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Appellate Review of Federal Youth Corrections Act Sentences in the Aftermath of Dorszynski v. United States

Catherine A. Foddai

APPELLATE REVIEW OF FEDERAL YOUTH CORRECTIONS ACT SENTENCES IN THE AFTERMATH OF *DORSZYNSKI v. UNITED STATES*

I. INTRODUCTION

As the United States enters its third century, perhaps no problem concerns its citizens more than the steady increase in crime, particularly youthful crime. Such concern is not, however, new to the 1970s. More than twenty-five years ago Congress enacted the Federal Youth Corrections Act (FYCA)[1] in an attempt to meet the problem of crime "at its focal point, . . . before the traits of the habitual criminal are allowed to develop, . . . by permitting the substitution of correctional rehabilitation for retributive punishment . . . ."[2] Although FYCA has not been the panacea envisioned by Congress, it has permitted federal district court judges to impose less stringent sentences than those mandated by the particular statute.[3]

While the district court may or may not use FYCA in sentencing,[4] its sentence, if within statutory limits, generally may not be reviewed.[5] The Supreme Court has recognized, however, the duty of the appellate court to scrutinize the "judicial process" utilized by the district court in imposing sentence.[6] Many courts have employed this rationale and have vacated sentences, finding that sentencing discretion was abused or not exercised at

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1. 18 U.S.C. § 5005 et seq. (1970). The Act was subsequently amended to include residents of the District of Columbia. Id. § 5024.

2. H.R. Rep. No. 2979, 81st Cong., 2d Sess., in U.S. Code Cong. Serv. 3983 (1950) [hereinafter cited as House Report].

3. See notes 15-26 infra and accompanying text.

4. The Act may be disregarded, in sentencing youthful offenders, only if the trial court has made a specific finding of no benefit. See notes 84-85 infra and accompanying text. When a defendant is between the ages of 22 and 26, this requirement does not apply. Dorszynski v. United States, 418 U.S. 424, 433 n.9 (1974); Ross v. United States, 531 F.2d 839, 840 (7th Cir. 1976); Stead v. United States, 531 F.2d 872, 874 (8th Cir. 1976); United States v. Brown, 522 F.2d 207, 208 (5th Cir. 1975) (per curiam); United States v. Gamboa-Cano, 510 F.2d 598 (5th Cir. 1975) (per curiam); Chandler v. United States, 401 F. Supp. 658, 660 (D.N.J. 1975). But see United States v. Torun, No. 76-1055 (2d Cir., June 14, 1976).

5. Townsend v. Burke, 334 U.S. 736, 741 (1948); United States v. Crowe, 516 F.2d 824, 825 (4th Cir. 1975) (per curiam); United States v. Dancy, 510 F.2d 779, 784 (D.C. Cir. 1975); United States v. Hartford, 489 F.2d 652, 654 (5th Cir. 1974); see Woosley v. United States, 478 F.2d 139, 143 (8th Cir. 1973) (en banc); United States v. Daniels, 446 F.2d 967, 969 (6th Cir. 1971). This enormous sentencing freedom is an anomaly within the American judicial system. The ABA has noted that "in no other area of our law does one man exercise such unrestricted power." ABA Project on Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences, Introduction, 1 & 2 (Approved Draft 1968) [hereinafter cited as ABA Draft].

6. Dorszynski v. United States, 418 U.S. 424, 443 (1974), quoting with approval the Fifth Circuit decision in United States v. Hartford, 489 F.2d 652, 654 (5th Cir. 1974).

all;[7] that the sentence was imposed mechanically;[8] or, in FYCA situations, that an express finding of no benefit was not made before adult sentence was imposed.[9]

In 1974, in *Dorszynski v. United States*,[10] the Supreme Court, while agreeing that an express no benefit finding was required under the Act,[11] affirmed again the virtually unfettered discretion of the district courts in sentencing.[12] Although *Dorszynski* has restricted appellate review of FYCA sentences,[13] appellate courts continue to review and vacate such sentences.[14]

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7. United States v. Riley, 481 F.2d 1127 (D.C. Cir. 1973); United States v. Waters, 437 F.2d 722 (D.C. Cir. 1970).

8. United States v. Schwarz, 500 F.2d 1350, 1352 (2d Cir. 1974) (per curiam), United States v. Hartford, 489 F.2d 652, 654 (5th Cir. 1974).

