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## REVIEW OF LEGAL BUT EXCESSIVE SENTENCES IN THE FEDERAL COURTS

### INTRODUCTION

Traditionally, the role of the judiciary during feudal times was to determine the question of guilt and to enter judgment. When this was done, punishment was imposed as a matter of course unless the defendant was given a royal pardon. Hence, the major variations in punishment existed primarily in the methods by which the offender was to be executed rather than in the length of his incarceration.<sup>1</sup>

Reform, in the nature of making the punishment fit the individual and the crime, rather than the crime alone, brought into being the possibility of inequality in the treatment of convicted offenders.

Before reform all offenders were treated with inhumane equality; after reform humane inequality was guaranteed, carrying with it the possibility that two offenders of substantially equivalent character whose criminal acts were not materially different might receive glaringly disparate sentences.<sup>2</sup>

In order to lessen this possibility, numerous control devices were promulgated: Among these were parole, probation, and appellate review of sentencing. While parole and probation have long been established methods for reducing the longevity of a defendant's sentence, appellate review of a legal sentence is practically unknown to criminal jurisprudence except in a handful of states where statutory authority has conferred this power.<sup>3</sup>

### THE FEDERAL COURT SYSTEM

Prior to the establishment of the circuit courts,<sup>4</sup> the Judicature Act of 1879<sup>5</sup> was construed to allow the circuit courts to modify a sentence whether it was illegal or too severe.<sup>6</sup> When the appellate jurisdiction of the circuit courts was transferred to the Circuit Court of Appeals in 1891,

<sup>1</sup> George, *Comparative Sentencing Techniques*, Fed. Prob., March 1959, p. 27.

<sup>2</sup> *Ibid.*

<sup>3</sup> For a collection of the state decisions, see, Annot., 29 A.L.R. 313 (1924); Supp. Annot., 89 A.L.R. 295 (1934). See generally, Hall, *Reduction of Criminal Sentences on Appeal*, 37 COLUM. L. REV. 521 (1937).

<sup>4</sup> 28 U.S.C.A. § 43 (Supp. 1959).

<sup>5</sup> "The circuit court for each judicial district shall have jurisdiction of writs of error in all criminal cases tried before the district court where the sentence is imprisonment . . . and in such case a respondent feeling himself aggrieved by a decision of a district court, may except to the opinion of the court . . ." Act of March 3, 1879, ch. 176, § 1, 20 Stat. 354.

<sup>6</sup> *United States v. Wynn*, 11 Fed. 57 (8th Cir. 1882); *Bates v. United States*, 10 Fed. 92 (7th Cir. 1881).

no similar provision was incorporated into the new act; hence it was recognized that the power to review in such cases had been abrogated.<sup>7</sup> Consequently, during the past seventy years, every circuit has repeatedly held that where the sentence imposed in the district court is within the statutory limits prescribed by Congress, the United States Court of Appeals has no power to review a seemingly excessive sentence,<sup>8</sup> in the absence of an abuse of discretion in the lower court.<sup>9</sup> Although unanimity of result has prevailed, disparity in the reasoning has existed; thus, the rule has been expressed in varying degrees of strictness. One line of cases, declaring the more strict form of the rule, has held that where the sentence was legal, no review of the trial court's discretion was possible even though the sentence were severe,<sup>10</sup> and that the only remedy available to a defendant who felt that his sentence was excessive was an appeal to the ex-

<sup>7</sup> *Jackson v. United States*, 102 Fed. 473 (9th Cir. 1900).

