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Discretionarily Enhanced Sentences Based Upon Suspected Perjury at Trial

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DISCRETIONARILY ENHANCED SENTENCES BASED UPON SUSPECTED PERJURY AT TRIAL

I. Introduction

Historically, a judge has had wide discretion in sentencing a convicted defendant with respect to the length of sentence to be imposed and the sources and types of information used to determine an appropriate sentence.[1] The sentence which the judge sets is directly dependent upon the information he elects to consider.[2] Since the primary aims of imprisonment are the reformation and rehabilitation of the defendant,[3] the judge does not base his sentencing decision upon the crime alone. Rather, he also considers those factors which he deems indicative of the defendant's rehabilitative needs.[4] Though judges weigh many factors in this regard when sentencing, several circuits have recently questioned the propriety of judges considering their belief that the defendant committed or suborned perjury[5] at trial.

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1. Williams v. New York, 337 U.S. 241, 246 (1949). While jury sentencing is a legitimate practice, generally it is the trial (sentencing) judge who decides what, if any, sentence to impose upon a defendant at a post trial sentencing hearing. To guide the judge the legislature fixes a range of permissible penalties for any given statutory crime. When sentencing a defendant within this range, the judge may set a single sentence, a minimum-maximum sentencing term or an indeterminate sentence in which the defendant is to be imprisoned. *See* 18 FED. R. CRIM. PROC. 32(a); ABA, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.3, at 63-64, § 2.4, at 74, § 2.5, at 80-82 (1968) [hereinafter cited as SENTENCING STANDARDS]; G. MUELLER, SENTENCING: PROCESS AND PURPOSE (1977); S. RUBIN, LAW OF CRIMINAL CORRECTION 81-126 (1973).

2. Regardless of what aggravating or mitigating factors the judge considers, however, the imposition of sentence cannot be greater than the statutory maximum for the crime of which the defendant was convicted. *See* Dorszynski v. United States, 418 U.S. 424, 441 (1978). Still one commentator has noted, "[n]owhere else in the criminal process is so much power trusted to the knowledge, instincts, and conscience of a judicial officer." Drew, *Judicial Discretion and the Sentencing Process*, 17 How. L. REV. 858, 859 (1973).

3. 337 U.S. at 248.

4. Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937); *But see* Bernard, *Individualization v. Uniformity: The Case for Regulation in Criminal Justice*, 40 FED. PROB. 19 (1976); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1292 (1952).

5. Perjury is defined by federal statute, providing in pertinent part:

> Whoever—
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> (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be

The traditional view taken by the federal courts has been to allow the suspected perjury to be considered by the judge inasmuch as it provides a telltale characteristic of the defendant and his chances for rehabilitation.[6] To exclude it from the sentencing process would undermine the accurate evaluation the judge attempts to make of the defendant for imposing a just sentence.[7] Circuits opposed to this practice conclude, however, that before a judge enhances a sentence based upon his suspicion of perjury, the defendant is entitled to receive a fair trial on that issue. The defendant has been denied his constitutional right to plead not guilty and have the protection of those inherent safeguards provided in an indictment and trial for perjury.[8] The defendant has been penalized for perjury which he may not have committed and for which he may still be subsequently prosecuted in a separate proceeding.

This Note will trace briefly the history surrounding a judge's discretionary use of information in sentencing. It will then examine how the circuits have dealt with increased penalties based upon the judge's belief that the defendant committed perjury during trial and how recent Supreme Court decisions have balanced this against the defendant's due process right to a fair trial for perjury.

II. Information Considered Before Setting Sentence

In order to determine an appropriate sentence, the judge must first familiarize himself with all relevant information concerning the defendant's background and character. This information is drawn

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true. . . . is guilty of perjury . . . .

18 U.S.C. § 1621 (1976). Section 1622 provides that "[w]hoever procures another to commit any perjury is guilty of subornation of perjury . . . ." *Id.* § 1622 (1976).

6. Few factors are as relevant for a judge's consideration as a defendant's criminal activity, including perjury, especially when that activity is closely related to the crime for which the defendant is charged. United States v. Doyle, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1968).

7. *See* 337 U.S. at 249-50.

8. In an action where a witness testified and was summarily charged and convicted of contempt and sentenced to sixty days in jail, the United States Supreme Court held

> that failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

In re Oliver, 333 U.S. 257, 273 (1948).

primarily from the pre-sentence investigative report,[9] evidence presented at trial, and the judge's personal observation of the defendant's behavior in the courtroom.[10] Recently, a federal statute was enacted extending this scope of inquiry by providing that no limitations shall be placed upon the sources or types of information a judge may consider in sentencing.[11] However, even before this statute was enacted, judges had exercised broad discretion over the information considered in sentencing.

