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***State v. Vandiver*: Whither Judicial Discretion Under the North Carolina Fair Sentencing Act?**

It has been said that “[a]side from the determination of guilt or innocence, selecting an appropriate sentence is perhaps the most important decision to be made in the entire criminal justice system.”¹ In any given jurisdiction, power to make this decision is distributed among legislators, judges and correctional officials. Each actor exercises discretion within a statutory framework and acts to check abuses by other participants in the sentencing process.² In North Carolina, an important area of discretion reserved to the judiciary is the application of aggravating or mitigating circumstances to impose a criminal sentence different from the presumptive term established by statute for a particular crime. A sentencing judge “may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing.”³ Perjury by a criminal defendant while testifying at trial is recognized as a valid aggravating factor in a majority of jurisdictions.⁴ Until recently, North Carolina was a member of that majority.⁵ The North Carolina Supreme Court held in *State v. Vandiver*,⁶ however, that perjury “may no longer constitute a nonstatutory aggravating factor in North Carolina.”⁷

This Note examines the court’s reasoning in *Vandiver* as well as the common-law and statutory contexts in which the decision was made. This Note concludes that the North Carolina Supreme Court erred in its holding in *Vandiver* and proposes an alternative standard that would allow trial courts to consider perjury by a criminal defendant as an aggravating factor in sentencing while minimizing the potential for abuse and due process violations.

On December 28, 1985, Robert E. Scott was visiting his mother and stepfather, Shirley and Joseph Haselden.⁸ The Haseldens lived in an apartment on the second floor of a rooming house in Fayetteville, North Carolina.⁹ At approximately 6:45 p.m., the Haseldens, Scott, and another resident of the house, Gregory Davis, went downstairs to the apartment below to complain about loud

1. DIVISION OF PROBATION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE PRESENCE INVESTIGATION REPORT 1 (Publication 105 1984) [hereinafter PRESENCE INVESTIGATION].

2. See C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 295-96 (1978).

3. N.C. GEN. STAT. § 15A-1340.4(a) (1988).

4. For a jurisdictional survey of the use of perjury as an aggravating factor in sentencing, see Annotation, *Propriety of Sentencing Judge’s Consideration of Defendant’s Perjury or Lying in Pleas or Testimony in Present Trial*, 34 A.L.R. 4TH 888, 891-900 (1984). See also *infra* note 141 (listing cases from various jurisdictions).

5. See *State v. Thompson*, 310 N.C. 209, 227, 311 S.E.2d 866, 876 (1984), *overruled*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

6. 321 N.C. 570, 364 S.E.2d 373 (1988).

7. *Id.* at 574, 364 S.E.2d at 375.

8. *Id.* at 570, 364 S.E.2d at 373.

9. *Id.*

music coming from it.¹⁰ Mildred Vandiver, the defendant, lived in the apartment that was the source of the noise, and it was her boyfriend, Paul Hair, who answered the door when the Haselden party knocked.¹¹ Hair began "yelling and cursing" and became embroiled in an argument with Scott.¹² When Scott asked Hair to turn the music down, Hair responded, "make me . . . white boy."¹³ At this point Vandiver came to the door and "profanely ordered" Scott and Davis not to bother Hair.¹⁴ Davis and Joseph Haselden returned to their respective apartments, Shirley Haselden remained on the stairs, and Scott continued to argue with Hair.¹⁵ Testimony differed as to what occurred next.

Shirley Haselden testified that as she stood at the base of the stairs across from Vandiver's door, Hair said, "Go ahead and do it if you're going to."¹⁶ According to Mrs. Haselden, Vandiver then entered the hallway, shouted profanities and stabbed Robert Scott with a butcher knife.¹⁷ The knife severed Scott's carotid artery, and he bled to death.¹⁸

Mildred Vandiver testified on her own behalf and denied that she stabbed Scott.¹⁹ Vandiver stated that after the others had returned upstairs, Scott entered her apartment and slapped her.²⁰ She testified that Hair, carrying a steak knife, followed Scott out of the apartment.²¹ Vandiver claimed not to have seen the actual stabbing. She testified that when Hair returned, the couple left the apartment to go to the store and visit friends.²² Vandiver also testified that Hair told her to take the blame for the stabbing because the police would not do anything to a woman.²³

Vandiver was convicted by a jury of murder in the second degree,²⁴ a Class C felony²⁵ with a presumptive term of imprisonment of fifteen years.²⁶ Under the provisions of the North Carolina Fair Sentencing Act,²⁷ the trial judge must impose the presumptive sentence "unless, after consideration of aggravating or mitigating factors, or both, he decides to impose a longer or shorter term."²⁸ The judge found one aggravating factor:

10. *Id.* at 570-71, 364 S.E.2d at 373-74.

11. *Id.* at 571, 364 S.E.2d at 374.

12. *Id.*

13. Defendant-Appellant's Brief at 2, *Vandiver* (1988) (No. 91A87).

14. *Id.*

15. *Vandiver*, 321 N.C. at 571, 364 S.E.2d at 374.

16. *Id.*

17. *Id.*

18. Defendant-Appellant's Brief at 4.

19. *Vandiver*, 321 N.C. at 571, 364 S.E.2d at 374.

20. *Id.*

21. *Id.*

22. Defendant-Appellant's Brief at 5.

23. *Vandiver*, 321 N.C. at 574, 364 S.E.2d at 374.

24. *Id.*

25. N.C. GEN. STAT. § 14-17 (Supp. 1988).

26. *Id.* § 15A-1340.4(f)(1) (1988).

27. An Act to Establish a Fair Sentencing System in North Carolina Criminal Courts, ch. 760, 1979 N.C. Sess. Laws 1st Sess. 850 (codified as amended in scattered sections of N.C. GEN. STAT. chs. 14, 15 & 15A (1983, 1986, 1988 & Supp. 1988)).

28. N.C. GEN. STAT. § 15A-1340.4(a) (1988).

The Defendant testified on her behalf in open court. The Defendant testified under oath that she did not stab the victim [sic], Robert Eugene Scott, but that one Paul Hair did. That by this testimony the Defendant did deliberately present evidence during the course of the trial which she knew was false. That the Jury by its verdict obviously found that the Defendant's testimony was false. This Court concludes and finds beyond a reasonable doubt that the Defendant committed perjury by such testimony.²⁹

In addition, the judge found one statutory mitigating factor: Vandiver's prior criminal record consisted solely of misdemeanors punishable by less than sixty days' imprisonment.³⁰ The trial judge found that the aggravating factor of Vandiver's perjury outweighed the mitigating factor of her minimal criminal record and sentenced her to the maximum term allowed by statute,³¹ life imprisonment.³²

Vandiver appealed directly to the North Carolina Supreme Court,³³ alleging two errors by the trial court.³⁴ Vandiver's second allegation of error, the focus of this Note, concerned the trial court's use of her alleged perjury as a nonstatutory aggravating factor. She contended that the trial judge had erred in finding perjury for two reasons. First, though Vandiver acknowledged that the supreme court had approved the use of perjury as an aggravating factor in sentencing,³⁵ she argued that her contradicted testimony did not constitute an "extreme case" of perjury, the standard previously announced by the court.³⁶ In addition, Vandiver urged the court to find error in the trial judge's determination that the jury's guilty verdict rendered her testimony "undeniably perjured."³⁷

29. Record at 34, *Vandiver* (No. 91A87).

30. *Vandiver*, 321 N.C. at 571, 364 S.E.2d at 374.

