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## A Judgement by Hunch: Revisiting Massachusetts' Rationale for Refusing to Increase Criminal Sentences Based on a Defendant's Alleged Perjury

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# A JUDGMENT BY HUNCH? REVISITING MASSACHUSETTS' RATIONALE FOR REFUSING TO INCREASE CRIMINAL SENTENCES BASED ON A DEFENDANT'S ALLEGED PERJURY

## I. INTRODUCTION

A bedrock principle of our judicial system is the right of every criminal defendant to testify at trial on his own behalf.<sup>1</sup> Yet, when a defendant testifies and is later convicted, should the trial judge have the discretion to impose an enhanced sentence if he determines that the defendant perjured himself?<sup>2</sup> Massachusetts, as a matter of state constitutional law, specifically prohibits judges from doing so,<sup>3</sup> whereas the Federal Sentencing Guidelines<sup>†</sup> (Guidelines) currently allows for such a consideration.<sup>4</sup>

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<sup>1</sup> See generally U.S. CONST. amend. VI. The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

*Id.*

<sup>2</sup> See generally *Commonwealth v. Souza*, 461 N.E.2d 166, 167 (Mass. 1984) (holding judge should not have presumed defendant's guilt without trial for perjury); *Commonwealth v. Coleman*, 461 N.E.2d 157, 165 (Mass. 1984) (stating judge cannot punish defendant for perjury without indictment and trial); *Commonwealth v. Juzba*, 705 N.E.2d 1148, 1152 (Mass. App. Ct. 1999) (ruling judge's consideration of defendant's truthfulness during trial impermissible when determining sentence).

<sup>3</sup> See *Juzba*, 705 N.E.2d at 1152 (vacating sentence based on judge's consideration of alleged perjury).

<sup>†</sup> In *United States v. Booker*, the United States Supreme Court addressed the constitutionality of the portion of the Federal Sentencing Guidelines requiring sentence enhancements based on aggravating factors not found by a jury beyond a reasonable doubt. 125 S. Ct. 738 (2005). The Court held that portions of the Guidelines permitting judges to increase sentences beyond the Guidelines' prescribed ranges based on some unsubstantiated factor was unconstitutional. *Id.* Although the Court's holding significantly limited much of the Guidelines' most powerful provisions, the Court explicitly refused to overrule *United States v. Dunnigan* and *United States v. Grayson*, two cases supporting sentence enhancements based on defendants' perjury. *Id.* at 753; see *United States v. Dunnigan*, 507 U.S. 87 (1993); *United States v. Grayson*, 438 U.S. 41 (1978). Specifically, the Court noted that the enhancement ability established by those cases could continue to exist so long as the ultimate sentence fell within the range included in the Guidelines. *Booker*, 125 S. Ct. at 753.

In the absence of a separate trial for the crime of perjury, Massachusetts judges cannot increase a defendant's sentence based on their personal belief that he lied without violating the defendant's due process rights.<sup>5</sup> Otherwise, a defendant who chooses to testify runs the risk that the judge may find that he perjured himself and increase his sentence.<sup>6</sup> In the absence of an opportunity for a fair and separate trial on the issue of perjury, a defendant's constitutional right to testify on his own behalf may therefore be "chilled."<sup>7</sup>

This Note will explore the controversy stemming from the Federal Sentencing Guideline, U.S.S.G. §3C1.1.<sup>8</sup> The Guidelines allow sentencing judges to increase the offense level of a criminal defendant based on a belief that he has committed perjury.<sup>9</sup> This Note will provide a comparative review of Massachusetts and federal courts' decisions, and will examine whether the Massachusetts Supreme Judicial Court should re-visit this issue with a view towards adopting the federal rule as reflected in the Guidelines, or whether it should continue to adhere to its original ruling.<sup>10</sup>

Part I of this paper will explore the historical background of the enactment of the Guidelines.<sup>11</sup> Part II will examine those cases that specifically address whether courts should consider alleged perjury at time of

While the Court acknowledged some tempering of the enhancement ability established by *Dunnigan* and *Grayson*, it explicitly stated, "[t]hus, while the reach of *Dunnigan* may be limited, we need not overrule it." *Id.* Therefore, federal courts may continue to enhance defendants' sentences based on their perjury, albeit within a smaller range.

<sup>4</sup> See 28 U.S.C. § 991 (1991) (establishing Sentencing Commission and its purposes).

<sup>5</sup> See *supra* note 2 and accompanying text.

<sup>6</sup> See *Coleman*, 461 N.E.2d at 164 (stating judge may not consider defendant's alleged perjury when determining severity of sentence). As a matter of public policy, the court found that if the judge considered the defendant's alleged perjury at sentencing, the judge would have denied the defendant of the defendant a fair and impartial determination of an appropriate sentence for the crime of perjury. *Id.* at 163-64.

