
Jonathan D. Savage

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CASENOTES

UNITED STATES V. GRAYSON
QUESTIONABLE SUPPORT FOR BROAD JUDICIAL DISCRETION IN SENTENCING

INTRODUCTION

When considering the subject of sentencing, it is necessary to begin with a recognition of its primacy in the criminal justice system. The majority of persons who are formally charged with a criminal offense plead guilty. As a result, they by-pass the trial proceedings and are therefore immediately faced with the imposition of a sentence. Thus, the sentencing process becomes the defendant's single most important contact with the judicial system. In addition to the majority who do plead guilty, a few plead not guilty and thus stand trial. The majority of these persons, however, are convicted and eventually must face a judge for sentencing.

Early common law jurists emphasized the judicial philosophy of retribution accomplished by a system of fixed penalties for all crimes. Because punishment was fixed, the sentencing procedure became a mere formality. The modern philosophy of sentencing, however, operates on the premise that punishment should "fit the offender and not merely the crime." The modern goal, therefore, is that the perceived probability of the reformatory

1. THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967). See also Santobello v. New York, 404 U.S. 257, 264 n. 2 (1971) (Douglas, J., concurring) (in 1964 90.2% of federal convictions were based on guilty pleas); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES § 1 (Approved Draft 1968); D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 3 (1966) (the precise data is difficult to establish but the figure is approximately 90%).


3. See W. Blackstone, Commentaries 376 (J. Wendell ed. 1847); Comment, The Admissibility of Character Evidence in Determining Sentence, 9 U. CHI. L. REV. 715 n.1 (1942) (The death penalty was imposed for at least 160 different crimes. Indeed, variations in punishment according to the severity of the crime were only found in the manner in which the death sentence was imposed).

tion and rehabilitation of the offender\(^5\) determines the length of a sentence. Out of this approach there has developed a system of indeterminate sentencing.\(^6\) Under this system, the sentencing judge, loosely governed by broad legislatively imposed minimum and maximum penalties,\(^7\) determines the degree of punishment necessary for the reformation of the offender.\(^8\) Emphasis is placed on individual treatment of the accused.\(^9\) Thus, length of sentence is no longer automatic, but is a result of broad

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6. By the 19th century, the theory of indeterminate sentencing had developed in the United States, replacing the retribution oriented philosophy of early English common law. K. Davis, Discretionary Justice 133 (1969) [hereinafter cited as Davis]. Penal reform in the United States, with emphasis on the use of the indeterminate sentence and parole, stemmed from the "Cincinnati Declaration: of the first meeting of the American Prison Association and was put into practice at the Elmira reformatory in New York in 1870." L. Friedman, A History of American Law 519 (1973); cf. H. Barnes & N. Teeters, New Horizons in Criminology: The American Crime Problem 488, 834 (1st ed. 143) (as early as 1787 Benjamin Rush stated that the indeterminate sentencing theory was used in the 1820's in houses of refuge for minors).

The Supreme Court, in important dictum found in Williams v. New York, 337 U.S. 241, gave legitimacy to the indeterminate sentencing movement:

Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. Indeterminate sentences the ultimate termination of which are sometimes decided by non-judicial agencies have to a large extent taken the place of the old rigidly fixed punishments. The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy . . . . Retribution is no longer the dominant objective of criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.

Id. at 248.

7. In the federal system, for example, second degree murder is punishable by imprisonment "for any term of years or for life." 18 U.S.C. § 1111 (1977). Rape is punished by "death or imprisonment for any term of years or for life." Id. at § 2031 (1977). Kidnapping is punishable by death, imprisonment for life or any term of years. Id. at § 1201 (1977).

8. The sentencing judge is obligated to make his decision on the basis of predictions regarding the convicted defendant's potential, or lack of potential, for rehabilitation. Williams v. New York, 337 U.S. at 247. The basic premise of the indeterminate sentence is the relatively modern concept that individualized rehabilitation is the paramount goal of sentencing. M. Frankel, Criminal Sentences: Law Without Order 87 (1972) [hereinafter cited as Frankel]. Accord, Shimm, Foreward, 23 Law & Contemp. Prb. 399 (1958) (sentencing must look to the offender's rehabilitation, to his restoration as a functioning, productive, responsible member of the community).

9. In Burns v. United States, 287 U.S. 216 (1932), a district court judge, through his discretionary power, revoked a defendant's probation privileges. The revocation was based on the judge's belief that the defendant was lying concerning his unexplained absences. The Supreme Court affirmed the revocation, and the judge's power to individualize each case, through careful, humane and comprehensive consideration of the particular offender. Id. at 220.
discretion on the part of the sentencing judge.10

"Indeterminate sentencing under the rehabilitation model presents the sentencing judge with a serious practical problem: how rationally to make the required character analysis so as to avoid capricious and arbitrary sentences [which the indeterminate sentence places] within the realm of possibility."11 One solution is to provide the judge with as much information as is reasonably practical concerning every aspect of the defendant's life.12 Included should be information concerning the person's character, propensities, present purposes and criminal tendencies.13 In most jurisdictions, probation officers conduct a presentence investigation of the defendant's life and provide such information. On the basis of that information a presentence report is used to aid the judge in sentencing.14 The judge, however, may consider information beyond the report and may also, on his own, conduct a broad inquiry concerning the defendant. This independent investigation is largely unlimited either as to the kind of information the judge may consider, or, as to the source from which it may come.15


12. Id., quoting Williams v. New York, 337 U.S. at 250. The federal statute provides:

Use of information in sentencing

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 court may, in the exercise of its broad discretion, dispense with the presentence report. E.g., United States v. Schwenke, 221 F.2d 356, 358 (2nd Cir. 1955) (by proceeding to impose sentence without the report, the judge simply exercised his discretionary power to dispense with it).


14. E.g., Gardner v. Florida, 430 U.S. 349 (1977). The defendant was convicted of murder, and the jury advised the court to impose a life sentence. But the judge, relying in part on the presentence report, imposed the death sentence. The case was remanded by the Supreme Court, not because of the judge's reliance on the presentence report, but his failure in a capital offense case to disclose all portions of the report he used in determining sentence; Morrissey v. Brewer, 408 U.S. 471 (1972) (judge considered presentence report in affirming revocation of plaintiff's parole); Gregg v. United States, 394 U.S. 409 (1969) (the judge was allowed to read the presentence report even before jury returned verdict); Williams v. New York, 337 U.S. at 246-47 (judge increased defendant's sentence based on criminal record revealed in presentence report).

15. FED. R. CRIM. P. 32(a)(2), 18 U.S.C.A. provides:
Under the guise of a scheme attempting to fit a proposed sentence to a particular offender, the sentencing judge in reality has full discretion to take whatever action he deems appropriate in each case. There are no specific guidelines with which to instruct the sentencing judge in his decision. Thus, the judge

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 or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

**Accord**, United States v. Tucker, 404 U.S. 443, 446 (1971) (in the sentencing proceeding the district judge conducted an inquiry into the defendant's background and gave explicit attention to the three previous felony convictions the defendant had acknowledged).

The sentencing judge may even take into account uncharged criminal acts. E.g., Davenport v. United States, 411 U.S. 919 (1973) (pending indictments); Williams v. New York, 337 U.S. at 244 (arrests); United States v. Marines, 335 F.2d 552, 554-55 (10th Cir. 1966) (dismissed charges); United States v. Bass, 336 F.2d 110, 119-20 (D.C. Cir. 1966) (defendant's involvement in large scale drug dealing); United States v. Card, 519 F.2d 309, 314 n.3 (7th Cir. 1975) (charges that have ended in acquittal); United States v. Atkins, 480 F.2d 1223, 1224 (9th Cir. 1973) (charges that have been revised on approval); Haslam v. United States, 431 F.2d 364 (9th Cir. 1970), reaffirmed on rehearing, 437 F.2d 955 (9th Cir.), cert. denied, 402 U.S. 912 (1971) (defendant's failure to appear for sentencing); United States v. Cifarelli, 401 F.2d 512, 514 (2d Cir.), cert. denied, 393 U.S. 987 (1968) (no conviction).