31. See N.C. GEN. STAT. § 14-1.1(3) (1986).

32. *Vandiver*, 321 N.C. at 571, 364 S.E.2d at 374. For a discussion of the weighing process, see *infra* note 83.

33. Vandiver was entitled to an appeal as of right on two bases. At the time of her sentencing, a defendant who was sentenced to life imprisonment by a superior court could appeal as of right directly to the supreme court. Act of March 29, 1967, ch. 108, 1967 N.C. Sess. Laws 149 (codified as amended at N.C. GEN. STAT. § 7A-27 (Supp. 1988)) (amended in 1987 to limit direct appeal to supreme court to first-degree murder convictions carrying sentence of death or life imprisonment). In addition, a defendant may appeal of right whenever the duration of the sentence imposed exceeds the presumptive term set by statute. N.C. GEN. STAT. § 15A-1444 (1988).

34. *Vandiver*, 321 N.C. at 571-73, 364 S.E.2d at 374-75. First, Vandiver argued that the trial court had erred in refusing to order disclosure of a police memorandum allegedly containing inconsistent prior statements by Mrs. Haselden. The supreme court held that the trial judge did not err in refusing disclosure because the document was only a narrative of the offense and not a statement by a witness as required by statute. *Id.* at 573, 364 S.E.2d at 375 (citing N.C. GEN. STAT. § 15A-903(f) (1988)).

35. See *State v. Thompson*, 310 N.C. 209, 227, 311 S.E.2d 866, 876 (1984), *overruled*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

36. Defendant-Appellant's Brief at 9. For a discussion of the extreme-case standard, see *infra* text accompanying notes 94-98.

37. Defendant-Appellant's Brief at 11. The state's argument in response stressed two points. First, the testimony of the eyewitness, Mrs. Haselden, was corroborated significantly by another prosecution witness and was characterized as unequivocal. Brief for the State at 5-6, *Vandiver* (No. 91A87). In addition, the state attempted to distinguish the situation in *Vandiver* from previous cases disallowing the use of perjury as an aggravating factor. *Id.* at 6. Specifically, the state contrasted Vandiver's inconsistent testimony and the unequivocal nature of Mrs. Haselden's eyewitness account

The court's response was surprising. It held that perjury by a criminal defendant no longer may be considered a nonstatutory aggravating factor in sentencing convicted felons.³⁸ The court criticized the standard it had developed in *State v. Thompson*³⁹ that trial judges "should refrain from finding perjury as an aggravating factor except in the most extreme case."⁴⁰ The *Vandiver* court discounted the *Thompson* standard as "unworkable" and an "insufficient bulwark[] against misuse of the aggravating factor."⁴¹ Justice Martin, writing for a unanimous court, found it "impossible to formulate adequately concrete guidelines to prevent future erroneous findings."⁴² With its holding in *Vandiver*, the court overruled three previous cases, each less than four years old at the time of the decision,⁴³ and North Carolina became a member of the minority of jurisdictions that refuse to recognize perjury by a criminal defendant as an aggravating factor.⁴⁴

The issues and arguments in *Vandiver* are not new, but instead represent the latest development in the centuries-old conflict over how to treat those convicted of crime.⁴⁵ There are basically two models of criminal sentencing available to any society: indeterminate and determinate.⁴⁶ An indeterminate system is based on the rehabilitative model of sentencing.⁴⁷ Judges and parole boards are granted broad discretion to individualize the correctional treatment and restraint on a convicted offender in order to effect her reformation and rehabilita-

with previous cases concerning defendants' consistent testimony and unbelievable state's witnesses. *Id.*

38. *Vandiver*, 321 N.C. at 574, 364 S.E.2d at 375.

39. 310 N.C. 209, 311 S.E.2d 866 (1984), *overruled*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

40. *Id.* at 227, 311 S.E.2d at 876. For a discussion of *Thompson*, see *infra* notes 87-98 and accompanying text.

41. *Vandiver*, 321 N.C. at 573-74, 364 S.E.2d at 375.

42. *Id.* at 574, 364 S.E.2d at 375.

43. See *id.* The three cases overruled by *Vandiver* are: *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986); *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), *cert. denied*, 476 U.S. 1165 (1986); *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984).

44. See Annotation, *supra* note 4, at 891.

45. For more extensive discussion of the history of criminal sentencing, see S. SHANE-DUBOW, A. BROWN & E. OLSEN, SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT 1-12 (1985) (published as part of the National Institute of Justice series, *Issues and Practices in Criminal Justice*) [hereinafter SENTENCING REFORM]; TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 83-115 (1976) [hereinafter FAIR AND CERTAIN PUNISHMENT]. For legislative history and an analytical overview of the North Carolina Fair Sentencing Act, see generally S. CLARKE, FELONY SENTENCING IN NORTH CAROLINA, 1976-1986: EFFECTS OF PRESUMPTIVE SENTENCING LEGISLATION (1987) [hereinafter FELONY SENTENCING]; Comment, *Criminal Procedure—The North Carolina Fair Sentencing Act*, 60 N.C.L. REV. 631 (1982).

46. N.C. GOVERNOR'S CRIME COMM'N, TRUTH IN SENTENCING: A REPORT TO THE GOVERNOR 6 (1987) [hereinafter TRUTH IN SENTENCING].

