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NOTES

Past Arrests and Perceived Perjury as Sentencing Factors in Illinois

INTRODUCTION

When sentencing, a judge enjoys broad discretion and considers myriad factors. Many of these factors provide a judge with valu-

1. “Sentence” in this article refers to the procedures outlined in Illinois’ Unified Code of Corrections, ILL. REV. STAT. ch. 38, ¶ 1005-4-1 (1981), requiring the court to consider: trial evidence, presentence reports, testimony of aggravating and mitigating evidence, sentencing alternatives, and defendant’s statement in his or her own behalf. Id. ¶ 1005-4-1(a)(1)-(a)(5). This provision covers all sentencing hearings except those at which the death penalty is sought, where a specialized list of factors in aggravation and mitigation is used. ILL. REV. STAT. ch. 38, ¶ 9-1 (1981). “Hearing in aggravation and mitigation” is subsumed under ILL. REV. STAT. ch. 38, ¶ 1005-4-1 (1981), and the factors considered are listed specifically at ILL. REV. STAT. ch. 38, ¶ 1005-5-3.1 (1981) (mitigation) and ILL. REV. STAT. ch. 38, ¶ 1005-5-3.2 (1981) (aggravation). “Probation” is a possible sentencing disposition, ILL. REV. STAT. ch. 38, ¶ 1005-5-3(b) (1) (1981), so that a probation hearing also falls under ILL. REV. STAT. ch. 38, ¶ 1005-4-1 (1981).

2. Broad discretion has been historically accorded judges when sentencing. See Note, Procedural Due Process at Judicial Sentencing for Felony, 81 HARV. L. REV. 821, 822 (1968) [hereinafter cited as Note, Procedural Due Process]. The United States Supreme Court has endorsed discretion in sentencing. Williams v. New York, 337 U.S. 241, 246 (1949). The Court cited the sentencing goal of rehabilitation as the basis for the trial judge’s need of all available information so that he or she can tailor the sentence to the individual. The Court found further support for discretion in sentencing in the statutory requirement that the sentencing court consider information regarding the defendant’s criminal record, characteristics, financial condition, circumstances affecting his or her behavior “as may be helpful in imposing sentence . . . and such other information as may be required by the court.” FED. R. CRIM. P. 32(c)(2). In United States v. Tucker, 404 U.S. 443, 446 (1972), the Court reiterated this position, stating that a sentencing judge “may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information . . . or the source from which it may come.” For a history of judicial sentencing discretion, see D. Fogel, We Are the Living Proof . . . The Justice Model for Corrections, ch. 1 (1975) [hereinafter cited as Fogel]; Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for “Fixed” and “Presumptive” Sentencing, in DETERMINATE SENTENCING: REFORM OR REGRESSION (National Institute of Law Enforcement and Criminal Justice 1977); Coffee, The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice, 73 MICH. L. REV. 1361 (1975) [hereinafter cited as Coffee].

This rehabilitative model of sentencing, with its dependence on broad judicial discretion, has been increasingly criticized as ineffective and unjust. See, e.g., Fogel, supra this note; M. Frankel, CRIMINAL SENTENCES, LAW WITHOUT ORDER (1973) [hereinafter cited as Fran-
able guidance in his or her determination of the appropriate sentence for the individual defendant. Some factors, however, raise

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In 1977, as part of the movement away from the emphasis on the sentencing goal of rehabilitation, Illinois became one of the first states to adopt a determinate felony sentencing statute. ILL. REV. STAT. ch. 38, ¶ 1005-8-1 (1981). Under determinate sentencing, where the goal emphasis shifts to deterrence and equalization of sentences for the same crime, the specific term of years is imposed within the statutory range allotted to the felony. Under the former indeterminate sentencing statute, a minimum and maximum term within the statutory range was set, and the prisoner was ultimately released by correction authorities at some point, within that range, when they deemed him or her rehabilitated. See generally Aspen, New Class X Sentencing Law: An Analysis, 66 ILL. B.J. 344 (1978) [hereinafter cited as Aspen]; Schiller, Illinois' New Sentencing Laws—The Effect on Sentencing in Cook County: Some Early Returns, 60 CHI. B. REC. 130 (1978); Note, Determine Sentencing in California and Illinois, 1979 WASH. U.L.Q. 551.

The question arises whether the change from indeterminate to determinate sentencing, with the shift away from the rehabilitative emphasis, has actually affected the sentencing judge's discretion. Discretion during sentencing is firmly established in Illinois case law. See, e.g., People v. Perruquet, 68 I11. 2d 149, 153, 368 N.E.2d 882, 883 (1977); People ex rel. Crews v. Toman, 367 Ill. 163, 165, 10 N.E.2d 657, 658 (1937); People v. Lloyd, 93 Ill. App. 3d 1018, 1028, 418 N.E.2d 131, 138 (1st Dist. 1981).

When deciding on the new sentencing law, the General Assembly rejected a proposal to fix sentences entirely. This proposal would have effectively abolished judicial discretion, in order to eliminate disparate sentencing. See Fogel, supra this note. The argument has been made that under the law as adopted, judicial discretion is "considerably more meaningful" due to the elimination of the ultimate determination of release by correction authorities. See Bagley, Why Illinois Adopted Determinate Sentencing, 62 JUD. 390, 395 (1979) [hereinafter cited as Bagley]. Under the current sentencing law, the judge continues to assess independently all of the factors. ILL. REV. STAT. ch. 38, ¶ 1005-4-1(b) (1981). Aspen, supra this note, at 551, saw a new "void of reduced judicial discretion."

due process questions, and the value of these factors as an aid in sentencing must be weighed against any infringement on the defendant’s constitutional rights.4

This article will examine two such factors currently considered

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4. Due process at sentencing has been slow to develop, and the question of what due process rights a defendant may assert successfully is unsettled. Sentencing has been determined a "critical stage" entitling a defendant to the sixth amendment right to counsel. Mempa v. Rhay, 389 U.S. 128, 134 (1967); Townsend v. Burke, 334 U.S. 736, 741 (1948). Williams v. New York, 337 U.S. 241, 250 (1949), still governs sentencing proceedings, permitting wide access to background information regarding the defendant. See supra note 2. Williams did not allow the defendant the right to cross-examine the state’s witnesses due to the delays this procedure would presumably create in the criminal justice system. In Specht v. Patterson, 386 U.S. 605, 608 (1967), procedural due process at sentencing was extended to permit the defendant to confront witnesses testifying to a psychiatric report at a separate hearing under a sex offender act. Williams was distinguished due to the factual difference between the two cases. North Carolina v. Pearce, 395 U.S. 711, 723 (1969), also approved Williams, but found due process violated when the defendant exercised his or her right to trial or to appeal and consequently received a greater sentence. Id. at 725. United States v. Tucker, 404 U.S. 443, 446 (1972), reasserted the broad discretion of the trial judge, but vacated a sentence based on convictions obtained without presence of counsel. Id. at 449. See also Gideon v. Wainwright, 372 U.S. 335 (1963). In Gardner v. Florida, 430 U.S. 349, 358 (1977), a plurality opinion stated, "[I]t is now clear that the sentencing process . . . must satisfy the requirements of the Due Process Clause." The Court vacated a death sentence based on a presentence report undisclosed to the defendant. Williams once again was distinguished and not overruled, id. at 356, though a defendant may now argue a right to cross-examination, at least in a capital case. See infra note 42, regarding defendant’s right to cross-examine.


5. See Note, A Comment on State v. Montoya and the Use of Arrest Records in Sentencing, 9 N.M.L. Rev. 443, 460 (1979) [hereinafter cited as Note, Arrest Records] (the sentencing consideration of arrest records is violative of defendant’s due process rights); Note, Discretionary Penalty Increases on the Basis of Suspected Perjury, 1975 U. Ill. L.F.
by Illinois judges when sentencing: past arrests not resulting in conviction and perjury perceived at trial. First, the article will review the factor of arrests not resulting in conviction and the general Illinois rule that, to protect the defendant's due process rights, evidence of such arrests is inadmissible during sentencing. In this regard, the article will analyze three exceptions to this rule: (1) the past arrest was nonprejudicial to the defendant, or was presumptively disregarded by the sentencing judge; (2) the past arrest was relevant to assessment of the defendant's moral character and rehabilitative potential; and (3) the evidentiary reliability of the past arrest was established through cross-examination of the state's witnesses testifying at the sentencing hearing. Discussion will focus on the third exception, and conclude with a suggested model under which the defense cross-examination of witnesses during the sentencing hearing would balance the state's need to present the sentencing judge with all available information.

The second sentencing consideration which this article will explore is the effect of perjury perceived by the judge at trial. The utilization of the perceived perjury factor in Illinois sentencing will be traced both before and after the United States Supreme Court decision in United States v. Grayson. The discussion will examine the chilling effect on the defendant's right to testify during trial which may result from the consideration of perceived perjury during sentencing. The value of perceived perjury as an index of the defendant's potential for rehabilitation will then be assessed. The article will conclude with a proposed model under which a sentencing judge could avoid possible due process infringements by indicating the specific weight given to the various factors responsible for each increment of the sentence imposed.

CONSIDERATION DURING SENTENCING OF ARRESTS NOT RESULTING IN CONVICTION IN ILLINOIS

Since 1931, Illinois has followed the rule that, during sentencing, a judge may consider the prior convictions of a defendant. The

677, 684 (1975) [hereinafter cited as Note, Suspected Perjury] (the sentencing consideration of perceived perjury is violative of defendant's due process rights).

