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## Constitutional Criminal Procedure - Due Process - Judgment and Sentence - Judge's Discretion to Consider Defendant's False Testimony

Timothy J. Mains

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CONSTITUTIONAL CRIMINAL PROCEDURE—DUE PROCESS—JUDGMENT AND SENTENCE—JUDGE'S DISCRETION TO CONSIDER DEFENDANT'S FALSE TESTIMONY—The United States Supreme Court has held that neither the due process clause nor 18 U.S.C. § 3481, which guarantees a criminal defendant's right to take the stand in his own defense, precludes a judge, in determining sentence, from taking into account his belief that the defendant's testimony under oath contained willful and material falsehoods.

*United States v. Grayson*, 98 S. Ct. 2610 (1978)

In August 1975, Ted Grayson was serving a three year sentence in a federal prison for distributing a controlled substance. In October, he escaped from prison but was apprehended two days later in New York City. After being indicted for this escape pursuant to 18 U.S.C. § 751(a),<sup>1</sup> Grayson was tried before a jury in the United States District Court for the Middle District of Pennsylvania. His sole defense was duress—that he had been forced to flee from prison because of threats to his life made by other inmates. Crucial aspects of Grayson's story were contradicted by the government's rebuttal evidence and cross-examination. The jury disbelieved Grayson's testimony and returned a verdict of guilty.

At the subsequent sentencing hearing, the judge noted that he could sentence Grayson to a maximum five year prison term without specifying any reason.<sup>2</sup> He then proceeded to impose a two year sentence rather than a lighter one because he believed that the defendant had lied on the witness stand.<sup>3</sup> Grayson appealed to the United States Court of Appeals for the Third Circuit, which initially affirmed the sentence imposed by the district court.<sup>4</sup> Upon rehearing, however, that court directed that Grayson's sentence be vacated,<sup>5</sup> believing that *Poteet v. Fauver*,<sup>6</sup> required that the case be

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1. 18 U.S.C. § 751(a) (1970) provides in pertinent part that "[w]hoever escapes or attempts to escape . . . shall . . . be fined not more than \$5,000 or imprisoned not more than five years, or both; . . ."

2. *United States v. Grayson*, 550 F.2d 103, 104 (3d Cir. 1976). In *Grayson*, the court of appeals observed that the trial court properly noted that it could, without giving any explanation, sentence Grayson to the maximum term of imprisonment provided by the statute.

3. *Id.* at 105 (quoting from the District Court record). "Secondly, 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 the sentencing, and I will do so."

4. *United States v. Grayson*, No. 76-1646 (3d Cir., filed Sept. 16, 1976).

5. *United States v. Grayson*, 550 F.2d 103 (3d Cir. 1976).

6. 517 F.2d 393 (3d Cir. 1975). In *Poteet*, the court of appeals observed that a defendant

remanded for resentencing without consideration of the false testimony. The United States Supreme Court granted certiorari<sup>7</sup> to resolve a conflict among the courts of appeals.<sup>8</sup> The Court, in a 6-3 decision,<sup>9</sup> reversed and remanded for reinstatement of the district court sentence.<sup>10</sup>

Speaking through Chief Justice Burger, the majority concluded that the sentencing judge must be allowed to consider his belief that the defendant committed perjury on the witness stand when determining the appropriate sentence.<sup>11</sup> The Court stressed, however, that its decision was not intended to mean that every defendant who takes the stand in his own defense and is subsequently found guilty should have his sentence increased because the judge did not believe his story.<sup>12</sup>

In arriving at this decision, the Court initially referred to its 1949 decision of *Williams v. New York*,<sup>13</sup> in which Justice Black noted that the prevalent modern philosophy of penology is that the pun-

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had 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. *Id.* at 396 (citing *State v. Poteet*, 61 N.J. 492, 495-96, 295 A.2d 857, 858 (1972)). *But see* note 63 and accompanying text *infra*.

7. 434 U.S. 816 (1977).

