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Abstract

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KEYWORDS: Judicial, Sentencing, Court

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1. GENERAL CONSIDERATIONS

The Supreme Court has clearly stated the general rule that sentencing lies properly within the sound discretion of the trial judge and that, in exercising his discretion, a judge is not restricted by technical rules of evidence.[1] He can consider many sources and types of evidence "to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."[2] This principle has also been expressed by the Fifth Circuit Court of Appeals,[3] and cases where an abuse of discretion by the sentencing court has been found by an appellate court are indeed rare.[4]

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1. Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079 (1949).

2. *Id.* at 246.

3. United States v. Frontero, 452 F.2d 406 (5th Cir. 1971) ("in absence of other constitutional provision or of statute, this Court has no power to review the length of sentence within the limits permitted by statute") *Id.* at 409; United States v. Menichino, 497 F.2d 935 (5th Cir. 1974) (sentence within statutory limit "does not ascend to the orbit of a constitutional violation," *Id.* at 945, and sentence will be disturbed only for abuse of discretion); United States v. White, 524 F.2d 1249 (5th Cir. 1975) (length of sentence, if within statutory limits, is not a matter for consideration of appellate court); United States v. Gamboa, 543 F.2d 545 (5th Cir. 1976) (sentencing court exercises broad discretion, not subject to review except for arbitrary or capricious action amounting to a gross abuse of discretion).

4. *See, e.g.*, United States v. Hartford, 489 F.2d 652 (5th Cir. 1974) (sentence under the Federal Youth Corrections Act [FYCA] which was harsher than that allowed under the substantive statute was repugnant to the legislative intent of FYCA, and thus an abuse of discretion. Also, a rigid policy of always imposing the maximum for drug offenses is an exercise of no discretion and thus an abuse of discretion); Dorszynski v. United States, 418 U.S. 424, 94 S.Ct. 3042 (1974) (limited appellate review is available when no sentencing discretion is exercised at all).

However, as with all general rules, there are exceptions. Thus, a criminal defendant at sentencing does retain some due process protection. He is entitled, for example, to rudimentary notions of fairness,[5] to have materially untrue matters in his record disregarded,[6] to have constitutionally invalid convictions disregarded[7] and to be sentenced no more than once for the same offense in compliance with the ban against double jeopardy.[8]

2. AREAS OF CONCERN

From a survey of appellate opinions which deal with challenged sentences, it appears that sentencing judges within the Fifth Circuit should be aware of several issues which concern appellate courts and which seem to recur with some frequency. Most frequently, the fact situations giving rise to those issues occur: (1) when the sentencing court may be considering another prior conviction which is constitutionally defective; (2) when the court may be considering materially untrue information or potentially unreliable hearsay; and (3) when the court has not allowed the defendant to examine and attempt to refute information in the presentence report.

A. Invalid Convictions

In *United States v. Tucker,*[9] the Supreme Court held that sentences

5. *See, e.g.,* United States v. Huff, 512 F.2d 66 (5th Cir. 1975) (ex parte memo from prosecutor to judge deprived defendant of due process right to hear and rebut information it contained).

6. Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252 (1948). (Court erroneously considered charges for which defendant had been acquitted. Supreme Court considered these to be materially untrue assumptions).

7. United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589 (1972) (two of three prior convictions explicitly relied on by sentencing judge had been obtained in violation of Gideon v. Wainwright).

8. United States v. Durbin, 542 F.2d 486 (8th Cir. 1976) (defendant sentenced originally to 12 years, then prior conviction that the sentencing court had considered was set aside. Relying on *Tucker,* the sentencing court vacated the 12-year sentence and, considering defendant's criminal activity while on parole, gave him a 15-year sentence. Held: not an abuse of discretion, but a violation of the ban against double jeopardy.) *See also* United States v. Bell, 457 F.2d 1231 (5th Cir. 1972).

9. 404 U.S. 443, 92 S.Ct. 589 (1972). The crucial issue upon remand, according to the *Tucker* Court, would be whether the sentence in the instant case would have been different if the judge had known that the prior convictions were constitutionally invalid

must be vacated and reconsidered when the sentencing court explicitly relies on constitutionally invalid prior convictions. This decision was reached after the Court discussed at length and expressed agreement with the general rule regarding a sentencing court's wide range of discretion.