47. *Id.* "The ultimate rationale of rehabilitation is that through supervision, control and treatment the criminal justice system will do something to, for or with the defendant so that when the person's sentence is completed . . . the defendant . . . will thereafter obey, not disobey, the law." J. BURNS & J. MATTINA, SENTENCING 3-4 (1978). In essence, the rehabilitative model seeks to diminish the criminal's need or desire to commit future criminal acts. See FAIR AND CERTAIN PUNISHMENT, *supra* note 45, at 69.

tion.⁴⁸ The legislature provides few, if any, criteria to determine appropriate sentences,⁴⁹ but relies instead on judges and correctional administrators to ensure that "the punishment . . . fit[s] the offender and not merely the crime."⁵⁰ Under a determinate sentencing structure, an individual convicted of a crime receives a particular sentence mandated by the legislature, unless the trial judge finds specific mitigating or aggravating factors.⁵¹ A determinate sentencing structure deemphasizes the rehabilitative aspect of sentencing in favor of retribution for the crime committed⁵² and deterrence through increased certainty of imprisonment.⁵³ Among the other goals of a determinate sentencing structure are a reduction in both the disparity and severity of sentences, as well as an overall reduction in the number of prisoners incarcerated.⁵⁴

The primacy of either of these alternative models has varied over time. In the eighteenth century, sentencing was essentially determinative in nature.⁵⁵ Types of punishment were limited and generally fixed by statute.⁵⁶ For example, the English criminal code at the close of the eighteenth century contained over 200 mandatory capital offenses, ranging from murder to cutting a tree on another's property.⁵⁷ The nineteenth century, however, was marked by movement toward a system of indeterminate sentencing.⁵⁸ The increase in prison populations led to the use of alternative correctional measures such as probation, good time,⁵⁹ and parole, which in turn led to an increasingly indeterminate system.⁶⁰ In addition, intellectual support grew for a sentencing system that emphasized rehabilitation rather than punishment of criminals.⁶¹ By the middle of the twentieth century, the United States Supreme Court could safely state that "[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."⁶²

The indeterminate sentencing structure, with its avowed objective of rehabilitating criminals, relied heavily on the ability of the trial judge and correc-

48. See *Williams v. New York*, 337 U.S. 241, 247-48 (1949); *FAIR AND CERTAIN PUNISHMENT*, *supra* note 45, at 11; *TRUTH IN SENTENCING*, *supra* note 46, at 6.

49. See *FAIR AND CERTAIN PUNISHMENT*, *supra* note 45, at 11.

50. See *Williams*, 337 U.S. at 247.

51. See *FAIR AND CERTAIN PUNISHMENT*, *supra* note 45, at 19-20.

52. *TRUTH IN SENTENCING*, *supra* note 46, at 6.

53. See *FAIR AND CERTAIN PUNISHMENT*, *supra* note 45, at 7; C. SILBERMAN, *supra* note 2, at 192; J. WILSON, *THINKING ABOUT CRIME* 172-78 (1975).

54. See *SENTENCING REFORM*, *supra* note 45, at 9; *TRUTH IN SENTENCING*, *supra* note 46, at 6.

55. See *FAIR AND CERTAIN PUNISHMENT*, *supra* note 45, at 84.

56. See *FAIR AND CERTAIN PUNISHMENT*, *supra* note 45, at 84.

57. *SENTENCING REFORM*, *supra* note 45, at 1.

58. *SENTENCING REFORM*, *supra* note 45, at 4.

59. Good time is the reduction of a prisoner's sentence for a period of confinement during which he commits no disciplinary infractions. A more recent development is gain time, a process by which a prisoner's sentence is reduced based on "the amount of the inmate's assigned work or program participation." *FELONY SENTENCING*, *supra* note 45, at 4.

60. See *SENTENCING REFORM*, *supra* note 45, at 4-6.

61. *FAIR AND CERTAIN PUNISHMENT*, *supra* note 45, at 93-95.

62. *Williams v. New York*, 337 U.S. 241, 248 (1949).

tional officials to determine the appropriate treatment for an offender. Critical to this process of individualized punishment was the trial judge's possession "of the fullest information possible concerning the defendant's life and characteristics."⁶³ A judge should be "largely unlimited either as to the kind of information he may consider, or the source from which it may come."⁶⁴ His inquiry should not be hindered by "restrictive rules of evidence properly applicable to the trial."⁶⁵

It was during this period of virtually unrestricted judicial discretion in the use of information for sentencing purposes that the United States Supreme Court decided *United States v. Grayson*.⁶⁶ In *Grayson* the Court held that a sentencing judge may consider the perjury of a criminal defendant to evaluate accurately the offender's "prospects for rehabilitation and restoration to a useful place in society."⁶⁷ The Court reasoned that perjury by a criminal defendant is "probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing."⁶⁸ Readiness to lie under oath at trial is "'among the more precise and concrete . . . indicia'" available to the sentencing judge as he attempts the difficult task of appraising the defendant's character.⁶⁹ The Court concluded that consideration of a defendant's perjury is proper and even necessary to rational determination of appropriate, individualized punishment.⁷⁰

Grayson was not without its dissenters. Justice Stewart, joined by Justices Brennan and Marshall, submitted a well-reasoned dissent that raised two primary objections. First, increasing an offender's sentence because the trial judge believes he has not testified truthfully imposes a penalty without due process.⁷¹ In addition, such a penalty will serve to inhibit the criminal defendant's consti-

63. *Id.* at 247 (footnote omitted).

64. *United States v. Tucker*, 404 U.S. 443, 446 (1972).

65. *Williams*, 337 U.S. at 247.

66. 438 U.S. 41 (1978). *Grayson* began as a federal criminal trial for prison escape. At trial, the defendant testified in his own defense. Defendant's testimony was impeached on cross-examination by the government and contradicted by rebuttal evidence. *Id.* at 42-43. The jury delivered a verdict of guilty, and the trial judge stated at the sentencing hearing that "it is my view that your defense was a complete fabrication without the slightest merit whatsoever. I feel it is proper for me to consider that fact in the sentencing, and I will do so." *Id.* at 44. Defendant appealed, claiming two errors by the trial court. First, he argued that his sentence amounted to punishment for perjury, a crime for which he had not been convicted. Also, defendant contended that allowing consideration of a criminal defendant's perjury in sentencing would chill the right to testify in one's own defense. *Id.* at 52.

67. *Id.* at 55. The Court adopted a four-part restriction on the trial judge's use of perjury as an aggravating factor. First, the defendant's statement must be willful. *Id.* Next, the statement must be a material falsehood. *Id.* In addition, the perjury must be assessed "in light of all the other knowledge gained about the defendant." *Id.* Finally, the perjury may be used only as an indicator of rehabilitative potential. *Id.*

68. *Id.* at 50.

69. *Id.* at 51 (quoting *United States v. Hendrix*, 505 F.2d 1233, 1236 (2d Cir. 1974) (Frankel, J.), cert. denied, 423 U.S. 897 (1975)). Judge Frankel is the author of a frequently cited book on criminal sentencing policies. See M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

70. See *Grayson*, 438 U.S. at 53.

71. See *id.* at 55-56 (Stewart, J., dissenting). A judge who increases the severity of a sentence because he suspects that the defendant has committed perjury arguably punishes the defendant for a crime "for which he has not been indicted, tried, or convicted by due process." *Id.* at 53.

tutional right to testify in his own behalf.⁷² Chief Justice Burger's majority opinion addressed both points. The due process rights of a defendant are not violated when a sentencing judge uses his first-hand observations of conduct and testimony at trial to tailor the sentence to the defendant after conviction.⁷³ Furthermore, the criminal defendant's right to testify is narrowly limited to "the right to testify truthfully in accordance with the oath There is no protected right to commit perjury."⁷⁴ *Grayson* continues to stand as good constitutional law today.