The courts have also found it essential to consider facts concerning the defendant's character. E.g., United States v. Dent, 477 F.2d 447, 449 (D.C. Cir. 1973) (defendant's malicious behavior); United States v. Carden, 428 F.2d 1116, 1118 (8th Cir. 1970) (age, health and family situation); United States v. Marcello, 423 F.2d 993, 1012 (5th Cir.), cert. denied, 398 U.S. 959 (1970) (past life and habits). See United States v. Doyle, 348 F.2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965) (the aim of the sentencing judge is to acquire a thorough acquaintance with the character and the history of the man before it).

The courts are not to consider facts deemed unconstitutional. North Carolina v. Pearce, 395 U.S. 711 (1969) (harsher sentence because defendant indicated his intention to appeal conviction); Maxwell v. Bishop, 398 F.2d 138, vacated and remanded, 398 U.S. 262 (1970) (where it is argued that due to the lack of defined sentencing standards in capital cases, race has played an important unconstitutional role in sentence determinations); Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968), cert. denied, 402 U.S. 961 (1971) (giving defendant a harsher sentence on the basis of evidence seized in violation of his fourth amendment rights); United States v. Mitchell, 392 F.2d 214 (2d Cir. 1968) (Defendant claimed his sentence was increased because he was an agnostic. However, the trial judge said he did not rely on this consideration and therefore the appellate court sustained the sentence).

Moreover, the judge's investigation of the offender is not confined by the narrow limits of trial court rules. See Williams v. New York, 337 U.S. at 250.


17. There is, however, a limited amount of case law that acts as guidelines. See note 15 supra.
Judicial Discretion develops a dependence on various informational sources. A major area of controversy concerning these sources surrounds the question whether a judge may consider the demeanor of the accused observed during the trial. More specifically, in fixing the sentence of a defendant within statutory limits, may the judge consider the defendant's alleged false testimony observed during the trial?

In 1917, the Fourth Circuit determined that in fixing a defendant's sentence, a sentencing judge could rely on his personal belief that the accused had committed perjury. The majority of the circuits have similarly held. However, not until

18. Id.
20. Peterson v. United States, 246 F. 118 (4th Cir. 1917), cert. denied, 246 U.S. 661 (1918). Defendant was convicted of stealing a rubber stamp worth 40 cents from a post office. The judge took into consideration his belief that the defendant had committed perjury in maintaining his innocence, and gave the defendant a three year sentence in prison.
21. Eight circuits have allowed the judge the right to weigh perjury in his sentencing decision. E.g., United States v. Nunn, 525 F.2d 958 (5th Cir. 1976) (The judge stopped defendant's testimony, sent jury out of room, and explained perjury laws to defendant. Defendant thereafter changed his testimony. Trial judge then considered his belief that defendant committed perjury in his sentence determination); United States v. Hendrix, 505 F.2d 1233, 1235 (2d Cir.), cert. denied, 423 U.S. 897 (1974) (district court judge stated, "I feel I added about two years for perjury during the trial in my sentence"); Hess v. United States, 496 F.2d 936 (8th Cir. 1974) (judge stated he did not believe defendant's story of having received his injury by a fall in the bathroom, rather than the result of a gun shot, and considered such testimony in sentencing); United States v. Moore, 484 F.2d 1284 (4th Cir. 1973) (FBI agent testified that though defendant agreed to answer questions, he failed to provide details of his story when interrogation got more specific. The court determined that this did not violate the defendant's privilege against self-incrimination, and the district court did not err in deciding to increase defendant's sentence because of his breach of this promise); United States v. Cluchette, 465 F.2d 749 (9th Cir. 1972) (The defendant contended that the judge abused his sentencing discretion by considering his suspicion of perjury. The appellate court stated that as long as the sentence fell within the statutory limits they would not disturb it); United States v. Wallace, 418 F.2d 876, 878 (6th Cir. 1969), cert. denied, 397 U.S. 955 (1970) (The jury decided that the defendant warranted only probation. However, the judge imposed a sentence because the defendant denied the charges both at the trial and sentencing hearing. Stated the court, "an inescapable demonstration of the defendant's perjury is a factor the judge may be derelict in ignoring"); United States v. Levine, 372 F.2d 70 (7th Cir. 1967) (The court was faced with the contention that the trial judge had abused his discretion in giving maximum sentence because he relied on the defendant's exercise of his right to take the stand. The judge stated: "I have made up my mind on this matter and indicated it before that this defendant took the stand, denied complicity all the way through, and in my judgment committed perjury before the court. I cannot see any grounds for leniency at all. . . ." Id. at 74 n.4. The appellate court said that the sentencing judge's comments only indicated that he believed the defendant committed perjury while testifying, and he may consider that factor in imposing the sentence); Humes v. United States, 186 F.2d 875 (10th Cir. 1951) (appellate court held that the sentencing judge had acted properly in considering the character of
United States v. Grayson\textsuperscript{22} did the Supreme Court deal specifically with the right of a judge to consider, in sentencing, his personal belief that the defendant had lied in court.

Facts and Findings of the Lower Courts

Ted Grayson escaped from a federal prison camp, but was apprehended and indicted for prison escape in violation of 18 U.S.C. § 751(a).\textsuperscript{23} At trial, Grayson admitted leaving camp, stating that he did so out of fear.\textsuperscript{24} However, the government's rebuttal evidence and cross-examination on crucial aspects of his story contradicted Grayson's testimony.\textsuperscript{25} The jury returned a

the defendant as reflected in his own perjury and his inducement of another's perjury at the trial in determining what sentence to impose). Cf Scott v. United States, 419 F.2d 264, 268-69 (D.C. Cir. 1969) (case remanded for resentencing. A trial judge may not impose further punishment because he disbelieves the defendant).

22. 438 U.S. 41.

23. \textit{Id.} The federal statute provides in part:

Whoever escapes or attempts to escape from the custody of the Attorney General or from any . . . facility in which he is confined by direction of the Attorney General . . . issued under the laws of the United States by any court . . . [may] be fined not more than $5,000 or imprisoned not more than five years or both . . . .


24. "I had just been threatened with a large stick with a nail protruding through it, by an inmate that was serving time at Allenwood, and I was scared, and I just ran." Grayson stated that the threats had been made in the presence of many inmates by one prisoner, Barnes, who sought to enforce collection of a gambling debt and followed other threats and physical assaults made for the same purpose. 438 U.S. at 42.

25. For example, Grayson testified that after crossing the prison fence he left his prison jacket at the side of the road. On recross, he stated that he also left his prison shirt but not his trousers. Government testimony showed that on the morning after the escape, a shirt marked with Grayson's number, a jacket and a pair of prison trousers were found outside a hole in the prison fence. \textit{Id.} at 43. It should be noted that in defendant's brief to the Supreme Court, it is stated that the trousers that were found were khaki work trousers which could not be identified as belonging to Grayson. Also, the pants, along with other articles were found on Penn Hill, an area well known as a drop-off point for contraband coming in and out of the prison camp. The khaki work pants which were found in the area were of the type worn by inmates on most of the work details, but Grayson was in the kitchen detail, and they wore white pants. Brief for Appellee at 4, Grayson v. United States, 438 U.S. 41 (1978). On cross examination Grayson also testified: "I do believe that I phrased the rhetorical question to Captain Kurd, who was in charge of the [prison], and I think I said something if an inmate was being threatened by somebody, what would . . . he do. First of all he said he would want to know who it was." United States v. Grayson, 438 U.S. at 43.

On further cross examination, however, Grayson modified his previous recollection. Captain Kurd testified that Grayson had never mentioned in any way threats from other inmates. Finally, the alleged assailant, Barnes, by then no longer an inmate, testified that Grayson had never owed him money and that he had never threatened or physically assaulted Grayson. \textit{Id.} at 43.
Judicial Discretion

verdict of guilty. At the sentencing hearing the district court judge stated, that because he believed Grayson's story was a complete fabrication, he would consider in sentencing, his personal belief that Grayson had lied on the witness stand.

