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PALMER, J., concurring. I agree with the majority's conclusion that the trial court properly considered, for sentencing purposes, the fact that the defendant, Peter Tarasco, engaged in drug dealing. I also agree with the majority that, even though the defendant testified at trial concerning his drug dealing activities, details of those activities are set forth in the presentence investigation report, and that report apparently served as a primary source of information concerning the defendant's drug dealing. I therefore join the majority opinion.

Although the record indicates that the trial court also may have considered the defendant's own testimony acknowledging his drug trafficking activities, the majority avoids the defendant's claim that, in so doing, the trial court impermissibly burdened or chilled his constitutional right to testify in his own defense by using that testimony against him at the time of sentencing. I write separately to express my view that the defendant's constitutional claim lacks merit.¹

When the defendant elected to testify, he opened himself up to certain questions about his drug dealing activities, and the jury therefore was entitled to consider the defendant's answers to those questions in its deliberations. "A defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics." *Jenkins v. Anderson*, 447 U.S. 231, 238, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980). Consequently, there is no constitutional infirmity in "requir[ing] [a] defendant to weigh such pros and cons in deciding whether to testify." *McGautha v. California*, 402 U.S. 183, 215, 91 S. Ct. 1454, 28 L. Ed. 2d 711 (1971). I see no reason why it is permissible for the jury to consider such testimony for purposes of ascertaining whether the defendant is guilty or not guilty but not permissible for the court to consider that same testimony for purposes of sentencing. In other words, to the extent that the trial court relied on certain of the defendant's trial testimony in determining the appropriate sentence, the court's reliance on that testimony was no more a burden on the defendant's right to testify than was the jury's consideration of that same testimony in determining the defendant's guilt.

It is well established that "the [c]onstitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." (Internal quotation marks omitted.) *Jenkins v. Anderson*, supra, 447 U.S. 236. Thus, it is settled that a defendant who elects to testify may be subject to enhanced punishment if the trial court believes that he lied on the witness stand; see *United States v. Grayson*, 438 U.S. 41, 52–55, 98 S. Ct.

2610, 57 L. Ed. 2d 582 (1978); and there is no basis for concluding that a sentencing court cannot also consider a defendant's truthful but adverse trial testimony. See *id.*, 50 ("a sentencing authority may legitimately consider the evidence heard during trial, as well as the demeanor of the accused"). Indeed, a defendant who takes the stand and admits to illegal conduct is not immunized from prosecution for that conduct. Similarly, if, while testifying on his own behalf, a defendant admits to unlawful or improper conduct, he bears the risk that the trial court will consider that testimony, among many other factors, in determining the correct sentence. See *Portuondo v. Agard*, 529 U.S. 61, 69, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) ("[w]hen [a defendant] assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well" [internal quotation marks omitted]). To conclude otherwise would be inconsistent with the fact that "the evolutionary history of sentencing . . . demonstrates that it is proper—indeed, even necessary for the rational exercise of discretion—to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light those may shed on the sentencing decision." *United States v. Grayson*, *supra*, 53. It is not surprising, therefore, that the defendant has not cited a single case in which a court has concluded that a defendant's right to testify was violated because the sentencing judge considered the defendant's own damaging testimony for sentencing purposes. Consequently, there is no merit to the defendant's contention that his right to testify was impermissibly burdened on the basis of the trial court's consideration of his testimony in deciding on the appropriate sentence.

¹ I address this issue primarily because the majority's decision to avoid the defendant's constitutional claim possibly could be construed as suggesting that the claim might have merit, and I believe that it is important to dispel any such suggestion, especially for future cases.