Even as *Grayson* was being decided, criticism of the indeterminate sentencing structure was growing in response to observations of the failure of rehabilitation and severe disparities in sentence length for similar offenses.⁷⁵ These criticisms were exacerbated in North Carolina by concern over the growing prison population.⁷⁶ The North Carolina Fair Sentencing Act was enacted in 1978 "to reduce unjustified variation in sentences for felonies and to make such sentences, as well as time actually served in prison, more predictable."⁷⁷ It eliminated North Carolina's prior indeterminate sentencing law by providing presumptive sentences for most felonies, reducing parole release and supervision programs, and creating a statutory good-time program for inmates.⁷⁸

The Fair Sentencing Act, however, did not create a purely determinative sentencing structure. A judge may impose a sentence longer or shorter than the presumptive sentence after considering aggravating or mitigating factors.⁷⁹ The statute sets out sixteen aggravating and fifteen mitigating factors that a judge *must* consider before imposing a sentence.⁸⁰ In addition, the sentencing judge "may consider any aggravating and mitigating factors that he finds are proved

72. See *id.* at 56 (Stewart, J., dissenting).

73. See *id.* at 53-54.

74. *Id.* at 54.

75. See SENTENCING REFORM, *supra* note 45, at 6-7.

76. FELONY SENTENCING, *supra* note 45, at 1.

77. FELONY SENTENCING, *supra* note 45, at 3.

78. TRUTH IN SENTENCING, *supra* note 46, at 7. Presumptive sentencing is the name given to a system of criminal sentencing in which "a finding of guilty of committing a crime would predictably incur a particular sentence unless specific mitigating or aggravating factors are established." FAIR AND CERTAIN PUNISHMENT, *supra* note 45, at 19-20.

79. N.C. GEN. STAT. § 15A-1340.4(a) (1988).

80. *Id.* The statutory factors are set out in section 15A-1340.4(a), as follows:

(1) Aggravating factors:

a. The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.

b. The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

c. The defendant was hired or paid to commit the offense.

d. The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

e. The offense was committed against a present or former law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duties.

f. The offense was especially heinous, atrocious, or cruel.

g. The defendant knowingly created a great risk of death to more than one person by

by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing.”⁸¹ The purposes of sentencing also are defined by statute:

means of a weapon or device which would normally be hazardous to the lives of more than one person.

h. The defendant held public office at the time of the offense and the offense related to the conduct of the office.

i. The defendant was armed with or used a deadly weapon at the time of the crime.

j. The victim was very young, or very old, or mentally or physically infirm.

k. The defendant committed the offense while on pretrial release on another felony charge.

l. The defendant involved a person under the age of 16 in the commission of the crime.

m. The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.

n. The defendant took advantage of a position of trust or confidence to commit the offense.

o. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement. Such convictions include those occurring in North Carolina courts and courts of other states, the District of Columbia, and the United States, provided that any crime for which the defendant was convicted in a jurisdiction other than North Carolina would have been a crime if committed in this State. Such prior convictions do not include any crime that is joinable, under G.S. Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced.

p. The offense involved the sale or delivery of a controlled substance to a minor.

....

(2) Mitigating factors:

a. The defendant has no record of criminal convictions or a record consisting solely of misdemeanors punishable by not more than 60 days' imprisonment.

b. The defendant committed the offense under duress, coercion, threat, or compulsion which was insufficient to constitute a defense but significantly reduced his culpability.

c. The defendant was a passive participant or played a minor role in the commission of the offense.

d. The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense.

e. The defendant's immaturity or his limited mental capability at the time of commission of the offense significantly reduced his culpability for the offense.

f. The defendant has made substantial or full restitution to the victim.

g. The victim was more than 16 years of age and was a voluntary participant in the defendant's conduct or consented to it.

h. The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

i. The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.

j. The defendant could not reasonably foresee that his conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences.

k. The defendant reasonably believed that his conduct was legal.

l. Prior to arrest at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.

m. The defendant has been a person of good character or has had a good reputation in the community in which he lives.

n. The defendant is a minor and has reliable supervision available.

o. The defendant has been honorably discharged from the United States armed services.

Id.

81. *Id.* (emphasis added). This provision has been interpreted to allow the trial judge to consider factors in aggravation and mitigation that are not expressly listed in the statute. *See State v.*

The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.⁸²

If the trial judge uses either statutory or nonstatutory factors to impose a sentence other than the presumptive term of imprisonment, he must make specific findings in the record of those factors that are supported by a preponderance of the evidence.⁸³

In light of these statutory provisions, it is clear that the Fair Sentencing Act did not remove all discretion from trial judges in determining appropriate sentences.⁸⁴ The North Carolina Supreme Court has stated that the Act "is an attempt to strike a balance between the inflexibility of a presumptive sentence . . . and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender."⁸⁵ To strike that balance, the Act promotes both retribution and rehabilitation.⁸⁶

In *State v. Thompson*⁸⁷ the North Carolina Supreme Court adopted the reasoning of the United States Supreme Court in *Grayson* and allowed trial judges to consider a defendant's perjury as a nonstatutory aggravating factor relevant to sentencing.⁸⁸ The *Thompson* court held:

As long as the sentence is not increased to punish the perjury itself and the perceived perjury is being treated as only a factor to be weighed, we can find nothing in our statute which would preclude the use of perjury as an aggravating factor, provided, of course, it is proved by a preponderance of the evidence.⁸⁹

The court reasoned that lying under oath "often indicates a defendant's continued defiance of society's system of laws."⁹⁰ The court held that because such an

Setzer, 61 N.C. App. 500, 504-05, 301 S.E.2d 107, 110, *disc. rev. denied*, 308 N.C. 680, 304 S.E.2d 760 (1983). These factors often are called nonstatutory, and this Note follows that convention.

82. N.C. GEN. STAT. § 15A-1340.3 (1988).

83. *Id.* § 15A-1340.4(b). These findings are entered on a pre-printed worksheet provided by the Administrative Office of the Courts. To justify imposition of a sentence greater than the presumptive term, the trial judge must find that the aggravating factors outweigh the mitigating factors. *Id.* She may find "that one factor in aggravation outweighs more than one factor in mitigation and vice versa. . . . 'The discretionary task of weighing . . . factors is not a simple matter of mathematics.'" *State v. Ahearn*, 307 N.C. 584, 597, 300 S.E.2d 689, 697 (1983) (quoting *State v. Davis*, 58 N.C. App. 330, 333, 293 S.E.2d 658, 661, *disc. rev. denied*, 306 N.C. 745, 295 S.E.2d 482 (1982)).