On appeal, Grayson argued that the judge had erred by imposing a sentence, "the severity of which was based in part upon the judge's belief that the defendant had committed perjury during trial." The Third Circuit affirmed the conviction, but upon rehearing reversed in accordance with its previous decision in Poteet v. Fauver. "Poteet mandates that no additional

27. At the sentencing hearing, the judge stated:
I'm going to give my reasons for sentencing in this case with clarity, because one of the reasons may well be considered by a Court of Appeals to be impermissible; and although I could come into this Court Room and sentence this Defendant to a five-year prison term without any explanation at all, I think it is fair that I give the reasons so that if the Court of Appeals feels that one of the reasons which I am about to enunciate is an improper consideration for a trial judge, then the Court will be in a position to reverse this court and send the case back for resentencing. In my view a prison sentence is indicated, and the sentence that the Court is going to impose is to deter you, Mr. Grayson, and others who are similarly situated. Secondly, it is my view that your defense was a complete fabrication without the slightest merit whatever. I feel it is proper for me to consider that fact in the sentencing, and I will do so.

Id. at 104-5 (emphasis added).

The court could, with no explanation, sentence Grayson to the maximum term of imprisonment provided by statute, that is, a five-year prison term. See Gore v. United States, 357 U.S. 386 (1978); Dorsynski v. United States, 418 U.S. 424, 431 (1974); Government of Virgin Islands v. Richardson, 498 F.2d 892, 894 (3rd Cir. 1974).

28. Grayson advanced three contentions in his direct appeal to the appellate court. The first was that the district court had erred in failing to ask his voir dire question: "Would you be more likely to find the defendant guilty merely because he has previously been convicted of a crime?" His second claim was that the court had erred in permitting the introduction of evidence of his prior convictions for the purpose of impeaching his credibility. Without explanation, both of these contentions were found to have no merit. Grayson's third contention was, as presented in the text, that the judge had erred by imposing a sentence, "the severity of which was based in part upon the judge's belief that the defendant had committed perjury during trial." United States v. Grayson, 550 F.2d at 105 n.3.

29. Id. at 105.
31. 517 F.2d 393 (3rd Cir. 1975). In Poteet, a defendant's prison sentence was augmented because he persisted in maintaining his innocence after the jury had returned a guilty verdict, even though there was no charge of perjury or conviction for that crime. The defendant claimed he was denied due process. "A defendant has a right to defend himself, and although he is not privileged to commit perjury, the sentencing judge may not add a penalty because he believes the defendant lied." Id. at 395. The appellate court in Poteet gave two reasons for its decision: 1) One cannot be punished except upon a charge and opportunity for a hearing giving due process and 2) the
penalty may be imposed upon a defendant because the trial judge believes that the defendant lied while testifying. Here, Grayson's sentence was unquestionably increased for just this reason. His sentence, therefore, cannot stand."\(^{32}\) The Supreme Court granted certiorari to resolve the conflict between the circuits on this issue.\(^{33}\)

**Grayson in the Supreme Court**

In an opinion written by Chief Justice Burger, the Supreme Court affirmed the district court's decision.\(^{34}\) *Grayson* reaffirmed that a sentencing judge, in fixing the sentence of a defendant within statutory limits, may consider the defendant's false testimony observed by the judge during the trial.\(^{35}\)

The majority's decision emphasized the need, directly resulting from the nature of indeterminate sentencing, for all sentencing judges to have sufficient information concerning the character of the offender and his potential for rehabilitation.\(^{36}\) The demeanor of the accused during trial, especially his willingness to perjure himself in court, was deemed sufficiently probative of his prospects for rehabilitation.\(^{37}\) Thus, the judge had the legal right, and now the personal duty, to consider such testimony.\(^{38}\)

\(^{32}\) United States v. Grayson, 550 F.2d at 105. The appellate court determined that the trial judge could not be allowed to weigh respondent's testimony in fixing a suitable sentence, even after finding it to be a "complete fabrication without the slightest merit whatsoever," because to do so would penalize defendant for exercising his right, would violate due process by punishing him for perjury without notice of the charge or opportunity to be heard, or could deter other criminal defendants from taking the witness stand by placing an unfair burden on their right to testify. *Id.* at 103.


\(^{34}\) United States v. Grayson, 438 U.S. at 41.

\(^{35}\) *Id.* at 55.

\(^{36}\) *Id.* at 50. *See* notes 41-63 and accompanying text *infra*.

\(^{37}\) United States v. Grayson, 438 U.S. at 50. *See* notes 41-49 and accompanying text *infra*.

\(^{38}\) *See generally* United States v. Grayson, 438 U.S. 41.
ANALYSIS

The defendant set forth two arguments in order to affirm the appellate court's decision and relieve the sentencing judge of his right to consider alleged false testimony. First, he argued that the district court's sentence constituted punishment for the crime of perjury for which he had not been indicted. Second, the defendant alleged that by permitting the consideration of perjury, the Court would "chill" the defendant's right to testify on his own behalf and would also inhibit his right to testify truthfully.

Alleged Perjury as a Relevant Sentencing Factor

Before addressing the defendant's arguments, the Court noted that in order to insure that the sentencing process would not become a "game of chance," the use of a wide range of information concerning the defendant's character was justified. Information about the individual aids the judge in assessing the offender's potential for rehabilitation. Thus, most factors leading to such a determination are acceptable.

The Grayson Court supported this conclusion by recognizing that challenges levied against the constitutionality of broad judicial discretion in sentencing have led to a broader acknowledgement that a sentencing judge may consider information beyond the presentence report. Such information includes evidence heard during trial and the demeanor of the

40. Id.
41. Id. See United States v. Hendrix, 505 F.2d at 1236 where it is 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. . . . Impressions about an individual being sentenced — the likelihood that he will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, the degree to which he does not deem himself at war with his society — are, for better or worse, central factors to be appraised under our theory of "individualized" sentencing. The theory has its critics. While it lasts, however, a fact like the defendant's readiness to lie under oath before the judge who will sentence him would seem to be among the more precise and concrete of the available indicia.
42. United States v. Grayson, 438 U.S. at 52.
43. See note 15 supra.
44. See note 12 supra.
accused. A defendant's demeanor, exemplified by his truthfulness while testifying on his own behalf, indicates his attitude toward society and his prospects for rehabilitation and, therefore, is relevant to sentencing.

_Grayson_ emphasized the Court's belief in "the freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." A defendant's readiness to lie under oath evidences his ability to make such a choice. Such evidence, stated the Court, "may be deemed probative of his prospects for rehabilitation.

In those instances where a trial judge believes that the defendant has committed perjury, he may justify the imposition of a heavier sentence on the grounds that one's willingness to perjure reflects upon his ability to be rehabilitated. The increased sentence allows more time for the defendant's reformation, which his perjury shows to be needed. Even though eight circuits and the _Grayson_ Court have recognized the validity of this theory, if the major justification supporting it proves to be

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45. ABA, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, § 5.1 at 232 (1971).
47. United States v. Grayson, 438 U.S. at 52, quoting Morrisette v. United States, 342 U.S. 246 (1952) (defendant lacked the intent to steal bomb casings from the government, and thus never was faced with having to choose between good and evil). See Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937) (Judge Cardozo emphasized the assumption of freedom of the will as a “working hypothesis in the solution of [legal] problems”); Blocker v. United States, 288 F.2d 853, 856 (D.C. Cir. 1961) (Burger, J., concurring) (the law must proceed on the scientifically unprovable assumption that human beings make choices in the regulation of their conduct and that they are influenced by society's standards as well as personal standards); Fisher v. United States, 149 F.2d 28, 29 (D.C. Cir. 1945) (“In the determination of guilt, age old conceptions of individual moral responsibility cannot be abandoned without creating a laxity of enforcement that undermines the whole administration of criminal law”).
49. Id.
50. Some judges, speaking either for the majority or in dissent, have rejected the contention that they have the power to impose a second sentence for the substantive offense as a justification for increasing a sentence based on suspected perjury. See, e.g., United States v. Moore, 484 F.2d at 1288 (Craven, J., concurring). Although the appellate court approved of the district judge's consideration of defendant's false testimony under oath, Judge Craven felt that _Peterson_ should be overruled. Allowing a trial judge to impose a harsher sentence upon the defendant because he believes the defendant lied on the stand will destroy the defendant's right to testify on his own behalf. Scott v. United States, 419 F.2d at 269 (trial judge in determining sentence, took into consideration his belief that because defendant continued to assert his innocence, he must have committed perjury. On appeal, the use of this practice was rejected and sentence reversed).
51. See note 8 and accompanying text supra.
slightly weak and unreliable, indeterminate increases in sentences cannot be justified.\textsuperscript{52} Both case law and commentators have criticized the assumptions used to support the justification.\textsuperscript{53} The Court, however, largely ignored these attacks, and instead placed its reliance on several tenuous assumptions.