8. Prior to *Grayson*, the Supreme Court maintained that consideration of the defendant's perjury was not permitted in certain circuits. *See, e.g., Poteet v. Fauver*, 517 F.2d 393 (3d Cir. 1975); *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969). However, in other circuits the sentencing judge was permitted to consider the defendant's perjury as a factor in the determination of the appropriate sentence. *See, e.g., United States v. Nunn*, 525 F.2d 958 (5th Cir. 1976); *Hess v. United States*, 496 F.2d 936 (8th Cir. 1974); *United States v. Moore*, 484 F.2d 1284 (4th Cir. 1973); *United States v. Cluchette*, 465 F.2d 749 (9th Cir. 1972); *United States v. Wallace*, 418 F.2d 876 (6th Cir. 1969); *United States v. Levine*, 372 F.2d 70 (7th Cir. 1967); and *Humes v. United States*, 186 F.2d 875 (10th Cir. 1951). *But see* notes 62-65 and accompanying text *infra* for discussion of this conflict.

9. Chief Justice Burger delivered the opinion of the Court, in which Justices White, Blackmun, Powell, Rehnquist, and Stevens joined. Justice Stewart filed a dissenting opinion, in which Justices Brennan and Marshall joined.

10. *United States v. Grayson*, 98 S. Ct. 2610, 2618 (1978).

11. *Id.*

12. The Court emphasized:

Rather, we are reaffirming the authority of a sentencing judge to evaluate carefully a defendant's testimony on the stand, determine—with a consciousness of the frailty of human judgment—whether that testimony contained willful and material falsehoods, and, if so, assess in light of all the other knowledge gained about the defendant the meaning of that conduct with respect to his prospects for rehabilitation and restoration to a useful place in society.

*Id.*

13. 337 U.S. 241, 247 (1949) (in determining sentence judge may consider evidence of prior criminal conduct by the defendant in the presentence report in order to better determine his rehabilitative needs).

ishment should fit the offender and not merely the crime. Accordingly, sentences should be determined with an eye toward the reformation and rehabilitation of offenders.<sup>14</sup> In order to best achieve these objectives in *Grayson*, the Court relied upon *Williams* and *United States v. Tucker*,<sup>15</sup> which it cited for the proposition that nearly all aspects of the defendant's character and past history should be available to the judge to enable him to reach a rational, well-founded decision on the defendant's prospects for rehabilitation.

The majority rejected *Grayson's* constitutional argument that this method of sentencing constituted punishment for the crime of perjury for which he had not been indicted, tried, or convicted by due process.<sup>16</sup> *Grayson* did not contend that the district court had an impermissible purpose in considering his perjury, but rather that perjury could conceivably be considered by a sentencing judge for the impermissible purpose of saving the government the burden of a separate perjury prosecution. *Grayson* maintained that since the end result in either instance is increased time in prison, and since it is nearly impossible to determine whether a court considers perjury for a permissible or impermissible purpose, any consideration of perjury must be disallowed to insure due process to every criminal defendant.<sup>17</sup> The Court, however, found these reasons to be insufficient justification for terminating that which it and Congress have declared appropriate judicial conduct, and noted that the government's interest, as well as the offender's, in arriving at a rational determination of sentence, is one of the highest order.<sup>18</sup> The majority also asserted that its decision in *Williams*<sup>19</sup> supported the view that a trial judge should be able to consider a defendant's apparent

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14. *Id.* at 248.

15. 404 U.S. 443, 446 (1972) (judge may conduct an inquiry broad in scope, largely unlimited either as to the kind of information that can be considered or the source from which it comes).

16. 98 S. Ct. at 2617.

17. *Id.*

18. *Id.* The Court stated that the Government's interest more than justifies the risk that *Grayson* asserted is present when a sentencing judge considers a defendant's untruthfulness under oath. *Id.*

19. 337 U.S. 241 (1949). In *Williams*, the Court concluded that in determining sentence, consideration of evidence of prior criminal activity for which the defendant was neither tried nor convicted does not violate due process. The defendant was found guilty of murder and sentenced to life imprisonment by the jury. Nevertheless, on the basis of the presentence report, which detailed other crimes for which *Williams* had been neither charged nor convicted, the judge sentenced him to death.

perjury in determining the appropriate sentence, despite the risk that it might be considered for an improper purpose. The integrity of judges, and their fidelity to their oaths of office necessarily provide the only adequate assurance against this potential abuse of discretion.<sup>20</sup>