<sup>8</sup> *First Circuit*: *Crespo v. United States*, 151 F. 2d 44 (1st Cir. 1945), *petition for cert. dismissed*, 327 U.S. 758 (1946); *Second Circuit*: *United States v. Sohnen*, 280 F. 2d 109 (2d Cir. 1960); *United States v. Lo Duca*, 274 F. 2d 57 (2d Cir. 1960); *Roth v. United States*, 255 F. 2d 440 (2d Cir.), *cert. denied*, 358 U.S. 819 (1958); *United States v. Rosenberg*, 195 F. 2d 583 (2d Cir.), *cert. denied*, 344 U.S. 889 (1952); *Third Circuit*: *United States v. Williams*, 254 F. 2d 253 (3d Cir. 1958); *Fourth Circuit*: *Tincher v. United States*, 11 F. 2d 18 (4th Cir.), *cert. denied*, 271 U.S. 664 (1926); *Peterson v. United States*, 246 Fed. 118 (4th Cir. 1917); *Fifth Circuit*: *Granger v. United States*, 275 F. 2d 127 (5th Cir. 1960); *Sixth Circuit*: *Costner v. United States*, 271 F. 2d 261 (6th Cir. 1959); *De Mars v. United States*, 254 F. 2d 594 (6th Cir. 1958); *Livers v. United States*, 185 F. 2d 807 (6th Cir. 1950); *Beckett v. United States*, 84 F. 2d 731 (6th Cir. 1936); *Seventh Circuit*: *United States v. Hetherington*, 279 F. 2d 792 (7th Cir. 1960); *United States v. De Marie*, 261 F. 2d 477 (7th Cir. 1958); *United States v. Kapsalis*, 214 F. 2d 677 (7th Cir. 1954); *Scala v. United States*, 54 F. 2d 608 (7th Cir. 1931); *Bailey v. United States*, 284 Fed. 126 (7th Cir. 1922); *Wallace v. United States*, 243 Fed. 300 (7th Cir. 1917); *Eighth Circuit*: *Gurera v. United States*, 40 F. 2d 338 (8th Cir. 1930); *Feinberg v. United States*, 2 F. 2d 955 (8th Cir. 1924); *Goldberg v. United States*, 277 Fed. 211 (8th Cir. 1921); *Ninth Circuit*: *Pe Pendrea v. United States*, 275 F. 2d 325 (9th Cir. 1960); *Smith v. United States*, 273 F. 2d 462 (9th Cir. 1959); *George v. United States*, 266 F. 2d 343 (9th Cir. 1958); *Flores v. United States*, 238 F. 2d 758 (9th Cir. 1956); *Brown v. United States*, 222 F. 2d 293 (9th Cir. 1955); *Kachnic v. United States*, 53 F. 2d 312 (9th Cir. 1931); *Freeman v. United States*, 243 Fed. 353 (9th Cir. 1917), *cert. denied*, 249 U.S. 600 (1919); *Jackson v. United States*, 102 Fed. 473 (9th Cir. 1900); *Tenth Circuit*: *Adam v. United States*, 266 F. 2d 819 (10th Cir. 1959); *Hayes v. United States*, 238 F. 2d 318 (10th Cir. 1956), *cert. denied*, 353 U.S. 983 (1957); *Edwards v. United States*, 206 F. 2d 855 (10th Cir. 1953); *Rose v. United States*, 128 F. 2d 622 (10th Cir.), *cert. denied*, 317 U.S. 651 (1942).

<sup>9</sup> *United States v. Hetherington*, 279 F. 2d 792 (7th Cir. 1960); *Livers v. United States*, 185 F. 2d 807 (6th Cir. 1950); *Tincher v. United States*, 11 F. 2d 18 (4th Cir.), *cert. denied*, 271 U.S. 664 (1926); *Goldberg v. United States*, 277 Fed. 211 (8th Cir. 1921); *Wallace v. United States*, 243 Fed. 300 (7th Cir. 1917).

<sup>10</sup> *Granger v. United States*, 275 F. 2d 127 (5th Cir. 1960); *Beckett v. United States*, 84 F. 2d 731 (6th Cir. 1936); *Blockburger v. United States*, 50 F. 2d 795 (7th Cir. 1931), *aff'd*, 284 U.S. 299 (1932); *Bailey v. United States*, 284 Fed. 126 (7th Cir. 1922); *Peterson v. United States*, 246 Fed. 118 (4th Cir. 1917).

ecutive branch of the government for a pardon or executive clemency.<sup>11</sup> The other and more recent line of cases has declared that a sentence will not be reviewed except upon a showing of "abuse,"<sup>12</sup> "gross abuse,"<sup>13</sup> "gross and palpable abuse,"<sup>14</sup> or "a manifest abuse"<sup>15</sup> of discretion by the district court judge.

The rationale of the doctrine disallowing review of a sentence, while often expressed in terms of a lack of power,<sup>16</sup> appears to be that "in the enactment of our national laws against crime, . . . Congress has vested United States District Judges with wide discretion in assessing punishment within the limits of the various federal statutes,"<sup>17</sup> and the trial judge, who has heard and observed the defendant and the witnesses for and against him, is in the best position to make a just determination.<sup>18</sup> Conversely, if the sentence imposed by the district court were to be subject to review by the court of appeals, which obviously lacks the opportunity to observe the defendant's conduct and demeanor, or to hear matters for and against the defendant with respect to the quantum of punishment imposed, even greater disparity would result because of the strong possibility that a district judge's discretion would be misconstrued or misinterpreted on the basis of the "cold" record.<sup>19</sup>

Occasionally cited as authority for an opposite conclusion, section 2106 of the United States Code provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, *modify*, vacate, set aside or reverse any judgment, decree, or order of a court

<sup>11</sup> *Beckett v. United States*; *supra* note 10; *Bailey v. United States*, *supra* note 10; *Peterson v. United States*, *supra* note 10.