The first of these assumptions the Court relied upon was that of the "ability and duty of the normal individual to choose" between good and evil.\textsuperscript{54} This contention ignores the awesome and peculiar pressures placed on a defendant during trial.\textsuperscript{55} For example, a guilty person may choose to maintain his innocence, not from any lack of remorse, but as a consequence of his terror of incarceration.\textsuperscript{56} Similarly, a defendant's false testimony may simply reflect his attempt to avoid loss of community standing.\textsuperscript{57} Neither of these situations conclusively proves that the defendant's character resists rehabilitation. Despite this fact, the assumption that those who perjure themselves require a longer period for rehabilitation may be inappropriately applied to these defendants.

When a defendant pleads not guilty and is found guilty, the assumption generally drawn is that the defendant must have perjured himself.\textsuperscript{58} In comparison, the defendant who pleads

\textsuperscript{52} See note 136 infra.


\textsuperscript{54} United States v. Grayson, 438 U.S. at 52.

\textsuperscript{55} Scott v. United States, 419 F.2d at 269, states: [T]he 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. It is indeed unlikely that many men who commit serious offenses would balk on principle from lying in their own defense. The guilty man may quite sincerely repent his crime but yet, driven by the urge to remain free, may protest his innocence in a court of law.

\textsuperscript{56} Note, The Influence of the Defendant's Plea on Judicial Determination of Sentence, 66 YALE L. J. 204, 216 (1956) [hereinafter cited as Influence of Defendant's Plea].

\textsuperscript{57} Id. Also, in addition to suffering legal disabilities, a person convicted of a crime is informally punished by the community at large. For example, a released convict may have difficulty getting employed. See Prison Association of New York Ann. Report 60 (1950).

\textsuperscript{58} Some judges apparently presume a defendant committed perjury from the mere fact of conviction. Influence of Defendant's Plea, supra note 56 at 512. Cf. United States v. Moore, 484 F.2d at 1288 (dictum) "[A] verdict of guilty means only that guilt has been proven beyond a reasonable doubt,
guilty shows remorse, and thus manifests a positive attitude toward reform.\textsuperscript{59} However, a person's ability to reform may not necessarily be shown by his pleading guilty to an offense.\textsuperscript{60} When a judge renders a more severe sentence to a suspected perjurer than to a defendant pleading guilty to the same offense, the distinction can only be justified if the perjury indicates a difference in the rehabilitative prospects of the defendants.\textsuperscript{61}

In negotiating a plea,\textsuperscript{62} a defendant may admit guilt, not because he refuses to perjure, but because he realizes that his plea may mitigate his sentence.\textsuperscript{63} When a defendant avoids perjury for reasons of expediency and not principle, it is questionable whether the defendant pleading guilty represents an offender with better prospects for rehabilitation than one who perjures himself in an unsuccessful attempt to gain acquittal.\textsuperscript{64}

not that the defendant has lied in maintaining his innocence. It is better in the usual case for the trial judge who suspects perjury to request an investigation.” In effect, such a contention violates the defendant’s right to plead not guilty. The accused in a federal case has an absolute constitutional right to plead not guilty, and if he does elect to go to trial, an absolute statutory right to testify in his own behalf. 18 U.S.C. § 3481 (1976).

\textsuperscript{59} In a survey judges were questioned as to the effect of a defendant’s guilty plea on his sentence. 97\% of the judges stated that a defendant pleading guilty to a crime was given a more lenient punishment than a defendant who pleaded not guilty. \textit{Influence of Defendant’s Plea, supra note 56}, at 217 n.66. One judge surveyed attempted to justify the discrepancy by stating: “It must be kept in mind that ordinarily on a plea of guilty, the defendant’s case is presented in its most favorable light.” Another added: “When a man pleads guilty, all the details of his crime are rarely presented to the judge and a moderate, average sentence is imposed.” \textit{Id.} at 218 n.72.

\textsuperscript{60} See notes 62-64 and accompanying text infra.

\textsuperscript{61} In a survey, the majority of the judges stated that a defendant who they believed committed perjury deserved additional punishment. \textit{Influence of Defendant’s Plea, supra} note 56, at 211 n.55.

\textsuperscript{62} For a history of plea bargaining see Comment, \textit{The Plea Bargain in Historical Perspective}, 23 BUFFALO L. REV. 499 (1974). For an analysis of the effect of plea bargaining on judicial process see generally \textit{Kercher v. United States}, 274 U.S. 220, 223 (1927). The court noted that a guilty plea was different in purpose and effect from a mere admission or an extrajudicial confession; it is a conviction. “Like a verdict of a jury it is conclusive. More is not required, the court has nothing to do but give judgment and sentence.”; \textit{Nagel & Neef, The Impact of Plea Bargaining on the Judicial Process}, 62 A.B.A.J. 1020 (1976); Annot., 89 A.L.R.2d 1258 (1963); Annot., 29 A.L.R.2d 1157 (1953).

Recent cases dealing with the validity of plea bargaining are: United States v. Cawley, 481 F.2d 702 (5th Cir. 1973) (plea bargaining is an essential component of administration of justice and, when properly administered, should be encouraged); United States v. Levine, 457 F.2d 1186 (10th Cir. 1972) (plea bargaining is permissible when conducted fairly and when rights of the accused are fully protected).


\textsuperscript{64} This theory is stated in \textit{Influence of Defendant’s Plea, supra} note 56, at 210.

A reduction in sentence following a guilty plea is consistent with the
Determination of Alleged Perjury as a Violation of Due Process

The Court's application of the theory that a defendant who commits perjury on the stand demonstrates a greater need for rehabilitation, also raises a question of denial of procedural due process. May a defendant's sentence be increased solely because a single judge merely thought that the defendant had not testified truthfully, without granting the defendant a hearing to determine if he in fact committed perjury? Grayson contended that the judge could not.

The defendant based his due process argument on the ground that by permitting a judge to weigh alleged perjury in his rehabilitation theory of criminal punishment, only if such a plea is indicative of remorse for prior criminal acts. Although a guilty plea may at times be motivated by repentance, more often it would seem to represent exploitation by the accused of the prosecutor's and court's reaction to such plea. If a defendant who acknowledged his guilt were aware that the plea could not influence the extent of his punishment, then perhaps his action might reflect a renunciation of criminal propensities. But, the very fact that a defendant realizes a guilty plea may mitigate punishment impairs the value of the plea as a gauge of character.

See also Dash, Cracks in the Foundation of Criminal Justice, 46 ILL. L. REV. 385, 395-97 (1951); Newman, supra note 63, at 983-84.

65. The right to "due process of law" is guaranteed by the fifth amendment, which states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V (emphasis added). The fourteenth amendment similarly binds the states: "nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ." Id. amend. XIV. The "due process" clause has withstood several interpretations. See Wolf v. McDonnell, 418 U.S. 539, 557-58 (1974) (some kind of hearing is required); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (due process involves "the right to be heard before being condemned to suffer grievous loss of any kind"); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("[t]he fundamental requisite of due process of law is the opportunity to be heard"); McVeigh v. United States, 78 U.S. (11 Wall.) 259, 267 (1870) (right to notice and hearing).

66. There is no way of knowing how much greater the sentence was that the judge gave for Grayson's alleged perjury. The only way to know that the judge did increase the sentence was because he stated so in the record. In most cases, it is impossible to discern whether a sentencing judge had been influenced by his belief that the defendant had not testified truthfully, since there is no requirement that reasons be given. 438 U.S. at 55-56 n.1 (Stewart, J., dissenting).

sentencing consideration, such broad discretion might be created, thereby allowing the judge to determine a sentence by impermissible means as well.\textsuperscript{68} For example, since a judge is allowed broad discretion in considering the defendant's alleged perjury, nothing apart from his personal code of ethics would restrain him from injecting his personal prejudices into the determination as well.\textsuperscript{69} Thus, because of the lack of procedural safeguards, the broad reach of a judge's discretion ought to be strictly limited.\textsuperscript{70}

The Court, relying on \textit{Williams v. New York},\textsuperscript{71} established that due process does not require an adversary presentation to test the accuracy of information employed in sentencing.\textsuperscript{72} The due process clause need not become "a device for freezing the

\textsuperscript{68} The Court understood Grayson's argument to be that: [H]e argues that this Court, in order to preserve due process rights, not only must prohibit the impermissible sentencing practice of incarcerating for the purpose of saving the Government the burden of bringing a separate and subsequent perjury prosecution but also must prohibit the otherwise permissible practice of considering a defendant's untruthfulness for the purpose of illuminating his need for rehabilitation and society's need for protection. He presents two interrelated reasons. The effect of both permissible and impermissible sentencing practices may be the same: additional time in prison. Further, it is virtually impossible, he contends, to identify and establish the impermissible practice.