The Court likewise rejected Grayson's argument that judicial consideration of his testimony at trial impermissibly chilled his statutory right to testify in his own behalf.<sup>21</sup> The majority emphasized that this right is narrowly construed to be the right to testify truthfully in accordance with the oath.<sup>22</sup> To confirm this view, the Court referred to the unquestioned constitutionality of perjury statutes. The Court concluded that such a practice does not realistically affect a criminal defendant's decision to testify truthfully, and even assuming that it did, that effect is entirely permissible since there is no protected right to commit perjury.<sup>23</sup>

In dissenting, Justice Stewart maintained that no determination had been made that Grayson's testimony was false, and therefore the majority decision essentially meant that whenever a defendant testifies in his own behalf and is found guilty, he exposes himself to the possibility of an enhanced sentence.<sup>24</sup> This, he felt, represents nothing more than a penalty imposed upon the defendant for exercising his rights to plead not guilty and to testify in his own behalf. It does not matter, Stewart insisted, whether the harsher sentence is attributable to the defendant's prospects for rehabilitation or as a penalty for lying under oath. In either situation, all defendants who choose to testify in their own behalf face the very real prospect of an increased sentence based upon the trial judge's unreviewable perception that the testimony was untrue. Stewart favored the adoption of certain safeguards expressed by the dissenting judge in the court of appeals<sup>25</sup> in order to minimize the chance that the

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20. 98 S. Ct. at 2618.

21. *Id.* 18 U.S.C. § 3481 (1964) provides in relevant part: "In trial of all persons charged with offenses against the United States, . . . the person charged shall, at his own request, be a competent witness."

22. 98 S. Ct. at 2618.

23. *Id.* See *United States v. Wong*, 431 U.S. 174 (1977).

24. 98 S. Ct. 2610, 2618-19 (Stewart, J., dissenting).

25. In dissenting, Judge Rosenn noted that "[A] sentencing judge should consider his independent evaluation of the testimony and behavior of the defendant only when he is convinced beyond a reasonable doubt that the defendant intentionally lied on material issues of fact . . . [and] the falsity of defendant's testimony [is] necessarily established by the finding of guilt." 550 F.2d 103, 114 (3d Cir. 1976) (Rosenn, J., dissenting).

defendant's truthful testimony will be perceived as false. These safeguards, Stewart claimed, were not met in *Grayson*.<sup>26</sup>

Stewart concluded by emphasizing that the majority's decision placed the defendant at a disadvantage in deciding whether to testify.<sup>27</sup> In contrast to other witnesses, the criminal defendant can be penalized for perjury without ever having been indicted or convicted. Stewart perceived this handicap to be an unreasonable one since it tends to discourage the defendant from exercising his statutory right to testify,<sup>28</sup> and the defendant's failure to do so will often be prejudicial to his defense.<sup>29</sup> Finally, Stewart charged that the minimal contribution that the defendant's possibly untruthful testimony might make to the overall assessment of his potential for rehabilitation<sup>30</sup> cannot justify the imposition of this additional burden on his right to testify in his own behalf.

*Grayson* is the most recent development concerning the constitutionality of allowing sentencing judges to consider a wide range of information that reflects on the defendant's character in determining the appropriate sentence. Judges did not have the authority to determine the length of sentence until the nineteenth century when the concept of indeterminate sentencing began to develop in the United States.<sup>31</sup> Under this concept, the underlying goals of punish-

26. 98 S. Ct. at 2619 n.4 (Stewart, J., dissenting). The jury could have believed Grayson's story and yet found him guilty if they believed that under the same circumstances a reasonable man would not have felt compelled to flee from prison. Thus, in Judge Rosenn's opinion, the falsity of Grayson's testimony was not necessarily established by the finding of guilt. *Id.*

27. *Id.* at 2619 (Stewart, J., dissenting).

28. *Id.* at 2618.

29. See Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 212 n.36 (1956) [hereinafter cited as *Defendant's Plea*]. Even though a jury is instructed not to consider a defendant's failure to testify in his own defense, "a defendant who does not take the stand will probably fatally prejudice his chances of acquittal." *Id.*

30. Justice Stewart observed:

A sentencing judge has before him a presentence report, compiled by trained personnel, that is designed to paint as complete a picture of the defendant's life and character as is possible. If the defendant's suspected perjury is consistent with the evaluation of the report, its impact on the rehabilitative assessment must be minimal. If, on the other hand, it suggests such a markedly different character that different sentencing treatment seems appropriate, the defendant is *effectively* being punished for perjury without even the barest rudiments of due process.

