

## Judge's Disbelief of Defendant's Testimony May Justify an Increased Sentence

In *United States v. Grayson*,<sup>1</sup> the U.S. Supreme Court held that a sentencing judge may consider the defendant's false testimony, observed by the judge during trial, in setting the defendant's sentence.

Respondent Grayson had escaped from a federal prison camp, and, after being recaptured, was convicted of prison escape under 118 U.S.C.A. §751(a)(1976).<sup>2</sup> At trial, Grayson admitted leaving the prison camp, but in an attempt to establish a defense of duress, he asserted that he fled the camp out of fear.<sup>3</sup> Much of the testimony given by Grayson in support of his defense was contradicted by evidence offered by the Government. In sentencing respondent, the trial judge stated that "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."<sup>4</sup>

On appeal, the Third Circuit Court of Appeals held that a judge may not enhance a defendant's sentence because of his belief that a defendant lied while testifying. Grayson's two-year sentence was vacated and the case remanded to the district court for resentencing without consideration of the false testimony.<sup>5</sup> The Supreme Court granted certiorari<sup>6</sup> and reversed by a 6-3 decision.<sup>7</sup>

Historically, there have been different evidentiary rules for trial and sentencing.<sup>8</sup> The issue at trial is the guilt or innocence of the accused and thus strict evidentiary procedures to protect the rights of the accused are required. Under the modern approach, the issue in sentencing has been the defendant's potential for reformation and rehabilitation. In an effort to tailor the punishment to the criminal, sentencing judges have been given discretion in determining sentences within statutorily prescribed ranges.<sup>9</sup> In line with this policy and in order to guide sentencing judges in the exercise of their discretion, the strict evidentiary requirements of trial are relaxed with respect to the information a judge may consider in determin-

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1. 438 U.S. 41 (1978).

2. All facts are from the Court's opinion, *id.* at 42-44.

3. Duress is a valid defense to an indictment under 18 U.S.C.A. §751(a) (1976).

4. *United States v. Grayson*, 438 U.S. 41, 44 (1978), quoting *United States v. Grayson*, 550 F.2d 103, 105 (3d Cir. 1976).

5. 550 F.2d at 108.

6. *United States v. Grayson*, 434 U.S. 816 (1977).

7. 438 U.S. at 55.

8. See generally Annot., 77 A.L.R. 1211 (1932).

9. *Williams v. New York*, 337 U.S. 241 (1949).

ing a sentence.<sup>10</sup>

In *Williams v. New York*,<sup>11</sup> the U.S. Supreme Court held that a sentencing judge has wide discretion as to the sources and types of information he may consider in fixing a sentence. This decision approved a sentencing judge's consideration of crimes allegedly committed by the defendant but for which the defendant had never been prosecuted. Despite the *Williams* decision, several courts of appeals refused to allow judges to consider their suspicion that a defendant committed perjury as a factor in sentencing.<sup>12</sup> In 1970, the enactment of 18 U.S.C. §3577<sup>13</sup> provided further support for the *Williams* decision. Yet, even after judicial and legislative approval, there have remained two circuits which have not allowed sentencing judges to consider a defendant's perjury for the purpose of sentencing.<sup>14</sup>

A conflict had arisen among the courts of appeals because each had taken a different approach in analyzing the purpose and effect of a judge's consideration of a defendant's perjury. In the circuits which did not allow a sentencing judge to consider a defendant's perjury, the enhancement of a defendant's sentence based on an observed perjury was viewed as a denial of due process.<sup>15</sup> Due process requires that no person should be tried and convicted of an offense without reasonable notice of the charges against him or reasonable opportunity to examine witnesses against him.<sup>16</sup> These courts concluded that the purpose of increasing the defendant's sentence on the basis of the suspected perjury was to punish the defendant for lying.<sup>17</sup> The effect of such a practice is that the defendant has been convicted of and sentenced for the crime of perjury without ever having been charged or indicted for perjury. In addition, these courts further justified their refusal to permit a sentencing judge to consider a defendant's perjury on the theory that such an action would unduly burden the defendant's right to testify in his own behalf.<sup>18</sup> The possibility that a judge's disbelief of a defendant's testimony might result in a harsher sentence was viewed as an impermissible chilling of the defendant's constitutional right to take the stand.<sup>19</sup> Finally, it appears that these circuits did

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10. In *Gregg v. United States*, 394 U.S. 489, 492 (1969), the Court stated, "There are no formal limitations on their [presentence reports] contents, and they may rest on hearsay . . . ."

11. 337 U.S. 241.

12. See *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966); *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969); *Poteet v. Fauver*, 517 F.2d 393 (3d Cir. 1975).

13. The text of 18 U.S.C.A. §3577 (1970) reads: "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."

14. See 419 F.2d 264; 517 F.2d 393.

15. 517 F.2d 393.

16. *In re Oliver*, 333 U.S. 257 (1947).

