

Appellate Review of Sentencing (McGee v. United States)

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

St. John's Law Review (1972) "Appellate Review of Sentencing (McGee v. United States)," *St. John's Law Review*: Vol. 47 : No. 2 , Article 7.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol47/iss2/7>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

CRIMINAL LAW

APPELLATE REVIEW OF SENTENCING

McGee v. United States

Appellate review of criminal sentencing is not a new concept but, in recent years, the need for such a policy on the federal level has become increasingly apparent. Substantial discrepancies in sentences imposed in "draft-dodging" cases have provided significant impetus for limiting the trial judge's almost unlimited discretion. In *McGee v. United States*,¹ the Court of Appeals for the Second Circuit² reached a decision that, if followed, could limit sentencing disparities in such cases.

McGee was convicted of violating four provisions of the Selective Service Act of 1967,³ the most serious being his refusal to submit to induction into the Army.⁴ The trial judge imposed sentences of two years for each of the counts, the sentences to run concurrently.⁵ Subsequently, McGee's conviction under count 1 (refusing induction) was set aside⁶ and he moved under Rule 35 of the Federal Rules of Criminal Procedure for suspension or reduction of the sentences under the subordinate counts and release on probation.⁷ Judge Murphy of the District Court for the Southern District of New York denied the motion. The Second Circuit reversed and remanded, holding that the trial judge's denial of the motion must be accompanied by "at least a summary explanation of his reasons for declining to do so."⁸

¹ 462 F.2d 243 (2d Cir. 1972).

² Opinion by Friendly, C.J. The tie-breaking vote was cast by Judge Jameson of the United States District Court for the District of Montana sitting by designation. 462 F.2d at 244.

³ 50 U.S.C. App. § 451 *et seq.* (1970). The four counts involved were refusing to submit to induction (Count 1), failing to report for a physical examination (Count 2), failing to possess a valid notice of classification (Count 3) and failing to return a current information questionnaire to his local draft board (Count 4). *See* *United States v. McGee*, 426 F.2d 691 (2d Cir. 1970), *aff'd*, 402 U.S. 479 (1971).

⁴ There is little doubt that, had the defendant not committed the violations alleged in count 1, he would not have been prosecuted for the violations alleged in counts 2, 3 and 4. A government publication by the Selective Service System remarks that, unless a male of draft age refuses to register or refuses to submit to induction, other violations of the Selective Service Act of 1967 will usually be processed administratively and will not lead to criminal prosecutions. 462 F.2d at 246.

⁵ *United States v. McGee*, 426 F.2d 691, 692 (2d Cir. 1970), *aff'd*, 402 U.S. 479 (1971).

⁶ McGee's conviction was set aside with the consent of the government after defendant had moved pursuant to 28 U.S.C. § 2255 (1970) to vacate the conviction and sentence under count 1 because he had been unlawfully accelerated for induction. 462 F.2d at 244. *See* *Gutknecht v. United States*, 396 U.S. 295 (1970).

⁷ 462 F.2d at 247.

⁸ 462 F.2d at 244. McGee simultaneously moved to set aside the judgments and sentences on the remaining counts or, in the alternative, for a new trial on counts 2, 3 and 4 under FED. R. CRIM. P. 33.

Rule 35 provides three separate and distinct means of relief: correction of an illegal sentence,⁹ correction of a sentence imposed in an illegal manner,¹⁰ and reduction of a legal sentence. It is this last procedure that is involved in *McGee*.

A Rule 35 motion "is essentially a plea for leniency and presupposes a valid conviction."¹¹ The trial court is, in effect, being asked to reconsider its original verdict. The court may, in its discretion, reduce the sentence with or without additional information at its disposal.¹² Rule 35 does not require that the defendant be present or that the court hear testimony or arguments on the motion.¹³

Prior to the adoption of the rule, a trial court could modify a valid sentence only during the term of court at which the sentence was imposed.¹⁴ Rule 35 substituted a time limitation of 120 days which cannot be extended.¹⁵ Any motion made after the expiration of the time

⁹ The text of the rule reads: "The court may correct an illegal sentence at any time. . . ." FED. R. CRIM. P. 35. An illegal sentence is one in excess of the maximum authorized by statute. *Ruiz v. United States*, 365 F.2d 500, 502 (3d Cir. 1966). It also encompasses a sentence in violation of any other applicable statute as, for example, where a trial judge makes provision for parole where none is authorized. *Robinson v. United States*, 313 F.2d 817, 821-22 (7th Cir. 1963).