<sup>12</sup> *Goldberg v. United States*, 277 Fed. 211 (8th Cir. 1921).

<sup>13</sup> *Livers v. United States*, 185 F. 2d 807 (6th Cir. 1950).

<sup>14</sup> *Tincher v. United States*, 11 F. 2d 18 (4th Cir.), *cert. denied*, 271 U.S. 664 (1926).

<sup>15</sup> *United States v. Hetherington*, 279 F. 2d 792 (7th Cir. 1960).

<sup>16</sup> *United States v. Sohnen*, 280 F. 2d 109 (2d Cir. 1960), (no power); *Granger v. United States*, 275 F. 2d 127 (5th Cir. 1960), (no power); *Costner v. United States*, 271 F. 2d 261 (6th Cir. 1959), (no right to interfere); *Smith v. United States*, 273 F. 2d 462 (9th Cir. 1959), (without power); *Adam v. United States*, 266 F. 2d 819 (10th Cir. 1959), (will not disturb); *Roth v. United States*, 255 F. 2d 440 (2d Cir. 1958), (without power); *De Mars v. United States*, 254 F. 2d 594 (6th Cir. 1958), (no power); *United States v. De Marie*, 261 F. 2d 477 (7th Cir. 1958), (no control); *Hayes v. United States*, 238 F. 2d 318 (10th Cir. 1956), (will not interfere unless cruel and unusual); *Edwards v. United States*, 206 F. 2d 855 (10th Cir. 1953), (will not interfere unless clearly and manifestly cruel and unusual); *United States v. Rosenberg*, 195 F. 2d 583 (2d Cir. 1952), (no control); *Gurera v. United States*, 40 F. 2d 338 (8th Cir. 1930), (no control).

<sup>17</sup> *Livers v. United States*, 185 F.2d 807, 809 (6th Cir. 1950).

<sup>18</sup> *Tincher v. United States*, 11 F.2d 18 (4th Cir.), *cert. denied*, 271 U.S. 664 (1926); *Goldberg v. United States*, 277 Fed. 211 (8th Cir. 1921).

<sup>19</sup> *United States v. Wiley*, 184 F. Supp. 679 (N.D. Ill. 1960).

lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment . . . or require such further proceedings to be had as may be just under the circumstances.<sup>20</sup>

This section, while antedating the rule itself, has never been seriously considered by any federal court of appeals or the Supreme Court as conferring the necessary power to *reduce* a legal sentence.<sup>21</sup> Nevertheless, it has been urged by one writer that the power to reverse, affirm, or *modify* the judgment of the district court should include the power to reduce sentences. This argument proceeds upon the theory that without the word "modify" in the statute, it would still be possible for the appellate court to affirm the conviction, reverse the sentence, and remand the cause to the district court for resentence, which is usually what is done in those cases where the sentence is illegal.<sup>22</sup>

In such a case there is no true modification of any part of the judgment, and the added power to "modify" could not have been inserted merely to permit illegal sentences to be corrected in this manner, nor to permit the appellate court to reverse a sentence merely because it was excessive, and send the case back to the trial judge for resentence, for here again there is no modification of the judgment.<sup>23</sup>

The reduction of a legal sentence on the ground that it is excessive, without remand to the district court for resentence "would seem properly to be included within the power to 'modify,' for there is no reason to suppose that the revisers of the codes who inserted this word meant it to be limited. . . ." <sup>24</sup> But in *United States v. Rosenberg*,<sup>25</sup> the court, discussing the applicability of the section, declared:

Were this question *res nova*, this court should give that section serious consideration. Because, however, for six decades federal decisions, including that of the Supreme Court in *Blockburger v. United States*, . . .<sup>26</sup> have denied the existence of such authority, *it is clear that the Supreme Court alone is in a position to hold that § 2106 confers authority to reduce a sentence which is not outside the bounds set by a valid statute.* As matters now stand, this court properly regards itself as powerless to exercise its own judgment concerning the alleged severity of the defendants' sentences.<sup>27</sup>

<sup>20</sup> 28 U.S.C.A. § 2106 (Supp. 1959). (Emphasis added.)

<sup>21</sup> *Smith v. United States*, 273 F.2d 462 (9th Cir. 1959); *United States v. Rosenberg*, 195 F. 2d 583 (2d Cir. 1952).

<sup>22</sup> Hall, *Reduction of Criminal Sentences on Appeal*, 37 COLUM. L. REV. 521 (1937).

<sup>23</sup> *Id.* at 525.

<sup>24</sup> *Id.* at 526.

<sup>25</sup> 195 F.2d 583 (2d Cir. 1952).

<sup>26</sup> 50 F.2d 795 (7th Cir. 1931), *aff'd*, 284 U.S. 299. (1932).

