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## Criminal Law—Appellate Review of Legal but Excessive Sentences

In 1907 England recognized the right of a felon to seek review of his conviction,<sup>1</sup> thus giving full effect to a slowly developed concept<sup>2</sup> that has now become so firmly entrenched in our system of jurisprudence that few would question its value. However, the development may not yet have ended, for the merits of appellate review, so obvious and unquestioned when applied to pre-conviction proceedings, are still accorded surprisingly little recognition when applied to the equally crucial proceedings after conviction. Thus, the defendant, whose rights are so amply protected while he stands accused, is deprived of the most basic of all safeguards when it comes to the sentence he must serve.<sup>3</sup> The paradoxical nature of this "deliberate abandonment of the legal norm after conviction"<sup>4</sup> is readily apparent, but in the United States<sup>5</sup> only a minority of the jurisdictions provide for appellate review of legal but excessive sentences.

The position of the North Carolina Supreme Court on this matter was reiterated in *State v. Stubbs*<sup>6</sup> where the defendant was convicted of committing the "crime against nature" in violation of section 14-177 of the North Carolina General Statutes.<sup>7</sup> In a vain attempt to obtain appellate review of his sentence of imprisonment for not less than seven nor more than ten years, he contended that this was cruel and unusual punishment. But the court, concluding

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<sup>1</sup> Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 3.

<sup>2</sup> The *vox populorum* is final. Such was true of the early Roman law, as well as early common law. Indeed, the English common law was exceedingly slow in recognizing any judicial review in criminal cases. When appellate review was finally recognized, it was not a matter of right, but was permitted only upon consent of the Crown. Not until 1705 did review upon request become permissible in cases involving misdemeanors . . . .

Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 VAND. L. REV. 671, 672 (1962).

<sup>3</sup> Sobeloff, *A Recommendation for Appellate Review of Criminal Sentences*, 21 BROOKLYN L. REV. 2 (1954).

<sup>4</sup> Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 HARV. L. REV. 904, 919 (1962).

<sup>5</sup> The United States is the only country that allows "a single judge to set a minimum sentence at his own dictate." Second Circuit Court of Appeals Judicial Conference, *Appellate Review of Sentences*, 32 F.R.D. 249, 269 (1962).

<sup>6</sup> 266 N.C. 295, 145 S.E.2d 899 (1966).

<sup>7</sup> N.C. GEN. STAT. § 14-177 (1953).

that the sentence was within the limits authorized by statute,<sup>8</sup> persisted in its traditional approach and held that when "punishment does not exceed the limits fixed by the statute, it cannot be considered cruel and unusual punishment in a constitutional sense."<sup>9</sup>

North Carolina's refusal to review legal but excessive sentences is unquestionably the same rule presently applied by the federal courts. Under the Act of 1879 the old circuit courts held that the statutory authority "to pronounce final sentence and to award execution thereon"<sup>10</sup> gave them the power to render a sentence different from that of the district court.<sup>11</sup> But when the circuit courts of appeal were created, the view was adopted that the omission of the crucial language repealed the old law by implication in spite of some suggestions that the power was preserved by cross reference to the Act of 1879.<sup>12</sup> The statutory authority "to affirm, modify . . . or reverse" still exists,<sup>13</sup> but this provision has been largely ignored<sup>14</sup> with the result that "since 1891, federal upper courts have unswervingly denied themselves the power to revise sentences on appeal."<sup>15</sup>

The most searching judicial examination of the federal position is perhaps that of Judge Frank in the case of *United States v. Rosenberg*.<sup>16</sup> Julius and Ethel Rosenberg were convicted of delivering information to Russia and sentenced to death under section thirty-two of the United States Code, title fifty.<sup>17</sup> In stating his reasons for the use of maximum punishment the trial judge displayed something less than detached objectivity by holding the defendants responsible for causing the Korean War and altering the

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<sup>8</sup> At the time of his conviction the statute authorized a sentence of not less than five nor more than sixty years. A subsequent amendment, however, deemed the offense a felony and provided for a fine or imprisonment in the discretion of the court. Thus, the sentence was well within the limits of the statute under which Stubbs was convicted but, assuming that the new statute will not be construed as providing for specific punishment and will therefore be limited to a maximum punishment of ten years under N.C. GEN. STAT. § 14-22, it approached the maximum allowable at the time of appeal. *State v. Blackmon*, 260 N.C. 352, 132 S.E.2d 880 (1963).