<sup>7</sup> See *United States v. Akitoye*, 923 F.2d 221, 228 (1st Cir. 1991) (denying defendant's claim that judge violated his Sixth Amendment rights).

<sup>8</sup> See U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 [hereinafter GUIDELINES] (2002). Section 3C1.1 states:

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense by conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by two levels.

*Id.*

<sup>9</sup> See *id.*

<sup>10</sup> See *infra* notes 30-48 and accompanying text.

<sup>11</sup> See *infra* notes 10-30 and accompanying text.

sentencing.<sup>12</sup> This section of the Note will focus on Massachusetts district and superior court decisions in which defendants later argue on appeal that they were denied due process.<sup>13</sup> These opinions will be compared to federal court decisions that rely on the Guidelines and the supporting rationale advanced by the United States Supreme Court.<sup>14</sup> Following this discussion, Part III will analyze whether there is a reasonable basis for preserving the position adopted by Massachusetts, or if the Guidelines more appropriately address what role alleged perjury should have on the imposition of a criminal sentence.<sup>15</sup>

## II. HISTORICAL BACKGROUND OF FEDERAL SENTENCING GUIDELINES

Congress enacted the Sentencing Reform Act (SRA) in 1984 in response to the increasingly disparate prison sentences being imposed by judges using an unpredictable sentencing system.<sup>16</sup> Prior to the SRA's passage, judges enjoyed great leeway in the range of sentences they could impose.<sup>17</sup> If a sentence fell within the bounds set by statute, a judge did not have to provide reasons for the particular sentence initially or on appeal.<sup>18</sup> Under the old law, federal judges had no standards to guide them in their sentencing decisions and no appellate review existed with which defendants could initiate a challenge.<sup>19</sup> In the 1970s, critics began to highlight the increasing lack of public confidence in the criminal justice system and insisted that disparate sentences indicated an inherent unfairness.<sup>20</sup> These critics argued that the sentencing process lacked standards and review, and thus was subject to the whims and prejudices of individual judges.<sup>21</sup>

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<sup>12</sup> See *infra* notes 30-48 and accompanying text.

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

<sup>15</sup> See *infra* notes 49-64 and accompanying text.

<sup>16</sup> See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.12 (6th ed. 2000) (discussing Congress' creation of United States Sentencing Commission).

<sup>17</sup> See *Koon v. United States*, 518 U.S. 81, 96 (1998) (reviewing longstanding practice of judicial discretion).

<sup>18</sup> See *id.* at 96 (discussing doctrine of non-reviewability).

<sup>19</sup> See *Mistretta v. United States*, 488 U.S. 361, 363 (1989) (recognizing extent of pre-guidelines judicial discretion).

<sup>20</sup> See S. REP. NO. 225 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3228 (noting unjustified disparities among offenders for similar offenses).

<sup>21</sup> See Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion: Koon's Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines*, 79 B.U. L. REV. 493, 508 (1999) (analyzing facets of judicial discretion and changes following Sentencing Guidelines).

Before Congress enacted the SRA, sentencing law vacillated in its perceived purpose among the public and judicial community.<sup>22</sup> In the late 1950s, the law evolved from a focus on retribution and restitution to one of rehabilitation.<sup>23</sup> The Supreme Court of the United States recognized that it was necessary to individualize criminal sentences so that defendants emerged from prison as reformed citizens.<sup>24</sup> Judges were encouraged to consider the characteristics and history of the defendant when determining a sentence, constrained only by statutory limitations.<sup>25</sup> As a result, defendants could receive significantly different penalties depending on judges' opinions of the crime charged and their character analysis.<sup>26</sup> As critics of judges' unfettered discretion advocated for appellate review of sentences, the public also questioned the fairness of the judicial system.<sup>27</sup> The need for reforming the way in which defendants were sentenced became clear.

As a result of the public's increasing concern with the rate of violent crimes, drug use and recidivism, Congress enacted the Comprehensive Crime Control Act (CCA) in 1984.<sup>28</sup> This Act included one of the major federal criminal law reforms, specifically the SRA.<sup>29</sup> As a result of the CCA, Congress created the United States Sentencing Commission (Commission) that outlined a specific range of sentences for all categories of

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<sup>22</sup> See Lisa M. Rebellio, *Sentencing Under the Federal Sentencing Guidelines: Five Years of "Guided Discretion"*, 26 SUFFOLK U. L. REV. 1031, 1033-55 (1992) (tracing development of traditional sentencing goals and resulting criticism).