This decision has led to circuit court opinions which offer refinements to its general holding. Thus, in *Russo v. United States,*[10] the court held that, where a *Tucker* situation is asserted, the judge should "cause the record to factually reveal the processes through which the Judge has gone."[11] The procedure for this "factual outline" was stated in *Lipscomb v. Clark.*[12] There the court said,

> First, the district court should review the records involved in this conviction and determine if, treating the state convictions alleged to have been unconstitutional as void and thus not to be considered in sentencing, the five-year maximum sentence would still be the appropriate sentence based on the records of the trial and petitioner's adjusted conviction record (which would still consist of a twenty-five year sentence on a federal counterfeiting charge). If the district court finds that the maximum sentence would still be appropriate, an order so setting forth would seem sufficient to comply with the requirements of *Tucker.* If, on the other hand, the district court finds that should these prior convictions be proven unconstitutional and void that the maximum sentence would not be appropriate, then it should grant petitioner an evidentiary hearing and allow him to present evidence on his claim that the prior convictions in question were unconstitutional due to *Gideon.* If the district court is convinced of the validity of petitioner's allegations after such a hearing, it may then properly resentence. Such a procedure seems best designed to fully protect petitioner's rights.[13]

However, the presence of constitutionally invalid convictions in a defendant's record does not mean that *Tucker* automatically applies and brings into play the *Lipscomb* procedure. In *Rogers v. United States,*[14] the court held *Tucker* inapplicable because the sentencing judge had

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and not whether the convictions would have been obtained even if the defendant had been represented by counsel. Looking at the facts of this case, the Court said yes. *Id.* at 448.

10. 470 F.2d 1357 (5th Cir. 1972).
11. *Id.* at 1359.
12. 468 F.2d 1321 (5th Cir. 1972).
13. *Id.* at 1323.
14. 466 F.2d 513 (5th Cir. 1972), *cert. denied,* 409 U.S. 1046 (1972).

"specifically certified that the sentence was not enhanced by the existence of the earlier conviction."[15] *Tucker* was also held inapplicable in *Houle v. United States*,[16] where the court relied on Canadian convictions which were allegedly obtained without the benefit of counsel. The court reasoned that *Tucker* was concerned with convictions invalid under the United States Constitution, and the United States judicial precedents "cannot be imposed on Canadian proceedings."[17] The court explicitly stated that the Canadian convictions were permissibly considered by the sentencing court, and that the defendant was free to submit any explanatory material concerning the circumstances of those convictions.[18]

B. Untrue Information and Presentence Reports Disclosure

Closely related to the right to have invalid convictions disregarded is the right to have materially untrue information also disregarded. This principle was established by *Townsend v. Burke*,[19] and has been rigidly observed by the Fifth Circuit. In a recent case, *United States v. Woody*,[20] the court construed *Townsend* as establishing a constitutional right on behalf of a defendant "to know and to test the accuracy of any statement in the presentence report upon which the judge relies."[21] In that case, the court held that the judge's summary of confidential information relied on was not sufficient to provide the defendant with any notice of the nature of the information being held against him, and thus

15. *Id.* at 513-14. *See* Wheeler v. United States, 468 F.2d 244 (9th Cir. 1972) for an example of where the appellate court remanded for a more particular description of the sentencing court's reasoning. The statement by the lower court that he relied more on the seriousness of the crime than on the invalid convictions in the presentence report was not specific enough.

Another case which was remanded was United States v. Bishop, 457 F.2d 260 (7th Cir. 1972), where the sentencing court relied on convictions of a person who had the same name as the defendant. Although the appellate court relied on *Tucker*, it would seem that the same result would be compelled by Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252 (1948) which prohibited the sentencing judge from considering any facts in the criminal record that are materially untrue.