84. *Ahearn*, 307 N.C. at 596, 300 S.E.2d at 697.

85. *Id.* at 596, 300 S.E.2d at 696.

86. See N.C. GEN. STAT. § 15A-1340.3 (1988).

87. 310 N.C. 209, 311 S.E.2d 866 (1984), *overruled*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). *Thompson* concerned a defendant charged with armed robbery who testified in his own defense. His testimony consisted of an alibi defense that he was not in the state when the crime was committed. The testimony contained numerous inconsistencies, and Thompson ultimately was convicted. *Id.* at 223, 311 S.E.2d at 874.

88. For a discussion of *Grayson*, see *supra* notes 66-74.

89. *Thompson*, 310 N.C. at 221, 311 S.E.2d at 873.

90. *Id.* at 222, 311 S.E.2d at 873.

attitude adversely reflects on an offender's rehabilitative potential,⁹¹ which itself is a valid factor to be considered in sentencing,⁹² perjury is "reasonably related to the purposes of sentencing," as required of all nonstatutory aggravating factors that the sentencing judge may consider.⁹³

The *Thompson* court acknowledged the problems inherent in the use of perjury as an aggravating factor. To minimize these dangers, the court insisted on several restrictions on judicial use of the perjury factor. First, as required by statute,⁹⁴ the sentencing judge must be convinced by a preponderance of the evidence that the defendant has committed perjury.⁹⁵ Next, the judge must make findings on the record to ensure reviewability in the event the sentence imposed is greater than the presumptive sentence.⁹⁶ Finally, the court specifically stated that it "[did] not encourage the use of such perjury to enhance a defendant's sentence."⁹⁷ It should be used with "extreme caution" and only "in the most extreme case."⁹⁸

In *State v. Vandiver*⁹⁹ the North Carolina Supreme Court overruled *Thompson* and held that "perjury may no longer constitute a nonstatutory aggravating factor in North Carolina."¹⁰⁰ The court's reasoning was concise, and relied on two points.¹⁰¹ First, the court described the "extreme case" standard established in *Thompson* as unworkable and susceptible to misuse.¹⁰² In addition, the court found it impossible to create an adequate standard to prevent abuse by trial judges.¹⁰³ *Vandiver* places North Carolina in the minority of jurisdictions that prohibit the use of a criminal defendant's perjury as an aggravating factor in sentencing.¹⁰⁴

91. *Id.*

92. See N.C. GEN. STAT. § 15A-1340.3 (1988).

93. *Thompson*, 310 N.C. at 222, 311 S.E.2d at 873-74 (quoting N.C. GEN. STAT. § 15A-1340.4(a) (1988)).

94. N.C. GEN. STAT. § 15A-1340.4(a) (1988).

95. *Thompson*, 310 N.C. at 221, 311 S.E.2d at 873.

96. *Id.* at 225, 311 S.E.2d at 875; see also N.C. GEN. STAT. § 15A-1444(a)(1) (1988) (appeal of right when sentence imposed exceeds presumptive term set by statute).

97. *Thompson*, 310 N.C. at 226, 311 S.E.2d at 876.

98. *Id.* at 227, 311 S.E.2d at 876.

99. 321 N.C. 570, 364 S.E.2d 373 (1988).

100. *Id.* at 574, 364 S.E.2d at 375.

101. More significant, perhaps, is the reasoning *not* used by the *Vandiver* court. The court did not rely upon a due process, fifth, or sixth amendment rationale, as have other jurisdictions that reject the use of perjury as an aggravating factor in sentencing. See, e.g., *Beauvais v. State*, 475 So. 2d 1342, 1343-44 (Fla. Dist. Ct. App. 1985). Instead, the *Vandiver* court rested its holding on the need to avoid judicial subjectivity and "the interests of justice." *Vandiver*, 321 N.C. at 574, 364 S.E.2d at 375.

102. *Vandiver*, 321 N.C. at 573-74, 364 S.E.2d at 375.

103. *Id.* at 574, 364 S.E.2d at 375.

104. See Annotation, *supra* note 4, at 892-95. There are three primary reasons offered by those jurisdictions that do not allow the use of suspected perjury as an aggravating factor. First, increasing a defendant's sentence because she is believed to have committed perjury is equivalent to punishing her for a crime for which she has not been indicted, tried, or convicted. Next, such a practice discourages criminal defendants from exercising their constitutional right to testify in their own defense. Also, a number of jurisdictions hold that the use of perjury in sentencing works as a disincentive to the defendant's right to plead not guilty and to demand a trial. See, e.g., *Beauvais*, 475 So. 2d at 1344.

Three considerations point to the conclusion that the North Carolina Supreme Court erred in holding as it did in *Vandiver*. First, the court significantly overstated the *Thompson* standard's unworkability and potential for abuse. In addition, the court's holding is inconsistent with the sentencing philosophy contained in the North Carolina Fair Sentencing Act. Finally, the court vastly understated its own abilities when it found it impossible to formulate a more useful standard to govern the use of perjury as an aggravating factor.

Justice Martin, writing for the court in *Vandiver*, stated that "[e]xperience has demonstrated that the concerns expressed in *Thompson* were well-founded. The 'extreme case' standard has proved unworkable and our words of caution insufficient bulwarks against misuse of the aggravating factor."¹⁰⁵ This language does not accurately describe the reality of the *Thompson* standard as applied by the trial courts of North Carolina.

First, the *Vandiver* court exaggerated the actual use of nonstatutory aggravating factors, including perjury. It is true that the number of sentences that are greater than the presumptive term outnumber those that are below it.¹⁰⁶ In addition, the number of felony sentences that are above the presumptive term has increased by more than fifty percent since 1981.¹⁰⁷ These developments *could* indicate an overzealousness on the part of trial judges in the application of aggravating factors generally, but do not necessarily indicate that any particular nonstatutory factor is responsible. Actually, sentencing judges seldom find nonstatutory aggravating or mitigating factors at all.¹⁰⁸ This indicates that the disproportionate number of sentences above the presumptive term and the increasing frequency with which they are imposed are largely the result of statutory rather than nonstatutory aggravating factors.

It seems that if the *Thompson* court's concerns were well founded and its standard unworkable, as the *Vandiver* court maintained, then a great number of cases questioning the use of perjury as a nonstatutory aggravating factor would have found their way to the supreme court. This has not been the case. Since the court's decision in *Thompson*, only two cases have been appealed on the ground that perjury was used improperly as an aggravating factor.¹⁰⁹ In addition, the supreme court found only one of those two cases to constitute an improper use of perjury as an aggravating factor.¹¹⁰

In *State v. Rogers*¹¹¹ the supreme court held that the trial court had applied

105. *Vandiver*, 321 N.C. at 573-74, 364 S.E.2d at 375. For a discussion of the *Thompson* extreme case standard, see *supra* text accompanying notes 97-98.