98 S. Ct. at 2619 n.3 (Stewart, J., dissenting).

31. In 1817, New York became the first jurisdiction to implement the concept by enacting a statute that allowed the release of a prisoner serving five years or more who had exhibited good behavior and had served at least three-fourths of his sentence. Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. AM. INST. CRIM. L. & C. 9, 10 (1925) [hereinafter cited as Lindsey].

ment shifted from retribution and deterrence to reformation and rehabilitation.<sup>32</sup> Within this framework, the idea of fixed minimum and maximum penalties developed so that the length of sentence could be tailored to serve the defendant's rehabilitative needs.<sup>33</sup> This concept grants to trial judges broad discretion to impose that which they consider to be the proper length of sentence within prescribed statutory limits.<sup>34</sup> However, the judge's discretion to determine sentence based upon his predictions of the defendant's potential for rehabilitation presents a serious practical problem: how to rationally make the required predictions.

In order to make a rational judgment of the defendant's rehabilitative needs the judge needed adequate information about the defendant; in addition to the particular acts involved in the crime, he needed to be able to consider both the circumstances of the offense and the character and propensities of the offender.<sup>35</sup> Acquiring the information necessary to make such a reasoned decision was accomplished most practically and efficiently by means of a presentence investigation of the defendant's background conducted by trained personnel.<sup>36</sup> Constitutional challenges were leveled against the use of such information in sentencing, and as a result, the increase in the scope of information available to the judge tended to be slow and

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32. See Smith, *The Indeterminate Sentence for Crime—Its Use and Its Abuse*, CHARITIES AND THE COMMONS 731, 732 (1907), in which the author notes that “[T]he utmost pains are taken to gain knowledge of the distinctive aptitudes and defects of each individual and to apply such special training as may serve to develop his capabilities and cure his defects.”

33. The idea of allowing the courts to fix sentence within prescribed limits apparently originated in Massachusetts, where the legislature gave the court wide discretion in imposing sentence lengths. See Lindsey, *supra* note 31, at 30.

34. As a general rule, the courts of appeals have held that the length of sentence is a discretionary matter with the district court judge, and will not be subject to review so long as it falls within the bounds prescribed by statute. See *United States v. Tucker*, 404 U.S. 443, 447 (1972); *United States v. Cluchette*, 465 F.2d 749 (9th Cir. 1972); and *Peterson v. United States*, 246 F. 118, 119 (4th Cir. 1917), *cert. denied*, 246 U.S. 661 (1918). See generally Comment, *Appellate Review of Sentences and the Need for a Reviewable Record*, 1973 DUKE L.J. 1357 [hereinafter cited as *Appellate Review*].

35. See, e.g., *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) (judges may consider a defendant's past activities because they are an indication of his present attitudes and tendencies when determining the proper period of restraint that should be imposed upon him).

36. FED. R. CRIM. P. 32(c)(2) provides in pertinent part that “the report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence . . . , and such other information as may be required by the court.”

chaotic. But in *Williams v. New York*,<sup>37</sup> the Court significantly increased that scope of information available in the presentence report by permitting the inclusion of crimes for which the defendant was never tried or convicted.<sup>38</sup> More importantly, the *Williams* Court stressed that every aspect of the defendant's life had to be available to the judge for sentencing purposes if the indeterminate sentence concept were to be meaningful.<sup>39</sup> Congress reaffirmed this principle by enacting 18 U.S.C. § 3577,<sup>40</sup> which provides that no limitation can be placed upon information concerning the defendant's background, conduct, and character which the judge may receive and consider in determining sentence. In *United States v. Tucker*,<sup>41</sup> the Supreme Court further expanded the *Williams* rationale by explicitly stressing that the judge is not limited to consideration of the material in the presentence report.

Against this background, it has been suggested that perjury is not a true reflection of the defendant's character or prospects for rehabilitation, and thus should not be considered for sentencing purposes.<sup>42</sup> Although prior to *Grayson* the Supreme Court had never

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37. 337 U.S. 241 (1949).