<sup>27</sup> 195 F.2d at 605-07. (Emphasis added.)

Thereafter, on petition for certiorari,<sup>28</sup> Justice Frankfurter, after announcing the usual policy against stating the Court's reasons for denying the writ, stated:

One of the questions, however, first raised in the petition for rehearing, is beyond the scope of the authority of this Court, and I deem it appropriate to say so. A sentence imposed by a United States district court, even though it be a death sentence, is not within the power of this Court to revise.<sup>29</sup>

Until recently, therefore, no court of appeals had reviewed a legal sentence imposed in the district court upon the ground of severity, but a good number of decisions have stated that they would have done so if an abuse of discretion were present.<sup>30</sup> Hence, the setting was perfect for *United States v. Wiley*.<sup>31</sup>

In that case, Wiley and four others were indicted for the unlawful possession of goods stolen from interstate commerce.<sup>32</sup> All except Wiley withdrew their original not guilty pleas and pleaded guilty to both counts of the indictment,<sup>33</sup> whereupon sentences ranging from a year and a day to two years were imposed.<sup>34</sup> Upon trial,<sup>35</sup> Wiley was convicted of knowingly and unlawfully possessing merchandise stolen from interstate shipment.<sup>36</sup> His counsel moved for a presentence investigation,<sup>37</sup> which was denied, the court concluding:

No. I ordinarily don't do that where I hear the evidence in the case. I ordinarily do where there is no prior record.<sup>38</sup> Where the defendant stands trial it is well

<sup>28</sup> *Rosenberg v. United States*, 344 U.S. 889 (1952) (memorandum decision).

<sup>29</sup> *Id.* at 890.

<sup>30</sup> See cases cited in note 9 *supra*.

<sup>31</sup> 278 F. 2d 500 (7th Cir. 1960) (second appeal).

<sup>32</sup> 18 U.S.C.A. § 659 (Supp. 1959).

<sup>33</sup> Count I charged McGhee, Helen, and Kelley with unlawfully stealing dresses from interstate shipment. Count II charged McGhee, Helen, Kelley, Jackson, and Wiley with unlawful possession of the stolen goods. Each count carried a possible ten year sentence under the statute.

<sup>34</sup> Helen, Jackson, and Kelley received prison terms of a year and a day. McGhee, because of his prior record of four felony convictions, received two years.

<sup>35</sup> Wiley waived his right to a jury trial.

<sup>36</sup> 18 U.S.C.A. § 659 (Supp. 1959).

<sup>37</sup> "The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. . . ." FED. R. CRIM. P. 32 (c)(1).

<sup>38</sup> Although the government did not disclose a prior criminal record at the trial, it was subsequently brought out upon the hearing for probation, that Wiley, in 1946 at the age of thirteen, had been arrested for receiving stolen property and was placed on six months probation, and later had also been arrested several times for gambling. 278 F.2d at 502.

known in this Court I proceed to sentence immediately after the trial. I will hear anything you care to say as to his family situation and his background and his prior history.<sup>39</sup>

After mitigation, defendant's counsel asked the court to consider granting probation, whereupon the court stated: "Those are the facts that the defendant should have considered prior to committing the offense."<sup>40</sup> Thereafter, the court sentenced Wiley to three years, adding:

In view of the fact that the trial was expedited by waiving a jury and by stipulation of the various items that expedited the proof I make the sentence less than I otherwise would. It is, however, a serious crime, and it is a case for the imposition of a sentence, either on a plea of guilty or on a trial. Had there been a plea of guilty in this case probably probation might have been considered under certain terms, but *you are all well aware of the standing policy here that once a defendant stands trial that element of grace is removed from the consideration of the Court in the imposition of sentence.*

Taking into consideration the various factors that you have referred to . . . and that I have referred to, I make the sentence less than I otherwise would, but a sentence must be imposed.<sup>41</sup>

Two weeks later, the district judge heard the motion of defendant McGhee to vacate an order setting his appeal bond and the following colloquy between the court and Government counsel ensued:

MR. GRADY . . . : Here is a man with five prior felony convictions, your Honor, and you gave him two years.

THE COURT: I had the benefit of the trial of the co-defendant [Wiley] who pled not guilty. I did not know myself what would be a fair sentence, taking into consideration his plea of guilty.

Now, after all these occurred and after I had read the FBI report, I came to the conclusion that in view of his former record and also in view of what I regarded as his principal participation in this crime, that *he deserved a greater sentence than some of his co-defendants who, in my opinion, had a minor participation in the crime compared to his.*

*Accordingly, the one who stood trial, I believe I gave three years to him, did I not?*

MR. GRADY: That is right.