106. FELONY SENTENCING, *supra* note 45, at 13. For example, in 1985-86, 53% of sentences for most felonies were above the presumptive term, while only 10% were below it. *Id.* at Figure 23.

107. FELONY SENTENCING, *supra* note 45, at 14. In 1981-82, 35% of felony sentences examined were found to be greater than the presumptive term. In 1985-86, the percentage had grown to 53%. *Id.* at 14 & Figure 23.

108. FELONY SENTENCING, *supra* note 45, at 5.

109. See *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), *cert. denied*, 476 U.S. 1165 (1986), *overruled*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

110. See *Rogers*, 316 N.C. at 232, 341 S.E.2d at 730.

111. 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). *Rogers* dealt with a trial on charges of first-degree murder and assault with a

the *Thompson* standard improperly in finding perjury an aggravating factor.¹¹² The court stated that "under *Thompson* the witness's testimony must be *undeniably perjured*" and refused to find that mere conflict with the state's version of the facts, combined with otherwise intrinsically consistent testimony by the defendant, met this standard.¹¹³ In addition, the court emphasized the poor quality of the testimony offered by the state's witness¹¹⁴ and resisted the notion that a guilty verdict by a jury hearing defendant's own testimony compels a finding of perjury.¹¹⁵

A further example of the application of the *Thompson* standard is found in *State v. Brown*.¹¹⁶ In *Brown*, defendant testified on his own behalf and offered an alternative chronology of events to that offered by the state in his trial for the armed robbery and first-degree murder of a convenience store clerk. In addition, he denied making a limited confession to the police on the day of the crime. Finally, he admitted having several felony convictions, including one for the shooting of a police officer in Virginia that resulted in the officer's paralysis, but denied actually committing any of the offenses.¹¹⁷ The state offered evidence of the defendant's confession, his prior convictions and, most dramatically, secured the in-person testimony of the police officer Brown was convicted of shooting.¹¹⁸ The court reiterated its warning that "trial judges should exercise extreme caution in this area and refrain from finding perjury as an aggravating factor except in the most egregious cases."¹¹⁹ Nevertheless, the court sustained the trial court's finding of perjury by a preponderance of evidence, making clear that

deadly weapon with intent to kill. The co-defendant, Belinda Carraway, testified that the victim was shot in self-defense. The trial judge found that the jury, by convicting Carraway, disbelieved her testimony. The court then "likewise finds she committed perjury." *Id.* at 231-32, 341 S.E.2d at 730.

112. *Id.*

113. *Id.* at 232, 341 S.E.2d at 730 (emphasis added).

114. *Id.* ("testimony reeked of inconsistencies, contradictions, and recantations").

115. *Id.* The verdict, without more, does not authorize a finding of perjury. "In a prosecution for perjury it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances sufficient to turn the scales against the defendant's oath." *State v. Wilson*, 30 N.C. App. 149, 153, 226 S.E.2d 518, 521 (1976) (citing *State v. Sailor*, 240 N.C. 113, 115, 81 S.E.2d 191, 192 (1954)). The jury may find a defendant's testimony irrelevant to the issue of his guilt or innocence. Alternatively, the jury may believe the defendant's testimony, but still find that he failed to raise a reasonable doubt as to his guilt. Also, the defendant may testify truthfully in an effort to establish an affirmative defense, but ultimately fail to establish the defense for lack of some required element. See *United States v. Grayson*, 438 U.S. 41, 57 n.4 (1978) (Stewart, J., dissenting). Finally, "some essential elements of proof of criminal conduct, such as knowledge, intent, malice, and premeditation are sometimes so subjective that testimony about them cannot be readily categorized as true or false." *United States v. Moore*, 484 F.2d 1284, 1287-88 (4th Cir. 1973). Jurisdictions that allow the use of suspected perjury as an aggravating factor in sentencing attempt to control these possibilities by requiring that the sentencing authority find that the defendant's testimony "contained willful and material falsehoods," *Grayson*, 438 U.S. at 55, or that "the verdict of guilt must necessarily establish that the defendant lied, not merely that the jury did not believe his testimony." *Commonwealth v. Thurmond*, 268 Pa. Super. 283, 288, 407 A.2d 1357, 1359 (1979).

116. 315 N.C. 40, 337 S.E.2d 808 (1985), *cert. denied*, 476 U.S. 1165 (1986), *overruled*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

117. *Id.* at 47, 337 S.E.2d at 816.

118. *Id.* at 47-48, 337 S.E.2d at 816.

119. *Id.* at 69, 337 S.E.2d at 828. The court referred to its similar warning in *Thompson*. *Id.*; see *supra* note 98 and accompanying text.

Brown was an example of an egregious case.¹²⁰ Careful review of the case law in this area thus tends to repudiate the *Vandiver* court's view of the standard as unworkable or prone to misuse. If such were the case, then the argument undoubtedly would have been made by the *Vandiver* defendant. Both at trial and on appeal, however, defendant argued only that her testimony failed to rise to the level of undeniably perjured.¹²¹

Such an example of judicial activism is inconsistent with prior case law regarding appellate review of sentencing decisions. Ironically, none other than Justice (then Judge) Martin once wrote:

Judges still have discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within their sound discretion. . . .

The balance struck by the trial judge will not be disturbed if there is support in the record for his determination.¹²²

Even if the court had exercised the restraint counseled by then-Judge Martin, it may have been able to achieve the same result obtained in *Vandiver* without overruling *Thompson*. Defendant argued that the facts surrounding her testimony were more comparable with those of *Rogers*, in which the court refused to sustain the use of perjury as an aggravating factor.¹²³ As in *Rogers*, *Vandiver* arguably offered consistent testimony as to the events leading up to the stabbing. In addition, Mrs. Haselden, the state's only eyewitness, was taking medication at the time she allegedly saw defendant stab Scott.¹²⁴ The remainder of the testimony by the state's witnesses contained various inconsistencies as well.¹²⁵ It is conceivable that the *Vandiver* court could have reached the same result while observing *stare decisis* had it simply adopted defendant's arguments on appeal.¹²⁶

The court's holding prohibiting the use of perjury as a nonstatutory aggravating factor arguably is inconsistent with the North Carolina Fair Sentencing Act. At first glance, the Act, with its presumptive sentences, reduced parole release and supervision, statutory good-time for inmates, and appeals of right upon deviation from presumptive terms, appears to be a highly determinative sentencing structure.¹²⁷ The statutory scheme, however, contains many provisions that conflict with a true determinate system.¹²⁸ The Fair Sentencing Act is

120. *Id.* at 68, 337 S.E.2d at 828.