<sup>9</sup> 266 N.C. 295, 298, 145 S.E.2d 899, 902 (1966).

<sup>10</sup> Act of March 3, 1879, ch. 176, § 3, 20 Stat. 354.

<sup>11</sup> *United States v. Wynn*, 11 Fed. 57 (C.C.E.D. Mo. 1882); *Bates v. United States*, 10 Fed. 92 (C.C.N.D. Ill. 1881).

<sup>12</sup> *United States v. Rosenberg*, 195 F.2d 583, 604 n.25 (2d Cir. 1952).

<sup>13</sup> 28 U.S.C. § 2106 (1964).

<sup>14</sup> *United States v. Rosenberg*, 195 F.2d 583, 605 (2d Cir. 1952).

<sup>15</sup> *Id.* at 604 n.25.

<sup>16</sup> 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

<sup>17</sup> Act of June 15, 1917, ch. 30, title I, § 2, 40 Stat. 218-19 (now 18 U.S.C. 794 (1964)).

course of history.<sup>18</sup> In spite of the severity of the sentence and the somewhat shaky basis proffered, Judge Frank felt compelled to reject the argument that section 2106 of the Judicial Code granted the power to modify sentences on appeal. Were this a case of first impression, he reasoned, the section would require serious consideration, but because "for six decades federal decisions . . . have denied the existence of such authority, it is clear that the Supreme Court alone is in a position to hold that Sec. 2106 confers authority to reduce a sentence which is not outside the bounds set by a valid statute."<sup>19</sup> In addition an eighth amendment argument was rejected because, even assuming that a sentence under a constitutional statute could be held cruel and unusual, there were no circumstances in the case to justify a holding that this sentence shocked the conscience and sense of justice of the community. It is necessary, Judge Frank said, "to treat as immaterial the sentences given (or not given) to the other conspirators,<sup>20</sup> and also to disregard what sentences this court would have imposed or what other trial judges have done in other espionage or treason cases. For such matters do not adequately reflect the prevailing mood of the public."<sup>21</sup>

The United States Supreme Court has never interpreted section 2106 in regard to the modification of sentences on appeal but it has expressed a disinclination to enter this area. In *Gore v. United States*<sup>22</sup> the defendant received multiple sentences for an offense consisting of a single sale of narcotics. Relying on the intent of Congress and rejecting a double jeopardy argument, Mr. Justice Frankfurter's opinion for the Court upheld the sentences declaring that the proper apportionment of punishment was within the do-

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<sup>18</sup> "I consider your crime worse than murder. Plain deliberate contemplated murder is dwarfed in magnitude by comparison with the crime you have committed. In committing the act of murder, the criminal kills only his victim. . . . But in your case, I believe your conduct . . . has already caused, in my opinion, the Communist aggression in Korea, with the resulting casualties exceeding 50,000 and who knows but that millions more of innocent people may pay the price of your treason. Indeed, by your betrayal you undoubtedly have altered the course of history to the disadvantage of our country." *United States v. Rosenberg*, 195 F.2d 583, 605-06 n.28 (2d Cir. 1952).

<sup>19</sup> *Id.* at 605-06.

<sup>20</sup> It is, perhaps, worthy of note that one of the conspirators, Sobell, was sentenced to thirty years imprisonment (*id.* at 590) and that another who had helped bring "to justice the arch criminals in this nefarious scheme" received only a fifteen year sentence (*id.* at 606 n.28).

<sup>21</sup> *Id.* at 609.

