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Albright, Justice, concurring:

I reluctantly concur in the decision of this case because our jurisprudence has generally recognized the propriety of a sentencing circuit judge taking into account a defendant's failure to admit the commission of an offense for which he or she has been convicted by a jury. I especially recognize the propriety of such a consideration as part of the sentencing decision where the sentencing court is convinced that a convicted person actually lied during the trial of the case. Nevertheless, I urge caution.

In several cases throughout the country in recent months it appears that persons convicted of offenses – sometimes very serious offenses – have later been cleared of those charges by the evolving technology surrounding DNA testing. In one such case a convicted person was denied parole on multiple occasions because, as it turned out, he truthfully and correctly refused to acknowledge guilt of a crime he did not commit.

In the case before us the sentencing judge refused to consider lighter sentences or alternative dispositions because the defendant failed to admit guilt. The judge publicly announced that he would consider a lighter sentence if the defendant admitted guilt.

Presumably, had the defendant admitted guilt, the judge felt that it was possible, if not probable, that some lighter sentence or alternative treatment of the defendant would have satisfactorily protected the public interest, served as sufficient punishment, and promoted the interests of both the defendant and society.

I respectfully submit that the judge could have entertained such considerations by simply assuming the guilt of the defendant. Having made such an assumption, the question remains what sentence would adequately protect the public interest, appropriately punish the defendant, and promote the interests of both the defendant and society.

In recent public remarks United States Supreme Court Associate Justice Anthony M. Kennedy called for a re-examination of sentencing practices throughout the country, including especially the so-called “Federal Sentencing Guidelines.” Among other things, Justice Kennedy pointed to the high number of persons incarcerated in the United States compared to other western democracies. Justice Kennedy has a point – a very important point.

I am authorized to state that Justice Starcher joins in this concurring opinion.