121. See Defendant-Appellant's Brief at 8-12.

122. *State v. Davis*, 58 N.C. App. 330, 333-34, 293 S.E.2d 658, 661 (Martin, J.) (quoted with approval in *State v. Ahearn*, 307 N.C. 584, 597, 300 S.E.2d 689, 697 (1983)), *disc. rev. denied*, 306 N.C. 745, 295 S.E.2d 482 (1982).

123. See Defendant-Appellant's Brief at 11. For a discussion of *Rogers*, see *supra* notes 111-115 and accompanying text.

124. Defendant-Appellant's Brief at 11.

125. See *id.* These discrepancies included the lighting of the murder scene, the actual movements and location of Mrs. Haselden, and her prior inconsistent statements. *Id.*

126. This is not to say the supreme court would have definitely reached this outcome. *Vandiver* was overheard by a police officer to say, "What do you do when a white boy slaps you?" Defendant-Appellant's Brief at 5.

127. See *supra* notes 77-83 and accompanying text.

128. For example, rehabilitation is retained as a purpose of sentencing. N.C. GEN. STAT. § 15A-

probably best described as a "hybrid of old and new concepts."¹²⁹ The North Carolina Supreme Court previously has stated,

The Fair Sentencing Act was not intended . . . to remove all discretion from our able trial judges. The trial judge should be permitted wide latitude in arriving at the truth as to the existence of aggravating and mitigating circumstances, for it is only he who observes the demeanor of the witnesses and hears the testimony.¹³⁰

More specifically, the statute expressly empowers the sentencing judge to "consider *any* aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing."¹³¹ Though the statute describes sixteen aggravating and fifteen mitigating factors the trial judge must consider, she is not in fact limited by this enumeration.¹³² The trial judge's discretion in this area is such that "[t]here is a presumption that the [sentencing] judgment of a court is valid and just."¹³³ A holding, like *Vandiver*, that reins in trial judges hardly is consistent with such common law and statutory discretion.

Courts traditionally have allowed sentencing judges to use a broad range of information in determining an appropriate sentence for an individual, a practice inconsistent with the restrictive holding in *Vandiver*. To determine an appropriate sentence, a trial judge may consider the "age, character, education, environment, habits, mentality, propensities and record of the defendant."¹³⁴ The sentencing judge is "not required to ignore the facts and evidence of the case,"¹³⁵ because only he observes the testimony and demeanor of witnesses.¹³⁶ The trial judge also may direct that a probation officer prepare a presentence report.¹³⁷ The probation officer is commanded by statute to investigate "*all circumstances* relevant to sentencing" and present his findings to the court.¹³⁸ Sentencing reports frequently contain information on the defendant's prior criminal record and may include arrests not followed by a conviction as well as juvenile

1340.3 (1988). Plea bargains are exempted from presumptive sentences, *id.* § 15A-1340.4(a), as are the most serious felonies. *Id.* Judges retain full discretion to suspend a sentence and place the convicted offender on probation. *Id.*

129. TRUTH IN SENTENCING, *supra* note 46, at 7; see *supra* notes 78-86 and accompanying text.

130. State v. Ahearn, 307 N.C. 584, 596, 300 S.E.2d 689, 697 (1983).

131. N.C. GEN. STAT. § 15A-1340.4(a) (1988) (emphasis added). Both the United States and North Carolina Supreme Courts have held that perjury by a criminal defendant is probative of rehabilitative potential. United States v. Grayson, 438 U.S. 41, 52 (1978); State v. Thompson, 310 N.C. 209, 222, 311 S.E.2d 866, 871 (1984), *overruled*, State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988). Rehabilitation is still explicitly identified as a valid purpose of sentencing in North Carolina. N.C. GEN. STAT. § 15A-1340.3 (1988).

132. See N.C. GEN. STAT. § 15-1340.4(a). For a complete listing of statutory aggravating and mitigating factors, see *supra* note 80.

133. Ahearn, 307 N.C. at 597, 300 S.E.2d at 697 (quoting State v. Pope, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962)).

134. State v. Morris, 60 N.C. App. 750, 754-55, 300 S.E.2d 46, 49 (1983). In North Carolina, the rules of evidence do not apply to sentencing hearings. N.C. GEN. STAT. § 15A-1334(b) (1988); N.C. R. EVID. 1101(b)(3).

135. Morris, 60 N.C. App. at 755, 300 S.E.2d at 49.

136. See Ahearn, 307 N.C. at 596, 300 S.E.2d at 697.

137. N.C. GEN. STAT. § 15A-1332(b) (1988).

138. *Id.* (emphasis added).

adjudications.¹³⁹ Such broad access to extrajudicial information concerning the convicted offender weighs heavily against restricting the use of what the trial judge has seen and heard at trial. To prohibit a sentencing judge from considering a criminal defendant's perjury is analogous to putting one's "finger in the dike," while a torrent of other extrajudicial information spills over the top of the wall of due process.

The court's failure to promulgate a sufficiently coherent standard allowing the use of perjury as an aggravating factor in sentencing, opting instead to prohibit its use altogether, is a third deficiency of *Vandiver*. Indeed, the court found it "impossible to formulate adequately concrete guidelines to prevent future erroneous findings" of perjury.¹⁴⁰ This pronouncement is hardly credible given the plethora of guidance in both statutes and case law in North Carolina, as well as that found in the majority of other jurisdictions that continue to use suspected perjury as an aggravating factor in sentencing.¹⁴¹

In applying North Carolina law, the court should have turned first to the statutory provisions governing sentencing in state courts. For nonstatutory aggravating or mitigating factors, the statute sets out a two-part standard. First, the factor must be "reasonably related to the purposes of sentencing."¹⁴² In addition, the factor must be established by a preponderance of the evidence.¹⁴³ Finally, the sentencing judge must "specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence."¹⁴⁴ This requirement discourages trial judges from considering illegitimate factors in sentencing by forcing them to articulate their reasonings. The findings also provide a basis for appellate review of the sentence imposed by the trial judge.

The case law refines the statutory foundation by providing guidance as to what constitutes a preponderance of the evidence. The supreme court in *State v. Thompson*¹⁴⁵ required "numerous discrepancies in the defendant's testimony" to reach the evidentiary threshold.¹⁴⁶ *Thompson* also instructed that sentencing

139. See DIVISION OF ADULT PROBATION AND PAROLE, N.C. DEP'T OF CORRECTIONS, ADULT PROBATION AND PAROLE MANUAL 1-2 (1983); PRESENTENCE INVESTIGATION, *supra* note 1, at 10-11.

140. *Vandiver*, 321 N.C. at 574, 364 S.E.2d at 375 (emphasis added).