<sup>22</sup> 357 U.S. 386 (1958).

main of penology and peculiarly a question of legislative policy. Equally so, he continued, "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>23</sup>

One case in the federal courts stands alone in this area. *United States v. Wiley*<sup>24</sup> involved five defendants, four of whom pleaded guilty to an indictment for possession of stolen goods under section 659 of the United States Code, title eighteen. Of these four the ringleader, a four-time convicted felon, received a two-year sentence and the other three, each of whom had a prior record, received sentences of one year and a day. On the other hand Wiley, who elected to stand trial, was convicted and sentenced to three years even though he was, as the trial judge admitted, only a minor participant. On appeal the Second Circuit Court of Appeals remanded the case for resentencing and observed, "Our part in the administration of federal justice requires that we reject the theory that a person may be punished because in good faith he defends himself when charged with a crime. . . . It is evident that the punishment imposed . . . on Wiley was . . . only in part for the crime for which he was indicted."<sup>25</sup>

The situation in the federal courts, then, appears somewhat static for the time being but there are some indications of development in the states. No less than ten states have, between 1843 and 1964, provided express statutory authorization for appellate review of sentences.<sup>26</sup> In those jurisdictions, of course, no real problem is encountered though a few of the courts, Arizona and Illinois for example, proclaim that sentences will be modified only for abuse of discretion.<sup>27</sup> In only two states, New Jersey<sup>28</sup> and Tennessee,<sup>29</sup>

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<sup>23</sup> *Id.* at 393.

<sup>24</sup> 278 F.2d 500 (1960).

<sup>25</sup> *Id.* at 504.

<sup>26</sup> ARIZ. REV. STAT. ANN. § 13-1717(B) (1956); CONN. GEN. STAT. REV. § 51-196 (Supp. 1963); HAWAII REV. LAWS § 212-14 (Supp. 1960); IDAHO CODE ANN. § 19-2821 (1948); ILL. ANN. STAT. ch. 38, § 121-9 (Smith-Hurd 1964); IOWA CODE ANN. § 793.18 (1946); MASS. ANN. LAWS ch. 278, § 28(B) (1956); NEB. REV. STAT. § 29-2308 (1956); N.Y. CODE CRIM. PROC. § 543; ORE. REV. STAT. § 138.050 (1964). Iowa was the first state to adopt such a statute. IOWA REV. STAT. § 47-75 (1843).

<sup>27</sup> *State v. Cuzick*, 97 Ariz. 130, 397 P.2d 629 (1964); *People v. Hobbs*, 56 Ill. App. 2d 93, 205 N.E.2d 503 (1965). *But see State v. Monks*, 96

have the courts assumed the power completely without the aid of statute. But by far the more typical are the states with ambiguous statutes granting the appellate courts the authority to "reverse, affirm, or modify the judgment"<sup>30</sup> of the lower courts. Only a few courts in states of this type have used the statutes to modify sentences<sup>31</sup> but their example points up the potential for change in a large number of states where the power is not now exercised.<sup>32</sup>

In North Carolina the supreme court is given statutory authority in any case to "render such sentence . . . as on inspection of the whole record it shall appear to them ought in law to be rendered. . . ."<sup>33</sup> Although that provision appears plain enough on its face, a search of the cases indicates that it has never been seriously considered as a basis for the modification of sentences on appeal. Instead, the arguments discussed by the court have repeatedly been based either on cruel and unusual punishment or on abuse of discretion.

The court in more recent cases has made some effort, not apparent in the early cases, to separate the two arguments.<sup>34</sup> If any distinction can be drawn here, it would seem to be that no sentence within the statutory limits can be considered cruel and unusual but that a sentence within the discretion of the trial judge can be reviewed where there is palpable abuse. However, such a distinction does not seem particularly valuable analytically for in either instance the contention urged must ultimately be the same; *i.e.*, under the circumstances of the case the sentence is a greater penalty than ought to have been imposed. In studying the cases, then, it is help-

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Ariz. 354, 395 P.2d 711 (1964); *State v. Evard*, 55 Ill. App. 2d 270, 204 N.E.2d 777 (1965).