6. "Conviction" is defined in the Illinois Unified Code of Corrections, ILL. REV. STAT. ch. 38, ¶ 1005-1-5 (1981), as "a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense, rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury."


8. People v. Popescue, 345 Ill. 142, 177 N.E. 739 (1931). The Illinois Supreme Court here
sentencing court is not bound by the strict rules of evidence which would preclude the introduction of such evidence at trial. In contrast, in 1941, the Illinois Supreme Court branded evidence of prior arrests not resulting in conviction as "incompetent and im-

first considered the question of whether the strict rules of evidence obtain during a sentencing hearing following the waiver of a jury trial and a plea of guilty. During trial, convictions, though admissible for impeachment purposes, are inadmissible for substantive purposes. People v. Montgomery, 47 Ill. 2d 510, 516, 268 N.E.2d 695, 698 (1971). Once guilt is determined, however, there is no longer any reason to bar evidence of convictions from consideration by the sentencing judge. People v. Popescue, 345 Ill. 142, 150, 177 N.E. 739, 743. In addition, the "court may of its own motion take notice of a prior conviction." Id. at 151, 177 N.E. at 743 (quoting 3 WHARTON'S CRIMINAL PROCEDURE (10th ed.) § 1890, at 320). The court also determined that a sentencing hearing is not a trial, id. at 152, 177 N.E. at 743, and that once a jury trial is waived, constitutional rights obtaining at trial are also waived. Id., 177 N.E. at 744.

One year following Popescue, the court in People v. Corry, 349 Ill. 122, 128, 181 N.E. 603, 605 (1932), held evidence of a defendant's prior convictions inadmissible at the sentencing hearing, which followed a bench trial and a not guilty plea. The court in People v. Spann, 20 Ill. 2d 335, 343, 169 N.E.2d 781, 784 (1960), expressly overruled Corry, finding no basis for the distinction which would permit consideration of convictions during sentencing, following a plea of guilty, but not following a plea of not guilty. Id. at 342, 169 N.E.2d at 783. This distinction is voided by the language of the present sentencing statute, ILL. REV. STAT. ch. 38, 1005-4-1(a), (b) (1981), which provides in part that "after a determination of guilt, a hearing shall be held to impose the sentence," and "[the] judge who presided at the trial or the judge who accepted the plea of guilty shall impose the sentence . . . ." (emphasis added).

9. People v. McWilliams, 348 Ill. 333, 336, 180 N.E. 832, 834 (1932). In McWilliams, the court upheld the trial court's taking judicial notice of defendant's pending indictments, explicitly endorsing their admissibility whether or not related to the instant conviction, and even though they were not offered into evidence. Id. at 337, 180 N.E. at 834. Cf. Williams v. New York, 337 U.S. 241, 247 (1949), where the United States Supreme Court stated:

"Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged . . . . A sentencing judge, however, is not confined to the narrow issue of guilt . . . . Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. [T]he due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure."

Id. at 251.

10. Pending indictments receive similar treatment to arrests not resulting in conviction, and will be subsumed under "arrests" in this note.

Under federal practice, arrests have been considered, Smith v. United States, 551 F.2d 1193, 1195 (10th Cir. 1977); Houle v. United States, 493 F.2d 915, 915 (5th Cir. 1974), as have pending charges, United States v. Johnson, 507 F.2d 826, 829 (7th Cir. 1974), cert. denied, 421 U.S. 949 (1975); United States v. Metz, 470 F.2d 1140, 1141 (3d Cir. 1972), cert. denied, 411 U.S. 919 (1973), dismissed charges, United States v. Marines, 535 F.2d 552, 554 (10th Cir. 1976); United States v. Doyle, 348 F.2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965), charges reversed on appeal, United States v. Atkins, 480 F.2d 1223, 1224 (9th Cir. 1973), and even charges ending in acquittal, United States v. Cardi, 519 F.2d 309, 314 n.3 (7th Cir. 1975); United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972). Contra United
material" at the sentencing hearing.11

Following that pronouncement, courts vacated or modified some sentences on the ground that, during sentencing, evidence of arrests had been improperly considered.12 The application of this rule barring consideration of arrests has been severely restricted, however, by the Illinois courts’ emphasis on the following overriding factors: (1) either the admission of past arrests was regarded as a trivial error in light of the balance of the information considered by the judge, or the presumption was made that the sentencing

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1. States v. Hubbard, 618 F.2d 422, 425 (7th Cir. 1979), where the trial judge considered the defendant’s voided confession, and the case was remanded for resentencing.

2. State jurisdictions are divided on whether arrests are admissible at sentencing. For listings, see Annot., 96 A.L.R.2d 787 § 7(d) (1976 & Supp. 1981).


4. Formerly, some Illinois courts distinguished hearings on the application for probation from sentencing hearings, and allowed the introduction of arrests at the former. See People v. Young, 30 Ill. App. 3d 176, 177, 332 N.E.2d 173, 174 (5th Dist. 1975); People v. Taylor, 13 Ill. App. 3d 974, 975, 301 N.E.2d 319, 320 (4th Dist. 1973). The courts reasoned that, by requesting the probation hearing, the defendant permitted the state to introduce such evidence, People v. Moore, 133 Ill. App. 2d 827, 829, 272 N.E.2d 270, 271 (5th Dist. 1971), and that the court owed a special duty to the public when admitting a defendant to probation, People v. Kelly, 36 Ill. App. 3d 476, 477, 344 N.E.2d 50, 52 (3d Dist. 1976). This distinction was nullified in People v. Kennedy, 66 Ill. App. 3d 34, 38, 383 N.E.2d 255, 258 (4th Dist. 1978), where the court noted that under the Unified Code of Corrections, I.L. REV. STAT. ch. 38, ¶ 1005-5-3(b)(1) (1981), probation is a sentencing disposition. The court reasoned that information considered unreliable and not permitted at a sentencing hearing was equally improper at a probation hearing. Accord People v. Williamson, 69 Ill. App. 3d 1037, 1041, 388 N.E.2d 240, 244 (3d Dist. 1979). Contra People v. Smothers, 70 Ill. App. 3d 589, 591, 388 N.E.2d 1114, 1115 (5th Dist. 1979).

5. In People v. Smothers, 70 Ill. App. 3d 589, 388 N.E.2d 1114 (5th Dist. 1979), a sentence was reduced on appeal where the trial judge stated that the "defendant has been subject to arrest. Of course we are not taking that into consideration because there was no conviction but he has subjected himself to possible arrests in the past year or two, so taking these items into consideration I am going to sentence defendant to four months." Id. at 591, 388 N.E.2d at 1115. In People v. Williamson, 69 Ill. App. 3d 1037, 1041, 388 N.E.2d 240, 244 (3d Dist. 1979), the case was remanded because the trial court relied during sentencing on testimony by the defendant’s accomplice regarding the defendant’s arrest record. In People v. Houston, 36 Ill. App. 3d 695, 702, 344 N.E.2d 641, 647 (1st Dist. 1976), cert. denied, 429 U.S. 1109 (1977), the case was remanded for resentencing when the trial judge considered the defendant’s alleged escape from the county jail. In People v. Bowlin, 133 Ill. App. 2d 837, 842, 272 N.E.2d 282, 286 (5th Dist. 1971), the sentence was modified when the trial judge stated, after hearing evidence of arrests but despite a lack of any convictions in the presentence report, that the defendant was “obviously a habitual criminal.” In People v. Jackson, 95 Ill. App. 2d 193, 238 N.E.2d 196 (1st Dist. 1968), the sentence was reduced because the trial judge had remarked, “I am going on his entire record. And he is one apparently from his [arrest] record who is quick to engage in violence.” Id. at 201, 238 N.E.2d at 200.
judge disregarded incompetent evidence;\textsuperscript{13} (2) the consideration of past arrests was deemed a proper part of the judge's overall assessment of the defendant's moral character and rehabilitative potential;\textsuperscript{14} and (3) the cross-examination of witnesses at the sentencing hearing by the defense rendered reliable the otherwise incompetent evidence of arrests.\textsuperscript{15}

\textit{Past Arrests Considered Trivial or Presumed Disregarded}

In \textit{People v. Riley},\textsuperscript{18} the defendants pleaded guilty to murdering a police officer during a barroom holdup. The defendants received death sentences. They appealed on the ground that, at the aggravation and mitigation hearing, evidence was introduced regarding prior arrests of both defendants. One defendant's arrests had occurred nineteen and twenty-one years previously, and the other defendant's record showed an eight-year-old discharged arrest.\textsuperscript{17} The Illinois Supreme Court warned that inclusion of such matters was "unnecessary and unfair . . . and might very easily bring about a reversal of the judgment in some cases."\textsuperscript{18} The court nevertheless upheld the sentence on the strength of the balance of the evidence,\textsuperscript{19} which included the defendants' admission to more than a dozen holdups, one of which resulted in a shooting.\textsuperscript{20} The court determined that the error of introducing the past arrests neither significantly impaired the defendants' standing during the sentencing hearing nor weighted the evidence against them.\textsuperscript{21}

Some Illinois courts have achieved the \textit{Riley} result by first citing the rule that prior arrests are inadmissible at sentencing, and then finding that the admission of such evidence was nonprejudicial in light of the remaining information. Usually, as in \textit{Riley}, these cases have involved weighty aggravating factors, as well as evidence of

\textsuperscript{13} See infra notes 16-30 and accompanying text.
\textsuperscript{14} See infra notes 31-40 and accompanying text.
\textsuperscript{15} See infra notes 41-54 and accompanying text.
\textsuperscript{17} \textit{Id.} at 367, 33 N.E.2d at 874.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.} at 373, 33 N.E.2d at 877. The court also relied on the distinction (now void, see supra note 8) made in \textit{People v. Popescue}, 345 Ill. 142, 177 N.E. 739 (1931), between a defendant who pleads guilty, and one who goes to trial on a plea of not guilty, to determine whether Riley had been prejudiced by the introduction of the improper evidence. 376 Ill. at 368, 33 N.E.2d at 875.
\textsuperscript{20} \textit{Id.} at 367, 33 N.E.2d at 874.
\textsuperscript{21} \textit{Id.} at 373, 33 N.E.2d at 877.
arrests. Sometimes, however, the arrests do appear to have influenced the sentencing decision. For example, one court upheld as nonprejudicial a sentence issued by a judge who considered the defendant's confession to charges later dropped.