\textsuperscript{69} See generally \textit{Frankel}, supra note 8.

\textsuperscript{70} United States v. Grayson, 438 U.S. at 53.

\textsuperscript{71} 337 U.S. 241. Here, a jury convicted the defendant of murder, but recommended a life sentence. The sentencing judge, partly basing his decision on information not known to the jury but contained in the presentence report, imposed the death penalty. The defendant argued that this procedure deprived him of his federal constitutional right to confront and cross-examine those supplying information to the probation officer and, through him, to the sentencing judge. The Court rejected this contention. "And modern concepts of individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information." \textit{Id.} at 247. "To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation." \textit{Id.} at 249-50. Therefore, the judge was held not to have acted unconstitutionally in considering either the defendant's participation in criminal conduct for which he had not been convicted or information found by the probation investigator that the defendant was a "menace to society." \textit{Id.} at 244.

\textsuperscript{72} The Court in \textit{Williams}, did not concern itself with the issue of the accuracy of the information in the presentence report. It simply assumed its accuracy and considered the propriety of its use in a sentencing hearing without the adversary safeguards of confrontation and cross-examination. \textit{Williams v. New York}, 337 U.S. 241. \textit{Williams} held, in short, that "in the absence of a specific request to do so, due process does not require confrontation and cross-examination of persons who have supplied out-of-court information used in the determination of the sentence." Cohen, supra note 10, at 14.
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The Court also stated that since a judge requires all the information he can gather in order to render a rational decision, it is in both the government's and the defendant's interest to avoid irrationality.74 This interest in rationality outweighs the defendant's right to due process.75 Furthermore, the Williams Court relied, in its conclusion, on the integrity of the judges and their fidelity to their oaths of office to protect against improper use of first hand perjury.76

The Grayson dissent argued that the practice supported by the majority places the defendant at a serious disadvantage. Other witnesses risk punishment for perjury only on indictment and conviction according to the full protections of due process.77 Only the defendant, whose testimony may play a crucial role in his defense, faces the additional risk that disbelief by a single listener, the judge, will result in additional time in prison.78

The majority's reliance on Williams v. New York79 directly contradicts its holding in Specht v. Patterson.80 Williams established that due process does not require an adversary presentation to test the accuracy of the information employed in sentencing.81 Specht, however, determined that the denial of a hearing on a new fact, not an ingredient of the offense charged,

75. Id. at 54. See note 63 supra.
76. United States v. Grayson, 438 U.S. at 55. Dependancy on a judge's integrity is not always reliable. E.g., FRANKEL, supra note 8, at 18. Judge Frankel tells of the time when a judge had set a defendant's sentence but increased it by a substantial amount at the hearing in retaliation of the defendant's labeling the trial as a "kangaroo court."
77. United States v. Grayson, 438 U.S. at 56.
78. Id.
79. 337 U.S. 241.
80. 386 U.S. 605 (1967). In Specht the defendant was convicted of indecent liberties under one Colorado statute that carries a maximum sentence of 10 years. However, upon the court's post-trial determination, and without notice and full hearings, the court found that the convicted defendant was an habitual offender, mentally ill, and was a threat to members of the public. Thus, he was sentenced under another statute which allowed for an indeterminate term from one day to life. The new statute required that a report of a complete psychiatric examination be sent to the sentencing judge, but it required no adversary hearing. Id.
violates procedural due process. In Specht, a specific isolated finding of fact was required before the judge could increase the defendant's sentence. Likewise, the judge in Grayson faced a single isolated fact not an ingredient of the offense of escape—whether or not the defendant actually committed perjury.

Specht indicated that when dealing with isolated factual issues, the requirements of due process overshadowed the needs of individual sentencing, thereby making procedural safeguards on that issue required. Williams, on the other hand stated that due process may not be used "to freeze" the evidence necessary for sentencing. The Specht principle, not that of Williams, appears best suited to perjury, in that a defendant need not be faced with the prospects of increased "rehabilitative" punishment when a separate criminal proceeding is available to determine the fact of perjury.

The majority failed to consider that perjury, as a sentencing factor, differs materially from other factors considered by the sentencing judge. Unlike information of prior criminal activity, or information of general character traits, perjury is punishable in a separate criminal proceeding. As a result, the denial of a defendant's opportunity to defend the allegations of perjury in trial violates his right to protections under due process.

82. Specht v. Patterson, 386 U.S. 605.
83. Id. See note 80 supra (the fact that defendant was an habitual offender, mentally ill, and was a threat to members of the public were new findings).
84. United States v. Grayson, 438 U.S. 41. See United States v. Espinoza, 481 F.2d 553, 556 (5th Cir. 1973) ("where a sentencing judge explicitly relies on certain information in assessing a sentence, fundamental fairness requires that a defendant be given at least some opportunity to rebut that information").
86. See Carroll, supra note 53. In considering the perjury sentencing issue, federal appellate courts have failed to extend the Specht principle to cases of suspected perjury. See, e.g., United States v. Hendrix, 305 F.2d 1233; United States v. Moore, 484 F.2d 1284; United States v. Cluchette, 465 F.2d 749.
88. United States v. Carden, 428 F.2d at 1118. See note 15 supra.
89. Perjury statutes do not exclude a defendant's perjury on his own behalf. See, e.g., United States v. Williams, 341 U.S. 58 (1951) (no violation to double jeopardy limitations to prosecute a defendant for perjury committed on his own behalf); 18 U.S.C. 1621 (1976). Defendants are, however, rarely prosecuted for the commission of perjury at a trial conviction. The more common case occurs when a defendant is acquitted in a criminal action and later prosecuted for perjury. United States v. Slutsky, 79 F.2d 504 (3rd Cir. 1935).
90. See notes 65 & 87 supra.
A defendant will not always be entitled to a separate jury trial on the question of perjury, because lying under oath in a judicial proceeding may sometimes be punishable as contempt.\textsuperscript{91} Criminal contempt may be punished summarily if the judge certifies that the conduct constituting the contempt occurred in the presence of the court.\textsuperscript{92}

For perjury to qualify as contempt, it must act as an "obstruction of the administration of justice."\textsuperscript{93} By virtue of the Supreme Court holding that perjury by itself does not "obstruct the administration of justice,"\textsuperscript{94} perjury must qualify as contempt in order to punish the defendant without a trial.\textsuperscript{95} Therefore, when a judge augments the sentence of a convicted defendant, as a penalty for perjury which cannot qualify as contempt, he accomplishes indirectly what he is prohibited to do directly.\textsuperscript{96} The majority's approval of this practice in Grayson facilitates such occurrences. Moreover, if the lengthened sentence for an alleged perjury falls within the statutory limits of the sentence it is not usually subject to review.\textsuperscript{97} On the other hand, if the defendant is cited for contempt, he retains a right of appeal.\textsuperscript{98}

When the responsibility for sentencing is placed solely within the discretionary power of the judge, the possibility exists that the judge's decision may prove erroneous.\textsuperscript{99} The judge

\begin{itemize}
  \item \textsuperscript{91} 18 U.S.C. § 401 (1976) provides in part:
  A court of the United States shall have power to punish by fine or imprisonment, at its discretion such contempt of its authority and none other, as—
  \begin{enumerate}
    \item Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice . . .
  \end{enumerate}

  \item \textsuperscript{92} FED. R. CRIM. P. 42(a), 18 U.S.C.A. provides:
  A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

  \item \textsuperscript{93} See note 91 supra.

  \item \textsuperscript{94} In re Michael, 326 U.S. 224 (1945) (a witness may not be punished for contempt for perjury alone); Ex parte Hudgings, 249 U.S. 378 (1919) (a district court has no power to adjudge a witness guilty of contempt solely because in the court's opinion he is wilfully refusing to testify truthfully).