38. See note 19 *supra*. The *Williams* Court rejected the defendant's argument that he had a constitutional right to confront and cross-examine the individuals who supply the information used in sentencing. The Court thus established the rule that due process does not require an adversary presentation to test the accuracy of information employed in sentencing.

39. The Court observed that historically a judge has been permitted "wide discretion in the sources and types of evidence used by him in determining the kind and extent of punishment to be imposed within limits fixed by law." It further noted that this approach has even greater relevance under the modern concepts of individualized sentencing and should be extended to include "every aspect of the defendant's life." 337 U.S. at 250. The need for this information in an effort to arrive at the appropriate sentence, the Court concluded, far outweighed the chance for abuse. *Id.*

40. 18 U.S.C. § 3577 (1970) provides that: "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." The legislative history of 18 U.S.C. § 3577 specifically cites the Supreme Court's decision in *Williams*. See H.R. REP. No. 1549, 91st Cong., 1st Sess., reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007, 4040.

41. 404 U.S. 443, 446 (1972) (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).

42. See *United States v. Moore*, 484 F.2d 1284, 1288 (4th Cir. 1973) (Craven, J., dissenting) (the assumption that one who lied under stress had less capacity for rehabilitation than one who pleads not guilty and fails to testify is weak and unproven). See also Note, *Discretionary Penalty Increases On the Basis of Suspected Perjury*, 1975 U. ILL. L.F. 677, 687 [hereinafter cited as *Discretionary Penalty Increases*], which expresses the view that suspected perjury should not be considered in determining sentence. Some of the reasons espoused by the author in support of his view are: suspected perjury is not probative of the defendant's prospects for rehabilitation due to the pressures on him at trial, and due to the advent of



decided this precise issue, almost without exception, perjury has been deemed to be probative of the defendant's prospects for rehabilitation and thus a relevant factor in determining the appropriate sentence.<sup>43</sup> The United States Court of Appeals for the District of Columbia is the only circuit to have directly rejected the idea that a defendant's perjury on the witness stand is relevant to recognized purposes of sentencing. In *Scott v. United States*,<sup>44</sup> the court of appeals maintained that the urge to escape conviction and remain free is first and foremost in the minds of defendants. Consequently, even those criminal defendants who sincerely feel remorse over their crimes are likely to lie under oath if they believe that there is a remote possibility that by doing so they can escape conviction.

Although the *Grayson* Court did not deny that there are great psychological pressures on a defendant at trial, it nevertheless directly rejected the *Scott* rationale as resting upon a deterministic view of human conduct that is inconsistent with the underlying precepts of our criminal justice system.<sup>45</sup> The Court followed the

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the plea bargaining system which allows criminal defendants to plead guilty to a lesser offense in order to receive a lighter sentence, regardless of their true character and prospects for rehabilitation; the detection of perjury, unlike the elements in the presentence report, rests solely on the subjective determination of the judge, who is not trained to detect perjury; and the procedural safeguards of a new trial are available to decide the issue of the defendant's suspected perjury.

43. See *United States v. Hendrix*, 505 F. 2d 1233, 1236 (2d Cir. 1974) (under the theory of individualized sentencing, the defendant's willingness to lie under oath before the judge who will sentence him would seem to be among the more "precise and concrete" of available indicia concerning his character and prospects for rehabilitation); *Humes v. United States*, 186 F.2d 875, 878 (10th Cir. 1951) (the attitude of a convicted defendant with respect to his willingness to commit a serious crime like perjury is a proper matter to consider in determining what sentence shall be imposed within the limitations fixed by the applicable statute); *Peterson v. United States*, 246 F. 218 (4th Cir. 1917), *cert. denied*, 246 U.S. 661 (1918) (perjury unquestionably is a telling commentary on the defendant's character, revealing his continued lack of respect for the necessity to abide by societal rules, including those not beneficial to one's personal interest). See also *Defendant's Plea*, *supra* note 29, at 211. See also *ABA Standards Relating to Sentencing Alternatives and Procedures*, § 5.1, at 532 (1971), for a study which established, with respect to sentencing practices, the probative value of the defendant's conduct on the stand. The committee noted that "[t]he trial judge's opportunity to observe the defendant, particularly if he chose to take the stand in his defense, can often provide useful insights into an appropriate disposition."