16. 493 F.2d 915 (5th Cir. 1974).
17. *Id.* at 916.
18. *Id.*
19. 334 U.S. 736, 68 S.Ct. 1252 (1948).
20. 567 F.2d 1353 (5th Cir. 1978).
21. *Id.* at 1361.

was not sufficient compliance with FED. R. CRIM. PRO. 32(c)(3)(B).[22] "[T]o do otherwise [not remand] would mean that we would be doing no more than paying lip service to the right of the defendant to rebut possibly erroneous information without providing a viable opportunity for him to do so."[23]

The court in *Woody* discussed at length the history and purpose of FED. R. CRIM. PRO. 32(c), which deals with disclosure of contents of presentence investigation reports.[24] The rule has been interpreted to allow wide discretion by the trial judge in deciding how much of the report to disclose to the defendant.[25]

Before the 1966 amendment to Rule 32,[26] there was no language

22. FED. R. CRIM. PRO. 32 (c) (3) provides in full:

(3) Disclosure

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged inaccuracy contained in the presentence report.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(D) Any copies of the presentence investigation report made available to the defendant or his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Youth Corrections Division of the Board of Parole pursuant to 18 U.S.C. §§ 4208(b), 4252, 5010(e), or 5034 shall be considered a presentence investigation within the meaning of subdivision (c) (3) of this rule.

23. 567 F.2d at 1363.

24. *Id.* at 1358-61.

25. *Id.* at 1358.

26. That amendment added the following: "The court before imposing sentence

relating to disclosure by a court to a defendant of a report's contents. Consequently, disclosure was made or withheld solely as a discretionary choice of the individual judge.[27]

The two-sentence amendment in 1966 to Rule 32(c) codified the existing practice of allowing judges to use their discretion in determining whether to disclose the contents of presentence investigative reports. Although the 1966 amendment contained an Advisory Committee's note that urged a policy of disclosure, the amendment failed to accomplish the goal intended by its draftsmen.[28]

In 1975, the rule was amended again in an effort to encourage disclosure.[29] Now, the rule contains mandatory language, and it provides that the defendant and his lawyer are to be allowed to see the report's contents unless the material falls into the enumerated exceptions contained in FED. R. CRIM. PRO. 32 (c) (3) (A).[30] However, to

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may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government."

27. *See* 567 F.2d at 1358-59, n. 10, which states: "For example, in United States v. Durham, 181 F.Supp. 503 (D.D.C. 1960), *cert. denied,* 364 U.S. 854, 81 S.Ct. 83, 5 L.Ed. 2d 77 (1960), the court held that presentence investigation reports are strictly confidential and not to be disclosed to the defendant." *See also* Hoover v. United States, 268 F.2d 787, 790 (10th Cir. 1959); Powers v. United States, 325 F.2d 666, 667 (1st Cir. 1963). Other courts disclosed the contents of the presentence investigation report and permitted comment thereon. *See* Shields v. United States, 237 F.Supp. 660 (D.C. Minn. 1965); Smith v. United States, 223 F.2d 750, 754 (5th Cir. 1955), *rev'd on other grounds,* 360 U.S. 1, 79 S.Ct. 991, 3 L. Ed. 2d 1041 (1959).

A survey conducted in 1963 by the Junior Bar Section of the Bar Association of the District of Columbia revealed the diverse treatment of the contents of presentence investigation reports. Questionnaires were sent to 294 active district judges and 51 senior district judges. The questionnaire contained the following question: "Is it the practice of your Court to divulge any information contained in presentence reports to defense counsel?" Of the 157 responses received, 63 (43%) stated that the reports were exhibited to defense counsel and 83 (57%) stated that the disclosure was refused. The response also indicated that 11 judges exhibited the entire report to counsel, 19 judges provided excerpts of the reports to counsel, and 13 judges provided summaries. Junior Bar Section of the District of Columbia, Discovery in Federal Criminal Cases, 33 F.R.D. 101, 125 (1963).

28. *See* Baker v. United States, 388 F.2d 931 (4th Cir. 1968), where the court noted the differing practices relating to disclosure by district judges.