¹⁰ "[A]nd may correct a sentence imposed in an illegal manner. . . ." FED. R. CRIM. P. 35. A Rule 35 motion to correct a sentence illegally imposed must be made within the time allowed to reduce a valid sentence, *i.e.*, within 120 days from the day of sentencing, from the day of the court's receipt "of a mandate issued upon affirmance of the judgment or dismissal of the appeal," or from "entry of an order or judgment of the Supreme Court . . . having the effect of upholding a judgment or conviction." *Id.*

The question still to be decided in this area is whether a sentence imposed in defendant's absence is illegally imposed within the meaning of this rule. *Cf. Walsh v. United States*, 374 F.2d 421, 426 (9th Cir. 1967) (not illegal). *But cf. Bartone v. United States*, 375 U.S. 52 (1963) (illegal).

¹¹ *Poole v. United States*, 250 F.2d 396, 401 (D.C. Cir. 1957). *See also United States v. Ellenbogen*, 390 F.2d 537, 543 (2d Cir. 1968).

¹² Without additional information, a court may, for the same reasons that led to its original sentence, be reluctant to reduce a penalty. Realistically, mitigating circumstances either unknown or misunderstood at the original sentencing must be brought forth for the motion to have any chance of success. *Cf. United States v. Stromberg*, 179 F. Supp. 278, 279 (S.D.N.Y. 1959); *United States v. Harden*, 9 F.R.D. 258, 259 (W.D. Pa. 1949).

¹³ *Jacobsen v. United States*, 260 F.2d 122, 123 (8th Cir. 1958).

¹⁴ The original Committee Note to Rule 35 reads in part:

The second sentence introduces a flexible time limitation on the power of the court to reduce a sentence, in lieu of the present limitation of the term of court. Rule 45(c) abolishes the expiration of a term of court as a time limitation, thereby necessitating the introduction of a specific time limitation as to all proceedings now governed by the term of court as a limitation. The Federal Rules of Civil Procedure (Rule 6(c)) . . . abolishes the expiration of a term of court as a time limitation in respect to civil actions. The two rules together thus do away with the significance of the expiration of a term of court which has largely become an anachronism.

¹⁵ U.S.C. App. at 4508 (1970).

¹⁶ The original time limit was 60 days, extended to 120 days by a 1966 amendment. The 1966 Committee Note to Rule 35 reads in part:

The second sentence has been amended to increase the time within which the court may act from 60 days to 120 days. The 60 day period is frequently too short

period will not be entertained.¹⁶ In addition, a motion to reduce a valid sentence cannot be entertained during the pendency of an appeal.¹⁷

In *McGee*, the court noted that the trial judge's original determination of sentence was based on appellant's conviction of all four charges and did not take into account the subsequent reversal of the count 1 conviction. The court felt that, as a result, the judge was probably partly influenced, even as to the counts 2 through 4 sentences, by the constitutionally invalid count 1 conviction. "If such were in fact the case, appellant's initial sentences under counts 2 through 4 would require reconsideration."¹⁸ The Second Circuit also noted that the usual appellate procedure in cases where invalid convictions may have influenced a sentence is to vacate and remand for resentencing on the valid counts. However, due to the Rule 35 motion in this case, the trial court had already had an opportunity to reconsider the sentences on the three valid counts. Thus, McGee had exhausted the normal chain of remedies but the court of appeals, in a singular decision, ordered the trial judge to either alter the original sentence or justify his failure to do so.¹⁹

to enable the defendant to obtain and file the evidence, information and argument to support a reduction in sentence. Especially where a defendant has been committed to an institution at a distance from the sentencing court, the delays involved in institutional mail inspection procedures and the time required to contact relatives, friends and counsel may result in the 60-day period passing before the court is able to consider the case.

Id.

¹⁶ See *United States v. Koneski*, 323 F.2d 862, 863 (4th Cir. 1963); *Urry v. United States*, 316 F.2d 185, 186 (10th Cir. 1963).

¹⁷ See *United States v. Grabina*, 309 F.2d 783, 785 (2d Cir. 1962), *cert. denied*, 374 U.S. 836 (1963).

¹⁸ 462 F.2d at 245.

