tulchinskys that you would on some issues be taking  
23 a very strong position before the judge, but if he  
24 denied your request he might still be right and  
25 there would be no basis for appeal? Did you make

1 that explanation to them?

2 A. Not in the words that you've just used,  
3 no.

4 Q. In any words.

5 A. Well, I can't recall the exact details of  
6 what I told the Tulchinskys about what the judge  
7 might do at the sentencing hearing.

8 Q. How about what you might do, though.

9 A. I definitely told them what I intended to  
10 do.

11 Q. And did you tell them that even if the  
12 judge ruled against you there may still not be an  
13 issue to appeal?

14 A. I'm sure I told them that.

15 Q. And in fact on page 124 at the bottom of  
16 the sentencing transcript with respect to this  
17 obstruction of justice didn't you tell the judge: I  
18 don't believe you are wrong within the terms that  
19 the appeals court reviews this, or the Supreme  
20 Court, but I don't agree with a lot of things that  
21 the appeals court and the Supreme Court do?

22 A. Yes, I made that statement to the judge.

23 Q. So with respect to the obstruction of  
24 justice enhancement the judge told you he was going  
25 to impose after making the findings he did, is it

1 fair to say that you did not believe the Court of  
2 Appeals would overrule it?

3 A. Absolutely.

4 Q. And did you communicate that to the  
5 defendants?

6 A. Yes.

7 Q. And did you explain why you believed that?

8 A. (Brief pause.) I just don't know whether  
9 I told them why I believed that.

10 Q. Okay. Now, after -- you had to leave  
11 before the judge finally imposed sentence, but at  
12 any time before you left did either defendant tell  
13 you that they wanted to appeal the judge's  
14 sentence? Because the judge had already told you he  
15 was going to impose the enhancement and sentence to  
16 18 to 24 months.

17 A. No, neither defendant expressed any desire  
18 whatsoever to appeal.

19 Q. Now, after the sentencing hearing was  
20 over, in the 10 or 20 days let's say after the  
21 sentencing hearing was over did either defendant  
22 ever tell you that they wanted to appeal?

23 A. No. And it's 10 days, as you know.

24 Q. Right.

25 A. And I told them that it was 10 days.

1 Q. Did your office make any effort to see  
2 whether the defendants within the 10 days wanted to  
3 appeal?

4 A. Yes.

5 Q. What was that?

6 A. They were contacted.

7 Q. How?

8 A. Telephone call by my paralegal.

9 Q. And when was that?

10 A. Within the 10 days. I can't tell you what  
11 day.

12 Q. And what -- who is your paralegal by name?

13 A. Sharon Standley.

14 Q. And what did Ms. Standley ask the  
15 defendants?

16 MS. SHEIN: Objection, your Honor. That  
17 would definitely be hearsay. He doesn't know.

18 A. That's correct.

19 THE COURT: I agree it would be hearsay.  
20 I'll take the answer for purposes of the record and  
21 later determine whether I can rely on hearsay  
22 evidence. But for purposes of the record why don't  
23 you go ahead and give the answer.

24 A. She told me that she contacted the  
25 defendants and wanted to make sure that they hadn't

1 changed their minds.

2 Q. And what did she say their response was?

3 A. They hadn't changed their minds. They  
4 didn't want to appeal.

5 Q. Now, is it fair to say that after the  
6 sentencing -- or at times during the sentencing  
7 hearing, at the breaks, you told the defendants that  
8 you could identify no appeals issue which would be  
9 successful? Is that correct?

10 A. It is.

11 Q. Now, did you also at any time during that  
12 sentencing hearing, during the breaks or otherwise,  
13 tell the defendants that because there were no  
14 successful issues that they could not procedurally  
15 file a Notice of Appeal?

16 A. Absolutely not.

17 THE COURT: Did you ever tell them that  
18 even though you did not think that there were any  
19 issues that could be successfully appealed that if  
20 they wanted to you would file a notice on their  
21 behalf anyway?

22 THE WITNESS: Yes, I did.

23 THE COURT: And do you remember, was it  
24 one or both of them that you told that to?

25 THE WITNESS: I'm sure I communicated that

1 to both of them.

2 THE COURT: And do you remember when in  
3 the process that would have been?

4 THE WITNESS: It would have been either  
5 the night before or the day of sentencing.

6 THE COURT: Thank you. Mr. Uram, go  
7 ahead.

8 MR. URAM: I have nothing further.

9 THE COURT: All right.

10 Cross-examination?

11 CROSS-EXAMINATION

12 BY MS. SHEIN:

13 Q. The paralegal, does she still work for  
14 you?

15 A. Yes.

16 Q. She's not a lawyer, is she?

17 A. No.

18 Q. Did she tell you who she talked to?

19 A. No, she didn't.

20 Q. Do you know when she talked to them?

21 Anybody?

22 A. No, I don't.

23 Q. So you're not sure she did talk to  
24 anybody?

25 A. No, I'm not. She was not under oath when

1 she told me this and it's hearsay.