Another exception to the general rule barring evidence of past arrests is created by the presumption that a judge makes distinctions while sentencing, thereby disregarding incompetent evidence. Based on this presumption, many Illinois courts have thus upheld sentences imposed when evidence of arrests was admitted during the sentencing hearing.

The rationale behind excluding past arrests stems from the due process concern that a defendant will be sentenced for a crime that he or she may not have committed. In addition, a defendant who

22. See, e.g., People v. Lairson, 131 Ill. App. 2d 612, 617, 266 N.E.2d 735, 739 (3d Dist. 1971), where, although the FBI report contained evidence of arrests, the fact that the report also contained evidence of three prior convictions was a sufficient ground to show that the defendant was not prejudiced during sentencing. In People v. Drewniak, 105 Ill. App. 2d 37, 245 N.E.2d 102 (1st Dist. 1969), the sentence was upheld even though the trial judge had heard evidence of police arrest records indicating discharge and lack of prosecution. The appellate court found this "merely superfluous" in light of the defendant's convictions. Id. at 43, 245 N.E.2d at 105.

23. See, e.g., People v. Wilson, 11 Ill. App. 3d 693, 297 N.E.2d 277 (1st Dist. 1973), where the sentence was upheld because the "mere fact" that the sentencing judge was aware that the defendant had previously been arrested "could not have materially prejudiced her position or seriously impaired her standing." Id. at 696, 297 N.E.2d at 279. The trial judge had read three sheets of her gambling arrests. Interestingly, the trial judge had said:

I don't think there is any doubt but what the defendant doesn't feel that writing policy is a crime or that it is a social question. The only problem is how we stop her from writing policy. She just won't stop. Outside of the convictions mentioned by counsel there, I couldn't help but perusing the three sheets of arrests; I suppose many arrests without convictions, as is usual in this type of case. Probation hasn't worked. Fines haven't worked. I don't know what to do. The only thing I can think of is a sentence. Ninety days, House of Corrections.

Id. at 695, 297 N.E.2d at 278.

24. People v. Hightower, 38 Ill. App. 3d 177, 180, 347 N.E.2d 351, 353 (3d Dist. 1976). Here, the trial judge stated, "[i]f there is a confession by the Defendant that he did in fact commit other crimes for which he was not convicted, I will consider that because that is not a prior arrest, that is a statement by the Defendant." Id. 347 N.E.2d at 353. The defendant claimed that the statements were false and had been obtained by police trickery.

25. People v. Popescue, 345 Ill. 142, 156, 177 N.E. 739, 745 (1931). The court said, "[c]ertainly no good reason can be assigned why a judge, often sitting as chancellor in chancery cases, should part of the time be said to possess legal discernment enough to sift out the competent and disregard the incompetent evidence but [not] when determining . . . degree of punishment in . . . criminal matter[s] . . . ." Id.


27. People v. Williamson, 69 Ill. App. 3d 1037, 1040, 388 N.E.2d 240, 243 (3d Dist. 1979);
was not tried following an arrest did not receive a full and fair opportunity to be heard regarding that arrest, because the matter did not progress to the trial stage. When evidence of that prior arrest is admitted during sentencing for a separate, unrelated conviction, the possibility exists that the judge will increase the sentence because he or she has considered the arrest factor.  

Prejudice to the defendant could occur either when there are few other aggravating factors, because the past arrest would blemish the record, or when there are many aggravating factors, because the past arrest would add weight to the judge’s overall negative impression of the defendant. Alternatively, the presumption that the judge has disregarded the evidence fails to account for the difficulty inherent in so doing, and for this reason some courts have been unwilling to make the presumption.

Past Arrests Relevant to the Defendant’s Moral Character and Rehabilitative Potential

Sentencing objectives include individualization of the sentence and rehabilitation of the defendant. In order to achieve these


28. See Note, Arrest Records, supra note 2, at 460. See also Coffee, Future of Sentencing, supra note 2, at 1377-82, for arguments that use of arrest records produces discriminatory results, since such records are maintained in many different ways and their consideration actually measures not culpability but differences in police work and record keeping. Using arrest records also labels a marginally criminally-oriented individual as a confirmed criminal.

29. Coffee, Future of Sentencing, supra note 2, at 1384, found that when arrest records predominate in the report, the arrests will probably be assessed as significant. This assessment is unfair and works to the detriment of the defendant.

30. The Illinois Supreme Court has said that, “[r]ealistically, it is impossible for a judge, in determining what sentence should be imposed to erase from his mind the testimony of the defendant.” People v. Jones, 52 Ill. 2d 247, 249, 287 N.E.2d 680, 681 (1972). See also People v. Ackerman, 132 Ill. 2d 251, 252, 269 N.E.2d 737, 738 (2d Dist. 1971), where the sentence was vacated after the trial judge suggested that the defendants take a lie detector test regarding past criminal activity. When the defendants refused to take the test, the judge sentenced them to prison, without hearing further evidence. The appellate court said “[w]e must conclude that the refusal to take the test could not be shielded from the court’s mind in making his decision and must have had some undetermined influence on the final judgment.” Id. at 255, 269 N.E.2d at 740.

31. See supra note 2. Although the rehabilitation objective has lately been criticized, it is still one of the four sentencing goals of rehabilitation, incapacitation, deterrence, and retribution. For an argument that the criminal justice system has simply become imbalanced in favor of rehabilitation, see Bagley, supra note 2, at 392. For a discussion and listing of articles on each of the goals, see Note, Roberts v. United States: Sentencing the Defendant Who Refuses to Cooperate, 18 Am. Crim. L. Rev. 565 (1981) [hereinafter cited as Note, Roberts]. See also Ill. Const. art. I, § 11 (1970): “All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to
objectives, the judge "may search anywhere, within reasonable
bounds" for facts in aggravation and mitigation. The search may
include inquiry into "the general moral character of the offender,
his morality, his habits, his social environments, his age, his natu-
ral inclination or aversion to commit crime, [and] the stimuli
which motivate his conduct." Many courts have subsumed con-
sideration of the defendant's past arrests under these background
factors, the rationale being that "the more the judge knows, the
better." Thus, sentences have been upheld when past arrests
were admitted during sentencing, on the ground that arrest evi-
dence assisted the judge's assessment of the defendant's moral
character.

Sentencing courts have also considered the bearing that the ar-
rests may have on the defendant's potential for rehabilitation. This
practice finds statutory support in the stated purpose of the
Illinois Unified Code of Corrections, which is "to prescribe san-
tions proportionate to the seriousness of the offense and permit the
recognition of differences in rehabilitation possibilities among indi-
vidual offenders" and "to restore offenders to useful citizen-
ship."

The due process concern raised when an arrest record is admit-
ted during sentencing, as a factor bearing on character analysis or
rehabilitation potential, also arises when such a record is consid-
ered nonprejudicial, or is presumptively disregarded. Although a

useful citizenship."

32. People v. McWilliams, 348 Ill. 333, 336, 180 N.E. 832, 834 (1932).
McWilliams, 348 Ill. 333, 336, 180 N.E. 832, 834 (1932)).
34. See People v. Adkins, 41 Ill. 2d 297, 300, 242 N.E.2d 258, 260 (1968), for enunciation
of the so-called Adkins rule: a sentencing judge should have the fullest possible information
regarding the defendant's life and characteristics. This is basically Illinois' restatement of
36. People v. Smith, 81 Ill. App. 3d 764, 775, 401 N.E.2d 1017, 1025 (1st Dist. 1980);
People v. Barksdale, 44 Ill. App. 3d 770, 781, 358 N.E.2d 1150, 1158 (1st Dist. 1976); and
People v. Jones, 36 Ill. App. 3d 491, 494, 344 N.E.2d 40, 42 (2d Dist. 1976) all upheld
sentences where arrests were considered relevant to the determination of the defendants' moral
characters.
37. In People v. Gaines, 21 Ill. App. 3d 839, 847, 316 N.E.2d 14, 21 (1st Dist. 1974), the
court characterized activity preceding arrest as highly relevant to the determination of the
defendant's potential rehabilitation. The court in People v. Schleyhahn, 4 Ill. App. 3d 591,
596, 281 N.E.2d 409, 413 (4th Dist. 1972), said that, "[t]o exclude conduct that is 'criminal'
but to admit proof of conduct amounting to something less, is self-defeating."
sentencing judge needs information regarding the defendant’s background in order to evaluate the defendant’s future, the consideration of a past arrest not reduced to conviction inevitably presents the possibility that the judge may increase the sentence based on a crime not committed by that defendant. Thus, the relative value of arrest records as rehabilitative indicia must be balanced against the danger that their consideration will violate the defendant’s due process rights.