The principal case dealing with the latitude of this discretionary power is *Williams v. New York.*[12] In *Williams,* a jury found the defendant guilty of first degree murder and recommended life imprisonment. However, after reviewing the pre-sentence report on Williams, which revealed an extensive history of criminal and social misconduct, the trial judge decided to impose the death sentence.[13] Among the factors he considered were burglaries to which the defendant confessed but was never convicted.[14] The United States Supreme Court affirmed the death sentence and upheld the complete judicial discretion of the sentencing judge. The Court found "[h]ighly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."[15] This has been interpreted as authorizing judges to consider not only evidence presented in open court, but also responsible unsworn statements or out of court information relative to the circumstances of the crime and the defendant's background.[16]

Indeed only when a reviewing court believes a judge to have considered information that is materially untrue and thus not indica-

9. 337 U.S. at 249-50. The pre-sentence report is made available to the judge, upon his request, from the probation department. 18 FED. R. CRIM. PROC. 32(c); S. WILLIAMS, THE LAW OF SENTENCING AND CORRECTIONS 12-20 (1974).

10. Chaffin v. Stynchcombe, 412 U.S. 17, 32 (1973); *See* Zumwalt, *The Anarchy of Sentencing in the Federal Courts,* 57 JUD. 96, 99 (1973); K. DAVIS, DISCRETIONARY JUSTICE 133-41 (1969); Glueck, *Predictive Devices and the Individualization of Justice,* 23 LAW & CONTEMP. PROB. 461 (1958).

11. 18 U.S.C. § 3577 (1976). As stated in Smith v. United States, 551 F.2d 1193 (10th Cir. 1977), the primary purpose of this statute was to "clearly authorize the trial judge to rely upon information of alleged criminal activity for which the defendant had not been prosecuted." *Id.* at 1196.

12. 337 U.S. 241 (1949).

13. *Id.* at 244.

14. *Id.*

15. *Id.* at 247.

16. Williams v. Oklahoma, 358 U.S. 576, 584 (1959).

tive of a defendant's rehabiltative needs will the decision be remanded for resentencing.[17] In *United States v. Tucker*,[18] the trial judge in sentencing the defendant for robbery considered prior convictions in which he had been denied counsel. While the Supreme Court acknowledged that "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come,"[19] it nevertheless found an abuse of sentencing discretion.[20] The Court reasoned that since the trial judge specifically considered misinformation of a constitutional magnitude the sentence violated due process of law.[21] The case was remanded to the trial court for a reconsideration of Tucker's sentence.[22]

Generally, however, this Court imposed limitation has had minimal effect.[23] Federal appellate courts have upheld judicial consideration of many sentencing factors including a defendant's past crimnal activity,[24] facts concerning his character,[25] past life and habits[26] and standing in the community.[27] Not restricted to this out of court information judges will also consider any trial evidence indicative of the defendant's rehabilitative needs. Testimony, in particular, has been found a reliable sentencing factor since it is given under oath, subject to cross examination and presented while the judge

17. Townsend v. Burke, 334 U.S. 736, 740-41 (1948).

18. 404 U.S. 443 (1972).

19. *Id.* at 446.

20. The Court applied retroactively to the prior state convictions, which were considered in sentencing, its holding in Gideon v. Wainright, 372 U.S. 335 (1963). 404 U.S. at 447 n.4. *Gideon* guaranteed the right of counsel to any person charged with a crime in a state court proceeding. 372 U.S. at 344.

21. 404 U.S. at 447.

22. *Id.* at 449.

23. Absent evidence of some specific materially unreliable factor being made available to the judge for sentencing, reviewing courts are ordinarily reluctant to question the judge's sentencing decision. *See* 334 U.S. at 740.

24. Besides the defendant's past convictions, judges have considered in sentencing: United States v. Cardi, 519 F.2d 309, 314 (7th Cir. 1975) (charges of which defendant was acquitted); United States v. Atkins, 480 F.2d 1223, 1224 (9th Cir. 1973) (convictions reversed on appeal). *See* United States v. Marines, 535 F.2d 552, 554 (10th Cir. 1976) (dismissed charges); United States v. Metz, 470 F.2d 1140, 1141 (3d Cir. 1972) (pending charges); Austin v. United States, 408 F.2d 808, 810 (9th Cir. 1969) (arrests).

25. United States v. Dent, 477 F.2d 447, 449 (D.C. Cir. 1973) (psychiatric reports on defendant).

26. United States v. Carden, 428 F.2d 1116, 1118 (8th Cir. 1970) (juvenile defendant's earlier use of drugs).

27. United States v. Marcello, 423 F.2d 993, 1012 (5th Cir. 1970) (defendant's relations with public and police).

has the opportunity to observe the witness.[28] Consequently, when the defendant testifies the trial judge is able to personally evaluate one of the more meaningful sources of information considered in sentencing.

III. The Split Among the Circuits

For over sixty years, federal trial judges have unilaterally increased penalties[29] on criminal defendants who, in the judge's belief, have committed or suborned perjury at trial. For the greater part of this period appellate courts uncompromisingly sustained these sentencing decisions. Only during the last decade did several circuits digress in their approach to this accepted practice.