THE COURT: And to this particular defendant who pled guilty, and whom I regarded, after my review of all of the facts and the FBI reports, and after my hearing of the evidence in the case where one of the defendants pled not guilty [Wiley], I came to the conclusion that this particular defendant [McGhee] was somewhat of a ringleader and I gave him two years, *less than a minor participant who stood trial* [Wiley], but greater than other minor participants who, like this defendant, had pled guilty.<sup>42</sup>

<sup>39</sup> United States v. Wiley, 184 F. Supp. 679, 681 (N.D. Ill. 1960).

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.* (Emphasis added.)

<sup>42</sup> United States v. Wiley, 278 F.2d 500, 501, 502 (7th Cir. 1960). (Emphasis added.)

Wiley appealed from the conviction<sup>43</sup> upon the grounds that the district court erred in finding that he had possession of the stolen goods, and that the court failed to receive and act upon his application for probation.<sup>44</sup> The Court of Appeals for the Seventh Circuit affirmed the conviction but remanded the cause to the district court for consideration of Wiley's application for probation,<sup>45</sup> stating:

[U]nder the *standing policy* announced by the district judge in this case, he does not consider an application for probation by a defendant who pleads not guilty and stands trial. While, in considering an application for probation, the court's decision on whether or not probation shall be granted in any particular case, is seldom set aside except for abuse of discretion, the intention of Congress, under the Probation Act, requires that an application for probation . . . must be received and acted upon by the court, regardless of whether the conviction is based upon a plea of guilty or follows a trial. To hold otherwise, would be tantamount to saying that a district court can narrow the area for probation established by Congress. Of course, this cannot be true.<sup>46</sup>

Thereafter, in pursuance of the court's mandate, a hearing was held on the motion for probation. At the conclusion thereof, the district court declared that in view of the fact that no new evidence had been brought out, its decision remained the same, whereupon probation again was denied and the three-year sentence reimposed.<sup>47</sup>

Wiley again appealed,<sup>48</sup> this time upon the grounds that the district court had abused its discretion in refusing probation and in reimposing the three year sentence when McGhee, the acknowledged principal in the crime, who had four prior felony convictions, had received "only" two years on a plea of guilty.<sup>49</sup>

This time the court found that the district court had not erred in refusing to grant probation, but indicated that if they had been sitting as the trial court, defendant's application would have been granted.<sup>50</sup> Upon Wiley's other contention, however, the court declared that the lower court had abused its discretion in that it had "arbitrarily singled out a minor defendant"<sup>51</sup> who had stood trial, and they reversed the judgment

<sup>43</sup> United States v. Wiley, 267 F.2d 453 (7th Cir. 1959).

<sup>44</sup> 18 U.S.C.A. § 3651 (Supp. 1959).

<sup>45</sup> 267 F.2d 453 (7th Cir. 1959).

<sup>46</sup> *Id.* at 455. *But cf.*, Judge Hastings' partial dissent in this case upon the ground that the majority cites no authority for the proposition that the court of appeals may set aside an order refusing to grant probation. (Emphasis added.)

<sup>47</sup> 278 F.2d at 502.

<sup>48</sup> United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

<sup>49</sup> *Id.* at 503.

<sup>50</sup> *Id.* at 502.

<sup>51</sup> *Id.* at 503.

with directions to enter judgment not inconsistent with their opinion.<sup>52</sup>

While conceding the fact that the court of appeals will not ordinarily interfere with the district court's discretion in sentencing, the court reasoned:

[W]here the facts appearing in the record point convincingly to the conclusion that the district court has, without any justification, arbitrarily singled out a minor defendant for the imposition of a more severe sentence than that imposed upon the co-defendants, this court will not hesitate to correct the disparity. *In so doing it is exercising its supervisory control of the district court, in aid of its appellate jurisdiction.*<sup>53</sup>

It is worth noting at this point that no authority for the above-mentioned proposition . . . *i.e.*, that an abuse of discretion in sentencing by a district court may be reviewed on appeal, was cited, although, as noted previously,<sup>54</sup> an abundant number of decisions have so intimated in the past.<sup>55</sup> Instead, the court relied in part on *LaBuy v. Howes Leather Co.*,<sup>56</sup> for the proposition that when the court of appeals reviews the discretion exercised in the district court it is doing so by exercising its supervisory control of the district court in aid of its appellate jurisdiction. As later pointed out,<sup>57</sup> however, *LaBuy* has been generally interpreted as advocating purely administrative supervision, and not review of sentencing.<sup>58</sup>

Directly bearing upon the question of its power to review, the court relied very heavily upon *Yates v. United States*.<sup>59</sup> In that case defendant was convicted of eleven criminal contempts<sup>60</sup> when she refused to answer eleven questions concerning the Communist Party membership of others. In finding that there was but one contempt, and not eleven, the Supreme

<sup>52</sup> *Id.* at 504. The court based its finding of an abuse of discretion upon a comparison of the sentences imposed, the district court's "standing policy" against extending leniency to those who stand trial, the district court's admission that it considered Wiley a minor participant, and a comparison of each defendant's criminal record.