<sup>23</sup> See *Williams v. New York*, 337 U.S. 241, 248 (1949) (noting retribution and reformation as important objectives of criminal justice system).

<sup>24</sup> See *Williams*, 337 U.S. at 247 (holding sentences for similar crimes should vary based on the particular offender). In *Williams*, the jury recommended to the court that the defendant receive a life sentence. *Id.* The judge instead imposed the death penalty. *Id.* His decision was based in part upon the defendant's record and in part upon a finding from probation that the defendant was a "menace to society." *Id.* The Supreme Court affirmed the sentencing judge's decision. *Id.*

<sup>25</sup> See *Mistretta v. United States*, 488 U.S. 361, 364 (1989) (noting Congress grants judges wide discretion in imposing sentences).

<sup>26</sup> See Weinstein, *supra* note 21, at 508 (analyzing facets of judicial discretion and changes following Guidelines). Under prior law, any sentence imposed was legal because there was a lack of governing guidelines and rules. *Id.*

<sup>27</sup> See Kate Stith & Steve Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 231, 261-73 (1993) (outlining political debates surrounding sentencing reform). Before the enactment of the Sentencing Guidelines, appellate review only took place under dangerous offender and dangerous drug offender statutes, as well as in rare cases where the judge imposed illegal sentences using false information or constitutionally impermissible factors. *Id.*

<sup>28</sup> See Pub. L. No. 98-473, tit. 2, 98 Stat. 1837, 1976 (1984).

<sup>29</sup> See 28 U.S.C. §§ 991-998; see S. REP. NO. 225, at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3184 (stating Act contains significant improvements in sentencing laws).

federal offenses.<sup>30</sup> The Commission represented Congress' attempt to provide a degree of uniformity that federal courts previously lacked.<sup>31</sup> In defining the Guidelines, the Commission reviewed many federal criminal sentences and identified statistically significant factors previously deemed relevant in sentencing.<sup>32</sup> The Commission then created sentencing guidelines for cases involving those identified factors.<sup>33</sup>

Though the SRA drastically altered federal sentencing, judges still possess significant judicial discretion.<sup>34</sup> Judges apply a complex set of rules that define the mandatory sentencing range for each offender.<sup>35</sup> These rules encompass factors such as the substantive conduct of the defendant and his criminal history.<sup>36</sup> The Guidelines allow departures in certain instances, and if it occurs, the defendant is allowed the opportunity for appellate review.<sup>37</sup> When a judge imposes a sentence within the Guidelines, however, it is un-reviewable.<sup>38</sup>

Under the Guidelines, the nature of the crime charged provides the base offense level and the type of conduct the judge should consider in determining the sentence.<sup>39</sup> Each Guideline has particular offense charac-

<sup>30</sup> See *id.* The Commission consists of seven voting members. *Id.* No more than four may be members of the same political party. *Id.*

<sup>31</sup> See Weinstein, *supra* note 21, at 1042 (discussing creation of United States Sentencing Commission). Congress granted the Commission broad powers to fulfill the mandate of establishing sentencing policies, including the provision that gave the Commission "all necessary powers and duties to fulfill its directive." *Id.*

<sup>32</sup> See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-31 (1988) (discussing process employed by Sentencing Commission). The statistical analysis included about 110,000 federal criminal sentences. *Id.* By examining particular conduct relevant to sentencing for each offense, the Commission developed models of the factors used by judges to individualize sentences. *Id.* For example, in the typical bank robbery, defendants who used a gun generally received a greater sentence than those who did not. *Id.* Gun use was therefore considered by the Commission as a characteristic worthy of a harsher sentence for the crime of robbery. *Id.*

<sup>33</sup> See *id.* If a factor did not occur with statistically significant frequency, the Sentencing Commission omitted those factors, assuming that judges would individualize sentences in those cases with atypical factors. *Id.*

<sup>34</sup> See Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 637 (1971) (stating judges have discretion because there "is no officially wrong answer" when deciding sentences within Guidelines).

<sup>35</sup> See U.S. SENTENCING GUIDELINES MANUAL §§ 5K2.1-.14, at 246-49 (1987).

<sup>36</sup> See *id.*

<sup>37</sup> See Rebello, *supra* note 21, at 1046 (outlining instances where departure from Guidelines is permitted). A judge may depart from the guidelines in several circumstances: 1) if the crime committed involves factors not adequately considered by the Commission 2) if a factor considered by the Commission is present to a degree substantially in excess of that usually involved in the crime; and 3) upon motion by the government where a defendant is providing substantial assistance to the authorities. *Id.*

<sup>38</sup> See *id.* (noting appeals court generally only reviews judges' failure to depart from Guidelines upon misapplication of Guidelines or violation of law).