¹⁹ *Id.* at 246-47. The justification necessary to "purge this possible taint" must be in the form of a summary explanation of the judge's reasons. There is no standard given as to what reasons might be acceptable. On remand, Judge Murphy refused to reduce McGee's sentence and elected to state his reasons for his denial of the Rule 35 motion. *United States v. McGee*, 442 F. Supp. 442 (S.D.N.Y. 1972). The trial judge's annoyance with the Second Circuit's decision was apparent in an opening remark: "We must first digress to call attention to some inadvertent statements in the majority opinion of the court, since they cast a shadow on our judgement where none exists." *Id.* at 443. Recognizing that the court of appeals thought the initial sentence excessive, he continued, "[I]n any event, we would not reduce the sentence by one day no matter what the 'belief' of the Court of Appeals is. The sentence is within the statutory limit and, as Judge Timbers said so cogently, 'It is none of our appellate business.'" *Id.* at 445. Finally, almost as an afterthought, Judge Murphy stated what he considered sufficient legal justification to deny the Rule 35 motion to reduce sentence on the three remaining counts:

[T]hey were, in the judgment of the Congress and in ours, equally serious crimes; they were each committed at different times than Count 1 and with each other . . . in sum, each showed an uncompromising attitude and a callous disregard . . . of a law that he [McGee] did not approve and a desire to take the consequences as a martyr.

Id.

Dissenting Judge Timbers pointed out that the Second Circuit "has never reversed, vacated or modified a discretionary order of a trial judge on a Rule 35 motion to reduce sentence."²⁰ He felt that appellate courts have "absolutely no business" reviewing sentences of a trial court.²¹

Until the last few years, such a position was virtually unassailable. It was extremely rare for appellate courts to review sentences unless they were in excess of the statutory limit.²² Recently, however, in *United States v. Daniels*,²³ the Sixth Circuit Court of Appeals ordered the trial judge to impose a reduced sentence where the defendant had been sentenced to the maximum period permitted and where there was evidence of mitigating circumstances.

In *United States v. Tucker*,²⁴ the trial judge, in sentencing Tucker, gave consideration to his prior convictions which were later adjudged constitutionally invalid as violative of the holding in *Gideon v. Wainwright*.²⁵ The Ninth Circuit remanded the case for resentencing "without consideration of any prior convictions which are invalid. . . ."²⁶ The government appealed and the Supreme Court granted certiorari. In affirming, the Court acknowledged the broad, almost unlimited, discretion of a trial judge to determine what sentence to impose but held that, under the facts of *Tucker*:

[T]hese general propositions do not decide the case before us. For we deal here not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude.²⁷

In affirming this denial of the Rule 35 motion to reduce sentence, the court of appeals, in a per curiam decision, noted:

[A] statement of reasons may be so perfunctory or otherwise inadequate as to amount to a failure to provide a reasoned explanation, [but] we are unable to find such to have been the case here and are now satisfied as to the independent integrity of the sentences imposed on the three valid counts. Since the sentencing judge has broad discretion within the statutory limits, it is not sufficient for reversal that we do not find the reasons for imposing two years' imprisonment on a defendant with a concededly valid conscientious objection claim to be particularly persuasive.

McGee v. United States, 465 F.2d 357, 358 (2d Cir. 1972).

²⁰ 462 F.2d at 247.

²¹ *Id.* at 253.

²² See *United States v. Moody*, 395 F.2d 670 (6th Cir. 1968); *Flores v. United States*, 238 F.2d 758 (9th Cir. 1956); *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1950), cert. denied, 344 U.S. 838 (1952); *Gurera v. United States*, 40 F.2d 338 (8th Cir. 1930). But see *United States v. Ginzburg*, 398 F.2d 52, 56 (3d Cir. 1968).

²³ 446 F.2d 967 (6th Cir. 1971). Daniels was a member of the Jehovah's Witnesses and refused to perform alternate service on religious grounds. It was uncontested that this was his sole motivation yet the judge imposed the maximum five-year sentence.

²⁴ 404 U.S. 443 (1972).

²⁵ 372 U.S. 335 (1963).

²⁶ 431 F.2d 1292 (9th Cir. 1970).

²⁷ 404 U.S. at 447.