29. For the text of the rule in its present language, *see* note 22 *supra.*

30. In a recent Fifth Circuit opinion, United States v. Ruiz, 580 F.2d 177 (5th Cir. 1978), the court held that the disclosure requirements of the present rule can only be activated by a request of the judge. The request may be made to the judge at the

promote disclosure and further the rule's intent, if a judge relies on information that was withheld under one of the rule's exceptions in imposing sentence, he must still provide an oral or written summary of that information to the defendant or to his lawyer.[31] It was the adequacy of this summary that was at issue in *Woody.*

In *Woody,* the court also approved the Ninth Circuit's holding in *United States v. Weston,*[32] which required the setting aside of a 20-year narcotics sentence that was based on uncorroborated hearsay testimony.[33] At sentencing, the defendant had staunchly denied the truth of the allegations, and had been given an opportunity by the judge to refute them. However, the appellate court felt the burden of "proving a negative"—that she was *not* a large scale herion dealer as an anonymous informant had said she was—was too heavy.[34]

A similar case which dealt with allegedly untrue material in the presentence report is *Shelton v. United States.*[35] There, a defendant convicted on income tax charges objected to the truthfulness of material in the presentence report linking him to drug traffic. Citing a line of precedent, the court held that Shelton should be afforded an opportunity to refute the information.[36] Upon remand, the court directed the sen-

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sentencing, or by a prior written motion properly filed with the court. The court refused to accept the proposition that an informal request to a probation officer is equivalent to a formal request to a federal judge.

31. The policy behind the Rule's latest amendments is reflected in the Advisory Committee's notes which state:

> The Advisory Committee is of the view that accuracy of sentencing information is important not only to the defendant but also to effective correctional treatment of a convicted offender. The best way of insuring accuracy is disclosure with an opportunity for the defendant and counsel to point out to the court information thought by the defense to be inaccurate, incomplete, or otherwise misleading.

32. 448 F.2d 626 (9th Cir. 1971).

33. 567 F.2d at 1364.

34. 448 F.2d at 634.

35. 497 F.2d 156 (5th Cir. 1974).

36. *See also* United States v. Espinoza, 481 F.2d 553 (5th Cir. 1973) for an example of where the trial judge abused his discretion in refusing to allow the defendant to refute factually the reasons given orally by the judge for the sentence, when the defendant claimed that the reasons were factually erroneous.

> By endowing the district court with discretion in sentencing, it is presupposed that such discretion will be exercised consistent with both the appearance and reality of due process. The action of the court below, in refusing to permit rebuttal of the stated factual basis for the sentence, is tantamount to an abuse of discretion and is inconsistent with the need for enlightened sentencing.

Id. at 558. United States v. Battaglia, 478 F.2d 854 (5th Cir. 1973) establishes a

tencing judge to weigh his authority to withhold the confidential contents of the report against the defendant's rights to be fairly advised of the information which formed the basis of that sentencing.[37]

A case where inadequate disclosure was made to a defendant is *United States v. Hodges*.[38] The facts there indicate that the judge revealed only portions of the information contained in the presentence report and asked the defendant to refute it if possible. This was found to violate FED. R. CRIM. PRO. 32 (c)(3)(A) which, except for confidential material and other limited exceptions, "removes the judge's discretion to refuse requested disclosure of presentence reports."[39] After remand, the court sustained the new sentence[40] and strengthened its prior holdings that the burden is on the defendant to show that his sentence was based on a tainted record, and that the sentencing court actually relied on misinformation in handing down the sentence.[41]

3. SPECIFIC FACTORS

Despite these procedural safeguards afforded a defendant at

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defendant's right to a hearing when he disputes factual matter so that he "may seek to remove any lingering doubt the court may have had about the true situation." *Id.* The *Shelton* court construed Rogers v. United States, 466 F.2d 513 (5th Cir. 1972) as imposing the burden of showing that the trial judge relied on inaccurate information concerning the defendant. 497 F.2d at 160.

37. *Id.* at 159.

38. 547 F.2d 951 (5th Cir. 1977).

39. *Id.* at 952.

40. 559 F.2d 1389 (5th Cir. 1977).