<sup>28</sup> See, *e.g.*, *State v. Hall*, 87 N.J. Super. 480, 210 A.2d 74 (Super. Ct. App. Div. 1965).

<sup>29</sup> See, *e.g.*, *Brooks v. State*, 187 Tenn. 361, 215 S.W.2d 785 (1948).

<sup>30</sup> ARK. STAT. ch. 27, § 2144 (1947).

<sup>31</sup> See, *e.g.*, *Commonwealth v. Garramone*, 307 Pa. 507, 161 Atl. 733 (1932).

<sup>32</sup> A 1962 survey shows the number of states in which the question is undecided as twenty-two, but of the fifteen listed as denying the power by case law eight are shown to have statutes of the ambiguous type. Mueller, *supra* note 1, at 688-97.

<sup>33</sup> N.C. GEN. STAT. § 7-11 (1953). Also worthy of consideration is the language of N.C. GEN. STAT. § 7-10 (1953): "The Supreme Court has jurisdiction to review, upon appeal . . . any matter of law or legal inference."

<sup>34</sup> Compare *State v. Welch*, 232 N.C. 77, 59 S.E.2d 199 (1950), with *State v. Hamby*, 126 N.C. 1066, 35 S.E. 614 (1900).

ful to look at all of those in which this basic contention has been made.

Although the contention has been rejected in almost every instance regardless of the argument used, the precedent is not as firm as the pat language of the court implies, for the early cases, later cited as authority for denying the power of review, actually left the question open. Thus, in one of the earliest cases in which the contention was urged, the court found that a statute permitting the sheriff to collect the fine of an indigent defendant by renting him to the highest bidder was not open to the criticism that the punishment was "too severe or not of an usual kind." But the court did recognize that punishment open to that criticism would raise a question about their power to review it.<sup>35</sup> The question raised, however, appeared to be resolved by *State v. Driver*<sup>36</sup> where the court held clearly that a five-year sentence for wife beating was cruel and unusual and that there could be no such anomaly as an "unconstitutional judgment of an inferior Court affecting the liberty of the citizen, not the subject of review by the Court of Appeals, where every order or judgment involving a matter of law or legal inference is reviewable!"<sup>37</sup>

The cases following *Driver* involved relatively short sentences, typically two years or less, and rarely provided the court with an opportunity to invoke that holding. However, the possibility was not foreclosed for in each case the court found reason to point out either that the discretion had not been abused or that the sentence did not err on the side of severity.<sup>38</sup> Undeniably, the question was still open in 1914 for in *State v. Lee*,<sup>39</sup> where the conviction of a Negro boy for robbery of eleven cents was reversed for error in the charge, the court said that while it was unnecessary to decide the extent of their power to review the judge's discretion, a nine-year sentence was not commensurate with such an offense. Again,

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<sup>35</sup> *State v. Manuel*, 20 N.C. 144 (1838).

<sup>36</sup> 78 N.C. 423 (1878).

<sup>37</sup> *Id.* at 427.

<sup>38</sup> See, e.g., *State v. Dowdy*, 145 N.C. 432, 58 S.E. 1002 (1907); *State v. Farrington*, 141 N.C. 844, 53 S.E. 954 (1906); *State v. Rippy*, 127 N.C. 516, 37 S.E. 148 (1900); *State v. Hamby*, 126 N.C. 1066, 35 S.E. 614 (1900); *State v. Apple*, 121 N.C. 584, 28 S.E. 469 (1897); *State v. Reid*, 106 N.C. 714, 11 S.E. 315 (1890); *State v. Miller*, 94 N.C. 904 (1886); *State v. Pettie*, 80 N.C. 367 (1879).