Past Arrests Rendered Reliable Evidence by Defense Cross-Examination

When the defense has cross-examined the state’s witnesses during the sentencing hearing, some Illinois appellate courts have permitted consideration of the defendant’s past arrests. The cross-examination procedure tests the reliability of otherwise incompetent evidence, thereby rendering it admissible. Such courts thus balance the defendant’s due process right to be sentenced only upon conviction against the public’s interest in having all useful and relevant factors before the sentencing judge. The cross-examination procedure provides a compromise: though not a full-scale trial on the past arrest issue, cross-examination gives the defendant some opportunity to test the information before the court, while at the same time making the information available to the state.

40. See People v. Gaines, 21 Ill. App. 3d 839, 846, 316 N.E.2d 14, 21 (1st Dist. 1974), where the court stated that when arrests are considered, the defendant’s right not to be punished for a crime of which he or she had not been convicted must be weighed against the need for both the defendant’s rehabilitation and the protection of the public.

41. People v. Lakes, 60 Ill. App. 3d 271, 275, 376 N.E.2d 730, 733 (2d Dist. 1978); People v. Barksdale, 44 Ill. App. 3d 770, 781, 358 N.E.2d 1150, 1158 (1st Dist. 1976); People v. Davis, 38 Ill. App. 3d 649, 651, 348 N.E.2d 533, 535 (2d Dist. 1976); People v. Jones, 36 Ill. App. 3d 491, 493, 344 N.E.2d 40, 42 (2d Dist. 1976); People v. Lemke, 33 Ill. App. 3d 795, 798, 338 N.E.2d 226, 228 (2d Dist. 1975); People v. Gaines, 21 Ill. App. 3d 839, 847, 316 N.E.2d 14, 21 (1st Dist. 1974); People v. Loomis, 132 Ill. App. 2d 903, 905, 271 N.E.2d 66, 68 (2d Dist. 1971). But see People v. Schmidt, 61 Ill. App. 3d 7, 377 N.E.2d 553 (2d Dist. 1978), where the court concluded that the defendant had no right to cross-examine during the sentencing hearing because this would convert the hearing into a full-scale evidentiary proceeding. The court found the trial judge’s use of arrests in sentencing proper, since the trial judge stated that he was not taking them “too much” into account. Id. at 10, 377 N.E.2d at 556. In People v. Drewniak, 105 Ill. App. 2d 37, 44, 245 N.E.2d 102, 106 (1st Dist. 1969), the appellate court stated that the decision to allow cross-examination during sentencing is discretionory.

42. Whether there is a right to cross-examine during a sentencing hearing is not settled. Courts interpreting Fed. R. Crim. P. 32 have denied cross-examination. See United States v. Needles, 470 F.2d 652, 657 (2d Cir. 1973), where the Second Circuit said that although material, untrue assumptions admitted during sentencing would violate the defendant’s due
A few Illinois cases have also considered the related issue of whether the defendant should have notice, prior to the sentencing hearing, of the state’s witnesses, so that the defense may prepare to cross-examine effectively. Although finding such notice necessary, the courts have yet to invalidate a sentence on the ground that the defendant was not properly notified of the state’s presentation.43

process rights, sentencing is not a full evidentiary hearing, and there is no right to test the presentence report through cross-examination. In Fernandez v. Meier, 432 F.2d 426, 427 (9th Cir. 1970), the Ninth Circuit cited Williams v. New York, 337 U.S. 241 (1949), to support a denial of cross-examination at sentencing. The Second Circuit in United States v. Fischer, 381 F.2d 509, 511 (2d Cir. 1967), cert. denied, 390 U.S. 973 (1969), denied the existence of a right to cross-examine, reasoning that cross-examination would cause the sources of background information to “dry up.” Other federal courts, however, have found a right to cross-examine. See United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971), where the Ninth Circuit vacated a sentence based on information “of so little value.” The Third Circuit in United States ex rel. Brown v. Rundle, 417 F.2d 282, 285 (3d Cir. 1969), declared that fundamental fairness required a right to cross-examine when testimony was damaging and material. The United States Supreme Court, in Gardner v. Florida, 430 U.S. 349, 358 (1977), required some general minimum due process standards at sentencing, without specifically granting the right to cross-examine. These minimum standards had formerly been outlined in Morrissey v. Brewer, 408 U.S. 471, 489 (1972), which involved parole restrictions. Coffee, supra note 2, at 1429, saw the defendant’s right to establish the accuracy of factual information “emerging” though “unsettled.” Pugh & Carver, supra note 4, at 36-37, called for giving the defendant a right to at least a limited presentation (not a full-scale evidentiary hearing) to contest the government’s sentencing recommendation. Accord Note, Procedural Due Process, supra note 2, at 842. Other commentators have openly advocated a right to cross-examine during sentencing. See Fennell & Hall, supra note 3, at 1693; Harkness, supra note 3, at 1087; and Note, Right to Rebut, supra note 4, for a discussion of State v. Kunz, 55 N.J. 128, 259 A.2d 695 (1969), and State v. Horne, 56 N.J. 372, 267 A.2d 1 (1970), cases requiring both disclosure of presentence reports and cross-examination during sentencing. Before the Supreme Court decided Williams v. New York, 337 U.S. 241 (1949), one commentator advocated the right to cross-examine, noting the case at the appellate level as an example of due process deprivation because the defendant was sentenced to death on the basis of untested information. Note, Right of Criminal Offenders to Challenge Reports Used in Determining Sentence, 49 COLUM. L. REV. 567 (1949).

STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES, Standard 18-6.4(b)(1980) [hereinafter cited as STANDARDS] suggests that a defendant should be permitted to cross-examine witnesses who testify at a sentencing hearing. “The guiding principle would be the provision of an effective opportunity for both parties to rebut all allegations likely to have a significant effect on the sentence imposed.” The Commentary calls for upgrading due process standards for sentencing, yet stops short of transforming the hearing into a full-scale trial. Commentary at 451. In the case of a material controverted fact there “is no escaping the need to conduct an evidentiary hearing.” Id. at 460.

43. Since Illinois permits access to the presentence report, ILL. REV. STAT. ch. 38, ¶ 1005-3-4(b)(2) (1981), the question of notice would arise concerning a disparity between the presentence report and the actual testimony of the state’s witnesses. This issue was discussed in People v. Stoutenborough, 64 III. App. 3d 489, 493, 381 N.E.2d 415, 420 (4th Dist. 1978), where the court noted the danger that, without proper notice, a defendant could be unaware of prejudicial evidence and have insufficient time to prepare a rebuttal. In
People v. Poll

In 1980, the Illinois Supreme Court considered in People v. Poll the question of whether evidence of pending charges was improperly admitted when a court sentenced a defendant for attempted burglary and armed violence. The defendant’s conviction was followed by an aggravation and mitigation hearing. The presentence report listed the defendant’s prior convictions as follows: (1) the defendant received probation, as a juvenile, for possession of alcohol and violation of curfew; (2) the defendant received six months in prison, as an adult, for aggravated battery; (3) the defendant received two concurrent two-to-ten year sentences for two unrelated burglaries; and (4) the defendant received four years in prison for escape. Additionally, the presentence report included currently pending charges of unlawful use of weapons, battery, and conspiracy to escape.

Over defense objection, the state presented testimony, given by both the defendant’s former cellmate and a deputy sheriff, regarding the pending battery charge. Another deputy sheriff testified at the hearing about the pending charge of conspiracy to escape. The defense cross-examined each of these witnesses.

The trial judge stated that he based the sentence on the record of the defendant’s prior convictions. The appellate court remanded for resentencing, on the ground that the admission of evidence of the pending charges was an error violating the defendant’s due process rights to both a jury trial and to be proven guilty beyond a reasonable doubt. On appeal to the Illinois Supreme Court, the

Stoutenborough, however, the court found that the variance between the presentence report provided to the defendant and the subsequent testimony was insubstantial. Relying on Stoutenborough, the defendant in People v. Siefke, 97 Ill. App. 3d 14, 421 N.E.2d 1071 (2d Dist. 1981), argued that he had no notice of the evidence presented at the sentencing hearing, and thus was unable to make a successful cross-examination. The court rejected the assertion on the ground that the defense had requested neither a continuance nor a recess in which to discuss the defendant’s version of the facts. Id. at 17, 421 N.E.2d at 1073.

See also Standards, supra note 42, Standard 18-5.4(a) which suggests that:

fundamental fairness to the defendant requires that the substance of all derogatory information which adversely affects the defendant’s interests and which has not otherwise been disclosed in open court should be called to the attention of the defendant and defense attorney in a form sufficient to give adequate opportunity for rebuttal.