A. Circuits Supporting a Judge's Consideration of Perjury in Sentencing

The Court of Appeals for the Fourth Circuit was the first federal appellate court to render a decision on a judge's consideration of perjury in sentencing. In *Peterson v. United States*,[30] the defendant was tried and convicted of stealing a forty-cent rubber stamp from the post office. During the trial, the government introduced testimony to prove that Peterson was also guilty of subornation of perjury, a crime for which he had not been indicted.[31] Based primarily on his suspicion that Peterson suborned perjury, the judge imposed the maximum sentence for larceny of three years.[32] Despite its belief

28. United States v. Lustig, 555 F.2d 737, 751 (9th Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978); Cook v. Gray, 530 F.2d 133, 136 (7th Cir.), *cert. denied*, 425 U.S. 980 (1976); United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972); United States v. McCoy, 429 F.2d 739, 743 (D.C. Cir. 1970).

29. *See* note 2 *supra*.

30. 246 F. 118 (4th Cir. 1917), *cert. denied*, 246 U.S. 661 (1918).

31. *Id.*

32. While nothing in the record indicated the subornation of perjury induced the three year sentence, a letter written four months later by the sentencing judge shows that he considered it.

> "Concerning the sentence in the A.T. Peterson case I see no impropriety in my stating to you the fact that the offense for which the defendant was formally found guilty by the jury was and is in my opinion rather trifling, and for it a moderate punishment would have been amply sufficient. However, I became firmly convinced during the trial and believe now that Peterson was guilty of subornation of perjury of the most glaring character, and I further took into consideration the fact that the theft of the post office stamp was committed for an ulterior and decidedly criminal purpose. The main reason for the severe sentence imposed, however, was the subornation of perjury."

Id. at 118-19 (quoting letter of Judge Henry Clay McDowell, Western District of Virginia).

that the sentence was overly severe, the court of appeals upheld the trial judge's decision.[33] The court refused to sustain the contention that the judge had abused his discretion in convicting for one crime and punishing mainly for another.[34] Peterson's subornation of perjury, the Fourth Circuit found, was clearly reflected in the record and directly related to the larceny of which he was convicted.[35] Since subornation of perjury reveals a defendant's criminal inclinations, the court concluded it was a proper factor for consideration in sentencing.[36]

The Fourth Circuit had the opportunity to consider this issue again in *United States v. Moore.*[37] In *Moore,* the defendant was charged with knowingly receiving a stolen automobile. He was convicted and given a four year sentence although he had no prior criminal record. Among the reasons given to justify such a harsh sentence was the judge's belief that the defendant committed perjury while testifying.[38]

On appeal, Moore requested the Fourth Circuit to reconsider its holding in *Peterson.* The court of appeals rejected Moore's request noting that several other circuits had followed its decision in *Peterson.*[39] The court cautioned judges, however, regarding the dan-

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33. *Id.* at 119.
34. *Id.*
35. *Id.*
36. *Id.*
37. 484 F.2d 1284 (4th Cir. 1973).
38. *Id.* at 1286-87. The judge stated at the sentencing hearing:

"You took the stand in your own defense, as you have every right to do, but you testified falsely under oath in an attempt to exculpate yourself from this crime. The court should take that into account in deciding what is the proper sentence in a case of this sort."

Id.

39. *Id.* at 1287. Prior to *Moore,* four circuits had upheld a judge's consideration of perjury in sentencing, reasoning along much the same line as the court in *Peterson.*

In Humes v. United States, 186 F.2d 875 (10th Cir. 1951), the defendant was found to have committed and suborned perjury at his trial. The Tenth Circuit reasoned that because perjury is a serious crime which has a bearing upon a defendant's veracity and hence his chances for rehabilitation, it is a proper factor for consideration in sentencing. *Id.* at 878.

The court of appeals in United States v. Levine, 372 F.2d 70 (7th Cir. 1967), affirmed the finding of the sentencing judge who had recognized Levine to be perjurer and increased his sentence accordingly. The Seventh Circuit reasoned that when an enhanced penalty is allotted, it is based solely on an unfavorable characteristic of the defendant and not on an independent finding of the substantive crime of perjury. *Id.* at 74.

In United States v. Wallace, 418 F.2d 876 (6th Cir. 1969), *cert. denied,* 397 U.S. 955 (1970), the sentencing judge was of the opinion that the defendant's offense, in light of his past, warranted only probation. However, after determining the defendant's guilt to a practical

ger of indiscriminately treating every convicted defendant who testifies as a perjurer.[40] A conviction, it noted, only means that the defendant has been proven guilty of the crime charged, not that he has committed perjury in testifying to that charge.[41] The majority suggested that because judges are often misled by the facts or cannot correctly categorize some essential element of proof, it is best for the judge who suspects perjury to request an investigation and possible prosecution by the United States Attorney, where the facts warrant it, for perjury is a "separate and distinct crime."[42] Thus, while the Fourth Circuit did not reverse its decision in *Peterson*, it did retreat from the hard-line attitude reflected in the earlier case.

The following year, the Second Circuit in *United States v. Hendrix*[43] took a more moderate approach to resolving the sentencing dilemma. In *Hendrix* the defendant was tried for possession with intent to distribute cocaine and marijuana. Defendant Hendrix testified that he had no knowledge of the cocaine or marijuana found in his home.[44] However, evidence showed that Hendrix who earned

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certainty during trial and then hearing the defendant categorically deny every aspect of the charges against him, the judge imposed a sentence. The court of appeals affirmed and noted further that in certain instances the sentencing judge will be censored if he does not consider that the guilty verdict was inconsistent with the defendant's sworn testimony. *Id.* at 878 (dictum).