<sup>53</sup> *Id.* at 503. (Emphasis added.)

<sup>54</sup> See cases cited in note 9 *supra*.

<sup>55</sup> Just what prompted the court to disregard these bases of authority is difficult to ascertain. A few likely reasons may be advanced however, namely: that these decisions were by-passed for want of a stronger rationale; that the ultimate conclusions reached in those cases bore out the past futility of the court of appeals to review sentencing and hence were too beneficial to an opposite view; or that the principle established by these decisions was so widely recognized that mention thereof would be superfluous.

<sup>56</sup> 352 U.S. 249 (1957).

<sup>57</sup> 184 F. Supp. at 682.

<sup>58</sup> *E.g.*, *Fisher v. Delehant*, 250 F. 2d 265 (8th Cir. 1957); *Doble v. United States District Court*, 249 F. 2d 734 (9th Cir. 1957); *Great No. Ry. v. Hyde*, 245 F. 2d 537 (8th Cir. 1957).

<sup>59</sup> 356 U.S. 363 (1958).

<sup>60</sup> 18 U.S.C.A. § 401 (Supp. 1959).

Court<sup>61</sup> reversed ten of the convictions and affirmed one, but vacated the one-year sentence for that conviction and remanded the cause to the district court for re-sentencing. On remand, the district court, after hearing, resentenced Yates to one year. The court of appeals affirmed<sup>62</sup> but noted that the sentence was severe. On certiorari,<sup>63</sup> the Supreme Court reversed the judgment below and remanded the case to the district court with directions to reduce the sentence to the time which the defendant had already served (seven months) in the course of the extensive litigation.<sup>64</sup>

It is submitted that the learned court in *Wiley v. United States*,<sup>65</sup> erroneously interpreted the limited holding of the *Yates* case. The most important element in *that* case was the fact that Yates had committed criminal contempt—one of those rare areas of the federal criminal code wherein Congress has not placed any statutory limitation on the degree of punishment to be imposed, but has left the quantum thereof to the broad discretion of the district court. Review, in such a case, is commendable for the reason that otherwise an overly severe sentence or exorbitant fine<sup>66</sup> would be unappealable, since no matter what judgment was given, it would be legal and binding because within the bounds of the district court's discretion.

To praise the *Yates* decision is one matter; to twist the basis of the decision is another matter, and one which should not be allowed to stand as authority for the proposition that the Supreme Court has advocated appellate review of sentencing where in fact that court has stated after *Yates*, in *Gore v. United States*:<sup>67</sup>

In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility . . . these are peculiarly questions of legislative policy. Equally so are the much mooted problems relating to the power of the judiciary to review sentences. First the English and then the Scottish Courts of Criminal Appeal were given power to revise sentences, the power to increase as well as the power to reduce them. . . . *This Court has no such power.*<sup>68</sup>

<sup>61</sup> 355 U.S. 66 (1957).

<sup>62</sup> 252 F. 2d 568 (9th Cir. 1958).

<sup>63</sup> 356 U.S. 363 (1958).

<sup>64</sup> *Ibid.*, the court stated that while it would not ordinarily reduce a contempt sentence, it would do so where the district court failed to exercise its discretion in the light of the reversal of the judgment but, in effect, merely sought to justify the original sentence.

<sup>65</sup> 278 F. 2d 500 (7th Cir. 1960).

<sup>66</sup> See, *United States v. UMW*; 330 U.S. 258 (1947), where the Supreme Court reduced what it considered an excessive fine (\$3,500,000) imposed upon the union for contempt.

<sup>67</sup> 357 U.S. 386 (1958).

<sup>68</sup> *Id.* at 393. (Emphasis added.)