Yet another breach in the no appellate review of sentence wall may be developing as a result of challenges to its constitutionality under the eighth amendment's prohibition against "cruel and unusual punishment."²⁸ In *Furman v. Georgia*,²⁹ the Supreme Court, in a decision that saw each of the five majority justices filing a separate opinion, held that the discretionary imposition of the death penalty constituted cruel and unusual punishment within the ambit of the eighth and fourteenth amendment prohibitions.³⁰ The eighth amendment rationale is not limited, at least in theory, to the imposition of the death sentences. It could be applied to any punishment that "does not comport with human dignity"³¹ or to a penalty that the law ". . . inflicts upon some people . . . [but] does not inflict upon others,"³² or that is ". . . unacceptable to contemporary society."³³ It is at least possible that these descriptions may embrace an excessive but legal prison sentence.

At present, 13 states and the military court system have statutes allowing appellate review of excessive but legal sentences.³⁴ The remaining states and the federal judiciary system have no such statutory provisions for appellate review of sentences. On the national level, the last 15 years have seen numerous congressional attempts to create a

²⁸ U.S. CONST. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

²⁹ 408 U.S. 238 (1972). The *Furman* decision also applied to two other cases granted certiorari at the same time: *Jackson v. Georgia*, 22 Ga. 790, 171 S.E.2d 501 (1969); *Branch v. Texas*, 447 S.W.2d 932 (Tex. Crim. App. 1969).

³⁰ U.S. CONST. amend. VIII, XIV.

³¹ 408 U.S. 282 (1972) (Brennan, J., concurring).

³² *Id.* at 282.

³³ *Id.* at 282.

³⁴ Arizona, ARIZ. REV. STAT. ANN. § 13-1717; Connecticut, CONN. GEN. STAT. ANN. §§ 51-194, 51-195, 51-196 (Supp. 1972); Florida, FLA. STAT. ANN. § 924.41 (Supp. 1972); Hawaii, HAWAII REV. LAWS § 212-14 (Supp. 1965); Illinois, ILL. ANN. STAT. ch. 38, § 117-3 (c) (Supp. 1972); Iowa, IOWA CODE ANN. § 793.18 (1950); Maine, ME. REV. STAT. ANN. tit. 15, 2142-43 (Supp. 1972); Maryland, MD. ANN. CODE art. 26, §§ 132-38 (Supp. 1971); Massachusetts, MASS. GEN. LAWS ANN. ch. 278, § 28A-28C (Supp. 1972); Nebraska, NEB. REV. STAT. § 291308 (1964); New York, N.Y. CODE CRIM. PROC. §§ 543, 764 (McKinney 1958); Oregon, ORE. REV. STAT. §§ 138.050, 168.090 (1969 Repl. Part); Tennessee, TENN. CODE ANN. § 40-2711 (1955). Connecticut, Maine, Maryland and Massachusetts allow the appellate tribunal to increase an inadequate sentence as well as decrease an excessive one.

In most jurisdictions, the appeal is to the regular appellate courts of the state but in Connecticut, Maine, Massachusetts and Maryland the appeal is to a three-judge panel composed of judges appointed by the highest judicial official of the state. Procedures and availability and scope of review vary from state to state.

In the military court system, sentence may only be reduced. Appeal may be made to either the convening authority, a board of review operating out of the Judge Advocate General's Office or by the office of the Judge Advocate General itself. 10 U.S.C. §§ 860, 862 (b), 863-64, 865(a), 866(a)-(c), 869 (1970).

statutory right of appeal in the federal courts.³⁵ None have succeeded.³⁶ However, as the instant case demonstrates, the federal courts have occasionally circumvented this lack of statutory authority.³⁷

The principal reasons favoring enactment of legislation allowing appellate review of sentences may be stated briefly:³⁸

- 1) It would encourage respect for law and perhaps foster rehabilitation. Certainly the judicial system loses respect when the occasional abuse of one judge goes uncorrected. Defendants who receive sharp sentences in comparison to others treated more leniently are likely to be embittered and unreceptive to rehabilitation.³⁹
- 2) It would prevent the gross injustices that have been fostered by the inability of appellate courts to correct excessively harsh sentences. Appellate review would promptly cure such sentences.⁴⁰

³⁵ The following bills have been introduced by Senator Roman Hruska (R. Neb.): S. 2722, 89th Cong., 1st Sess. (1963); S. 2879, 87th Cong., 2d Sess. (1962); S. 1692, 87th Cong., 1st Sess. (1961); S. 3914, 86th Cong., 2d Sess. (1960). Senator Estes Kefauver (D. Tenn.) introduced S. 1480, 84th Cong., 1st Sess. (1955). House bills introduced by Representative Kenneth Keating (R. N.Y.) were: H.R. 270, 85th Cong., 1st Sess. (1957) and by Representative Thomas Lane (D. Mass.): H.R. 4932, 84th Cong., 1st Sess. (1955).