The Ninth Circuit in United States v. Cluchette, 465 F.2d 749 (9th Cir. 1972), found nothing offensive about the judge's comments regarding the less than candid testimony of the defendant. The court stated that a judge cannot impose a sentence in a mental vacuum. He must be allowed to consider the defendant's testimony and behavior on the witness stand if an accurate evaluation of the defendant's rehabilitative needs is to be made. *Id.* at 754.

40. 484 F.2d at 1287.

41. *Id.* at 1288.

42. *Id.* at 1287-88. Judge Craven, dissenting on this issue in *Moore*, emphatically stated what was implicit in the majority opinion: a summary adjudication of guilt is a "judgment by hunch" whereby the defendant is denied every constitutional and procedural safeguard accorded in an indictment and trial for perjury. This practice, he found, "will inevitably chill and hamper, if not ultimately destroy, the right to testify in one's own behalf." *Id.* at 1288 (Craven, J., concurring in part and dissenting in part). Practices that have a chilling effect on the defendant's right to testify have been found to violate the United States Code which provides: "In trial of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness. . . ." 18 U.S.C. § 3481 (1976).

43. 505 F.2d 1233 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975). Also decided one year after *Moore* was Hess v. United States, 496 F.2d 936 (8th Cir. 1974). The Eighth Circuit affirmed a defendant's sentence which was based in part upon the judge's finding of perjury. The court, noting other circuit decisions on this issue, found it was "by no means clear that this [perjury] was an impermissible factor" for a judge's consideration. *Id.* at 939.

44. 505 F.2d at 1234.

only six to seven thousand dollars annually, had purchased a sixty-four thousand dollar home and bought a new Cadillac every two years.[45] According to the trial judge the defendant's testimony amounted to " 'the most outrageous situation of perjury in any trial' he had seen" in thirteen years.[46] He decided therefore on the basis of this finding to " 'add about two years' " to the sentence.[47]

On appeal, Judge Frankel found some merit to the argument that a judge's consideration of perjury chills the defendant's right to testify in his own behalf,[48] but noted that judges also consider a defendant's cooperation with law enforcement when, for example, he tells the truth.[49] The court reasoned that the trial "judge's use and appraisal of a vivid trial circumstance, after adversary testing, is scarcely to be deemed less reliable" than other factors weighed in sentencing.[50] Nevertheless, recognizing the need for some safeguard to protect the defendant from an arbitrary assessment of perjury, the Second Circuit held that a judge must be convinced "beyond a reasonable doubt" of the defendant's perjury.[51]

In upholding the trial judge's sentencing decision the court of appeals found the jury could not possibly have convicted Hendrix of drug possession without finding beyond a reasonable doubt that he deliberately and wilfully lied on the stand.[52] Thus, the judge had properly considered his suspicion of perjury as a factor in sentencing.[53] The purpose behind the Second Circuit's use of the "beyond

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45. *Id.*

46. *Id.*

47. *Id.* at 1235.

48. *Id.* at 1236. *See* note 42 *supra.*

49. 505 F.2d at 1236. In analyzing the problem a judge confronts when sentencing a defendant, Judge Frankel stated:

> The effort to appraise "character" is, to be sure, a parlous one, and not necessarily an enterprise for which judges are notably equipped by prior training. Yet it is in our existing scheme of sentencing one clue to the rational exercise of discretion. If the notion of "repentence" is out of fashion today, the fact remains that a manipulative defiance of the law is not a cheerful datum for the prognosis a sentencing judge undertakes.

Id.

50. *Id.* at 1235.

51. *Id.* at 1236.

52. *Id.* at 1237.

53. In United States v. Nunn, 525 F.2d 958 (5th Cir. 1976), the defendant was given an increased penalty because he changed his testimony during the trial. The Fifth Circuit, although it relied upon *Hendrix* in upholding the trial judge's decision, did not adopt the "beyond a reasonable doubt" standard for unilateral perjury considerations. *Id.* at 960.

a reasonable doubt" standard is simply to compel the judge to weigh the defendant's testimony against all the conflicting trial evidence. If the evidence did not sustain a finding of perjury beyond a reasonable doubt, the judge would be required to bypass his consideration of that issue in sentencing and leave the entire matter to the United States Attorney for possible prosecution,[54] as was recommended in *Moore*.[55] By providing such guidance to trial judges, the Fourth and Second Circuits emphasized the requirement that a judge base his sentencing decision solely upon reliable information.

B. Circuits Opposed to a Judge's Consideration of Perjury in Sentencing

The District of Columbia was the first circuit to deviate from the accepted practice of permitting judges to independently label a defendant's testimony perjurous and enhance his sentence accordingly. In *Scott v. United States*,[56] the defendant denied any participation in the robbery of which he was subsequently convicted.[57] During the sentencing hearing the judge repeatedly stated his belief that Scott had lied while on the witness stand.[58] On the basis of the judge's remarks, Scott appealed contending that the judge had abused his discretion in sentencing him.