17. 517 F.2d 393.

18. *Id.*

19. 550 F.2d at 108 (Adams, J., concurring).

not allow consideration of a defendant's perjury because of their view that, in light of the pressures of a criminal trial, the perjury is not probative of the defendant's rehabilitative potential.<sup>20</sup>

The U.S. Supreme Court granted certiorari in *Grayson* to resolve the conflict among the courts of appeals. After reviewing the development of the rehabilitation approach to sentencing, the Court turned to the problem of how a sentencing judge was to determine a defendant's rehabilitative potential. The Court affirmed previous decisions reasoning that the better informed a judge is of a defendant's character and propensities, the better able he is to make a rational evaluation of the defendant's rehabilitative potential.<sup>21</sup> To this end, sentencing judges have been provided with the means and authority to gather a wide range of information about a convicted defendant.<sup>22</sup> The Court, quoting from *Williams*, went on to argue that to deny a judge wide discretion in the sources and types of information used in sentencing would undermine the modern philosophy of penology.<sup>23</sup> Because the Court considers rehabilitation potential important in sentencing, any weakening of the judge's discretion would require substantial justification.

In rejecting *Grayson's* due process argument, the Court distinguished between a permissible and an impermissible purpose for considering a defendant's perjury. The Court acknowledged that it would be impermissible to consider a defendant's perjury for the purpose of punishing the defendant for lying. However, the Court stressed that it would be entirely permissible to consider the defendant's perjury for the purpose of evaluating the defendant's rehabilitative potential. Petitioner argued that it would be impossible to ascertain the purpose for which a defendant's perjury was considered and that the result of a permissible purpose would be the same as the result of an impermissible purpose. The Court held that, in light of the Government's interest in providing a rational basis for sentencing decisions, the difficulties cited by petitioner would be insufficient justification to restrict the scope of information available to sentencing judges.

The Court also rejected petitioner's argument that to allow a sentencing judge to consider a suspected perjury would impermissibly chill a defendant's right to testify in his own behalf. Based on the unquestioned constitutionality of perjury statutes, the Court reasoned that a defendant has only the right to testify truthfully. Therefore, a judge's consideration of a defendant's false testimony could not affect a defendant's right to testify. The Court stressed that the purpose of its holding in the present case was

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20. 419 F.2d 264.

21. See, e.g., *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51 (1937); 337 U.S. 241.

22. FED. R. CRIM. P. 32(c)(2) authorizes the compilation of presentence reports containing information about a defendant's characteristics and history to aid in sentencing. See also 18 U.S.C.A. §3577 (1970), *supra* note 11.

23. 438 U.S. at 49; 337 U.S. at 249-50.

not to require a judge to enhance a defendant's sentence for an observed perjury, but rather to reaffirm the sentencing judge's authority to take into account willful and material falsehoods when evaluating a defendant's rehabilitative potential. In the opinion of the Court, such a sentencing practice should not affect a defendant's decision to testify truthfully.

The three Justices who joined in the dissenting opinion<sup>24</sup> felt that the goal of preserving the rehabilitation approach to sentencing could not justify allowing a judge to enhance a defendant's sentence on his personal belief that the defendant testified falsely. The dissenting Justices viewed as minimal the contribution of an unconfirmed falsehood to a sentencing judge's ability to determine rehabilitative potential. These Justices disagreed with the majority's approval of a sentencing practice that constitutes a significant impairment of a defendant's right to testify. Accordingly, they would have affirmed the judgment of the court of appeals.

The Supreme Court in *Grayson* resolved the conflict among the circuits as to the appropriateness of a judge's consideration of an observed perjury in setting a defendant's sentence. As a practical matter, the Court's decision to allow sentencing judges to consider a defendant's perjury was the only logical solution to the conflict. Since a sentencing judge is allowed to consider criminal conduct of a defendant alleged in a presentence report, it would be inconsistent not to allow a judge to consider a perjury observed at trial. However, in reaching its decision, the Court failed to accord sufficient weight to the risks involved in allowing a judge to enhance a defendant's sentence on the basis of a suspected perjury. There is a real danger that a defendant's right to testify will be impaired by this sentencing practice and, as the dissent pointed out, the Court "prescribes no limitations or safeguards to minimize a defendant's rational fear that his truthful testimony will be perceived as false."<sup>25</sup> The sentencing judge's opinion that the defendant testified falsely need not be noted in the presentence report and therefore is not subject to disclosure.<sup>26</sup> While the Court's decision was justified by the importance of the rehabilitative approach to sentencing, the Court was not justified in leaving unremedied the risks inherent in the sentencing practice it approved.

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24. Justices Stewart, Brennan, and Marshall dissented, 438 U.S. at 55.

25. 438 U.S. at 57 (Stewart, J., dissenting).

26. See FED. R. CRIM. P. 32(c)(3), requiring disclosure of material contained in the presentence report.