³⁶ The only exception to the lack of congressional approval is an extremely limited right to appellate review of sentencing which is available to designated "special offenders" under 18 U.S.C. §§ 3575, 3576 (1970).

This absence is all the more striking in that a comparison with other nations indicates that those American jurisdictions failing to provide a remedy stand largely alone in this respect.

Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 STAN. L. REV. 405, 406 (1968) [hereinafter Weigel].

³⁷ *Yates v. United States*, 356 U.S. 363, 366 (1968). Cf. *Scarbeck v. United States*, 317 F.2d 546, 569 (D.C. Cir. 1962), cert. denied 374 U.S. 856 (1963); *United States v. Wiley*, 278 F.2d 500, 503 (7th Cir. 1960).

³⁸ For a comprehensive study of the pros and cons of appellate review, see *Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249 (1962) [hereinafter *Symposium*].

³⁹ Respect for the legal system can be achieved through the prompt correction of abuses. A system that allows the whims of one man to determine the fate of a defendant is not likely to promote respect for the law. See A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, APPELLATE REVIEW OF SENTENCES (Approved Draft 1968). Cf. Bennett, *The Sentence—Its Relation to Crime and Rehabilitation* in OF PRISONS AND JUSTICE, S. Doc. No. 70, 88th Cong., 2d Sess. 307, 311 (1964).

Defendants are often hostile when confronted by a judge with unlimited power. This does not aid in the rehabilitation of the offender. It has been suggested that, if the defendant is aware that the judge's sentence is not final, it might not only eliminate the hostile attitude but might be a positive step towards rehabilitation. See Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453 (1960).

⁴⁰ Examples of such excessive sentences are almost unlimited:

In recent years there have been cases, in at least one state, where consecutive sentences have run as high as 300 years. In one instance, involving a 17-year-old boy, the sentence was 140 years, resulting from seven consecutive 20-year sentences for a series of robberies all committed in one night.

Sobeloff, *A Recommendation for Appellate Review of Criminal Sentences*, 21 BROOKLYN L.

- 3) It would create a rational and uniform sentencing policy. This would lessen the incidence of disparate sentences.⁴¹
- 4) Extensive study of one system of appellate review has shown that it can work well.⁴²

REV. 2, 3 (1954) [hereinafter Sobeloff]. In another case, after a young man was blinded in an accident, his wife left, taking their small children with her. After he recovered his sight, needing money to locate his family, he robbed a bank. Feelings of remorse drove him to turn himself in to the police. He received a sentence of 40 years. The average sentence for bank robbery at the time was less than 13 years. Kennedy, *Justice is Found In the Hearts and Minds of Free Men*, 25 FED. PROB. 3, 4 (1961); 30 F.R.D. 401, 424-25 (1961).

The only relief now available from such sentences is executive clemency. This is, at the very best, an extremely slow process. See REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON PUNISHMENT FOR CRIME at 26 (1942).

It has been argued that, although executive clemency is available to correct excessive sentences, the judiciary should be able to correct its own mistakes. Judicial errors of other types are correctable on appeal but, in most jurisdictions in the United States, sentencing errors are not.

[T]he standards governing the wise exercise of Executive clemency are by no means the same standards which would be invoked to correct unjustified disparity in sentencing. Finally there is no right to Executive clemency. The victim of a serious injustice ought to have a right to get it corrected.

Remarks of Judge Weigel, *Appellate Review of Sentences Hearings on S. 2722 Before the Subcommittee on Improvements in Judicial Machinery of The Senate Committee on the Judiciary*, 89th Cong., 2d Sess. 73 (1966).

⁴¹ "It is well recognized that where there are many trial judges and no power of appellate review, there is but little uniformity of sentencing policy." Sobeloff, *supra* note 40, at 8. This does not mean that there should be no disparity in sentences. "Reasonable disparity is necessary to achieve the purposes of sentencing." Weigel, *supra* note 36, at 405. But excessive disparity is unjustifiable. See Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55 (1966); *Institute of Judicial Administration, Disparity In Sentencing of Convicted Defendants* (1954). The need for sentencing standards for trial judges to follow is acute:

[I]n the difficult and important task of sentencing offenders, there are almost no precedents or standards to follow. Since determining what sentence to impose has nearly always been a matter of judicial discretion, few opinions have been written to explain sentences. The knowledge and wisdom of individual judges have thus died with them.