Pursuant to the court's mandate,<sup>69</sup> the cause came before the district court for a revaluation of Wiley's sentence,<sup>70</sup> whereupon the court discussed the various factors which had induced the imposition of the three-year sentence on Wiley as compared to the lighter ones given his co-defendants, and the general effect of the two prior *Wiley* decisions. Recognizing the reluctance on the part of the court of appeals to review sentencing in the past, the district court proceeded to list some of the "practical problems" facing the federal courts in the administration of the Federal Probation Act<sup>71</sup> as a consequence of the two *Wiley* decisions, namely: (1) that now there would be undue pressure imposed upon the district judge to order a presentence investigation<sup>72</sup> and to grant probation in those cases where such a "privilege" should be denied<sup>73</sup> thus resulting in economic waste; (2) that the district judge who considers, before imposing sentence, confidential government reports, which do not appear in the record, must either divulge their content, thereby reducing their effectiveness in future pending investigations, or maintain their secrecy and risk reversal by the appellate court, who are ignorant of this information which may have been the motivating force behind the sentence; (3) that there is a danger that the presentence investigation, which is also confidential and not included in the record, will lose its effectiveness because of the difficulty in securing information about the defendant; (4) that prior to *Wiley*, there were numerous appeals based upon a denial of probation, and that now there will be even more; and (5) that the court of appeals, because of its already over-crowded dockets, will be unable to bear the influx of these appeals under the Probation Act. It is not difficult to see that these same considerations are, by way of analogy, even more evident since the declaration of the court of appeals of their power to review sentences.

In defense of its criticized policy against affording leniency to defendants who stand trial, the court advanced the following reasons: (1) such a practice encourages guilty pleas—which are necessary for the proper administration of criminal justice, and which save the government time

<sup>69</sup> 278 F. 2d at 504.

<sup>70</sup> *United States v. Wiley*, 184 F. Supp. 679 (N.D. Ill. 1960).

<sup>71</sup> 18 U.S.C.A. § 3651 (Supp. 1959).

<sup>72</sup> The court may, in the exercise of its discretion, dispense with the presentence report. *United States v. Schwenke*, 221 F. 2d 356 (2d Cir. 1955). It has been urged by another district judge that according to FED. R. CRIM. P. 32 (c), a presentence investigation is mandatory in every case *unless* the judge *affirmatively* directs that none should be taken. Consult Holtzoff, *The Criminal and the Probation Officer*, Fed. Prob., December 1959, p. 3. Also consult Yankwich, *Individualization of Punishment in the Federal Courts*, Fed. Prob., March 1957, p. 3.

<sup>73</sup> *Compare, Burns v. United States*, 287 U.S. 216 (1932).

and money; and (2) a defendant, by standing trial, negates the inference that he is seriously concerned with rehabilitation.<sup>74</sup> Various authorities have taken opposite sides on these views.<sup>75</sup> Those which favor the court's position contend that while the trial court's primary responsibility is to adjudicate, if guilty pleas were not encouraged by exchanging some degree of leniency, our entire court system would snap under the strain of congestion, thereby reducing the chance of a speedy trial and increasing the risk of prolonged incarceration for those awaiting trial.<sup>76</sup>

The argument logically follows that if leniency is to be given in those cases where the defendant pleads guilty, it must necessarily be cut off where the defendant stands trial. So, where several defendants make different pleas to the same offense, the result is often a disparity in their respective sentences. Consequently, when the court of appeals determined that Wiley had received a more severe sentence because he stood trial, the district court's retort was that "*it seems more correct . . . to say that the defendant who stands trial is sentenced without leniency according to law.*"<sup>77</sup>

Those who oppose the practice of encouraging guilty pleas point out that an accused, who believes that he has a good defense, and therefore goes to trial, "pays a judicially imposed penalty for exercising constitutionally guaranteed rights."<sup>78</sup> This admirable position is focused, however, primarily upon the occasional situation in which an *individual, convicted* offender receives what he terms an excessive sentence, and it ignores a method whereby overall administrative efficiency is fostered.

Among those factors which motivated the court in assessing punishment,<sup>79</sup> the most influential in the court's estimation was the information disclosed by the confidential FBI reports<sup>80</sup> not included in the record. This report revealed Wiley's criminal association with a large-scale "fenc-

<sup>74</sup> For a discussion of "The Influence of the Defendant's Plea on Judicial Determination of Sentence," see Comment bearing that title in 66 YALE L. J. 204 (1956).

<sup>75</sup> Accord, Ohlin & Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROB. 495, 502 (1958); LUMMUS, *THE TRIAL JUDGE* 46-47 (1937). *Contra*, Comment, *supra* note 74.

<sup>76</sup> In a recent survey of the 246 district court judges, a majority of those responding believed that a defendant who pleads guilty is entitled to leniency because of the role of the guilty plea in the efficient and economical administration of criminal law. Comment, *supra* note 74, at 219.

<sup>77</sup> 184 F. Supp. at 685. (Emphasis added.)

<sup>78</sup> Comment, *supra* note 74, at 220.

<sup>79</sup> The other factors mentioned were: (1) the fact that Wiley stood trial; (2) the seriousness of the offense; (3) Wiley's criminal record; (4) Wiley's prospects for rehabilitation; (5) deterrence; and (6) retribution.