2 Q. You said you discussed appealing the  
3 sentencing in particular with the Tulchinskys at the  
4 sentencing hearing. When would that have been?

5 A. Well, I don't know.

6 Q. When did you leave?

7 A. That afternoon.

8 Q. Before the sentence was imposed; correct?

9 A. I'm not sure that's true.

10 MS. SHEIN: I would refer to the record,  
11 your Honor; that it appears he did leave prior to  
12 that.

13 THE COURT: I remember we had some  
14 discussion about the prospect of him leaving. Does  
15 the transcript say that he showed -- reflecting  
16 leaving the room?

17 MR. URAM: Yes. What happened was, your  
18 Honor, and the transcript reflects this, Mr. Cohan  
19 had a plane to catch. You inquired how long he  
20 could stay. You informed the defendants that you  
21 were going to impose the obstruction of justice  
22 enhancement and you would be sentencing in the 18 to  
23 24 month range, and then we took up the question of  
24 staggered reporting dates. This is while Mr. Cohan  
25 was still here. Then you said let's take a break so

1 the defendants can decide who will report first.  
2 Mr. Cohan left sometime after that break. Mr. Kenna  
3 alone returned with the defendants with their  
4 decision and your final imposition of sentence.

5 THE COURT: And Mr. Cohan did that with my  
6 permission.

7 MR. URAM: Correct.

8 THE COURT: That refreshes my memory, and  
9 that's reflected in the transcript you're  
10 representing.

11 MR. URAM: Yes, your Honor.

12 Q. BY MS. SHEIN: So you did leave prior to  
13 the sentencing being completed.

14 A. Definitely, yes.

15 Q. So you did not have the opportunity to  
16 speak to the Tulchinskys that day after sentence was  
17 imposed.

18 A. That's true.

19 Q. You did prepare some very nice pleadings  
20 and you objected to more things than just the  
21 obstruction. Do you recall that?

22 A. Oh, yeah.

23 Q. And some of those objections were  
24 sustained and some were not. Do you recall that?

25 A. Yes.

1 Q. So there were some objections that were  
2 made that were not sustained, and therefore were  
3 left unresolved.

4 A. Well, the obstruction was one of them.  
5 I'm not sure --

6 Q. Let me help you a little bit, because  
7 there was another very specific one that you had  
8 brought up, and that was the one related to the  
9 determination that the tax burden that they were  
10 required to experience individually, somehow double  
11 counting or whatever, your argument was at the time  
12 may not be done so for the purpose of establishing  
13 the actual amount of money involved; that they would  
14 be -- that would set the Guidelines up; correct? Do  
15 you recall that? I may have stated it a little  
16 scattered.

17 A. I object to the form of the question,  
18 counsel, but I certainly talked about the fact that  
19 each of them was being stuck with the total tax  
20 liability and that that was an error of law. And  
21 there was some discussion of a case called Charroux,  
22 C H A R R O U X, that was very unpleasant for me to  
23 contemplate.

24 Q. You had in fact discussed quite a bit of  
25 case law and had a very good objection to present to

1 the Court at that time.

2 A. I thought it was pretty good.

3 Q. It was overruled, but it was an objection  
4 that you had made. So there were at least two  
5 issues that I've been able to identify that were  
6 pretty strong and you had quite a bit of discussion  
7 with the Court on; is that correct?

8 A. Yes.

9 Q. To the best of your recollection. Do you  
10 recall the Court in the sentencing stating: In  
11 other words, I find that your clients intentionally  
12 lied in material matters, and it seems to me that  
13 means that they committed perjury and that they  
14 should receive an obstruction enhancement. Why  
15 shouldn't they? Do you remember that question to  
16 you?

17 A. Not specifically, but I remember -- I mean  
18 I just read the transcript on the plane, so I  
19 remember pretty well what I read of the transcript.  
20 And I remember basically saying, well, what about  
21 Mr. Uram? And going into that in some detail.

22 Q. It's on page 72. And then your response  
23 was that this is going to take a while. And then  
24 you went into quite an extensive dissertation  
25 concerning why you felt, both legally, factually and

1 otherwise, that the instruction on enhancements  
2 shouldn't apply, including your comment that I -- on  
3 page 90 that did I suborn perjury when I put them up  
4 there, feeling obviously passionate about the fact  
5 that you felt they had not lied.

6 THE COURT: Well, he made a very creative  
7 argument, I thought, that not -- one that I hadn't  
8 thought of until he made it. I ultimately rejected  
9 it, but he came up with an argument as to how their  
10 testimony could in effect have been false, even  
11 regarding issues of their own intent, but that it  
12 might not have been intentionally false, and  
13 therefore the jury could have convicted them based  
14 on the evidence but that that wouldn't necessarily  
15 have amounted to a determination of perjury.