44. 419 F.2d 264, 269 (D.C. Cir. 1969). The court of appeals concluded that "the peculiar pressures placed upon a defendant threatened with jail and the stigma of conviction make his willingness to deny the crime an unpromising test of his prospects for rehabilitation if guilty." *Id.*

45. 98 S. Ct. at 2617. See *Morissette v. United States*, 342 U.S. 246, 250 (1952) (our criminal justice system is premised upon the "belief in the freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil").

majority position in this area, and concluded that the defendant's suspected perjury clearly may be deemed probative of his prospects for rehabilitation based upon the ability and duty of the normal individual to choose good over evil.<sup>46</sup>

Conceding that perjury may be relevant for sentencing purposes, Grayson insisted that there was no way of determining whether a judge considered it for that legitimate reason or rather as a penalty imposed for the independent substantive offense of perjury.<sup>47</sup> If it were considered for the latter reason, this would be an impermissible practice since it violates due process safeguards. The defendant would be receiving punishment for perjury without having an opportunity to defend himself at a trial on that issue.<sup>48</sup>

Grayson maintained that since it was impossible to determine the particular reason for which the perjury was considered, due process mandated that consideration of perjury for any reason be precluded.<sup>49</sup> The majority rejected this argument relying on its decision in *Williams*.<sup>50</sup> Although *Williams* did not specifically involve the issue of considering perjury, it clearly supports *Grayson*. Evidence of prior and subsequent crimes for which the defendant was neither tried nor convicted may be considered although it potentially poses similar due process implications in that it may be considered for the impermissible purpose of imposing additional punishment for those crimes. In light of this consideration, a contrary result in *Grayson* would likely have required that *Williams* be overruled. Consequently, the ramifications of deciding that the procedure in *Grayson* violated due process would have been to remove from the consideration of the sentencing judge most of the information traditionally considered for sentencing purposes. This result would render the indeterminate sentencing process a meaningless exercise.<sup>51</sup> The continued viability of the indeterminate sentencing process as a valuable component of our criminal justice system depends on its opera-

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46. 98 S. Ct. at 2617. See note 43 and accompanying text *supra*.

47. *Id.*

48. However, the court of appeals in *Grayson* held that this was not a problem because the suspected perjury was considered solely for its reflection upon the defendant's character, and not as punishment for perjury. 550 F.2d at 111.

49. 98 S. Ct. at 2617. See text accompanying note 17 *supra*.

50. *Id.* See note 19 *supra*.

51. *Id.* The parlous effort to appraise character, observed Chief Justice Burger, degenerates into a game of chance to the extent that a sentencing judge is deprived of relevant information concerning every aspect of a defendant's life (citing *Williams v. New York*, 337 U.S. 241, 250 (1949); *United States v. Hendrix*, 550 F.2d 1233, 1236 (2d Cir. 1974)).

tion within this framework, and thus the need for this information far outweighs the potential of abuse.<sup>52</sup>

The second contention raised by Grayson was that a defendant has a statutory right to testify in his own behalf,<sup>53</sup> and that the practice of increasing his sentence on the basis of suspected perjury chills that right.<sup>54</sup> In light of the fact that the defendant's primary concern at trial must be to escape conviction,<sup>55</sup> it is highly unlikely that he would jeopardize his chances by not testifying simply because of the possibility that if found guilty he might have his sentence increased because the judge erroneously viewed his testimony as false.<sup>56</sup>

Assuming that this practice might possibly have some chilling effect on the right to testify, that fact alone should not be sufficient to render it unconstitutional. The Court has emphasized in the past that any chilling effect on the rights of a criminal defendant is unconstitutional only if the practice in question places an impermissible burden on those rights, and not when it merely requires him to make a difficult choice concerning whether or not to exercise his rights.<sup>57</sup> In *Grayson*, this issue was never addressed because the Court dismissed the argument concerning the chilling effect as frivolous.<sup>58</sup> However, the Supreme Court's decision in *Crampton v.*

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52. See notes 18 & 39 and accompanying text *supra*.

53. 18 U.S.C. § 3481 (1964). See note 20 *supra*.