The Court of Appeals for the District of Columbia remanded the case for resentencing holding that it was to be done without any consideration of the suspected perjury.[59] Chief Judge Bazelon, writing for the court, noted that if the judge in fact imposed a harsher penalty as a result of the alleged perjury, then the defendant had plainly been denied a trial for that offense.[60] To support its position, the court of appeals maintained that a defendant's denial of guilt does not reflect his rehabilitative needs. The court reasoned that "[i]t is indeed unlikely that many men who commit serious offenses would balk on principle from lying in their own defense."[61] Yet even if a defendant was fully repentent, the court continued, he might testify falsely when threatened with the thought of imprison-

54. 505 F.2d at 1236-37.
55. 484 F.2d at 1288.
56. 419 F.2d 264 (D.C. Cir. 1969).
57. *Id.* at 268.
58. *Id.*
59. *Id.* at 266.
60. *Id.* at 269.
61. *Id.*

ment and the stigma of a conviction.[62] This tenuous relationship between a defendant's testimony and his rehabilitative needs becomes apparent when the penitent defendant, succumbs to the peculiar pressure prison puts upon him and falsely testifies, subsequently receiving an enhanced sentence for perjury.[63] Furthermore, the court of appeals noted the needlessness of another form of deterrence for perjury. Since a defendant is already concerned about the jury discerning his untruthful testimony and convicting him, and the United States Attorney subsequently prosecuting him, any further punishment, the court believed, would have little deterrent effect at best.[64] The District of Columbia Circuit, though presenting unique and convincing arguments, was not joined in its holding against enhanced sentencing on the basis of suspected perjury until the Third Circuit decided *United States v. Grayson.*[65]

In *Grayson,* the defendant was tried for escaping from a federal prison where he was serving a three-year sentence for distributing a controlled substance.[66] His sole defense was duress. Grayson claimed that he owed gambling debts to fellow inmates and was forced to flee prison when threats were made upon his life.[67] After Grayson was convicted, the judge stated at the sentencing, "it is my view that your defense was a complete fabrication without the slightest merit whatsoever. I feel it is proper for me to consider that fact in sentencing, and I will do so."[68]

Grayson, relying upon a principle established by the Third Circuit in *Poteet v. Fauver,*[69] appealed the sentencing decision. In *Poteet,* the defendant was charged with robbery and maintained his innocence first throughout the trial and then during the sentencing hearing where he rejected the judge's post-conviction attempts to coerce a confession of guilt.[70] Thereafter Poteet received a fourteen

62. *Id.*

63. Additionally, one questions whether the defendant who refuses to admit his wrongdoing and plea bargains his way to a lesser sentence is a better prospect for rehabilitation than the penitent defendant who perjures himself thus receiving a substantially greater penalty. Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence,* 66 YALE L.J. 204, 217 (1956).

64. 419 F.2d at 269.

65. 550 F.2d 103 (3d Cir. 1977).

66. *Id.* at 104.

67. *Id.*

68. *Id.* at 106.

69. 517 F.2d 393 (3d Cir. 1975).

70. *Id.* at 394-95.

to sixteen year sentence while his co-defendant received a five year sentence after admitting his guilt at sentencing.[71]

Emphasizing the unconstitutionality of the judge's post trial statements,[72] the Third Circuit in *Poteet* remanded the case for resentencing. The court elaborated on this issue, stating that, "[a] defendant has a right to defend, and although he is not privileged to commit perjury in that defense, the sentencing judge may not add a penalty because he believes the defendant lied."[73] There having been no charge, hearing or conviction of perjury, a punishment for that crime would violate the defendant's due process rights.[74] A heavier penalty would also unduly burden the defendant's right to defend, as his mere denial of a charge under oath might lead to successive punishments for that crime.[75]

In *Grayson,* nevertheless, the Third Circuit initially upheld the judge's sentencing decision, finding the factual setting of *Poteet* to be dramatically different.[76] Upon rehearing, however, the court of appeals found that Grayson's reliance upon *Poteet* was not misplaced[77] and that the Third Circuit prohibited a judge from enhancing a defendant's sentence based on his belief that the defendant perjured himself at trial.[78] By so extending the principle in *Poteet*

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71. *Id.* at 394. While no reference was made at sentencing that the judge imposed a harsher sentence on Poteet because he refused to admit his guilt, the court of appeals was "not convinced that an increment of prison time was not added to Poteet's sentence because he persisted in maintaining his innocence after the jury had returned a guilty verdict." *Id.* at 398. The court was able to infer that Poteet received a harsher sentence based on the trial judge's statement to the co-defendant immediately after his admission of guilt. The judge stated, "[t]hat saved you ten years. . . . If you hadn't come clean I don't mind telling you I was going to send you to State Prison for ten to twelve years." *Id.* at 397. *See* note 23 *supra.*

72. *Id.* at 396-98.

73. *Id.* at 395.