  \item \textsuperscript{95} See note 91 supra.

  \item \textsuperscript{96} Influence of Defendant's Plea, supra note 56, at 214.

  \item \textsuperscript{97} See notes 103-5 and accompanying text infra.

  \item \textsuperscript{98} An order adjudging a defendant guilty of criminal contempt is appealable. In re Merchant Stock and Grain Co., 223 U.S. 639, 642 (1912); See Yates v. United States, 356 U.S. 363 (1958).

  \item \textsuperscript{99} See, e.g., Hess v. United States, 496 F.2d at 939 (court emphasizes that judges must realize they are not infallible). In United States v. Moore, 484 F.2d at 1258 (Craven, J., concurring), Judge Craven concurred with the decision, but only because of past precedent. He stated, among other things, that the trial judge should never impose additional punishment be-
is given few guidelines,\textsuperscript{100} and additionally the attempt to appraise character is, in the Court's own words, a parlous endeavor "not necessarily an enterprise for which judges are notably equipped by prior training."\textsuperscript{101} If the defendant alleges judicial error in pre-trial and trial proceedings, he is protected from abuse by appellate review of those errors.\textsuperscript{102} In sentencing, however, unless the judge states his reasons in the record, as the judge in \textit{Grayson} did,\textsuperscript{103} or if the punishment imposed exceeds statutory limits,\textsuperscript{104} the likelihood of appellate review is minimal.\textsuperscript{105} Without appellate review of judicial error in sen-

cause of his belief that defendant lied in his own defense, because, as juries are sometimes wrong, so may be the judge.

100. \textit{See note 15 supra} (guidelines resulting from case law).


102. 28 U.S.C. \textsection 2106 (1976) provides for federal jurisdiction of review. The Supreme Court or any other court of Appellate jurisdiction may affirm, modify, vacate, set aside, or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the case and direct the entry of such appropriate judgment, decree, or order, or require such further proceeding to be had as may be just under the circumstances.

103. \textit{See note 27 supra}.

104. \textit{E.g., Gore} v. United States, 357 U.S. 386 (1958) (the wide discretion of the sentencing judge and the factors he may consider lead to the general proposition that sentences within statutory limits are normally unreviewable); Gurera v. United States, 40 F.2d 338, 340-41 (8th Cir. 1930) ("[t]he rule that appellate court has no control over a sentence which is within the limits provided by statute is firmly established").

105. Most appellate reversals of improperly imposed sentences have arisen in the unusual case where the judge improvidently made an explanation. \textit{See, e.g., United States} v. Tucker, 404 U.S. 443 (1972) (the judge's decision was based on grounds which were later determined unconstitutional); United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971), \textit{cert. denied}, 404 U.S. 1061 (1972) (a judge's sentence was overruled when he cited facts about the defendant that were untrue). Thus, the judge is put in an uncomfortable situation. He can be silent, or risk reversal by stating his means of determination. \textit{See United States} v. Derrick, 519 F.2d 1, 3-4 (6th Cir. 1975) where it states:

We freely recognize, as no doubt did the trial judge, that had he not stated his views on the record here, the subjective process by which he reached his sentencing decision would not be exposed, and there would probably be no remand. If preventing possible remand or reversal is to be the sole objective of his endeavors, therefore, the seasoned trial judge would want carefully to weigh his words so as to avoid the increased risk which sometimes comes from expressing himself too openly and honestly on a given situation. It is difficult to urge that trial courts express themselves freely upon the record when it can be shown that, in so doing, they subject themselves to greater risk of reversal on remand.

\textit{See also, Gollaher} v. United States, 419 F.2d 520, 530 (9th Cir.), \textit{cert. denied}, 396 U.S. 960 (1969) ("[i]f the trial judge makes no mention of his thoughts on [defendant's perjury] any sentence within legal limits will stand"). \textit{Cf., Wyzanski, A Trial Judge's Freedom and Responsibility}, 65 HARV. L. REV. 1281, 1293 n.63 (1952) (trial judge's sentencing is in effect reviewable by pardoning and commutation authorities).
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It is illogical to allow the judge greater discretionary power which may lead to an increased margin of error. It is necessary to remember that ninety percent of offenders simply plead guilty; thus, most defendants have contact with the criminal judicial system only in the sentencing process. It is clearly inequitable to allow review of alleged error for only the ten percent that traverse the gamut of trial, and then only in the pretrial and trial stages.

**Determination of Alleged Perjury Acting as a “Chilling Effect”**

When a person is punished for the alleged commission of perjury without indictment or hearings, he has lost his procedural due process rights. This loss precipitates another invasion into the defendant's rights, that of his right to testify on his own behalf. Both federal statute and the sixth amendment guarantee this right. The issue, however, that remains is whether the discretionary augmentation of sentences based on alleged perjury “chills” the defendant's right to testify.

The majority in *Grayson* passed over this issue by stating simply that its decision does not infringe on the defendant's right to testify in his own behalf, for this right is limited to testimony in accordance with the oath. Any “chilling effect,” reasons the Court, is permissible because it simply inhibits the defendant from taking the stand to testify falsely. Neither statute, nor the Constitution grants the right to lie. On the contrary, perjury statutes punish those who give false testimony.

The dissent rejected the narrow statement that a “chilling effect” is acceptable because it simply hinders one from testifying falsely. The dissent argued that procedural due process is...

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106. See note 1 supra.

> Competency of accused

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. *His failure to make such a request shall not create any presumption against him.* (emphasis added).

109. Id. at 54.
110. Id.
111. See note 89 supra.
112. See note 107 and accompanying text supra.
114. Id. at 55.
infringed because the defendant's failure to convince, not only the jury of his innocence, but also the judge, may thereby result in additional time in prison.\textsuperscript{115} In order to fully preserve a defendant's due process rights, the judge's broad power to augment one's sentence for statements he believes to be perjured must yield to the defendant's free choice to testify on his own behalf.

The \textit{Grayson} majority places the defendant in a new dilemma. His credibility is placed into question from the moment he begins to speak, and if he fails to convince the jury of his innocence, he is punished. After \textit{Grayson}, in order to avoid further punishment, the defendant must also convince the judge that he has not perjured himself.\textsuperscript{116} Because of this new burden the defendant may decide not to testify. However, this course of action may also work against the defendant. Despite the standard instruction given to the jury that they should not draw any adverse inference from the defendant's failure to testify, "a defendant who does not take the stand will probably prejudice his chance of acquittal."\textsuperscript{117}

By its decision, the \textit{Grayson} majority placed a judge's sole determination of alleged perjury on the same level as material facts disclosed to the judge in the presentence report. In doing so, the Court failed to recognize a basic distinction between the two types of information. Of all the information presented to a sentencing judge, only alleged perjury results directly from courtroom pressures and leaves no legal recourse for a defendant wrongly accused of perjury.\textsuperscript{118} For example, unlike alleged perjury, prior crimes committed by the defendant for which he has not been convicted, gives the judge an indication of the defendant's character, yet, has no "chilling effect." This is because information on prior crimes does not result from trial pressures, and error in the use of such information is subject to review.\textsuperscript{119}

Similarly, consideration of other crimes has no "chilling effect" on a defendant's decision to testify because, despite what is said or done in court, the defendant's criminal record remains unchanged and accessible to the judge.\textsuperscript{120} Thus, unlike the use of alleged perjury, the presentence report's full character ap-

\begin{itemize}
\item \textsuperscript{115} Id. at 56.
\item \textsuperscript{116} Carroll, supra note 54, at 683. See also note 87 supra.
\item \textsuperscript{117} United States v. Grayson, 438 U.S. at 58. n.5.
\item \textsuperscript{118} Absent direct appeal of alleged error in sentencing by the judge, see notes 147-51 infra, and absent the acceptance of the argument that alleged perjury is a separate finding of fact that requires hearing, see notes 79-86 and accompanying text supra, there is no adequate legal recourse.
\item \textsuperscript{119} Carroll, supra note 53, at 689-90.
\item \textsuperscript{120} Id.
\end{itemize}
praisal is a more accurate and acceptable means with which to evaluate a defendant and determine a sentence. The presentence evaluation does not arise from courtroom pressures, nor do its conclusions affect the defendant’s decision whether to testify. In view of these basic differences, the Grayson majority should have placed the use of the defendant’s alleged perjury, as an informational factor, in a category of its own governed by stricter procedural rules.121