41. *Id.* at 1391. Cases distinguishing the *Espinoza* and *Shelton* line of decisions include United States v. Ashley, 555 F.2d 462 (5th Cir. 1977). Where a defendant has been given an opportunity to refute information considered in imposing sentence, the wide latitude allowed by Williams v. New York, 337 U.S. 241 (1949) comes into play. It is "essential that the [judge] '[possess] the fullest information possible concerning the defendant's life and characteristics.'" 555 F.2d at 466, citing *Williams*. *See also* United States v. Garcia, 544 F.2d 681 (3rd Cir. 1976), where disputed material in presentence reports did not invalidate the court's use of those reports. The court assured one defendant it would not rely on a challenged allegation, and the other defendant declined to have a court-offered evidentiary hearing. *Id.* at 684.

In United States v. Menichino, 497 F.2d 935 (5th Cir. 1974), the court found no due process violation where defense counsel had been afforded an opportunity to examine and deny "anonymous accusations" of criminal activity against the defendant. "Counsel for the defendant made an able and effective argument for leniency, and his client received a sentence less than the statutory maximum. Since he did not ask that sentencing be delayed, he cannot now object to its result." *Id.* at 945-46.

sentencing, a judge is by no means confined to the strict evidentiary rules which govern during trial. The wide latitude given to judges by *Williams* has been, and continues to be, the law in the Fifth Circuit.[42]

As an indication of some of the factors which have been permissibly and impermissibly considered by sentencing judges, the following cases have been summarized. The Fifth Circuit has held that a judge, in imposing sentence, may consider a person's arrest while on bail awaiting trial, even if it does not result in an indictment.[43] Foreign convictions may also be considered.[44] The court has also stated, in general language, that a judge may consider a defendant's activities, "including his relation to public and police authorities, his position in the community and other factors" which aid the judge in balancing among "(i) punishment, (ii) deterrence and (iii) rehabilitation."[45] In sentencing narcotics law violators, accurate information concerning a defendant's prior use of cocaine "is an integral part of those factors which the sentencing judge should consider in framing the appropriate sanction."[46] A judge, at sentencing, may also consider a defendent's prior state law violations which show a propensity to violate the law, or which show that he does not respond to certain types of punishment.[47]

United States v. Bowdach[48] dealt with a sentence imposed pursuant to 18 U.S.C. §3575, the Dangerous Special Offender statute. It calls for enhanced punishment if the judge makes certain findings, one of which is that the defendant is dangerous, as defined in the statute. In that case, the Fifth Circuit approved the sentencing judge's consideration of facts underlying two firearms convictions that were overturned on appeal; those facts were deemed relevant to finding the defendant dangerous for purposes of the statute.[49] The court also said that a sentencing judge can consider "evidence of crimes for which the defendant has been indicted but not convicted, and evidence of other crimes."[50] A judge may not,

42. *See* United States v. Ashley, 555 F.2d 462, 466 (5th Cir. 1977), where the court cites *Williams* as controlling authority, and additionally cites Houle v. United States, 493 F.2d 915 (5th Cir. 1974) and United States v. Marcello, 423 F.2d 993 (5th Cir. 1970) *cert. denied* 398 U.S. 959, *reh. denied* 399 U.S. 938.

43. Houle v. United States, 493 F.2d 915 (5th Cir. 1974).

44. *Id.* at 916.

45. United States v. Marcello, 423 F.2d 993, 1012 (5th Cir. 1970) *cert. denied* 398 U.S. 959, *reh. denied* 399 U.S. 938.

46. United States v. Hartford, 489 F.2d 652, 656 (5th Cir. 1974).

47. United States v. Jones, 533 F.2d 1387 (6th Cir. 1976).

48. 561 F.2d 1160 (5th Cir. 1977).

49. *Id.* at 1175-76.

50. *Id.* at 1175. It is important to note, however, that a defendant, under this

however, in any situation, rely on hearsay computer statistics which seek to establish how many sales a narcotics dealer may have made before he was apprehended.[51]

A defendant's associates, or his alleged status in the Mafia, can be considered in arriving at a comprehensive judgment about a convicted defendant.[52] In allowing this, however, the Seventh Circuit pointed out that it was in no way "advocating a policy of guilty by association."[53] In the circumstances of a sentencing, where the person's guilt has already been determined, that problem is not present.[54]