<sup>80</sup> The report could now be publicly revealed because subsequent to the second Wiley decision, the principal subject under surveillance had been murdered.

ing" operation under which Wiley occupied the capacity of liaison between thief and receiver. It is recognized that a judge may, in determining the sentence, rightfully consider a defendant's prior criminal conduct, as revealed by presentencing reports or other pertinent data, as a gauge of his antisocial inclinations.<sup>81</sup>

The information contained in the report, but not in the record, not only points out that while Wiley may have been somewhat of a minor participant in the theft, he was, in fact, a major participant in the fencing operation; but also rather poignantly demonstrates the inability of a reviewing court to intelligently review sentencing on the basis of the trial record.

Regarding the *Wiley* decisions in what it termed "an uncertain and dangerous precedent,"<sup>82</sup> the district court concluded its opinion by reimposing the three-year sentence, but then suspending the same in compliance with the court of appeals' mandate.

#### CONCLUSION

Perhaps the ultimate question presented is just what the decision in *Wiley v. United States*<sup>83</sup> stands for. If it merely redefines the proposition that the court of appeals will review a sentence in those cases where an abuse of discretion is found, then *Wiley* will go down as the first decision to find such abuse, even though some doubt still exists as to whether or not such abuse in fact was present. But if *Wiley* enunciates that a court of appeals in the exercise of its supervisory control of the district court may, *in every case*, review a sentence imposed by the district court and then set it aside in those cases where an abuse of discretion is found, then *Wiley* constitutes a clear departure from seventy years of *stare decisis*. While, admittedly, the latter view represents a broad interpretation of *Wiley*, it is not inconceivable that a subsequent reviewing court could find that their supervisory control includes the power to review a sentence upon any ground, since it could be argued that this control is unlimited in scope. Nevertheless, it is obviously hazardous to predict with any degree of reasonable certainty just what effect *Wiley* will have among future decisions, especially since fabricated upon a weak foundation of authority.

If the ruling in *Yates v. United States*<sup>84</sup> can be interpreted as advocating review of a legal sentence, as the court of appeals in *Wiley* assumes,

<sup>81</sup> *Williams v. New York*, 337 U.S. 241 (1949). See, *Pence v. United States*, 219 F. 2d 70 (10th Cir. 1955).

<sup>82</sup> 184 F. Supp. at 688.

<sup>83</sup> 278 F. 2d 500 (7th Cir. 1960).

<sup>84</sup> 356 U.S. 363 (1958).

the result in the *Wiley* case is sound. But if *Yates* is strictly limited to cases where Congress *has not* fixed the statutory limits within which the district judge must confine his sentence, then *Wiley* has erroneously extended the power of the court of appeals. Furthermore, in view of the fact that the court based its decision to a strong extent upon the disparity of the defendants' sentences, *Wiley*, if it is to be considered *stare decisis*, must be limited to those cases involving multiple defendants only. In either event, there is a strong possibility that *Wiley v. United States* will be *sui generis*.

Many legal writers have favorably advocated appellate review of sentencing and have outlined their formulae for its eventual inception.<sup>85</sup> But if Congress is to adopt a system which entitles the court of appeals to review the sentence imposed by the district court, it is suggested that it should do so only upon the following terms: (1) There should be no review unless a clear abuse of discretion is shown; and (2) If an abuse of discretion does exist, it should be disclosed by every factor which the trial court had at its disposal, namely: the *complete* record as evidenced by the trial transcript, any pre-sentencing reports, and confidential investigative reports. An accompanying written explanation of the factors motivating the judge in sentencing might also be included. It is submitted that only under these circumstances can a proper, intelligent review be accomplished.

<sup>85</sup> McGuire & Holtzoff, *The Problem of Sentence in the Criminal Law*, 20 B.U.L. REV. 423 (1940); ORFIELD, *CRIMINAL APPEALS IN AMERICA* (1939).

## THE TIDELANDS OIL CONTROVERSY

As unbelievable as it would, no doubt, seem to our founding fathers, the boundaries of the states were not fully determined until June 15, 1960—more than one-hundred eighty years after this country had declared its independence of England. The reason for this anomaly was a belated realization on the part of the United States that perhaps it, and not the coastal states, owned the lands submerged beneath the marginal sea. With the birth of this realization, the United States began to actively pursue a program intended to bring these valuable lands within its jurisdiction, and thereby came into existence the dispute commonly termed the *Tidelands Oil Controversy*.<sup>1</sup>

Although it was oil which precipitated the struggle, the interests involved were much more valuable than the "black gold" resting beneath

<sup>1</sup> Technically, the tidelands is that area of land situated between high-water and low-water marks. In the Tidelands Oil Controversy, it refers to the lands lying beyond the low-water mark and extending out to the continental shelf.