<sup>39</sup> See U.S. SENTENCING GUIDELINES MANUAL 1.2 (1988).

teristics and establishes a specific process for judges to engage in when establishing appropriate sentences.<sup>40</sup> In determining the base offense level, a judge may modify the level by applying provisions in the Guidelines that allow sentences to be adjusted based on various factors.<sup>41</sup> Factors that the judge may consider include the defendant's role in obstruction of justice and his acceptance of responsibility for the crime.<sup>42</sup>

Section 3C1.1 of the Guidelines provides that if a defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice" the sentencing judge shall increase the level of offense by two.<sup>43</sup> One example of such conduct is perjury.<sup>44</sup> The Commentary to the Guidelines recognizes that this provision "is not intended to punish a defendant for the exercise of a constitutional right."<sup>45</sup> Thus, refusing to admit one's guilt, in the absence of an admission of guilt under oath, is not a basis for applying this provision while enhancement is proper if the defendant commits perjury.<sup>46</sup> The provision is applied in this way because under the Guidelines, a two-level increase in offense is appropriate where the defendant impeded the administration of justice by testifying untruthfully.<sup>47</sup>

### III. CONSIDERATION OF ALLEGED PERJURY: A COMPARISON OF MASSACHUSETTS AND FEDERAL COURTS' DECISIONS

Whether a judge can consider a defendant's false testimony at sentencing is enunciated in *United States v. Grayson*.<sup>48</sup> In *Grayson*, the Su-

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* (listing factors courts may consider). Examples of such factors include factors related to the victim, the defendant's role in the criminal offense, and multiple counts. *Id.*

<sup>42</sup> See *id.* (specifying factors to be considered when modifying sentences).

<sup>43</sup> See U.S. SENTENCING GUIDELINES MANUAL §3C1.1; NOWAK & ROTUNDA, *supra* note 16 (explaining application of U.S. Sentencing Guideline §3C1.1). The Guidelines created by Congress are binding on federal courts. *Id.* If a trial judge wishes to depart from the Guidelines, he must find "aggravating or mitigating factors" and disclose the specific reason for deviating. *Id.*

<sup>44</sup> See *United States v. Crosby*, 96 F.3d 1114, 1115 (8th Cir. 1996) (holding defendant's offense level properly increased due to alleged perjury about his involvement in drug conspiracy); *United States v. Pattan*, 931 F.2d 1035, 1042 (1991) (affirming proper application of Guidelines when defendant's false statements obstructed administration of justice).

<sup>45</sup> See U.S. SENTENCING GUIDELINES MANUAL § 3C1.1, cmt. n.2 (2002) (acknowledging inaccurate testimony does not always constitute purposeful attempt to obstruct justice).

<sup>46</sup> See *id.* (asserting Guidelines' provision not intended as punishment for testifying on one's own behalf).

<sup>47</sup> See *United States v. Husky*, 924 F.2d 223, 225 (11th Cir. 1991) (holding commission of willful perjury justified increased sentencing).

<sup>48</sup> See *United States v. Grayson*, 438 U.S. 41, 50 (1978) (deciding judge may consider defendant's suspected perjury at sentencing).

preme Court upheld a sentence where the district court judge had expressly stated that he thought the defense offered was a complete fabrication and subsequently considered that fact at sentencing.<sup>49</sup> Despite objections, the Supreme Court held that a defendant's propensity to lie under oath was indicative of his prospects for rehabilitation and thus properly considered at sentencing.<sup>50</sup> In its decision, the Court relied in part upon the analysis given by Judge Marvin Frankel.<sup>51</sup> Speaking for the Second Circuit, Judge Frankel noted that a defendant's readiness to lie under oath before the very judge who will sentence him strongly indicated the lack of hope for rehabilitation.<sup>52</sup>

Following the Court's reasoning in *Grayson*, many defendants argued that they were therefore sentenced not only for the substantive crime with which they were charged, but also the uncharged, untried crime of perjury.<sup>53</sup> The Supreme Court has made clear that a defendant's right to testify on his own behalf is not without boundaries.<sup>54</sup> According to *Grayson*, a sentence which accounts for the defendant's false testimony does not violate due process, nor constitute punishment for the yet unproven and untried crime of perjury.<sup>55</sup> Once a defendant chooses to testify on his own behalf there is no constitutional right to do so falsely.<sup>56</sup> Under the guise of considering a defendant's allegedly false testimony as indicative of whether he can be successfully rehabilitated, the courts allowed federal judges to create a sentencing system tailored towards that goal.<sup>57</sup>

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<sup>49</sup> See *id.* at 44. At sentencing, the judge gave his reasons for increasing the defendant's sentence so that if the case was appealed, the Court of Appeals would be able to determine whether the reasons were improper. *Id.*

<sup>50</sup> See *id.* at 50. The *Grayson* Court stated in part: "A defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes towards society and prospects for rehabilitation and hence relevant to sentencing." *Id.*

<sup>51</sup> See *id.* at 51 (reciting Judge Frankel's argument in favor of judicial discretion).