141. See, e.g., *United States v. Grayson*, 438 U.S. 41, 55 (1978) (federal); *United States v. Warren*, 13 M.J. 278, 284 (C.M.A. 1982) (military); *Dymenstein v. State*, 720 P.2d 42, 46 (Alaska Ct. App. 1986); *People v. Speed*, 129 Ill. App. 3d 348, 349, 472 N.E.2d 572, 573-74 (1984); *Commonwealth v. Thurmond*, 268 Pa. Super. 283, 287-88, 407 A.2d 1357, 1359-60 (1979); *State v. Bertoldi*, 495 A.2d 247, 253-54 (R.I. 1985); *State v. Finley*, 355 S.E.2d 47, 52 (W. Va. 1987). For a more detailed discussion, see Annotation, *supra* note 4, at 890-900.

142. N.C. GEN. STAT. § 15A-1340.4(a) (1988).

143. *Id.*

144. *Id.* § 15A-1340.4(b).

145. 310 N.C. 209, 311 S.E.2d 866 (1984), *overruled*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

146. *Id.* at 223, 311 S.E.2d at 874. Most revealing was the fact that defendant denied being in the state for the entire month surrounding the crime. When confronted with a signed affidavit of indigency that he had submitted in person to a clerk of court named Mrs. Wright during his alleged absence, he responded, "I don't remember talking to no Miss Wright. I remember talking to Mrs. Spangler." *Id.* at 214, 311 S.E.2d at 869.

judges "should exercise extreme caution . . . and should refrain from finding perjury as an aggravating factor except in the most extreme case."¹⁴⁷ Subsequent decisions provide examples of when such extreme cases arise.¹⁴⁸ The case law provides negative examples as well. Mere conflict with the state's evidence is not sufficient to support a finding of perjury if the defendant's testimony is otherwise consistent.¹⁴⁹ Likewise, a verdict of guilty does not compel a finding of perjury.¹⁵⁰ Testimony must be found to be "undeniably perjured" to be used as an aggravating factor.¹⁵¹

A somewhat clearer formulation may be found by turning to other jurisdictions for comparison. The United States Supreme Court in *United States v. Grayson*¹⁵² established a four-part test for the discretionary use of perjury as an aggravating factor.¹⁵³ A compelling formulation of the *Grayson* standard is found in *Commonwealth v. Thurmond*.¹⁵⁴

First, the misstatements must be willful. . . . Second, the misstatement must be material, not of marginal importance. . . . Third, the verdict of guilt must necessarily establish that the defendant lied, not merely that the jury did not believe his testimony. . . . Fourth, the verdict must be supported by sufficient credible evidence. . . . Fifth, the trial court, if not acting as trier of fact, must observe the testimony allegedly false. . . . Finally, the court may consider the defendant's lying only as one fact among many bearing on sentence.¹⁵⁵

In light of such well-developed alternative standards, not to mention those within the court's jurisdiction, it is extremely difficult to believe that the North Carolina Supreme Court could not sift and choose among them to develop a standard of its own.

The North Carolina Supreme Court erred in its holding in *Vandiver* for three reasons. First, it significantly overstated the unworkability of the existing standard governing the use of suspected perjury by a criminal defendant as an aggravating factor in sentencing.¹⁵⁶ Next, it failed to take into account the large amount of judicial discretion provided by statute under the Fair Sentencing Act.¹⁵⁷ Finally, and perhaps most importantly, the court shirked its responsibil-

147. *Id.* at 227, 311 S.E.2d at 876.

148. *E.g.*, *State v. Brown*, 315 N.C. 40, 68, 337 S.E.2d 808, 828 (1985), *cert. denied*, 476 U.S. 1165 (1986), *overruled*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). For a discussion of *Brown*, see *supra* notes 116-20 and accompanying text.

149. *State v. Rogers*, 316 N.C. 203, 232, 341 S.E.2d 713, 730 (1986), *overruled*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

150. *Id.*; see *supra* note 115.

151. *Rogers*, 316 N.C. at 232, 341 S.E.2d at 730.

152. 438 U.S. 41 (1978).

153. See *supra* note 67. It is interesting to note that the military has adopted a system almost identical to that described in *Grayson*, but compresses it to a three-point analysis. *United States v. Warren*, 13 M.J. 278, 285-86 (C.M.A. 1982). First, the court must find the accused lied under oath. *Id.* at 285. Next, the falsehoods must be willful and material. *Id.* at 286. Finally, the perjured testimony is considered only as it bears on the rehabilitative potential of the convicted offender. *Id.*

154. 268 Pa. Super. 283, 407 A.2d 1357 (1979).

155. *Id.* at 287-88, 407 A.2d at 1359-60.

156. See *supra* notes 106-26 and accompanying text.

157. See *supra* notes 127-39 and accompanying text.

ity to its own precedent by failing to adequately consider alternatives to overruling a developed body of case law.¹⁵⁸ Such action, particularly in light of the statutory framework provided by the Fair Sentencing Act, ignores *stare decisis* and flies in the face of legislative intent.

Perjury by a criminal defendant should be considered as a nonstatutory aggravating factor bearing on sentencing in North Carolina.¹⁵⁹ To fully answer the concerns voiced by the supreme court in *Vandiver*, a restrictive framework, such as that found in *Commonwealth v. Thurmond*,¹⁶⁰ should be adopted. In this way, the criminal defendant's right to testify on his own behalf will be protected and her due process rights preserved.

It has been said that "[i]n theory, the function of the courts is to determine the guilt or innocence of the accused. Actually, it is to decide what to do with persons whose guilt or innocence is not at issue."¹⁶¹ The noted scholar James Q. Wilson has said that sentencing is *the primary task* of the court system.¹⁶² By moving to a more strictly presumptive system of sentencing in its decision in *Vandiver*, the North Carolina Supreme Court shifts part of its "primary task" to the legislature, and in effect "substitute[s] the capriciousness of the legislature for the capriciousness of individual judges."¹⁶³ This can only serve to upset the sentencing balance of power established under the North Carolina Fair Sentencing Act.

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158. See *supra* notes 140-55 and accompanying text.

159. Alternatively, the legislature could amend the Fair Sentencing Act to add perjury by a criminal defendant to the already existing list of 16 aggravating factors that a trial judge must consider during sentencing. No other jurisdiction has yet done so, however. Given the highly subjective determination required of the trial judge in such a situation, it does not seem appropriate to *require* him to consider perjury as an aggravating factor. A more reasonable approach, and that advocated by this Note, is to allow him the option to do so.

160. 268 Pa. Super. 283, 407 A.2d 1357 (1979).

161. J. WILSON, *supra* note 53, at 163.

162. See J. WILSON, *supra* note 53, at 179.

163. C. SILBERMAN, *supra* note 2, at 294.