Where a defendant wins a right to be resentenced, the judge may consider lawless behavior or criminal activity while on parole from the earlier sentence. However, the limits of the first sentence may impose double jeopardy restraints on the second sentence.[55] Likewise, in a revocation of probation hearing, the judge is not confined, in his consideration of sentencing to the original crime or the offenses of which proof was offered at the revocation hearing. He can permissibly consider the defendant's progressive criminal history.[56]

A judge may also consider facts which are disclosed at trial, out of

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statute, is entitled to an evidentiary hearing before sentencing. At this hearing, the defendant is entitled to assistance of counsel, compulsory process, and the right to cross examine witnesses. 18 U.S.C. § 3575(b). Thus, due process safeguards are provided. *See also* United States v. Sweig, 454 F.2d 181 (2d Cir. 1972), where the court said that a judge could permissibly consider a defendant's failure to cooperate with government officials in their investigation of influence peddling, and evidence adduced at trial relating to counts of which the defendant was acquitted. This, however, is not the law in this circuit. *See* text accompanying notes 66 and 67 *infra.* United States v. Martinez, ____ F.2d ____, No.78-5204 (Nov. 22, 1978) indicates that a judge can also consider the factual basis of counts in an indictment that are dismissed.

51. United States v. Cavazos, 530 F.2d 4 (5th Cir. 1976).

52. United States v. Cardi, 519 F.2d 309 (7th Cir. 1975).

53. *Id.* at 313.

54. *Id.*

55. *See, e.g.,* United States v. Durbin, 542 F.2d 486 (8th Cir. 1976).

56. United States *ex rel* Sluder v. Brantley, 454 F.2d 1266 (7th Cir. 1972). In this case, the defendant was sentenced to 20 to 40 years on revocation of probation which stemmed from a burglary conviction. The judge permissibly considered the progression of criminal activity by the defendant which culminated in a kidnapping and alleged aggravated statutory rape. *Compare* Haller v. Robbins, 409 F.2d 857 (1st Cir. 1969), where the court said that "a kidnapper's conduct towards his victim is of great relevancy in determining sentence," *Id.* at 859, but nonetheless held that an ex parte communication from the prosecutor to the judge concerning the details of the conduct was a violation of due process.

the presence of the jury. For example, in *United States v. Hodges*,[57] the court held that the district judge had properly considered statements by witnesses, out of the jury's presence, that the defendant had successfully robbed other banks. Although on appeal the defendant claimed surprise at the judge's reliance on those statements, they appeared in the presentence report and the defendant declined to refute them at sentencing. The court specifically found that the sentencing did not lack fundamental fairness.[58]

In the Fifth Circuit, it is permissible for a judge to consider his feelings that a defendant has perjured himself during trial.[59] However, in the context of a new trial, it is impermissible for a judge to consider the possibility that the defendant perjured himself, and then impose a

57. 556 F.2d 366 (5th Cir. 1977).

58. *Id.* at 369.

59. United States v. Nunn, 525 F.2d 958 (5th Cir. 1976). In *Nunn*, the appellate court adopted the words of Judge Frankel's opinion in United States v. Hendrix, 505 F.2d 1233 (2d Cir. 1974), which said that the argument contending that consideration of possible perjury amounts to a conviction without due process.

> [It] ignores the nature of the sentencing process as it exists in our system and of the factors the trial judge may consider in exercising a frequently enormous range of discretion. If there is no clear consensus on these factors, it is certainly clear that they include, as aggravating circumstances, conduct that is not literally "criminal," or at least has not been duly adjudged criminal in the case in which sentence is being imposed.
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> 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 "repentance" 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. *Compare*, Bazelon, C.J., with Leventhal, J., in Scott v. United States, *supra*, 419 F.2d 269 and 282, respectively. Impressions about the 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 or 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.

525 F.2d at 960-61, quoting from 505 F.2d at 1235-36 (2d Cir. 1974).

For further Fifth Circuit authority which allows a judge to consider the possibility of perjury, *see* United States v. Gamboa, 543 F.2d 545 (5th Cir. 1976). This view is not accepted by all circuits; *see* 525 F.2d at 960, notes 4 & 5.

harsher sentence after the second trial than that imposed after the first.[60] This was described by the court as an adjudication of guilt, "of the crime of perjury without a presentment to a grand jury, without a trial by a jury of his peers, without the right to present evidence in his behalf, and without other procedural safeguards designed for the protection of an accused."[61] That conclusion, however, was reached on the basis of double jeopardy considerations; not as an abuse of discretion.