<sup>52</sup> See *id.*

<sup>53</sup> See *United States v. Moore*, 484 F.2d 1284, 1288 (4th Cir. 1973) (advising that a suspicion of perjury should result in an investigation rather than increased sentence).

<sup>54</sup> See *Grayson*, 438 U.S. at 54 (reaffirming right guaranteed by law is the narrow right to testify truthfully).

<sup>55</sup> See *id.* at 53 (reversing judgment of court of appeals and remanding for reinstatement of sentence of district court).

<sup>56</sup> See *Moore*, 484 F.2d at 1289 (noting defendant has no constitutional right to testify falsely).

<sup>57</sup> See *Williams v. New York*, 337 U.S. 241 (1949) (allowing sentencing judges to consider information about the defendant's background when imposing a sentence). The court in *Williams* noted that sentencing judges should not be limited to the information about the defendant that was learned during the court proceedings. *Id.* In addition, the judge should be able to obtain "information concerning every aspect of a defendant's life" so as to properly make a sentence appropriate for the individual offender. *Id.* See also *Grayson*, 438 U.S. at 1018 (holding judge may consider suspected perjury when deciding whether defendant can be successfully rehabilitated). Chief Justice Burger noted that to-

Since the Supreme Court's decision in *Grayson*, only one circuit has rejected the Court's reasoning.<sup>58</sup> Prior to the creation of the Guidelines, the First Circuit Court of Appeals maintained that considering alleged perjury represented an improper practice.<sup>59</sup> In *Scott v. United States*, the court remanded the case for re-sentencing where the judge repeatedly stated he did not believe the defendant's testimony and thus increased his sentence accordingly.<sup>60</sup>

Fifteen years later, Massachusetts state courts continue to adhere to the reasoning in *Scott*.<sup>61</sup> In general, state courts have followed the rationale of *Grayson* and have held that a defendant's alleged perjury or lying during trial may be considered at sentencing provided it reflects on the defendant's prospects for rehabilitation.<sup>62</sup> In Massachusetts, the *Scott* court provided a clear explanation why it rejected *Grayson*, finding the connection between alleged perjury and rehabilitation a tenuous one.<sup>63</sup>

First, the *Scott* court challenged the argument in *Grayson* that when a defendant willingly lies under oath a court should impose an additional punishment.<sup>64</sup> *Scott* held that if the government wanted to prosecute for perjury then they should do so under a separate proceeding where the de-

wards the end of the nineteenth century the sentencing function changed from specific incarceration periods defined by the legislature, to the idea that the purpose of incarceration was primarily to rehabilitate offenders. *Id.* Sentencing judges now considered not only the offense committed and its severity, but also the individual defendant and his or her hopes of rehabilitation. *Id.*

<sup>58</sup> See *Moore*, 484 F.2d at 1286 (holding that judges may properly consider defendant's false testimony under oath at sentencing); *United States v. Cluchette*, 465 F.2d 749, 754 (9th Cir. 1972) (affirming propriety of sentencing judge to consider untruthful testimony of defendant); *United States v. Wallace*, 418 F.2d 876, 878 (6th Cir. 1969) (holding judge may consider defendant's alleged perjury when deciding severity of punishment); *Scott v. United States*, 419 F.2d 264, 266 (1964) (objecting to trial judge's consideration of defendant's alleged perjury); *Williams*, 337 U.S. at 241 (permitting sentencing judge to consider information available on defendant's background).

<sup>59</sup> See *Scott*, 419 F.2d at 269 (rejecting probative value of defendant's false testimony in his own defense).

<sup>60</sup> See *id.* at 267. At sentencing the judge read a letter submitted by the appellant that referred to a visit his lawyer had made to the judge's law clerk. *Id.* During that visit, the clerk had stated that the defendant could only get a light sentence from the judge by confessing and apologizing for the crime. *Id.* The defendant maintained his innocence and, after being found guilty by the jury, the judge told the defendant he eventually hoped to hear him apologize for what he had done. *Id.*

<sup>61</sup> See *supra* note 2 (stating alleged perjury is an improper factor to consider at sentencing).

<sup>62</sup> See Jean E. Maess, Annotation, *Propriety of Sentencing Judge's Consideration of Defendant's Perjury or Lying in Pleas or Testimony in Present Trial*, 34 A.L.R.4th 888 (listing cases recognizing that a sentencing court may consider defendant's false testimony).