54. Judge Craven has suggested that a defendant may choose not to take the stand in his own defense because he fears that a harsher sentence will be imposed if his story is disbelieved by the judge. See *United States v. Moore*, 484 F.2d 1284, 1288 (4th Cir. 1973) (Craven, J., dissenting). "Such a practice will inevitably chill and hamper, if not ultimately destroy, the right to testify in one's own defense. It seems to me unconscionable that a defendant must run the risk of conviction of the offense charged and at the same time run the gauntlet of disbelief." *Id.* See also *Discretionary Penalty Increases*, *supra* note 42, at 689.

55. *Scott v. United States*, 419 F.2d 264, 269 (D.C. Cir. 1969) (the great pressures placed upon a criminal defendant at trial to escape conviction reduce the probative value of his false testimony).

56. See Brief for Petitioner at 9, *United States v. Grayson*, 98 S. Ct. 2610 (1978). The *Grayson* Court asserted that it is extremely doubtful that this practice would ever deter a criminal defendant from taking the stand in his own defense to present truthful, exculpatory testimony that could lead to acquittal. *Id.* at 2618. See also note 29 *supra*, for the effect of a defendant's failure to take the stand upon his chances of acquittal.

57. See *Crampton v. Ohio*, 402 U.S. 183, 213 (1971). The Supreme Court held that the practice in question is not impermissible if it merely requires the defendant to make a difficult choice concerning whether or not to exercise his right to testify, because "the criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow." *Id.*

58. 98 S. Ct. at 2618.

*Ohio*,<sup>59</sup> casts considerable light upon the chilling effect issue. In *Crampton*, the Court upheld the constitutionality of Ohio's unitary trial system in which the jury determines guilt and sentence at the same proceeding. The Court concluded that this practice did not chill the defendant's fifth amendment right against self-incrimination, but merely forced him to decide whether to exercise his right to remain silent on the issue of guilt at the cost of surrendering his chance to plead his case on the punishment issue. If this practice, which forced the defendant to decide whether to exercise his constitutional right against self-incrimination, was held not to have an impermissible chilling effect, it would certainly seem that the same result should be reached with regard to a statutory right such as the right to testify in one's own defense.

In *Grayson*, the Supreme Court granted certiorari to resolve what it perceived to be a conflict among the circuits concerning the permissibility of considering a defendant's suspected perjury in determining the appropriate sentence.<sup>60</sup> The Court acknowledged that the majority of courts addressing this issue had concluded that the sentencing judge can consider the defendant's suspected perjury on the witness stand.<sup>61</sup> However, the Court believed that the decisions in *Scott v. United States*<sup>62</sup> and *Poteet v. Fauver*,<sup>63</sup> upon which *Grayson* was decided at the court of appeals level, were in conflict

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59. 402 U.S. 183, 215 (1971). In *Crampton*, the defendant challenged the constitutionality of Ohio's unitary trial system. Because guilt and punishment were determined at the same proceeding, Crampton was forced to relinquish his constitutional right to remain silent with respect to the issue of his guilt if he chose to plead his case on the issue of his punishment. He could remain silent on the issue of guilt only by surrendering his chance to be heard by the jury on the issue of punishment. Crampton contended that this practice impermissibly chilled his constitutional rights, but the Court concluded that it is "not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify." *Id.*

60. 434 U.S. 816 (1977).

61. See note 8 *supra*.

62. 419 F.2d 264 (D.C. Cir. 1969). In *Scott*, the court of appeals held that a judge may not increase a sentence because he believes the defendant lied in denying his guilt. Scott's sentence was overturned because the court of appeals concluded that the increased sentence was a direct result of the defendant's refusal to confess, and held that "a sentencing approach that in effect penalizes a defendant for preserving his right of appeal . . . cannot be regarded as consistent with law." *Id.* at 282.