Courts have also not been receptive to the argument that different sentences for co-defendants convicted of essentially similar criminal conduct violate a defendant's entitlement to equal protection.[62] As long as sentences are within the statutory limits, courts generally will not disturb them.[63] One case of disparate sentence dealt with two defendants convicted of marijuana charges, wherein one received a six-month prison term and the other received probation.[64] However, the defendant who received probation had plead guilty and had cooperated with the government. Since the sentence was within the statutory limits, it was not reviewable on appeal as an abuse of discretion.[65]

Fifth Amendment considerations, however, do prevent trial judges from relying on a defendant's failure to cooperate with the government in imposing a harsher sentence than would have been imposed had he cooperated.[66] Likewise, a court may not penalize a defendant for not "coming clean" after conviction and before sentencing.[67] It is permissible, however, to consider as a factor among a range of others, that a

60. United States v. Bell, 457 F.2d 1231 (5th Cir. 1972).

61. *Id.* at 1236.

62. United States v. Frontero, 452 F.2d 406 (5th Cir. 1971); United States v. DeLaFuente, 550 F.2d 309 (5th Cir. 1977).

63. 550 F.2d 309.

64. Government of Canal Zone v. O'Calagan, 580 F.2d 161 (5th Cir. 1978).

65. *Id.* at 165.

66. United States v. Rogers, 504 F.2d 1079 (5th Cir. 1974), where the court stated: "When it has been made to appear that longer sentences have been imposed by the courts because the defendants refused to confess their guilt and persisted in their claims of innocence we have vacated the sentences." *Id.* at 1085. The court termed the comparison of the issues of confessing guilty with cooperating with the government as a "distinction without a difference." *Id.*

67. United States v. Wright, 533 F.2d 214, 215 (5th Cir. 1976). *See also* Thomas v. United States, 368 F.2d 941 (5th Cir. 1966), where the rule was established that a court may not pressure a defendant to confess his guilt prior to imposition of sentence. In Bertrand v. United States, 467 F.2d 901 (5th Cir. 1972), the rule was extended to the situation where a trial court may pressure a defendant to admit his guilt in a crime other than that to which he had originally pleaded.

defendant exhibits no remorse for his crime.[68]

One final situation which requires attention is sentencings in the context of plea bargains. In this setting, it is important that the judge know all of the terms of a plea agreement before imposing sentence. If the sentence is entirely within statutory limits, but the judge is not informed fully of the terms of the agreement, he will still be reversed for a sentence based on what the judge perceives to be the defendant's non-compliance with those terms.[69] In accepting a guilty plea, it is also imperative that the district judge personally advise the defendant of the maximum possible penalties. Permitting the United States Attorney to advise the defendant of the maximum possible sentence, instead of the judge doing it personally, constitutes reversible error.[70]

4. CONCLUSION

Although the cases may seem to create unnecessary exceptions and overly complex issues, the time honored general rule that sentencing is a discretionary function stands basically intact. Judges should keep in mind the motive behind the latest amendment to Federal Rule 32(c),[71] which is accuracy of information. All protections given to a convicted defendant serve that single function. The law allows a judge to consider a wide range of human qualities and instances of conduct on the part of the defendant, but the judge's sources of information must have some indicia of reliability. If that purpose is honored, and the various procedures supporting it are followed, sentences within the statutory maximum will probably not be vacated on appeal.

68. United States v. Richardson, 582 F.2d 968 (5th Cir. 1978).

69. United States v. Shanahan, 574 F.2d 1228 (5th Cir. 1978). In this case, the government mentioned no conditions of cooperation when the guilty plea was accepted by the district court. However, at sentencing, it argued to the court that the defendant had not fulfilled his part of the bargain because he had not cooperated. The sentence was vacated and remanded to another judge for resentencing.

70. United States v. Clark, 574 F.2d 1357 (5th Cir. 1978).

71. *See* note 22 *supra.*