<sup>63</sup> See *Scott*, 419 F.2d at 268 (noting problems arising from consideration of alleged perjury when sentencing).

<sup>64</sup> See *id.* at 268.

defendant would have all the protections inherent in a criminal trial.<sup>65</sup> By considering alleged perjury, a court would deny the defendant that right.<sup>66</sup>

Second, *Scott* argued that the commission of perjury does not necessarily reflect adversely upon the defendant's prospects for rehabilitation.<sup>67</sup> The *Scott* court noted that while a defendant may well indeed repent for his crime, the threat of jail and loss of freedom may nonetheless encourage him to argue his innocence in a court of law.<sup>68</sup>

Massachusetts state courts continue to maintain a very different sentencing procedure than that of the federal courts, and continue to rely on *Scott*.<sup>69</sup> The courts hold that consideration of alleged perjury is a "judgment by hunch- without accusation and without opportunity to defend."<sup>70</sup> Judgments of this kind are believed to "chill" the defendant's right to take the stand in his own defense.<sup>71</sup>

Even after the creation of section 3C1.1 of the Guidelines, Massachusetts has refused to alter its sentencing procedures in such a way that would allow judges to consider alleged perjury.<sup>72</sup> Despite the reliance of some district court judges on their belief that a defendant has lied, these decisions do not survive on appeal.<sup>73</sup> The Supreme Judicial Court of Massachusetts has yet to defer to either the model put forth in the Guidelines, or that adopted by the United States Supreme Court.<sup>74</sup>

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<sup>65</sup> See *id.* at 269 (noting imposition of additional sentence would deny defendant due process).

<sup>66</sup> See *id.*

<sup>67</sup> See *id.* at 270 (indicating reasons why a defendant may assert innocence).

<sup>68</sup> See *id.* The court noted that a defendant threatened with the prospect of jail has peculiar pressures placed upon him and, thus, his willingness to deny the crime is a weak test for his prospects of rehabilitation. *Id.*

<sup>69</sup> See *supra* note 2.

<sup>70</sup> See *Commonwealth v. McFadden*, 731 N.E.2d 82, 85 (2000) (ruling proper to consider several factors when imposing sentence, but cannot impose punishment for offense that court did not try defendant and convict); *Commonwealth v. Murray*, 351 N.E.2d 555, 557 (1976) (noting defendants denied their constitutional right to testify on their own behalf);

<sup>71</sup> See *Murray*, 351 N.E.2d at 558 (acknowledging consideration of alleged perjury places heavy burden on defendant when deciding whether to testify).

<sup>72</sup> See *Commonwealth v. Coleman*, 461 N.E.2d 157, 158 (Mass. 1984) (concluding judge improperly considered defendant's perjury in deciding penalty); see also *Commonwealth v. Gresek*, 461 N.E.2d, 172, 173 (1984) (holding judge cannot consider alleged perjury when imposing sentence); *Commonwealth v. Souza*, 461 N.E.2d 166 (Mass. 1984) (stating judge imposed improper sentence because judge considered alleged perjury of defendant); *Commonwealth v. Juzba*, 705 N.E.2d 1148, 1148 (Mass. App. Ct. 1999) (requiring remand for re-sentencing due to trial court's consideration of defendant's alleged perjury).

<sup>73</sup> See *supra* note 71 and accompanying text (noting defendants' right to testify may be hampered upon fear of further prosecution).

<sup>74</sup> See *Gresek*, 461 N.E.2d at 177 (stating reversible error occurs when judge considers alleged perjury). In *Gresek*, while on trial for operating a car while under the influence of alcohol, the defendant testified that he was not the operator of the car at the time of his

## IV. ANALYSIS

Judicial discretion is an inevitable part of the United States legal system.<sup>75</sup> Critics have reminded us that no matter how much we may try to account for the differences similarly situated persons may face, there will never be a rule on point for every situation.<sup>76</sup> Inherent in this fact is that it may be the judge, rather than the law, that decides the particular fate for a defendant.<sup>77</sup> Such a practice creates a problem in that the outcome for a defendant may be significantly different depending on who is making the decision. Many scholars urge legislators to narrow the scope of discretion by enacting more specific laws that limit the possibility of inconsistent sentencing.<sup>78</sup>

The Guidelines have been a clear step in the right direction towards addressing the problems of un-reviewable judicial discretion.<sup>79</sup> They have by no means eliminated the exercise of judicial discretion, but they have tamed it.<sup>80</sup> Judges who depart from the Guidelines are subject to appellate review while those who sentence within the bounds are afforded the discretion to individualize the sentence.<sup>81</sup>