<sup>39</sup> 166 N.C. 250, 80 S.E. 977 (1914).

in *State v. Woodlief*<sup>40</sup> where the sentence was only thirty days, the court said, "We are not prepared to say that this Court cannot review the judge as to the quantum of punishment, even where there is a limit set to the exercise of his discretion; but if the right exists, we will not do so except in a plain case. . . ."<sup>41</sup>

In spite of this precedent the court in 1929 dismissed the contention out of hand. In *State v. Daniels*<sup>42</sup> the court in a per curiam opinion held, apparently for the first time, that a sentence authorized by law "cannot be held to be 'cruel or unusual.'"<sup>43</sup> However, not one of the four cases cited in support of this proposition had failed to consider the possibility of reviewing sentences and certainly none of them had foreclosed it.<sup>44</sup> Four years later the court went so far as to cite *Woodlief* and *State v. Jones*<sup>45</sup> for a similar holding.<sup>46</sup> Since the court said in *Jones* that there was nothing in the record to show abuse of discretion and in *Woodlief* that the quantum of punishment might be reviewed in a proper case, the authority is at least questionable. But the language, once used, was soon followed and in 1940 the error was compounded when in *State v. Brackett*<sup>47</sup> the court cited *Daniels* for the same easy rule.

In the next twenty years there was from time to time a slight recognition that some limitation existed but on the whole the precedent was taken as established.<sup>48</sup> For example, where a defendant sought review of a sentence for obtaining money by false pretenses, the court answered that authorized punishment could not be cruel and unusual and that the discretion of the trial judge could be reviewed "only in case of manifest gross abuse."<sup>49</sup> But the possibility of gross abuse occurring seems to have diminished considerably

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<sup>40</sup> 172 N.C. 885, 90 S.E. 137 (1916).

<sup>41</sup> *Id.* at 891, 90 S.E. at 140.

<sup>42</sup> 197 N.C. 285, 148 S.E. 244 (1929).

<sup>43</sup> *Id.* at 286, 148 S.E. at 244.

<sup>44</sup> *State v. Dowdy*, 145 N.C. 432, 58 S.E. 1002 (1907); *State v. Farrington*, 141 N.C. 844, 53 S.E. 954 (1906); *State v. Pettie*, 80 N.C. 367 (1879); *State v. Manuel*, 20 N.C. 144 (1838).

<sup>45</sup> 181 N.C. 543, 106 S.E. 827 (1921).

<sup>46</sup> *State v. Fleming*, 202 N.C. 512, 163 S.E. 453 (1932).

<sup>47</sup> 218 N.C. 369, 11 S.E.2d 146 (1940).

<sup>48</sup> See, e.g., *State v. Downey*, 253 N.C. 348, 117 S.E.2d 39 (1960); *State v. Lee*, 247 N.C. 230, 100 S.E.2d 372 (1957); *State v. Welch*, 232 N.C. 77, 59 S.E.2d 199 (1950); *State v. White*, 230 N.C. 513, 53 S.E.2d 436 (1949); *State v. Richardson*, 221 N.C. 209, 19 S.E.2d 863 (1942); *State v. Parker*, 220 N.C. 416, 17 S.E.2d 475 (1941); *State v. Wilson*, 218 N.C. 769, 12 S.E.2d 654 (1941).

<sup>49</sup> *State v. Stansbury*, 230 N.C. 589, 55 S.E.2d 185 (1949).

when the court decided *State v. Wright* in 1964.<sup>50</sup> In that case the defendant forged a check for only a small amount but was sentenced to prison for seven to ten years. The court noted that no more than ten years could be given for a check large enough to break a bank, quoted *Woodlief* to point out that there is a limit to the trial judge's discretion, but then concluded, "If the sentence is disproportionately long, the Governor and the Board of Paroles have ample authority to make adjustment. This Court, lacking such authority, must affirm the judgment."<sup>51</sup>