S. WARNER & H. CABOT, *JUDGES AND LAW REFORM 159-60* (1936). For a general treatment of sentencing disparities, see JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION OF THE A.L.I. AND A.B.A., *The Problem of Sentencing 56-77* (1962); McGuire and Holtzoff, *The Problem of Sentence in the Criminal Law*, 20 B.U.L. REV. 423 (1940). See also M. PAULSEN AND S. KADISH, *CRIMINAL LAW AND ITS PROCESSES 162-68* (1962).

⁴² In the United Kingdom, where the most extensive studies of the effect of appellate review of sentences have been undertaken, the verdict is generally favorable. See Meador, *The Meador Report: A Report Submitted to the American Bar Association Project on Minimum Standards for Criminal Justice* (1965). But success has not been universally achieved. See Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453 (1960); Hall, *Reduction of Criminal Sentences on Appeal*, 37 COLUM. L. REV. 521, 762 (1937). Reports of inadequacies and proposals for reform of sentencing procedures in New York have recently received extensive press coverage. See 168 N.Y.L.J., Nov. 14, 1972, at 1, col. 5; N.Y. Times, Sept. 25, 1972, at 1, col. 6; *Id.*, Sept. 26, 1972, at 1, col. 2; *id.*, Sept. 27, 1972, at 1, col. 1; *id.*, Sept. 28, 1972, at 1, col. 1. Chief Judge Fuld of the New York Court of Appeals has proposed that sentencing power be removed from judges:

To minimize disparity in sentencing, it may ultimately be demonstrated that it is desirable to commit to a correction authority or some other agency the responsibility and duty of determining the treatment to be accorded those convicted.

Id., Sept. 28, 1972, at 1, col. 1.

- 5) Statistical studies have indicated there is more severe sentencing of certain ethnic groups.⁴³

Opponents of appellate review argue that it would lead to frivolous appeals, thus adding to already overloaded appellate calendars.⁴⁴ Also, they contend that trial judges are in the best position to determine appropriate punishment since they personally observe defendants.⁴⁵

Despite these contentions, appellate review is gaining important support. The American Bar Association⁴⁶ and the Judicial Conference of the United States⁴⁷ have both endorsed appellate review and, recently, a very limited statutory exception has appeared.⁴⁸

The case for appellate review is best summed up in the words of Mr. Justice Stewart:

It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should have so neglected the most important dimension of fundamental justice.⁴⁹

If narrowly construed, the *McGee* holding will be of only limited use in circumventing judicial reluctance to review criminal sentences. However, if read broadly, *McGee* and its use of the Rule 35 motion may, in the absence of positive statutory authority, be a decisive step on the path to remedying this anomaly.

⁴³ "[B]eing black generally means one type of sentence while being white means another." Bullock, *Significance of the Racial Factor in the Length of Prison Sentences*, 52 J. CRIM. L. 411, 415 (1961). See also *Furman v. Georgia*, 408 U.S. 238 *et seq.* (1972) (Douglas, J., concurring).

⁴⁴ Although this seems to be the most telling argument against appellate review, it does, as Congressman Cellar has noted, "completely evade the issue of whether an appeals procedure is needed to insure the quality of justice that should characterize our courts." *Symposium*, *supra* note 38, at 309. In addition, "appeal minded defendants have almost invariably been able to find something to argue about, even when appeals have been limited to the validity of the conviction, and have seldom seemed discouraged by the chance of success appearing very small." Sobeloff, *supra* note 40, at 9-10.

⁴⁵ Under all existing proposals, the trial judge would continue to have primary sentencing responsibility but excessive sentences meted out due to his personal bias would be subject to review by disinterested appellate court judges. For a discussion of this problem, see *Symposium*, *supra* note 38.

⁴⁶ A.B.A., PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, APPELLATE REVIEW OF SENTENCES (Approved Draft 1968).

⁴⁷ 1964 JUD. CONF. REPT., at 86; 1967 JUD. CONF. REPT., at 79-80.

⁴⁸ 18 U.S.C. §§ 3575, 3576 (1970). Section 3576 allows review of sentences imposed on persons adjudged special offenders under § 3575. Such special offenders are subject to increased sentences. Review may be obtained by either the United States or the defendant. Sentence may be decreased or increased by the appropriate court of appeals.

⁴⁹ *Shepherd v. United States*, 257 F.2d 293, 294 (6th Cir. 1958).