The consideration of alleged perjury at sentencing is a form of judicial discretion that Massachusetts has rejected in both practice and principle.<sup>82</sup> While the majority of states have allowed for this exercise of judgment among its judges, Massachusetts has not waived in its position that such a practice is an abuse of judicial discretion.<sup>83</sup> Massachusetts has argued that in order to preserve a defendant's due process rights, his willing-

arrest. *Id.* On both cross and direct examination, as well as when questioned by the judge, the defendant asserted that his friend drove. *Id.* After the jury found the defendant guilty, the judge indicated that he should increase the punishment because it was implicit in the jury's finding that the defendant had been untruthful. *Id.* Specifically, he stated that such purported lying was "offensive to the whole judicial system" and that "he should have a taste of the House of Correction because he came in here and made a mockery of the judicial system." *Id.*

<sup>75</sup> See *supra* note 34 and accompanying text (discussing bounds of judicial discretion in criminal sentencing).

<sup>76</sup> See *supra* note 34 and accompanying text.

<sup>77</sup> See *supra* note 37 and accompanying text (describing important effects of judicial discretion in criminal sentencing).

<sup>78</sup> See *supra* note 34 and accompanying text (discussing measures to decrease inconsistent criminal sentencing).

<sup>79</sup> See *supra* note 31 and accompanying text (analyzing statistical analysis employed in federal sentencing decisions).

<sup>80</sup> See *id.* (noting inherent nature of judicial discretion in United States legal system).

<sup>81</sup> See *supra* note 38 and accompanying text (describing instances where judges are afforded judicial discretion under Guidelines.)

<sup>82</sup> See *supra* note 2 and accompanying text.

<sup>83</sup> See *supra* note 2 and accompanying text.

ness to lie under oath absent a separate trial cannot be considered as a permissible factor when sentencing.<sup>84</sup> Yet when looking back through the history of sentencing law, a counter-argument seems much more persuasive.<sup>85</sup>

The history of sentencing has clearly demonstrated that is necessary for a judge to consider the defendant as a whole when determining what sentence to impose.<sup>86</sup> In fact, judges are now obligated to consider not only the nature and severity of the offense, but also the individual character of the defendant and whether he can be successfully rehabilitated.<sup>87</sup>

Massachusetts excludes consideration of the defendant's conduct at trial and his testimony under oath as an indication of the defendant's prospects for rehabilitation.<sup>88</sup> Yet a court's conclusion that a defendant has committed perjury should be considered as one indicative factor.<sup>89</sup> It is unrealistic to assume that a judge simply erase from his mind the testimony given by the defendant when determining what sentence to impose.<sup>90</sup> The judge's observation of the defendant's testimony is highly relevant as to the defendant's prospects for rehabilitation.<sup>91</sup> If there is something that reflects poorly on this goal, it should be within the judge's discretion to consider it as it relates to the purpose of sentencing.<sup>92</sup>

Without the ability to take into account the defendant's whole personality and person, the sentencing judge is unable to exercise even the most basic form of judicial discretion.<sup>93</sup> He lacks the ability to evaluate the defendant's testimony on the stand and determine whether such testimony contained falsehoods that together with the other knowledge of the defendant, point to poor prospects for successful rehabilitation.<sup>94</sup> No matter the

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<sup>84</sup> See *supra* note 2 and accompanying text.

<sup>85</sup> See *supra* note 22 and accompanying text (reviewing history of federal sentencing laws).

<sup>86</sup> See *supra* note 32 and accompanying text (discussing methods utilized when tailoring criminal sentence).

<sup>87</sup> See *supra* note 48 and accompanying text (stating rehabilitation of defendant as factor to be considered at sentencing).

<sup>88</sup> See *supra* note 58 and accompanying text (arguing consideration of defendant's alleged perjury improperly influences sentencing decision).

<sup>89</sup> See *supra* note 47 and accompanying text (stating if judge makes independent finding of willful obstruction of justice, sentence is properly increased).

<sup>90</sup> A problem with the rule put forth by the Massachusetts Supreme Judicial Court is that judges, being human, will make essentially unreviewable sentencing decisions simply by not mentioning that they are factoring the defendant's willful perjurious testimony into their sentencing decision. See *supra* note 49.

<sup>91</sup> See *supra* note 47-51 and accompanying text (noting blatant, intentional falsehoods in defendant's testimony observed by judge are relevant as to defendant's chance of rehabilitation).

<sup>92</sup> See *supra* note 47-51 and accompanying text.

<sup>93</sup> See *supra* note 21 and accompanying text (discussing factors to be considered by sentencing judge).