44. 81 Ill. 2d 286, 408 N.E.2d 212 (1980).
45. Id. at 287, 408 N.E.2d at 213.
46. Id., 408 N.E.2d at 213.
47. Id. at 288, 408 N.E.2d at 214.
defendant relied upon the appellate court's reasoning. The state argued that the trial judge had predicated the sentence on the defendant's convictions, not on the pending charges. The state also contended that even if the judge had considered the latter, there was no reversible error, because "under certain circumstances" such evidence was properly admitted.49

The Illinois Supreme Court affirmed the sentence, finding that the trial judge had expressly based the sentence on the defendant's prior convictions. The court also held that even if the judge had considered the pending charges, there would be no reversible error "under the facts and circumstances of this case."50 In support of this holding, the court cited the United States Supreme Court case of Roberts v. United States,51 as well as several Illinois cases.52

The Poll opinion offered no analysis and thus provided little guidance to lower courts. The Illinois Supreme Court, having said

court held that the admission during sentencing of evidence of arrests, without the defendant's voluntary and knowing consent, violated the defendant's due process guarantees to a jury trial and to be proven guilty beyond a reasonable doubt. Id. at 539, 393 N.E.2d at 735. Thus, the case was remanded for resentencing. There was a dissent to the portion of the decision which remanded for a new sentencing hearing. 74 Ill. App. 3d at 541, 393 N.E.2d at 736 (Trapp, J., dissenting in part). Emphasizing that the defendant had the opportunity to cross-examine the witnesses testifying against him regarding the pending charges, Judge Trapp thought that the Poll fact pattern fell right in line with the cases where consideration of such evidence was deemed permissible, citing People v. Bey, 51 Ill. 2d 262, 281 N.E.2d 638 (1972), and People v. Schleyhahn, 4 Ill. App. 3d 591, 281 N.E.2d 409 (4th Dist. 1972). In addition, Judge Trapp found that the broad discretion of the judge, applied during a determination of a defendant's rehabilitation potential, included the consideration of factors such as arrests. 74 Ill. App. 3d at 540, 393 N.E.2d at 736 (Trapp, J., dissenting in part).


50. For an opinion stating that this was a holding, not dictum, see People v. Turner, 93 Ill. App. 3d 61, 70, 416 N.E.2d 1149, 1156 (1st Dist. 1981).

51. 445 U.S. 552 (1980). In Roberts, the United States Supreme Court held that a sentencing judge may consider a defendant's refusal to cooperate (e.g., by informing on his cohorts) as bearing on the likelihood of the defendant's rehabilitation. See Note, Roberts, supra note 31.

52. People v. Bey, 51 Ill. 2d 262, 287, 281 N.E.2d 638, 641 (1972) (the use of arrest evidence was upheld on the grounds that it was a proper consideration, nonprejudicial, and would have been disregarded by the judge if immaterial); People v. Kelley, 44 Ill. 2d 315, 318, 255 N.E.2d 390, 392 (1970) (evidence of the defendant's prior criminal misconduct arose during the cross-examination of the defendant's witnesses by the state, and was properly considered by the sentencing judge); People v. Adkins, 41 Ill. 2d 297, 300, 242 N.E.2d 258, 260 (1968) (evidence of arrests arising during the state's cross-examination of the defendant was held permissible since the judge must have all possible information regarding the defendant's background, and cross-examination at sentencing was deemed within the trial judge's discretion); People v. O'Neil, 18 Ill. 2d 461, 466, 165 N.E.2d 319, 322 (1960) (evidence of allegedly unsupported convictions was allowed absent prejudice to the defendant).
that consideration of pending charges would not be erroneous under "the facts and circumstances of this case," did not elaborate on the circumstances to which it referred, nor why these circumstances would render the error harmless. The distinguishing feature of the case, however, was that at the hearing the defense cross-examined the state's witnesses who testified to the defendant's pending charges. Subsequent courts have understood this to be the "circumstance of the case" referred to by the supreme court. 64

Cross-Examination Since Poll

The question of the admissibility during sentencing of the defendant's arrests has arisen frequently since the 1980 Poll decision, and has been resolved on varied grounds. Poll has been followed as precedent that arrests are properly admissible during sentencing if the defense has had the opportunity to cross-examine the witnesses at the hearing. 65 In Poll, however, the Illinois Supreme Court cited four Illinois cases to support its holding which sanctioned admitting evidence of arrests at the sentencing hearing. 66 These cases permitted arrest evidence, on the grounds that it was nonprejudicial to the defendant, was disregarded by the judge, or was relevant to the defendant's background and potential for rehabilitation. 67 As a result, some arrests since Poll have been found admissible primarily on the basis of the judge's avowed or presumed disregard of the arrest evidence. Arrests have also been found admissible due to their nonprejudicial effect on the defendant's sentence. 68 Rehabilitative potential, however, has recently

54. People v. Thomas, 96 Ill. App. 3d 443, 456, 421 N.E.2d 357, 367 (1st Dist. 1981); People v. Carpenter, 95 Ill. App. 3d 722, 727, 420 N.E. 2d 640, 644 (1st Dist. 1981); People v. Brown, 91 Ill. App. 3d 163, 167, 414 N.E.2d 249, 253 (2d Dist. 1980) (court remanded for resentencing of an indecent liberties with a child conviction where the trial court had considered a detailed entry in the presentence report describing the circumstances of a rape for which conviction had been later reversed, although the court noted that such information would have been relevant if subjected to cross-examination); People v. Jones, 86 Ill. App. 3d 253, 261, 408 N.E.2d 79, 86 (5th Dist. 1980); People v. Dominique, 86 Ill. App. 3d 794, 809, 408 N.E.2d 280, 292 (1st Dist. 1980).

55. See supra note 54.

56. See supra note 53.

57. See supra note 53.


60. People v. Lomas, 92 Ill. App. 3d 957, 961, 416 N.E.2d 408, 412 (3d Dist. 1981) (evi-
proven a weak basis for admission of the defendant’s arrests. One sentence was remanded because a detailed arrest description, included for its bearing on the defendant’s possible rehabilitation, had not been tested through cross-examination. Thus, to permit introduction of arrests since the Poll decision, the courts have occasionally relied on grounds other than the accuracy of the evidence presented.

Need for a Stronger Statement

The Illinois Supreme Court should provide clearer guidance than was given in Poll regarding the admissibility during sentencing of arrests. Cross-examination by the defense is necessary on one level to test the accuracy of the arrest evidence presented by the state. Through cross-examination, it could be determined whether the arrest did or did not occur. On another level, cross-examination provides a means by which to evaluate the arrest evidence as data determinative of the defendant’s criminal past. The defense should be given the opportunity to show why the arrest did not result in conviction. If the defendant were not indicted or prosecuted for a reason such as mistaken identity, then that arrest has no relevant bearing on the defendant’s background or rehabilitative potential, and should not be considered by the judge. If, on the other hand, the arrest were not reduced to conviction on a technicality, the arrest may have relevance to the determination of the defendant’s character or potential for rehabilitation. In either case, cross-examination at sentencing would provide a procedural means by which to balance the needs of the state and the defendant, without unduly burdening the criminal justice system. Under this model, evidence of past arrests must be reliable, but the sentence was upheld where the improperly admitted evidence was considered de minimus in nature).

62. See Coffee, supra note 2, at 1378, 1384. See also People v. Wunnenberg, 85 Ill.2d 188, 421 N.E.2d 905 (1981), for a recent example of a remandment for resentencing where the trial court considered the defendant’s set-aside conviction under the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1964). The Illinois Supreme Court held that since the purpose of the Act was to rehabilitate youthful offenders and provide them with a “fresh start free of the taint attached to a criminal conviction,” id. at 194, 421 N.E.2d at 908, such a set-aside conviction was not properly considered as an aggravating factor during sentencing. Id. at 195, 421 N.E.2d at 909.
63. See supra note 42. See also GUIDES, supra note 3, at 47. The Council of Judges also suggested that the defense attorney, in addition to cross-examining, should prepare his or her own presentence investigation. Id. at 49. In addition, in order to formulate an alternative sentencing proposal, the attorney should be fully knowledgeable about the defendant’s background. Id. at 51.
the court could continue to consider the possibility of the defendant's rehabilitation in light of his or her criminal history, including past arrests, without infringing upon due process rights. Moreover, the defendant would not face the possibility of prejudice, nor would the judge have to disregard evidence with which he or she had been presented.

In addition to cross-examination itself, the defendant should receive reasonable prior notice of the state's planned presentation at the sentencing hearing. Prior notice would effectuate defense cross-examination at the hearing. This model of cross-examination at sentencing would simplify on review the question of whether arrest evidence was properly presented, would permit the state fair access to the evidence when pertinent to the defendant, and would protect the defendant from prejudice by incompetent, irrelevant evidence, traditionally excluded by Illinois courts.

**Sentencing Consideration of Perceived Perjury in Illinois**

A sentencing judge's consideration of a defendant's past arrests bears great similarity to a sentencing judge's consideration of his or her belief that a defendant committed perjury during trial. Both considerations implicate the defendant's due process interests in being tried by jury and in being proven guilty beyond a reasonable doubt. In both instances, offenses for which the defendant has not been convicted are weighed by the judge in the determination of the sentence.

In Illinois, a sentencing judge may properly consider a defendant's admission that he or she committed perjury at trial, even when no separate conviction was obtained. Any serious concern of due process deprivation arising when the judge subsequently considers this admission at sentencing is abrogated when the defendant has admitted to having perjured himself during trial.

Due process concerns formerly led some Illinois courts to bar using the judge's perception of perjury at trial as a permissible sen-

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64. See supra note 43.
66. See, e.g., Note, Suspected Perjury, supra note 5, at 684.
67. In People v. Busch, 15 Ill. App. 3d 905, 908, 305 N.E.2d 372, 375 (1st Dist. 1973), the defendant admitted at trial that his testimony regarding the acquisition of a stolen automobile was false. The admission occurred after his girlfriend testified for the state that she had prepared his "bill of sale."
Courts specifically cited the denial of a jury trial as a possible but impermissible result of the sentencing consideration of perjury, at this stage a separate offense neither tried nor proved. Unlike the consideration of past arrests, which will appear in the presentence report whether or not the defendant takes the stand to testify, the consideration of perceived perjury engenders a chilling effect on the defendant's initial decision of whether to testify on his or her own behalf. The defendant must bear in mind during trial that if disbelieved, he or she may receive a term greater than that appropriate for the conviction itself.