The “chilling effect” that results from a judge’s unchecked determination of perjury, not only inhibits the defendant’s right to testify, but also his right to testify truthfully. For example, a defendant whose defense is unusual, may feel that he will be unable to adequately explain certain facts to the satisfaction of the jury or the court. If this is the case, he may fear that the trial judge will disbelieve his testimony and therefore impose a heavier sentence than he would have otherwise received if convicted. As a result, the defendant may feel safer not giving any truthful testimony, lest it be misconstrued, and thus not testify at all.122

The Court considered this argument “frivolous.”123 The Grayson decision, reasoned the Court, does not require judges to enhance sentences of all defendants whose testimony is deemed false. Rather, the decision simply gives the judge the right to carefully evaluate a defendant’s testimony in order to determine whether it contains willful and material falsehoods.124 If so, in light of all the other knowledge gained about the defendant, the judge must assess the meaning of that conduct with respect to prospects of the defendant’s rehabilitation and restoration to a useful place in society.125 “Awareness of such a process realistically cannot be deemed to affect the decision of an accused but unconvicted defendant to testify truthfully in his own behalf.”126

121. See, e.g., United States v. Hendrix, 505 F.2d at 1236, where the court recognized that the accused defendant may be unduly refrained from testifying because of fear that the jury’s or judge’s disbelief would automatically lead to an increased sentence. Stating that it was unrealistic to make a flat rule that perjury at the trial must never be considered, it stated two guiding concepts. First, judges should not consider the defendant who took the stand as an ipso facto perjurer. Second, perjury should not be treated as an adverse sentencing factor unless the judge is persuaded beyond a reasonable doubt that the defendant committed it.

122. Forcing the defendant to make such a choice directly violates his statutory and Constitutional right to testify. See note 107 supra.


124. Id.

125. Id. A stronger position as to the judge’s power in using alleged perjury is found in United States v. Wallace, 418 F.2d at 878. There the court states that an “inescapable” demonstration of the defendant’s perjury is a factor the judge may be “censored” in ignoring. Id.

The Grayson dissent, however, rejected the majority’s reasoning and questioned the wisdom of not placing safeguards on the judge’s exercise of his discretion. Safeguards would be warranted in order to minimize the defendant’s fear that his truthful testimony would be perceived as false.127 “[W]ithout such safeguards, [the dissent fails] to see how the Court can dismiss as ‘frivolous’ the argument that this sentencing practice will inhibit the right to testify truthfully.”128

The Grayson Court avoids the responsibility of placing guidelines on the judge’s discretionary power, and thus sidesteps defining the limitations on its use. The Court states that its decision is not a mandate, but merely a recognition of a tool provided for a sentencing judge.129 This “tool,” however, need not be a mandate in order to inhibit the defendant’s desire to assert his right to testify. Once the judiciary receives broad powers it may feel bound to use them.130

A recent example of the wide effect of the Grayson Court’s “tool” appeared in United States v. Santiago.131 Unlike his codefendants, Santiago exercised his fifth amendment right and refused to testify.132 The district court judge, believing that the evidence against the defendant was overwhelming, took a harsh view of defendant’s continual denial of guilt.133 When Santiago

127. Id. at 57. See note 121 supra.
128. 438 U.S. at 57. See United States v. Moore, 484 F.2d at 1288 (Craven, J., concurring) (“[t]ruth is, indeed, stranger than fiction, and every one of us know of at least one cock-and-bull story, believed by no one, that turned out to be true”).
130. A federal judge indicated that he would not have sentenced a particular defendant to jail if he had been guided only by the probation report. However, the judge felt required to consider information he had learned while presiding over this trial, related trials and sentencings, although the defendant had not had an opportunity to challenge the damaging information. The National Law Journal, Nov. 27, 1978, at 35, col. 4.
131. 582 F.2d 1128 (7th Cir. 1978). In Santiago, defendants attempted to sell heroin to an agent buyer. Santiago remained in the car while the others were in the street concluding the transaction. Once agreement of sale was made, a co-defendant went to Santiago and returned with the heroin. The defendants were indicted for intentional distribution of heroin in violation of 21 U.S.C. § 84 (a) (1) (1976). Defendant Santiago was tried and convicted in a jury trial. At the sentencing hearing, the judge stated that to him it was clear from the evidence that Santiago, who had had more narcotics experience than his associates, sought to insulate himself from the risk, but not from the money.
132. 582 F.2d at 1136.
133. The district court judge stated at the sentencing hearing: “The defendant Santiago was involved in the transaction. There is no question in my mind about it. He continues to deny his guilt, which is another strike against him, as far as I am concerned.” Id. After hearing this statement, Santiago’s counsel told the court: “That is on advice of counsel.” Id. However, the judge answered:
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received a harsher sentence than his codefendants he appealed, claiming that he had been inappropriately punished for exercising his fifth amendment rights.\textsuperscript{134}

The Seventh Circuit affirmed the conviction because the defendant did not clearly show abuse by the judge of his powers.\textsuperscript{135} The Santiago court used Grayson to support the belief of the necessity for a judge's broad power in sentencing.\textsuperscript{136} The vagueness of the power granted to a sentencing judge, by Grayson, places a heavier burden on the defendant who attempts to show clear abuse of judicial discretion. The undefined extent of the judge's discretionary power makes it more difficult for a defendant to define and prove its abuse.

As a result, Grayson may not only be used as a "tool" for augmenting punishment due to alleged perjury on the stand; it may also be interpreted as giving the judge broader power over various aspects of trial. This may include, as in Santiago, a possible restraint on the defendant's exercise of his fifth amendment right.

As a result, the defendant is placed in a "damned if you do, damned if you don't" dilemma. If he chooses to testify, he runs the risk of augmented sentence based on the judge's belief that the defendant perjured himself. Upon exercise of the constitutional right not to testify, again the judge may impose an increased sentence based on his belief that the defendant is in effect lying by not testifying. The Grayson decision, which

Well, telling lies on the advice of counsel does not win any points in my courtroom, and that is what he is still doing. \textit{At least he had the good sense not to take the stand and commit perjury during the trial, because had he done that, the sentence would be far more severe than it is going to be.}  
\textit{Id.} (emphasis added).

\textsuperscript{134} \textit{Id.} \textsuperscript{135} \textit{Id.} at 1137. The appellate court states that the trial court's exercise of its broad discretion can not be disturbed by review unless there is a plain showing of abuse of power by the trial court. \textit{Id. See also,} United States v. Cardi, 519 F.2d 309. Also, a showing of abuse is not shown by the mere fact that defendant received a harsher sentence after trial than his co-defendants who pleaded guilty. 582 F.2d at 1137. \textit{See Simpson v. United States, 342 F.2d 643 (7th Cir. 1965)} (court will not vacate a sentence of the appellant which was greater than that given to the pleading co-defendants, especially where record shows sentence imposed in a thoughtful and discriminating way). \textsuperscript{136} Recognizing that the district judge had stated his reasoning for sentencing in the records, this showed sufficient consideration. United States v. Santiago, 582 F.2d at 1137. In addition, although the court states its decision is not to be used as condoning a sentencing court's consideration of the failure of a defendant to admit guilt as an adverse consideration in sentencing, it did, through a footnote, support this example of a judge's wide discretion by citing to the powers granted to the judge in Grayson. \textit{Id.} at 1138.
places such a restraint on the defendant's exercise of his rights, cannot be justified.

**CONCLUSION**

For effective individual sentencing, a judge should consider as much information as possible which reflects the defendant's character. Differing conclusions as to what adequately reflects character have led to a wide discrepancy in the degree of punishment given to offenders who were punished for the same crime, but sentenced by different judges. Rehabilitation is the main goal of indeterminate sentencing. However, if an offender feels that he has been wronged by a sentence predicated on disparate sentencing practices, or if the punishment seems clearly disproportionate to the crime or sentencing norm, he is likely to be a poor candidate for rehabilitation.

137. Judge Frankel stated during a Senate Committee hearing on penal reform:

I have sentenced more people than I find it comfortable to count. I am certainly not happy, that some of the sentences were too harsh. Some no doubt, were excessively lenient, and I regret those too, but frankly, not as much. Always there has been a disquieting awareness of having too much power, too little knowledge, and next to nothing in the way of guidance from Congress, from higher courts, or from any other quarter. I have known vividly that I am responsible, with all my colleagues, for creating the crazy-quilt of sentencing disparities that is probably the most awful aspect of sentencing.