<sup>94</sup> See *supra* note 41 and accompanying text (recognizing importance of defendant's prospects of successful rehabilitation at sentencing).

integrity of the judge and his oath to office, under Massachusetts law he will be required to ignore what may appear to him in his firsthand observations of the defendant's testimony to be blatant lies under oath.<sup>95</sup>

The theory of individualized sentencing encourages judges to consider several factors about the defendant that involve a certain level of judicial discretion.<sup>96</sup> Judges take into consideration their own impressions about the defendant, allowing them in part to form a general opinion as to the likelihood the defendant will continue to commit criminal acts or whether there appears to be hope that he will find success through rehabilitative efforts.<sup>97</sup> An observation that the defendant is willing to lie under oath to the judge who will hand down the sentence clearly seems to be a factor of great relevance in determining the appropriate sentence.<sup>98</sup>

Under the Guidelines, a federal judge has the authority to consider such information and to make an informed decision as to the defendant's prospects for rehabilitation.<sup>99</sup> The judge does not have to wait for the defendant to be charged for the separate crime of perjury.<sup>100</sup> In the interests of judicial resources and the integrity of the court system, federal judges are able to incorporate their belief and the jury's finding that the defendant lied under oath into the sentencing decision.<sup>101</sup>

If Massachusetts were to adopt a similar sentencing procedure to Guideline §3C1.1, there are several safeguards that could be put in place to address the concern that a defendant who takes the stand and is found guilty will receive an enhanced sentence. The courts could require that a judge who increases a sentence, when challenged, must make a finding to support all elements of the perjury violation.<sup>102</sup> In such cases, the judge's increase in sentence would not be based on a mere whim but substantiated by observations leading to a finding of all elements of perjury.<sup>103</sup>

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<sup>95</sup> See *id.*

<sup>96</sup> See *supra* note 31 and accompanying text (providing examples of use of judicial discretion at sentencing).

<sup>97</sup> See *supra* note 32-33 and accompanying text (discussing discretionary process employed by federal sentencing judges).

<sup>98</sup> See *supra* note 32-33 and accompanying text.

<sup>99</sup> See *supra* note 33 and accompanying text (outlining sentencing process created by Commission).

<sup>100</sup> See *supra* note 42-44 and accompanying text (applying proper use of Guidelines when increasing defendant's sentence).

<sup>101</sup> See *supra* note 44 (stating permissible factors by which to increase defendant's sentence).

<sup>102</sup> See *supra* note 55 and accompanying text (holding no abuse of discretion when judge makes independent finding of willful obstruction of justice due to defendant's false testimony).

<sup>103</sup> See *supra* note 55 and accompanying text.

Enhancement of a defendant's sentence under Guideline §3C1.1 legitimizes the sentencing goals of our criminal justice system.<sup>104</sup> A defendant who is willing to frustrate judicial proceedings to avoid criminal liability indicates a need for both incapacitation and retribution, as compared to someone charged with the same crime that does not resort to perjury.<sup>105</sup> There is no suggestion that consideration of a defendant's untruthfulness should serve as an invitation for increasing the sentence as punishment for the alleged perjury.<sup>106</sup> Instead, the goal that §3C1.1 has furthered is that consideration of the alleged perjury is an invitation to determine the defendant's potential for rehabilitation, and thus an appropriate consideration at sentencing.<sup>107</sup>

Despite Massachusetts's argument to the contrary, the impact of the defendant's testimony upon the very judge who will sentence him is hardly irrelevant to that judge's determination of the defendant's character and chances for successful rehabilitation.<sup>108</sup> Increasing a defendant's sentence under the Guidelines is not a roundabout scheme to charge, try, convict, and sentence a defendant for perjury.<sup>109</sup> Rather, such a consideration is an inherent exercise of judicial discretion measured against one of the ingrained goals of our criminal justice system- individualizing criminal sentences in the hope that defendants can be reformed.<sup>110</sup>

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<sup>104</sup> See *supra* note 47 and accompanying text (discussing various goals of United States criminal sentencing).

<sup>105</sup> See *supra* note 32 and accompanying text (noting defendant's willingness to lie as impeding attainment of criminal sentencing goals).

<sup>106</sup> See *supra* note 55 and accompanying text (explaining limits of judicial discretion when imposing criminal sentence).

<sup>107</sup> See *supra* note 44 and accompanying text (describing proper application of Federal Guidelines).

<sup>108</sup> See *supra* note 52 and accompanying text (noting willingness to lie before a judge indicative of defendant's chances for successful rehabilitation)

<sup>109</sup> See *supra* note 54 and accompanying text.

<sup>110</sup> See *supra* note 57 and accompanying text (discussing importance of examining individual defendant as a whole when determining appropriate sentence).