74. *Id.*

75. *Id.* at 395-96. *See* note 42 *supra.*

76. 550 F.2d at 105. The Third Circuit in *Grayson,* initially interpreted *Poteet* as a case solely involving a judge's unsuccessful attempts to compel a defendant to confess under the threat of imposing a longer sentence, thereby forcing Poteet to waive his fifth amendment right to be free from self-incrimination. The *Poteet* court of appeals decision somewhat justifies this interpretation. The court no less than three times explicitly phrased the issue as whether a sentencing judge could subject a defendant to an additional penalty because he refused to admit his guilt. 517 F.2d at 394, 396 & 397.

77. "Although the colloquy between the judge and the defendant that took place in *Poteet* occurred during sentencing, it resulted from Poteet's defense at trial, on which the sentencing judge focused." United States v. Grayson, 550 F.2d at 106 (emphasis in original).

78. *Id.* Judge Rosenn dissented in *Grayson* on two grounds. *Id.* at 109-14 (Rosenn, J.,

to *Grayson's* facts the Third Circuit held that the judge's unilateral consideration of perjury was an improper factor in sentencing.[79] *Grayson* was appealed by the Government to the United States Supreme Court.

IV. *United States v. Grayson*

The grant of certiorari in *United States v. Grayson*[80] gave the Supreme Court the opportunity to resolve the conflict that had been created among the Circuits. Chief Justice Burger, writing for the majority, initially presented a historical analysis of *Williams v. New York* and its progeny.[81] He found that since sentencing required a consideration of the defendant's whole person and personality, any exclusion of relevant information would "degenerate into a game of chance" the judge's attempt to achieve an appropriate and rational sentence.[82] A defendant's conduct at trial and his testimoney under oath fall within the ambit of relevant information whenever they shed some light of the sentencing decision.[83] Thus, with a finding that *Williams* fully supported its decision, the Supreme Court held that a judge may properly consider his belief in sentencing that the defendant committed perjury at trial.[84]

The Court went on to reason that since both the defendant's and

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dissenting). First, he did not feel bound to *Poteet* because there was "absolutely no indication that Poteet received a harsher sentence because he testified falsely." *Id.* at 110 (Rosenn, J., dissenting). *See* note 76 *supra*. Secondly, based on his test of two safeguards for protecting the defendant's rights he found the defendant guilty of perjury. This test consisted of applying the *Hendrix* standard, that the sentencing judge be convinced "beyond a reasonable doubt" that the defendant lied before considering the perjury. Then, there "must be no possibility that the substantive law applied was such that the factfinder could have believed the defendant's testimony at the same time it found him guilty." 550 F.2d at 114 (Rosenn, J., dissenting).

79. *Id.* at 107. A subsequent case, United States v. Sneath, 557 F.2d 149, 151 n.2 (8th Cir. 1977), interpreted *Grayson* as largely refusing to allow a judge to consider suspected perjury when it would interfere with the defendant's statutory right to testify in his own behalf at trial. *See* note 75 *supra*. The Eighth Circuit distinguished *Grayson, Poteet* and *Scott* and found that since Sneath's lying occurred outside the courtroom, during an F.B.I. investigation, the lies were a proper subject for judicial consideration. Moreover, the Eighth Circuit reasoned that since Hess v. United States, 496 F.2d 1233 (2d Cir. 1974), allowed judges to take into account their suspicions of perjury when sentencing, this type of information was certainly permissible. 557 F.2d at 151. *See* note 43 *supra*.

80. 438 U.S. 41 (1978).

81. *Id.* at 45-52.

82. *Id.* at 53.

83. *Id.*

84. *Id.* at 53-54. *See* text accompanying notes 12-16 *supra*.

the government's interests in avoiding irrationality in sentencing are of the highest order, this more than justifies Grayson's asserted due process deprivations.[85] Furthermore, there was a serious doubt whether an "exclusionary rule," as suggested by Grayson, could ever actually prevent a judge from considering his suspicion of perjury in sentencing.[86] Only the judge's integrity and fidelity to his oath of office, the Court believed, would seem to provide the adequate assurances against such an improper consideration.[87] In response to Grayson's statutory argument that a judge's consideration of perjury "chills" the defendant's right to testify in his own behalf, the Court found that this right extends only to truthful testimony and is not intended to benefit the defendant who chooses to lie on the stand.[88] The Court reasoned, nonetheless, that once a defendant is made aware of the sentencing process and the fact that the judge evaluates his testimony against all conflicting trial evidence, the defendant will testify truthfully.[89]

Justice Stewart, in a dissenting opinion, chose not to assume that Grayson testified falsely. He explained that solely because an individual judge thinks a defendant has lied at trial does not mean his finding is true.[90] Nor does this situation change, he continued, when the increased sentence is viewed merely as a reflection of a defendant's prospects for rehabilitation.[91] The defendant still fears receiving an increased sentence based upon the unreviewable independent assessment of the sentencing judge.[92] Justice Stewart suggested that the majority should have prescribed some limitation or safeguard to minimize the defendant's fear of being unilaterally sentenced for

85. 438 U.S. at 53. The Court thus minimized the importance of Grayson's "constitutional argument that the District Court's sentence constitutes punishment for the crime of perjury for which he has not been indicted, tried or convicted by due process." *Id.*

86. *Id.* at 54.