**SENATE COMM. ON PENAL REFORM, 95TH CONG., 1ST Sess., REPORT ON § 1437** (Comm. Print 1978) [hereinafter cited as REFORM].

One writer recommends that bank robbers might consider New York but stay away from South Carolina. Bank robbery in New York's Southern Judicial District carries an average sentence of seven years in prison. In South Carolina, however, the average run eighteen years. These disparities existed even though the felons were convicted in federal courts of committing the same federal offense. CONG. Q., July 15, 1978, at 1807 [hereinafter cited as QUARTERLY].

For further examples of existing unjustified disparity in sentences, see Davis, supra note 6, at 133; Devitt, How Can We Effectively Minimize Unjustified Disparity in Federal Criminal Sentences?, 42 F.R.D. 218, 220 (1967); Kennedy, Justice is Found in the Hearts and Minds of Free Men, 30 F.R.D. 401, 424-25 (1961); Rubin, Disparity and Equality of Sentences, 40 F.R.D. 55, 56 (1967).

The disparities are not limited to time served, but are also found in the federal laws. Robbery of a federally insured bank carries a maximum term of 20 years in jail. 18 U.S.C. § 2113 (1977). However, robbery of a federal enclave carries only 15 years. 18 U.S.C. § 2111 (1977).

138. See notes 5-10 and accompanying text supra.

139. See, e.g., Shephard v. United States, 257 F.2d 293, 294 (6th Cir. 1958), where Judge Stewart remarked:

Justice is measured in many ways, but to a convicted criminal its surest measure lies in the fairness of the sentence he receives. Whether a sentence is fair cannot, of course, be gauged simply by comparing it with the punishment imposed upon others for similar offenses. But that test, though imperfect, is hardly irrelevant.
The *Grayson* decision is significant in that it approves of the use of information concerning the defendant obtained via a judge's broad discretionary power in sentencing, even though that power is based on a questionable theory of relevancy of the information. This judicial power takes on a greater significance than the value of the defendant's constitutional right of "due process," and freedom from procedural "chilling effects."

The fault of the *Grayson* Court lies, not in its approval of broad judicial discretionary power in sentencing, but in its failure to realize the grave dangers inherent in such a concept, and as a result, its failure to place guidelines on the judge's discretion. The Court could have followed *United States v. Hendrix*, which it cited as support. *Hendrix* established minimal guidelines for judicial consideration of perjury allegedly committed at the trial, whereas *Grayson* did not. Thus, as long as a sentencing judge remains within the prescribed statutory limits for a particular offense, and does not specify on record what led him to his exact determination, he is free to use whatever criteria he deems necessary to determine a sentence.

Chief Justice Burger recently stated, "[p]erhaps the real evil underlying our penal system is not its concepts, whether rehabilitation or vengeance or something else, but the lack of any agreed concept, the absence of plan and purpose, and worst of all—the indifference that underlies the neglect." The *Grayson* decision, written by Chief Justice Burger, aggravated this neglect.

**The Need for Standards**

Rather than neglecting the problem, what must be sought is a sentencing system that is a compromise between the "unacceptable" regime of unfettered judicial discretion, and the oppo-
The establishment of such a system would be based on two premises. First, the sentencing judge would need specific guidelines; a system to obtain knowledgeable advice in order to promote ordered discretion. Absent legislation, the Court could indirectly accomplish this end by requiring sentencing judges to articulate reasons for increasing sentences on the record. This practice could develop into a limited body of jurisprudence on sentencing standards. In *North Carolina v. Pearce*, the Court, by implication, recognized that sentencing decisions can be rationally justified and facts on which sentencing decisions are based can be specified on the record. As a result, judges


148. On January 30, 1978, the Senate overwhelmingly approved the Criminal Code Reform Act of 1978. Part of the reform, § 1437, would be the first stating specific objectives, policies, and guidelines for federal judges to follow in meting out sentences. The provisions of this statute create a new agency to determine sentences, and drastically revise the role presently played by judges.

The agency created is labeled the “Sentencing Commission.” This seven-member agency would become a permanent part of the judicial branch. The members would be appointed by the President, three of them from names submitted by the Judicial Conference.

The responsibility of this commission is to collect information on current sentencing practices throughout the country and establish guideline sentencing ranges within each statutory category. In most cases, judges would be required to follow these guidelines. For each federal offense, these guidelines would specify a series of sentencing ranges based on the circumstances of the crime and certain general defendant characteristics.

Even though a judge would be allowed to hand down a sentence above or below the guideline range, he would have to state reasons for going outside the guidelines, and their sentences could be appealed by the defendant or the government. *Quarterly*, supra note 136, at 1808.

"An articulation of reasons may actually contribute to the offender’s rehabilitation by avoiding any feeling that his sentence was arbitrary." Doronski v. United States, 418 U.S. 424, 456 (1974) (Marshall, J., concurring).


149. United States v. Hendrix, 505 F.2d 1233. *See* note 121 *supra*.

150. *See ABA Standards Relating to Appellate Review of Sentences* 1 (Approved Draft 1968); President’s Comm’n on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, (1967) at 145-46; Pugh & Carver, *supra* note 10, at 43. Connecticut has a system of written decisions handed down regarding sentences and appellate review of these sentences. However, standards have not been developed as expeditiously as was hoped. For an analysis of Connecticut’s experience in this area, see Comment, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 Yale L.J. 1453 (1960).

151. 395 U.S. 711.

152. *Id.* This case may be of considerable importance with regard to the development of sentencing standards by appellate courts. The controversy concerned the double jeopardy provision of the fifth amendment and held that a defendant who succeeds in overturning a conviction and is subse-
finding themselves in a similar situation could refer to specific reasons for determination, using such reasoning as a guideline in their own determinations.

Second, in formulating a sentencing system, a method for appealing sentences need be developed. Appellate review could be another means of conforming punishment of the defendant to that received by other offenders who commit the same crime. The Court began a move in this direction in its decision in *Townsend v. Burke*.

There the Court allowed review of the process of sentencing, but generally did not allow review of the severity of sentences. Thus, *Townsend* established judicial recognition of the need, and the legality of appellate review of sentencing. The *Grayson* Court could have continued the *Townsend* trend and validly increased its review power over the severity of sentences as well. However, despite *Townsend* and relentless

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153. See note 136 supra.

154. 334 U.S. 736 (1948). In *Townsend*, defendant and others were arrested and indicted for burglary and armed robbery in a Pennsylvania state court. All defendants pled guilty.

Defendant Townsend was given a sentence that was within the statutory limit. Townsend appealed, alleging violation of his constitutional rights in that, except for a 10 minute conversation with his wife, he was held incommunicado for a period of 40 hours between his arrest and his plea of guilty. Also, defendant pointed out that he was given no counsel.

The Supreme Court found that at the sentencing hearing, the sentencing judge had relied on several assumptions concerning Townsend's criminal record which were found to be materially false. The Court reversed the sentence, not because of the lack of counsel, nor because of the severity of the sentence. The Court recognized that if a sentence is within statutory limits, its severity ordinarily would not be grounds for review. Stated the Court:

It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the carelessness of designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.

*Id.* at 741. Thus, although the Court reversed mainly on procedural grounds, it did recognize that the severity of sentence may sometimes be the basis of review by the appellate courts. See generally *Townsend v. Burke*, 334 U.S. 736. For a discussion of this case see Comment, *Due Process and Legislative Standards in Sentencing*, 101 PA. L. REV. 257, 265 (1952).
criticism aimed at the lack of appellate review of sentencing, the Grayson Court avoided the issue and left the road open for a totally discretionary indeterminate sentencing process.

As a result of United States v. Grayson, it appears that the Court would prefer to have another branch of government correct the problems that the Court’s decisions helped to create. Fortunately, Congress has begun legislation with an aim toward penal reform, emphasizing the use of guidelines and appellate review. The Grayson Court could have lessened the immediate need for reform. Rather, Grayson emphasized it.

Jonathan D. Savage

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156. 438 U.S. 41.
157. See note 148 supra.
158. Id.
159. See notes 148, 150 supra.