Thus, the rule in North Carolina and the majority of jurisdictions in this country is, undeniably, no appellate review of legal sentences. But a potential for change exists. In many jurisdictions, including North Carolina, there is statutory authority available to a willing court. And in North Carolina and the federal courts there is a precedent, however thin, that can be argued in a proper case. Also, proposed congressional bills indicate forthcoming legislative scrutiny.<sup>52</sup> Further, the recently established principle of applying the eighth amendment to the states<sup>53</sup> and the correlative tendency to examine sentences more closely<sup>54</sup> suggests that reluctant state courts and legislatures may yet be prodded by the federal courts. An example of this possibility occurred recently in the Sixth Circuit Court of Appeals when a state prisoner, sentenced to life imprisonment without possibility of parole under an habitual criminal statute, sought federal habeas corpus on the ground that the sentence was so excessive as to constitute cruel and unusual punishment. The district judge relied on precedent established before *Robinson v. California* to reject the contention but the circuit court of appeals, while instructing the petitioner to exhaust his state remedies, held that reliance on such authority was no longer adequate.<sup>55</sup>

Perhaps the strongest argument for the appellate review of legal sentences is the opportunity it provides for the establishment of a jurisdiction-wide sentencing policy that would reflect current penology. Under the present rule it is manifest that the "courts are

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<sup>50</sup> 261 N.C. 356, 134 S.E.2d 624 (1964).

<sup>51</sup> *Id.* at 358, 134 S.E.2d at 625.

<sup>52</sup> S. 2722, 89th Cong., 1st Sess. (1965).

<sup>53</sup> *Robinson v. California*, 370 U.S. 660 (1962).

<sup>54</sup> See *Rudolph v. Alabama*, 375 U.S. 889 (1963) (dissenting opinion); *Driver v. Hinnant*, 356 F.2d 761 (1966), 44 N.C.L. Rev. 818.

<sup>55</sup> *Goss v. Bomar*, 337 F.2d 341 (6th Cir. 1964).

governed by individual and varying philosophies of crime control rather than by an orderly and consistent approach for the judiciary as a whole."<sup>56</sup> Thus, in North Carolina a trial judge remains free to follow such maxims as the one cited by the supreme court in 1925, "The deterrence theory is the kingdom of the criminal law."<sup>57</sup> But, quite aside from differences in active philosophies, the more frightening, though hopefully more rare, possibility exists for arbitrary and emotional judgments or simple mistake.<sup>58</sup> This is not to suggest that all discretion should be taken from the trial judge but rather that the objective should be "to provide a technique whereby discretion shall be allowed ample creative scope and yet be subject to some degree of discipline."<sup>59</sup> Without such discipline trial judges are left in a lonely position indeed and respect for the law on the part of those who come under its scrutiny suffers.

MARTIN N. ERWIN

#### Criminal Law—Nolle Prosequi With Leave—Possibility of Abuse

On February 24, 1964, an Orange County grand jury indicted Peter Klopfer for a trespass that had occurred on January 3, 1964. The defendant entered a plea of not guilty during a special criminal session of Orange County Superior Court in March, 1964. The jury was unable to agree on a verdict, and a mistrial was declared. The defendant was ordered to return for retrial during the same session, but the case was not reached at this time. Approximately one year later the solicitor indicated to the defendant's attorney that he intended to have a *nolle prosequi*<sup>1</sup> with leave entered. At

<sup>56</sup> Bennett, *The Sentence—Its Relation to Crime and Rehabilitation*, 1960 U. ILL. L.F. 500.

<sup>57</sup> *State v. Swindell*, 189 N.C. 151, 155, 126 S.E. 417, 418 (1925).

<sup>58</sup> In *Stubbs* it should be noted that the trial judge obviously intended to fix the sentence on the lower end of the permitted scale. In view of the fact that the old statute allowed a fifty-five year range of discretion, almost any factor could have caused him to add two years to the minimum. It is at least open to speculation that under the new statute the sentence would have been fixed at the lower end of the new scale, yet under the existing system the judiciary must leave the correction of its mistakes to other branches of government.

<sup>59</sup> Second Circuit Court of Appeals Judicial Conference, *Appellate Review of Sentences*, 32 F.R.D. 249, 273 (1962).

<sup>1</sup> *Nolle prosequi* will hereinafter be abbreviated as *nol. pros.*