87. *Id.*

88. *Id.* at 55. *See* note 42 *supra.*

89. *Id.*

90. *Id.* at 55 (Stewart, J., dissenting). Justice Stewart stated:

> In essence, the Court holds today that *whenever* a defendant testifies in his own behalf and is found guilty, he opens himself up to the possibility of an enhanced sentence. Such a sentence is nothing more nor less than a penalty imposed on the defendant's exercise of his constitutional and statutory rights to plead not guilty and to testify in his own behalf.

Id. at 56-57 (Stewart, J., dissenting) (emphasis in original).

91. *Id.* at 56 (Stewart, J., dissenting).

92. *Id.* at 56-57 (Stewart, J., dissenting).

perjury.[93] Moreover, he questioned whether a single instance of untruthful testimony could ever influence a defendant's chances for rehabilitation enough to warrant a perceptibly greater penalty.[94]

Assuming, nonetheless, that an enhanced sentence for suspected perjury is warranted, the Court in *Grayson* did not explore the extent to which a judge may appropriately exercise unfettered discretion in imposing sentence. Whether a judge may enhance the defendant's sentence on the basis of suspected perjury beyond the statutory maximum authorized for perjury[95] is still an unresolved issue. Yet even where the defendant's sentence is enhanced within the statutory maximum for perjury, it is unclear whether the sentence will remain unchanged if he is acquitted in a subsequent trial for perjury. Thus, while *Grayson* settled the dilemma of whether a judge could properly consider his suspicion of perjury in sentencing, it cannot be deemed the definitive case on the perjury-sentencing issue.

V. *United States v. Moriani*

Exactly one week after the Supreme Court decided *Grayson*, it summarily disposed of a similar case, *United States v. Moriani*.[96] Defendant Moriani, like defendant Grayson, was found to have committed perjury by the sentencing judge. Unlike Grayson, however, Moriani allegedly committed his perjury while testifying at the trial of a co-defendant.

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93. *Id.* at 57 (Stewart, J., dissenting). To alleviate the chilling effect a judge's arbitrary consideration of perjury has on the defendant's right to testify in his own behalf, Justice Stewart chose to apply Judge Rosenn's standard. *See* note 78 *supra*. He found, where Judge Rosenn had been wrong, that Grayson was not necessarily guilty of any perjury when he testified as to the duress he was under. Justice Stewart, applying the substantive law (Rosenn's second of two requirements) of the case, stated:

> Contrary to Judge Rosenn, I do not believe that the latter requirement was met in this case. The jury could have believed Grayson's entire story but concluded, in the words of the trial judge's instructions on the defense of duress, that "an ordinary man" would *not* "have felt it necessary to leave the Allenwood Prison Camp when faced with the same degree of compulsion, coercion or duress as the Defendant was faced with in this case."

Id. at 57 n.4 (Stewart, J., dissenting) (emphasis in original).

94. *Id.* at 56 n.3 (Stewart, J., dissenting). Twenty years earlier, Judge Potter Stewart noted, "it is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should have so neglected this most important dimension [imposing a just sentence] of fundamental justice." Shepard v. United States, 257 F.2d 293, 294 (6th Cir. 1958).

95. The maximum sentence for perjury, under 18 U.S.C. § 1621, is five years. The maximum sentence for subornation of perjury, under 18 U.S.C. § 1622, is two years.

96. 438 U.S. 910 (1978).

Moriani had pleaded guilty to bank robbery and was awaiting sentence when he took the stand at co-defendant Murphy's trial. In an attempt to exculpate Murphy, Moriani falsely testified that Murphy had never participated in the robbery.[97] After weighing this testimony and his belief that Moriani deliberately lied at his own sentencing hearing, the sentencing judge gave Moriani the maximum twenty year sentence.[98] On appeal, the Third Circuit extended its holding in *Grayson* to control the situation presented here.[99] The court reversed not only on the ground that the judge had considered Moriani's suspected perjury at the co-defendant's trial, but also because he had considered his belief that Moriani lied during the sentencing hearing.[100] In the United States Supreme Court, the case was vacated and remanded to the court of appeals for further consideration in light of *United States v. Grayson*.[101] Thus, the Supreme Court has indicated that a sentencing judge may properly consider a defendant's suspected perjury even when it occurs at the trial of another.

Moriani, however, should be limited to its facts. The judge who sentenced Moriani also presided at Murphy's trial and, therefore, was able to personally observe Moriani give his testimony in light of all the other evidence presented at trial. His first-hand impressions enabled him to evaluate carefully, under the *Grayson* rationale, his suspicion that Moriani lied during the trial.[102]

The sentencing judge's presence at trial afforded him not only a better comprehension of the defendant's testimony, but a better

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97. United States v. Adams, 555 F.2d 353 (3d Cir. 1977). An F.B.I. agent testified that Moriani had told him before trial that he [Moriani] would lie if need be to exculpate Murphy from a robbery conviction. *Id.* at 356 n.7.