63. 517 F.2d 395 (3d Cir. 1975). In *Poteet*, the trial judge increased the defendant's sentence because he refused to confess at the sentencing hearing. The trial judge had imposed a substantially lighter sentence on Poteet's equally mendacious co-defendant who confessed his guilt when he appeared before the judge for sentencing. The court of appeals concluded, however, that a sentencing judge may not add a penalty because he believes the defendant lied at the sentencing hearing.

with the majority view in this area.<sup>64</sup> A careful analysis of the decisions in *Poteet* and *Scott* reveals that such a conflict did not exist among the courts of appeals, and that *Poteet* and *Scott* are distinguishable in a very crucial respect. In both *Poteet* and *Scott*, the primary focus was on the conduct of the defendant in refusing to confess his guilt *after* the jury had returned a guilty verdict. The defendant's sentence was overturned in each instance because it had been used in an effort to coerce the defendant into relinquishing his fifth amendment privilege against self-incrimination and his sixth amendment right to appeal.<sup>65</sup> On the other hand, in *Grayson* there were no implications of coercion, since the sole concern of the sentencing judge was with the defendant's conduct on the witness stand *prior* to the jury verdict. Consequently, by characterizing the decisions in *Poteet* and *Scott* as conflicting with the result reached in *Grayson*, the Supreme Court may have unnecessarily diluted the rights of criminal defendants in those circuits.

Although it is possible to read *Grayson* as overruling *Poteet* and *Scott* and permitting judges to impose enhanced sentences upon criminal defendants when they refuse to confess at sentencing hearings, it does not appear that the Court intended such a result. Perhaps the Court should have distinguished *Poteet* and simply decided *Grayson* on the authority of *Williams* and 18 U.S.C. § 3577. Such an approach would have permitted the decisions in *Poteet* and *Scott* to remain intact, thereby protecting fifth and sixth amendment rights of the defendant while still enabling the Court to continue the *Williams* trend of allowing sentencing judges broader discretion to consider, for sentencing purposes, various aspects of a defendant's life and character.

The impact of *Grayson* will necessarily be limited since judges are not currently required to articulate the reasons supporting their

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64. See *United States v. Grayson*, 550 F.2d 103, 114 (3d Cir. 1976) (Rosenn, J., dissenting). The factual circumstances in *Grayson* are clearly distinguishable from those in *Poteet* in two distinct respects. First, in *Poteet*, the sentencing judge attempted to coerce a confession from the defendant by threatening him with a longer sentence if he refused to confess at the sentencing hearing. Second, *Poteet* involved a refusal to confess at the time of sentencing or allocution, and not perjury on the witness stand. The trial judge emphasized that he was not concerned with *Poteet's* false testimony on the stand, but rather with his refusal to confess after the jury had returned the verdict against him. "It is one thing what you do before the jury. When you come here for sentence, . . . that's the time for you to come clean, if there's any hope of your ever coming clean." *Id.* at 115 (quoting *Poteet v. Fauver*, 517 F.2d at 393). See also *United States v. Nunn*, 527 F.2d 1390 (5th Cir. 1976).

65. See notes 62 & 63 *supra*.

determination of sentences.<sup>66</sup> Until such time as a record of the sentencing process is required for appellate review, *Grayson* can be meaningfully enforced only when a judge chooses to articulate for the record the reasons for his determination of sentence.<sup>67</sup> Only then is it possible to insure that the judge considered the defendant's suspected perjury solely for its reflection on his prospects for rehabilitation and not for the purpose of penalizing the defendant for committing the perjury, or for refusing to confess.

*Timothy J. Mains*

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66. See *United States v. Grayson*, 550 F.2d 103, 104 (3d Cir. 1976). In *Grayson*, the court of appeals observed that the trial court quite properly noted that it could, without giving any explanation, sentence Grayson to the maximum term of imprisonment provided by the statute. See also *Appellate Review*, *supra* note 34, at 1358.

67. The need for judges to articulate the underlying reasons for the sentences they impose has prompted many suggested reforms that would require them to establish a record of the sentencing process for appellate review. See M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 42-43 (1973). One proposed reform would require a judge, when considering suspected perjury in determining sentence, to state that fact in the record and to include in the record the factors which he considered in determining that the defendant had, in fact, committed perjury. The potential for appellate review of the judge's subjective perception that the defendant had committed perjury would serve to safeguard the defendant's rights. See *Discretionary Penalty Increases*, *supra* note 42, at 691. Additional safeguards which have been proposed to reduce the chance of error in the judge's subjective perception of the defendant's suspected perjury would require that the judge be convinced beyond a reasonable doubt that the defendant intentionally lied on material issues of fact and that the falsity of the defendant's testimony be established by the fact that he was found guilty. See *United States v. Grayson*, 550 F.2d 103, 114 (3d Cir. 1976) (Rosenn, J., dissenting).