**United States v. Grayson**

In a 1978 case, *United States v. Grayson*, the United States Supreme Court considered the question of whether a sentencing judge may take into account his or her belief that a defendant committed perjury during trial. On trial for escape from prison, Grayson was found guilty. His sole defense was duress. At the

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68. In People v. Cornes, 80 Ill. App. 3d 166, 179, 399 N.E.2d 1346, 1355 (5th Dist. 1980), the court found no reliance on perceived perjury at sentencing, but stated that it would be impermissible to rely on perception of perjury. The court in People v. Cowherd, 63 Ill. App. 3d 229, 235, 380 N.E.2d 21, 25 (4th Dist. 1978), found that Illinois traditionally followed the rule of People v. Riley, 376 Ill. 364, 367, 33 N.E.2d 872, 874, cert. denied, 313 U.S. 586 (1941), that arrest evidence was inadmissible. See supra notes 10-11 & 16-18 and accompanying text. Perceived perjury, not reduced to a conviction, was equally inadmissible. See supra notes 10-11 & 16-18 and accompanying text. In People v. Greenlee, 44 Ill. App. 3d 536, 545, 358 N.E.2d 649, 657 (5th Dist. 1976), the sentence was reduced because the trial judge had stated, "[n]ow why you got up on this witness stand and tried to sucker me, so to speak, I don't know . . . . I am taking it into account . . . [and] . . . am going to give you a little higher sentence . . . because of your perjury." Id. at 544, 358 N.E.2d at 656. See also People v. Ortiz, 22 Ill. App. 3d 788, 797, 317 N.E.2d 763, 769 (1st Dist. 1974); People v. Higgins, 133 Ill. App. 2d 496, 497, 268 N.E.2d 265, 266 (5th Dist. 1971); People v. White, 130 Ill. App. 2d 775, 777, 267 N.E.2d 129, 131 (4th Dist. 1971).

69. See supra note 68.

70. See infra note 80. See also Note, Suspected Perjury, supra note 5, at 689.

71. See Note, Suspected Perjury, supra note 5, at 692, which characterized the consideration of perceived perjury as a "chilling triple threat" to a testifying defendant who must convince the jury, the judge, and the government that he or she is truthful, or suffer penalties meted out by each. Accord Note, Criminal Procedure—Sentencing—A Sentencing Judge May Consider a Defendant's False Testimony Observed During Trial in Fixing the Sentence of a Defendant Within Statutory Limits: United States v. Grayson, 98 S.Ct. 2610 (1978), 7 AM. J. CRIM. L. 87, 92 (1979) [hereinafter cited as Note, False Testimony].


73. Id. at 42. Grayson testified he had been threatened by another prisoner over gambling debts, so he had been frightened and "just ran." Id. at 42. Grayson's statement was contradicted by the government's evidence and by inconsistencies in Grayson's testimony on cross-examination. Id. at 43.
sentencing hearing, the trial judge reported that the sentence was based in part on his belief that the defendant had lied during trial. Under federal practice, the judge could have imposed the sentence without any explanation, thereby providing the defendant with no grounds for challenge. The trial judge's statement of his reasons for sentencing thus exposed the issue on appeal. The Supreme Court affirmed the sentence, finding consideration of perceived perjury relevant to a judge's assessment of a defendant's rehabilitative potential. The Court also found no chilling effect on the defendant's right to testify on his own behalf, reasoning that such a right is limited to truthful testimony.

The Grayson Court, however, did not consider the possibility that a judge may mistakenly perceive truthful testimony as perjured and thereby punish the defendant, without due process of law, for a crime that he or she has not actually committed. Perjury is a separate crime which may or may not have occurred, and the defendant is entitled to be tried separately for it, rather than summarily punished in conjunction with the instant conviction. For this reason, perceived perjury should not be a permissible sentencing factor.

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74. The trial 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 a 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 re-sentencing.

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 whatsoever. I feel it is proper for me to consider that fact in sentencing, and I will do so. (emphasis supplied by the Court).

75. Fed. R. Crim. P. 32(b)(1) requires only that "a judgment of conviction shall set forth the plea, the verdict of findings, and the adjudication and sentence."


77. Id. at 54.

78. In United States v. Moore, 484 F.2d 1284, 1288 (4th Cir. 1973) (Craven, J., concurring), the concurrence stated that, "[i]t seems to me unconscionable that a defendant must run the risk of conviction of the offense charged and at the same time run the gauntlet of disbelief."

79. See Scott v. United States, 419 F.2d 264, 269 (D.C. Cir. 1969), where Judge Bazelon held that perjury perceived at trial requires a separate proceeding to protect the defendant's due process rights.

80. Grayson has received much attention and almost unanimous criticism from the com-
Perceived Perjury in Illinois After Grayson

Subsequent to the Grayson decision, the question of whether perceived perjury may be properly considered during sentencing came before the Fourth Appellate District of Illinois. The Illinois court declined to follow Grayson, reasoning that perjury perceived at trial, like a past arrest, constituted a separate offense not reduced to conviction. The court cited the Illinois rule articulated in People v. Riley which held that such evidence is an improper sentencing consideration. The Illinois court also noted that an important factor in Grayson was the existence of a federal statute, not controlling in Illinois, which stated: "No limitation shall be

mentators. See Note, False Testimony, supra note 71, at 96 (the defendant should be separately tried for perjury, otherwise a denial of due process results, and the defendant's right to testify is impermissibly chilled); Note, Constitutional Criminal Procedure—Due Process—Judgment and Sentence—Judge's Discretion to Consider Defendant's False Testimony, 17 Duq. L. Rev. 521, 533 (1979) (under Grayson, the defendant may be penalized without due process; consequently, the sentencing judge should record specific bases for the sentence given, and more appellate review of sentencing should be provided to avoid penalty for unconvicted perjury); Note, Constitutional Law—Criminal Procedure—Sentencing Judge May Consider His Belief That Defendant Lied on Stand Without Violating Due Process or Impermissibly Chilling Defendant's Right to Testify in His Defense—United States v. Grayson, 98 S. Ct. 2610 (1978), 28 EMORY L.J. 159, 181 (1979) (perjury should be tried separately or defendant is exposed to judgment by hunch, infringing his constitutional rights and discouraging his choice to testify); Note, Discretionarily Enhanced Sentences Based upon Suspected Perjury at Trial, VII FORDHAM URB. L.J. 441, 457 (1979) (criminal trial is not a reliable context for determination of perceived perjury, which should be ascertained at a separate trial, and the sentencing judge should record specific sentencing factors for purposes of review); Note, Judge's Disbelief of Defendant's Testimony May Justify an Increased Sentence, 30 MERCER L. REV. 757, 760 (1979) [hereinafter cited as Note, Judge's Disbelief] (the defendant's right to testify on his or her own behalf will be chilled, especially since truthful testimony may be perceived as false); Note, United States v. Grayson: Inferred Perjury As a Valid Guide in Sentencing, 41 U. Prrr. L. Rev. 275, 289 (1980) (relation between perceived perjury and potential for the defendant's rehabilitation is questionable). For a contrary view, see Note, Criminal Procedure—Sentencing—Federal Sentencing Judge May Consider Defendant's False Trial Testimony—United States v. Grayson, 438 U.S. 41 (1978), 83 DICK. L. Rev. 367, 377 (1979) (the criminal justice system would be threatened if the judge was not allowed to consider perceived perjury at sentencing, because the majority of defendants are not prosecuted for perjury).


82. Id. at 235, 380 N.E.2d at 25. The trial judge stated, "I don't think anybody is entitled to take under oath the witness stand and deny any participation, which is equivalent to perjury, that you weren't even here, when I find that the jury has found you were there, that you did participate." Id. at 234, 380 N.E.2d at 24. In effect, the defendant was being sentenced both for guilt and for lying about what he did, with no trial regarding the latter. The appellate court did not remand for resentencing, but did reduce the imposed sentence of 10 to 30 years to seven to 15 years. Id. at 236, 380 N.E.2d at 26.

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.\textsuperscript{84}

Considering the question the following year, the Second Appellate District of Illinois disagreed with the Fourth District regarding the difference between the respective governing federal and Illinois laws.\textsuperscript{85} The court upheld a sentence where perceived perjury had been considered,\textsuperscript{86} finding the Illinois Unified Code of Corrections as broad as the federal law in permitting consideration during sentencing of "any matters that the investigatory officer deems relevant or the court directs to be included"\textsuperscript{87} in the presentence report. The court found the judge's perception of perjury indicative of the rehabilitative potential of the defendant, and therefore a proper sentencing consideration.\textsuperscript{88} Illinois appellate courts have


\textsuperscript{85} People v. Galati, 75 Ill. App. 3d 860, 865, 393 N.E.2d 744, 748 (2d Dist. 1979).

\textsuperscript{86} Id. at 865, 393 N.E.2d at 748. The federal and Illinois laws were also found comparable in People v. Moody, 66 Ill. App. 3d 929, 931, 384 N.E.2d 483, 486 (3d Dist. 1978), where the defendant had induced a co-defendant to perjure, and the sentencing court's consideration of the defendant's influence was upheld.