98. *Id.* at 357.

99. *Id.* at 359.

100. The Third Circuit reasoned:

> While we concede that a comparison of Moriani's testimony at his plea proceeding with his sentencing reveals appreciable and significant differences, even without the rule of *Poteet* [a man must be charged and accorded a hearing before being punished] we would be most reluctant to permit punishment by added prison time for what perhaps could have been no more than the product of a faulty memory.

Id. at 360. The court further found that the trial judge erred in his attempted recall of the prior plea proceeding. *Id.*

101. 438 U.S. 41 (1978). Even without the Supreme Court's decision in *Grayson*, however, the Third Circuit's reversal on the ground that the trial judge considered Moriani's suspected lying during the post-trial sentencing hearing appears to be clearly incorrect. Moriani was not then testifying under oath and hence not subject to perjury.

102. In *Grayson* the Court held, "we are reaffirming the authority of a sentencing judge to evaluate *carefully* a defendant's testimony on the stand . . . ." 438 U.S. at 55 (emphasis added).

overall understanding of the defendant's character. The opportunity to appraise a defendant's demeanor, while testifying, is what largely confers meaning to a judge's determination of whether perjury exists. Where the courts can require the sentencing judge to preside at the defendant's trial or in the alternative permit the use of second-hand information in sentencing for suspected perjury the choice should be an obvious one where the defendant's freedom may be at stake.[103]

VI. Conclusion

Perjury demonstrates a lack of respect for societal rules and therefore, may provide some indication of a defendant's need for rehabilitation. A judge's unilateral finding amid the fast moving, emotional context of a criminal trial is not, however, a reliable method for determining the issue of perjury. Congress has provided a separate process through which a defendant may be indicted and have his guilt or innocence of perjury reliably and ultimately determined.[104] The inequity of a judge's consideration of perjury is compounded when no reference is made at the sentencing hearing to the specific factors considered.[105] The defendant should know he is being sentenced in part for perjury if the punishment for that crime is to have any rehabilitative affect.

Justice requires, at the very least, that the defendant be accorded an impartial and informed sentencing. Such protection could be provided by: (1) having the judge base his finding on a standard comparable to that required for conviction of the substantive crime

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103. Without such an applicable rule the defendant might be sentenced by a judge who, after simply reading trial transcript, believed the defendant to have committed perjury while, the judge who tried the case and saw the defendant testify may have felt that no such perjury existed. *See* SENTENCING STANDARDS, *supra* note 1, § 5.1(a), at 231-32.

104. In addition to 18 U.S.C. §§ 1621, 1622, *see* note 5 *supra*, Congress has provided in § 1623 an alternative to perjury prosecutions under section 1621. 18 U.S.C. § 1623 applies only in a situation where the defendant has committed perjury during trial or in a grand jury proceeding. It allows the United States Attorney to forego certain evidentiary proof (*i.e.*, the two-witness rule) unique to perjury prosecutions. *See generally* Salzman, *Recantation of Perjured Testimony*, 67 J. CRIM. L. 273 (1976); Comment, *Perjury: The Forgotten Offense*, 65 J. CRIM. L. 361, 370-71 (1974); Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 212 (1956).

105. "It is well established . . . that generally a trial judge is under no obligation to give reasons for his sentencing decision, although it might well be the better practice for him to do so." United States v. Donner, 528 F.2d 276, 279 (7th Cir. 1976); *see* Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 9-10 (1972); SENTENCING STANDARDS, *supra* note 1, § 5.6(ii), at 269.

of perjury (a "beyond a reasonable doubt" standard) and (2) having the judge specifically state, along with other factors, that a consideration of perjury was included in sentencing and the circumstances which led him to that finding.[106] This latter safeguard would not only make the defendant aware of the reasons for his punishment, but also afford him the same right of appeal as he would have in a separate perjury proceeding.[107] These safeguards will, furthermore, compel the judge to carefully evaluate his suspicion that the defendant lied before imposing an increased sentence.[108] Until such practices are adopted, unilateral determinations of perjury will continue to be used to suit the bias of the particular judge, rather than to meet the needs of the individual defendant.

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106. Under the Criminal Reform Bill the judge, at the time of sentencing the defendant, must state in open court his reasons for imposition of the particular sentence. S. 1437, 95th Cong., 2d Sess. § 2003(b) (1978); SENTENCING STANDARDS, *supra* note 1, § 5.6(i), (ii), at 269.

107. Violations of due process that have been legitimately subjected to appellate review include: judge's reasons not being given for a harsher sentence at defendant's retrial (North Carolina v. Pearce, 395 U.S. 711 (1969)); defendant not afforded counsel at sentencing (Mempa v. Rhay, 389 U.S. 128 (1967)); increased penalty because defendant insisted on a trial (United States v. Derrick, 519 F.2d 1 (6th Cir. 1975)).

108. "Society ought to have as much interest in seeing that the prisoner is protected from arbitrary sentencing as in seeing that he is protected from arbitrary conviction. . . ." Note, *Procedural Due Process at Judicial Sentencing for Felonies*, 81 HARV. L. REV. 821, 827 (1968).