16 Q. BY MS. SHEIN: It was a very impassioned  
17 legal argument and a Guideline argument. I think  
18 you did represent that well. That is not my  
19 concern. But do you remember some or all those  
20 things that you did?

21 A. "The Theory of Cognitive Dissidence," by  
22 Leo Festinter, yes. I went to high school with his  
23 son. He wrote the book.

24 Q. Did you realize in rereading the  
25 transcript that the judge on at least seven

1 occasions suggested that the judge may not be right  
2 concerning particular issues raised; that there's a  
3 Court of Appeals for this? That kind of commentary?

4 A. I didn't count them.

5 Q. I did. You testified earlier that in  
6 close issues that you were granted -- strike that.  
7 Let me go back a minute. Let me just get to  
8 something very specific. You left, and therefore  
9 didn't talk to them again after sentencing about the  
10 appeal; is that correct?

11 A. I don't believe that is correct.

12 Q. Did you speak to them personally?

13 A. I believe we had a telephone conversation.

14 Q. And when was that?

15 A. I can't recall.

16 Q. Well, you testified that your paralegal  
17 within the 10-day time frame spoke with them. Did  
18 you also speak to them?

19 A. I may have.

20 Q. But you don't know.

21 A. No, I don't.

22 Q. Did they come to you after sentencing or  
23 did they -- do you recall having discussion even  
24 with Mr. Kenna where your clients said can we appeal  
25 this?

1           A.     We'd had discussions before that, but if  
2 you mean did they ask me and did we have discussion  
3 afterward whether they could appeal? No, I don't  
4 believe there was ever such discussion, because we  
5 had already determined between the three of us that  
6 they didn't want to appeal.

7           Q.     And that was the trial issues. Is that  
8 correct?

9           A.     I didn't understand --

10          Q.     Is that based on the trial issues?

11          A.     I believe it was based on the trial issues  
12 and the sentencing issues.

13          Q.     Well --

14          A.     I mean, there are many conversations that  
15 we had over a long period of time.

16          Q.     How could the Tulchinskys have told you  
17 they didn't want to appeal the sentencing when you  
18 left before the sentencing was completed?

19          A.     Because we knew what the sentence was  
20 before it was completed.

21          Q.     You knew the judge was going to give them  
22 18 months?

23          A.     I knew he was going to give them the  
24 enhancement.

25          Q.     Okay. But that's not --

1 A. He made that clear.

2 Q. But that wasn't the end of the sentence.

3 A. No, it's not the end.

4 Q. You don't know that the judge could have  
5 made other mistakes or that this mistake that you  
6 impassionately litigated was not resolved. You left  
7 before the resolution of the total sentence.

8 THE COURT: Well, this is getting into  
9 kind of argumentative. The record discloses what  
10 happened. I had determined what the sentencing  
11 range would be before he left and determined the  
12 ultimate sentence within the range after he left,  
13 and I sentenced at the bottom of the range. And I  
14 think it's really just argumentative.

15 MS. SHEIN: All right.

16 Q. BY MS. SHEIN: Does a fair trial mean that  
17 there's no appealable issues?

18 A. Not necessarily.

19 Q. Did you ever write to your clients after  
20 the sentencing and tell them that they had no  
21 appealable issues and give them any reasons why they  
22 didn't?

23 A. The beginning of that was did I ever write  
24 to my clients. No.

25 Q. Did you ever tell them that they could go

1 ahead and file a Notice of Appeal pro se or on their  
2 own?

3 A. I don't recall any discussions about them  
4 filing pro se. I told them that they had to file a  
5 Notice of Appeal within 10 days, that it was  
6 jurisdictional, and if they didn't do it they didn't  
7 have any appeal at all.

8 Q. Did you tell them that they could do that  
9 on their own?

10 A. No, I don't believe I ever discussed  
11 whether they could do it on their own or --

12 Q. And you never wrote them a letter  
13 suggesting any reasons why you thought an appeal  
14 wasn't viable.

15 A. I'll answer it again, no, I did not write  
16 them any such letter.

17 Q. You do recall, however, them asking you  
18 about appealing the case.

19 A. Not specifically asking me. I mean, we  
20 discussed whether there was anything to appeal and  
21 what the issues were in the case that might be  
22 appealed.

23 MS. SHEIN: Thank you very much. Nothing  
24 further on this, your Honor. If he doesn't have any  
25 recross, your Honor, I just want to comment on Mr.

1 Kenna's --

2 THE COURT: Thank you, Mr. Cohan. You're  
3 excused.

4 THE WITNESS: Thank you, your Honor.

5 C E R T I F I C A T E

6  
7 I, Diane L. Wildfeuer, do hereby certify  
8 that the foregoing transcript is a true and accurate  
9 transcription of the within proceedings, to the best  
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DIANE L. WILDFEUER, CSR-RDR-FCRR

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