\textsuperscript{87} ILL. REV. STAT. ch. 38, ¶ 1005-3-2(a)(6) (1981).

\textsuperscript{88} People v. Galati, 75 Ill. App. 3d 860, 865, 393 N.E.2d 744, 748 (2d Dist. 1978). See People v. Jones, 52 Ill. 2d 247, 287 N.E.2d 680, (1972), where the sentencing judge stated, "[defendant] said he signed [the police report] in blank at the police station. It is an incredible story and an indication in my mind of a criminal bent in this young man." The supreme court found that the perceived perjury had not enhanced the sentence, but was relevant to the defendant's rehabilitative potential. Id. at 249, 287 N.E.2d at 681. See also People v. Nedelcoff, 87 Ill. App. 3d 849, 852, 409 N.E.2d 316, 318 (6th Dist. 1980); People v. Jackson, 79 Ill. App. 3d 698, 708, 398 N.E.2d 959, 967 (1st Dist. 1979); People v. Genovese, 65 Ill. App. 3d 819, 823, 382 N.E.2d 872, 875 (2d Dist. 1978).

In People v. Hayes, 62 Ill. App. 3d 360, 366, 378 N.E.2d 1212, 1216 (1st Dist. 1978), the sentence for rape was upheld where during sentencing the judge stated to the defendant's attorney:

You think there would be anything about the fact your client took the stand and was almost making the woman into a prostitute who had been raped in the street, and lied? Do you think that has nothing to do with it? ... [Defendant] shows me he doesn't even have the beginning to feel that he wants to be rehabilitated. Id. at 363, 378 N.E.2d at 1214. Cf. United States v. Grayson, 438 U.S. 41, 50 (1978), where the United States Supreme Court said that, "a defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing."
also permitted the consideration of perceived perjury when they deemed it nonprejudicial to the defendant in light of the balance of the evidence.88

People v. Meeks

In 1980, the Illinois Supreme Court reviewed the propriety of the sentencing consideration of perceived perjury in People v. Meeks.89 The defendant had been convicted of three counts of unlawful delivery of a controlled substance and had been sentenced to three concurrent sentences of two years.90 The Fifth District Appellate Court remanded for resentencing due, inter alia, to the judge's consideration at sentencing of his belief that the defendant committed perjury.91 The court reasoned that such consideration during sentencing would result in a chilling effect on the defendant's choice to testify during the trial, and thus declined to deem perceived perjury a proper sentencing factor.92

The Illinois Supreme Court granted the state's petition for leave to appeal. The supreme court first reviewed the trial court's proper, detailed consideration of the defendant's presentence report. The court then examined the Illinois rules that sentencing courts are not bound by strict rules of evidence,93 and that the sentencing judge has broad discretion in determination of factors bearing on the defendant's sentence, limited only by the accuracy and reliability of the information.94 Finally, the court focused on the defendant's contention that the sentencing judge, contrary to

See supra notes 72-77 and accompanying text. This rationale is comparable to the rehabilitation theory allowing consideration of past arrest records. See supra notes 31-39 and accompanying text.

89. See, e.g., People v. Chicon, 55 Ill. App. 3d 100, 107, 370 N.E.2d 605, 611 (5th Dist. 1977). This rationale is comparable to the theory that consideration of past arrest records is permissible in the absence of prejudice. See supra notes 16-24 and accompanying text.

90. 81 Ill. 2d 524, 411 N.E.2d 9 (1980).
91. Id. at 526, 411 N.E.2d at 10.
92. 75 Ill. App. 3d 357, 366, 393 N.E.2d 1190, 1198 (5th Dist. 1979). The defendant had testified that she was in Chicago during her alleged participation in the delivery of drugs in Centralia, Illinois. As rebuttal evidence, the state proffered an employment application submitted during that period to the Centralia Power Company. This application was not presented to the jury. Instead, its use was restricted to impeachment evidence. Id. at 362, 393 N.E.2d at 1193. At sentencing, the trial judge noted that the defendant could not explain the existence of the application, and concluded she was "dealing a false hand." Id. at 366, 393 N.E.2d at 1198.
93. Id. at 367, 393 N.E.2d at 1198.
94. 81 Ill. 2d 524, 537, 411 N.E.2d 9, 15 (1980).
95. Id. at 535, 411 N.E.2d at 15 (quoting People v. Crews, 38 Ill. 2d 331, 337, 231 N.E.2d 451, 454 (1967)).
Illinois law, impermissibly considered perception of perjury. Although this defendant conceded that such a consideration was not violative of her due process rights, the court foreclosed future constitutional challenge to the issue by citing *United States v. Grayson* and adopting its position without analysis. The Illinois Supreme Court in *Meeks* additionally disagreed with the defendant's position that Illinois law precluded consideration of perceived perjury, finding it instead a relevant factor in assessment of the defendant’s potential for rehabilitation.

Objections to perceived perjury as a permissible sentencing factor include the chilling effect on the defendant's decision to testify on his or her own behalf (as a judge may disbelieve even truthful testimony), the right of the defendant to be sentenced on the basis of accurate information, and the expedient of a separate perjury trial. The value of perceived perjury as an indicator of the rehabilitative potential of the defendant is questionable, because fear of incarceration may lead even a defendant with significant potential for rehabilitation to commit perjury. The sentencing judge has access to more reliable means by which character and possibility of reform might be calculated, such as the detailed presentence report and any aggravation and mitigation testimony at the sentencing hearing.

**Factors Bearing on Rehabilitation and the Problem of an Unforeseen Constitutional Burden**

Even a sentencing factor normally considered by the courts in rehabilitation may engender due process violations when combined with the consideration of perceived perjury. The factor of a defendant's display or lack of remorse or penitent spirit is illustrative of this situation.

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97. 81 Ill. 2d 524, 537, 411 N.E.2d 9, 15 (1980).
98. Id. at 536, 411 N.E.2d at 15.
99. Ironically, this right was mentioned by the *Meeks* court. See supra text accompanying note 95.
100. See supra note 80. See also Scott v. United States, 419 F.2d 264, 269 (D.C. Cir. 1969); Note, *Suspected Perjury*, supra note 5, at 684, regarding a separate perjury trial.
101. See, e.g., Note, *Judge's Disbelief*, supra note 80, at 760. See also infra note 116.
104. See related discussion in Note, *Suspected Perjury*, supra note 5, at 687.
Consideration of the display or lack of remorse by the defendant has always been a permissible sentencing factor in Illinois. Unlike past arrests or perceived perjury, Remorse bears directly on the rehabilitative potential of the defendant. A finding of remorse or its absence has not always been conclusive, but has usually been accorded significant weight. A sentencing judge in Illinois indicated the importance accorded observed or perceived remorse when he stated: "The only thing—the only point—I believe that I can consider is that if a person feels remorse for the crime then he is half way to being rehabilitated."

105. People v. Morgan, 59 Ill. 2d 276, 282, 319 N.E.2d 764, 767 (1974) (the consideration of the defendants' absence of remorse, shown by the viciousness of their crimes and their unruly behavior at trial, where they spoke obscenely to the court and witnesses, threw shoes at the judge and over the jurors' heads, and attempted to escape, was appropriate in determining their sentence); People v. Gomez, 29 Ill. 2d 432, 434, 194 N.E.2d 299, 300 (1963) (when the sentencing judge said, "the rule isn't worth very much if you don't make an exception to it when the proper time comes, but I never grant probation to someone unless you come in and plead guilty and throw themselves upon the mercy of the Court and start out with a penitent spirit," he indicated a factor which could properly be considered); People v. Williams, 47 Ill. App. 3d 798, 804, 365 N.E.2d 415, 419 (1st Dist. 1977) (where one defendant in an armed robbery case received a 15-35 year sentence, and another defendant who manifested remorse by crying before imposition of sentence received eight to 15 years, sentencing court properly considered relative penitence of the defendants). See also People v. Williams, 97 Ill. App. 3d 394, 407, 422 N.E.2d 1179, 1185 (1st Dist. 1981); People v. Cox, 77 Ill. App. 3d 59, 70, 367 N.E.2d 358, 363 (1st Dist. 1977); People v. Petty, 33 Ill. App. 3d 183, 185, 336 N.E.2d 249, 250 (4th Dist. 1975).

106. People v. Oravis, 81 Ill. App. 3d 717, 719, 402 N.E.2d 297, 299 (4th Dist. 1980) (when the sentencing judge said, "I have an individual here with no remorse who has neither the ability apparently nor the intention of making restitution," the sentence was upheld because of the court's concern with the defendant's rehabilitative potential).

107. In People v. Piontkowski, 77 Ill. App. 3d 994, 397 N.E.2d 36 (5th Dist. 1979), the defendant emphasized his substantial potential for rehabilitation by pointing to the lack of a prior felony record, his desire to conquer alcoholism, and his sincere remorse. The trial judge nonetheless imposed an eight year sentence for armed robbery. The appellate court affirmed on the basis that the judge had discretion to weigh the factors, and remorse was not necessarily conclusive. Id. at 996, 397 N.E.2d at 38.

108. Where the trial judge felt, based on his personal observations, that the defendants took the trial as a joke, a new sentencing hearing was granted on the basis that the record showed no admonitions of the defendants by the court. People v. Rafac, 51 Ill. App. 3d 1, 364 N.E.2d 991, 993 (3d Dist. 1977); People v. Coleman, 50 Ill. App. 3d 1055, 1060, 364 N.E.2d 742, 747 (3d Dist. 1977).

109. See supra note 105.

110. People v. Starnes, 88 Ill. App. 3d 1141, 1145, 411 N.E.2d 125, 129 (5th Dist. 1980), quoting remarks of the trial judge, which continued:

If an individual realizes that he's done wrong and says 'I committed the crime . . . I'm sorry . . . go ahead and pass sentence—I won't do it again' . . . then you sort of have a feeling in experience with people that that individual realizes that he
The factor of remorse in a sentencing setting, however, is closely related to perceived perjury. When a judge decides that a defendant has committed perjury at trial, the judge frequently feels that the perjury manifests the defendant’s lack of remorse for the crime. Because perception of perjury may itself be considered during imposition of sentence, the defendant faces the possibility of an increased sentence whenever the judge believes the defendant to be perjurious, and consequently, unremorseful. Although either factor may properly be considered singly in aggravation of the defendant’s sentence, these factors achieve greater impact when joined.

Questions arise concerning this tandem consideration of the factors of perceived perjury and remorse. The first question concerns the judge’s ability to assess the defendant’s character and, simultaneously, the defendant’s desire or ability to simulate remorse. A judge might perceive perjury when the defendant is relating true, albeit unusual, testimony, and find this “perjurious” testimony indicative of the defendant’s remorselessness. Alternatively, a defendant desirous and capable of acting convincingly might appear truthful and thereby receive mitigating credit for penitence. The two considerations seem difficult to separate.

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Id. at 1145, 411 N.E.2d at 129. The sentence was affirmed.

111. People v. Nedelcoff, 87 Ill. App. 3d 849, 850, 409 N.E.2d 316, 317 (5th Dist. 1980) (the sentencing judge stated, “if somebody takes the witness stand and tries to lie his way out of it—[then] he hasn’t shown any remorse for this crime ...”); People v. Porter, 83 Ill. App. 3d 720, 721, 404 N.E.2d 337, 338 (4th Dist. 1980). It may also be argued in the reverse that a lack of remorse could lead to the commission of perjury.


113. The combinations are of course more varied. The defendant could be lying and remorseless, lying but sorry, truthful and sorry, or truthful but remorseless. The need for a psychiatrist participating in the sentencing hearing has been recognized. See Frankel, Criminal Sentences, supra note 2, at 74, which characterized this suggestion, originally made in S. Glueck, Crime and Justice 225 (1936), as germane in the sentencing context, though unrealistic. See also infra note 116.

114. See Note, Suspected Perjury, supra note 5, at 687, discussing “the trial judge’s possible inability to isolate perjury from amorphous personality characteristics.” See also Comment, Discretion in Felony Sentencing—A Study of Influencing Factors, 48 Wash. L.
A second question arises regarding the value of perceived perjury plus remorse as reliable indicia of a defendant's rehabilitative potential. When a defendant has been considered perjurious, his rehabilitation index will be dropped. Conversely, one who appears veracious might be considered easier to rehabilitate. If the latter defendant is so effective a perjuror as to avoid detection, however, he or she might ultimately prove the more difficult of the two to reintegrate into society.

The chilling effect on the defendant's decision to testify, present when a sentencing judge considers his or her perception that the defendant lied at trial, is thus exacerbated by the commonly considered factor of the defendant's remorse. Though the remorse factor itself encompasses no constitutional concerns, its simultaneous consideration with perceived perjury implicates the remorse factor in possible due process deprivation. This provides an additional objection to the endorsement of perceived perjury as a permissible sentencing consideration.

**Specific Sentencing Statement Needed**

Though Illinois law requires a sentencing judge to specify the factors that led to the sentence, the courts have interpreted the statute as a general directive, not requiring the sentencing judge to

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Rev. 857, 870 (1973) [hereinafter cited as Comment, Felony Sentencing] for an empirical study demonstrating the extremely complex factors which may influence a judge's sentencing decision: the defendant's race; the judge's educational background; the length of time that the judge has been a lawyer and on the bench; the number of the defendant's felony arrests; the attitude of the defendant as perceived by the judge; and the judge's philosophy regarding the probation officer's and the defense attorney's sentencing recommendations.

115. See supra note 106.

116. Cf. Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969), where the court concluded that perjury was an unreliable index of rehabilitation and said:

[T]he peculiar pressures placed upon a defendant threatened with jail and the stigma of conviction make his unwillingness to deny the crime an unpromising test of his prospects for rehabilitation if guilty . . . 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.

Id. at 269. Similarly, Judge Craven, concurring in United States v. Moore, 484 F.2d 1284 (4th Cir. 1973), found improper the assumption that one who lies on the stand demonstrates a lesser prospect for rehabilitation than one who pleads not guilty. Instead, whether a perjuror has less rehabilitative potential is a question "for psychiatrists." Id. at 1288.

117. See supra note 80.

118. ILL. REV. STAT. ch. 38, ¶ 1005-4-1(c) (1981). "In imposing a sentence for a felony, the trial judge shall specify on the record the particular evidence, information, factors in mitigation and aggravation or other reasons that led to his sentencing determination." See also ILL. REV. STAT. ch. 38, ¶ 1005-8-1(b) (1981), requiring a sentencing judge in a felony conviction to set forth his or her reasons for the sentence.
assign specific value to each factor considered. Sentencing under this statutory interpretation thus has been based on the overall impression that the judge received from all of the factors presented in aggravation and mitigation. If the statute were interpreted narrowly to require identification of each factor with its respective increment of the sentence imposed, a check on judicial discretion would result. While the additional effort required for compliance


120. The requirement of a report of reasons for sentence is new under the current Unified Code of Corrections. See supra note 118. Prior to this provision, a judge need not have stated any reasons for imposition of a particular sentence; cf. FED. R. CRIM. P. 32(b)(1). See Note, False Testimony, supra note 71, at 89, which characterized as admirable the Grayson trial judge's decision to outline his reasons for sentencing. The Note asserted, however, that even under a system not requiring a judge to report a statement of reasons, abuse is unlikely, due to the judge's "integrity and sense of justice."

Of course, it might be argued that requiring a specific statement of reasons for the sentence imposed would invite abuse. A judge could circumvent the purpose of such a statement by adding the time allotted to factors which were not the real basis for the incremental portion of the sentence. Judicial integrity and sense of justice, however, would prevail in this situation as well. Additionally, a system requiring a detailed report would appear to invite less abuse than a system requiring no report or a general one.

121. Commentators have supported such a model. GUIDES, supra note 3, at 53, recommended that the judge state the reasons for the sentence imposed, in order to clarify the sentence's objective for the defendant and for the public. FRANKEL, CRIMINAL SENTENCES, supra note 2, at 114, proposed the use of a detailed profile or checklist of factors to provide "some form of numerical or other objective grading," in order to curtail sentencing based on an overall "hunch." Aspen, supra note 2, at 351, foresaw the current broad interpretation of the Illinois statute and criticized that broad reading as "an attempt to comply with the letter, not the spirit, of the statute." Note, Procedural Due Process, supra note 2, at 843, found irrational the assertion by judges that articulating reasons for the sentence imposed is impossible, and called for such articulation to permit review. A brief account of "why the judge did what he did" would suffice. The importance of the trial judge's duty of sentencing outweighs the additional burden of such a report. Id. at 845. See also Comment, Felony Sentencing, supra note 114, at 860, claiming that in order to ascertain the desirability of continued judicial discretion, it is necessary to know precisely what factors judges use in determining sentences. See generally Berkowitz, The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal, 60 IOWA L. REV. 205 (1974).

A California court in In re Perez, 84 Cal. App. 3d 168, 148 Cal. Rptr. 302 (4th Dist. 1978), reversed a sentence where perceived perjury was considered, seeing the need for a procedural safeguard:

Because the consideration of perjury in the appraisal of a defendant's character runs the risk of being improperly expanded to support the imposition of punishment for the perjury itself, we think it incumbent upon a trial judge who injects the subject of perjury into the sentencing process expressly to state the sense in which it has been considered . . . .

Id. at 173, 148 Cal. Rptr. at 305.

See also STANDARDS, supra note 42, Standard 18-6.6(a)(ii), wherein the ABA suggested that the court should "state for the record in the presence of the defendant the reasons for
would be minimal, the benefits of simplifying appellate review, equalizing sentences, and reducing the chilling effect on a defendant's choice to testify on his or her own behalf would be maximized.

CONCLUSION

The sentencing consideration of both past arrest records and perceived perjury results in possible sentence enhancement for crimes that the defendant might not have committed. Consideration of perceived perjury additionally chills the defendant's decision of whether to testify in his or her own defense. The traditional consideration of remorse as indicative of the defendant's rehabilitative potential can exacerbate this objectionable result. In order to avoid constitutional problems, and to retain access to all available evidence for the sentencing decision, the defendant should be permitted to cross-examine the state's witnesses who testify at sentencing about arrest records. Additionally, after any sentencing hearing, the judge should render a statement specifically indicating the factors accounting for each portion of the sentence. Until such time as perceived perjury is deemed an impermissible sentencing factor, this practice would alleviate the abuse possible when perceived perjury and other factors are combined during a rehabilitation analysis at sentencing.

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selecting the particular sentence to be imposed." The Commentary noted the following reasons for such a statement: (1) therapeutic value to the defendant; (2) discipline effect on the judge's own thought process; and (3) facilitation of appellate review. Commentary at 488.