9. Brooks v. United States, 497 F.2d 1059 (6th Cir.), rev'd, 503 F.2d 1404 (6th Cir. 1974); United States v. Kaylor, 491 F.2d 1133 (2d Cir.) (en banc), vacated sub nom. United States v. Hopkins, 418 U.S. 909 (1974); United States v. Toy, 482 F.2d 741 (D.C. Cir. 1973); United States v. Forrest, 482 F.2d 777 (D.C. Cir. 1973) (per curiam); United States v. Phillips, 479 F.2d 1200 (D.C. Cir. 1973); United States v. Reed, 476 F.2d 1145 (D.C. Cir. 1973) (en banc); United States v. Coefield, 476 F.2d 1152 (D.C. Cir. 1973) (en banc); Cox v. United States, 473 F.2d 334 (4th Cir.) (en banc), cert. denied, 414 U.S. 869 (1973); United States v. Ward, 454 F.2d 992 (D.C. Cir. 1971) (per curiam).

10. 418 U.S. 424 (1974).

11. Id. at 441.

12. Id. at 431. One commentator believes that judicial resistance to appellate review of criminal sentences can be psychologically explained. In his view, the exercise of sentencing discretion contributes significantly to the judge's "self-identity and occupational satisfaction." Robin, Judicial Resistance to Sentencing Accountability, 21 Cr. & Delinq. 201, 202 (1975) [hereinafter cited as Robin]. Such resistance to accountability is merely symptomatic of human behavior, that is, an attempt to avoid sanctions and sanctioning opportunities. Id. at 204-05.

13. See, e.g., United States v. Hall, 525 F.2d 970 (5th Cir. 1976) (failure to place no benefit finding in judgment order not grounds for appellate review); United States v. Allen, 510 F.2d 651 (D.C. Cir. 1974) (failure to state reasons for sentencing as adult, after express no benefit finding made, not grounds for appellate review).

14. See, e.g., United States v. Holder, No. 75-1712 (4th Cir., June 28, 1976); United States v. Hopkins, 531 F.2d 576, 582 (D.C. Cir. 1976) (reliance upon inaccurate information in sentencing); United States v. Neal, 527 F.2d 63 (8th Cir. 1975) (failure to make express no benefit finding); United States v. Ortiz, 513 F.2d 198 (9th Cir.) (per curiam), cert. denied, 423 U.S. 843 (1975) (inconsistent treatment of offender in sentencing); United States v. Bailey, 509 F.2d 881 (4th Cir. 1975) (failure to make express finding of no benefit); United States v. Rogers, 504 F.2d 1079 (5th Cir. 1974), cert. denied, 422 U.S. 1042 (1975) (refusal to utilize Act because defendant exercised constitutional right against self-incrimination); Belgarde v. United States, 503 F.2d 1054 (9th Cir. 1974) (per curiam) (failure to make express no benefit finding); United States v. Maples, 501 F.2d 985 (4th Cir. 1974) (unconstitutional standard employed in sentencing). But see United States v. Scruggs, No. 76-1132 (8th Cir., July 13, 1976). In urging that the long-standing rule against appellate review of criminal sentences be modified, the ABA recognized that review is in fact available now. Many appellate courts, dissatisfied with what they believe to be an excessive sentence, seize upon technical errors to review and remand for a new trial. ABA Draft, supra note 5, at 3. The ABA believes that overt appellate review of the sentence itself (as distinguished from the judicial process employed in arriving at the sentence) would focus the issue squarely upon the severity of the sentence, avoiding a retrial where only the sentence is found to be defective. Id.

This Note will examine appellate review of FYCA sentences before and after the watershed decision of *Dorszynski*, analyzing the various techniques employed by appellate courts to scrutinize the district court's exercise of its greatest power.

II. Federal Youth Corrections Act

The purpose of FYCA was to provide the federal courts with an alternative means of sentencing youths between the ages of eighteen and twenty-two by emphasizing rehabilitation rather than punishment.[15] The Act created a Youth Correction Division within the Board of Parole[16] empowered to provide for youthful offenders committed to it a "system of analysis, treatment, and release that will cure rather than accentuate the anti-social tendencies that have led to the commission of crime."[17] Encouraged by the success of a similar English program,[18] Congress believed that this new sentencing device would drastically decrease youthful crime.[19]

Under FYCA, the sentencing judge may choose among four alternative sentencing procedures. If the court believes that the youth offender needs no commitment, it may suspend the sentence and place the youth on probation.[20] The second alternative permits the court to sentence the youth to the custody of the Attorney General, in lieu of imprisonment under other statutory provisions,[21] with release required within six years of conviction.[22] The third alternative permits the court, if it finds that the youth offender will not benefit from treatment under the Act, to sentence the offender to the custody of the Attorney General[23] for a term which may exceed six years but may not exceed the maximum period authorized by statute for the crime.[24] Finally, a court may, if it finds that the offender will derive no benefit from FYCA sentencing, sentence the youth "under any other applicable penalty provision."[25] In effect, the last alternative permits the district court to ignore the preferential sentencing procedure established by Congress and sentence the youth offender as an adult. In such cases, the trial judge may properly consider deterrence and punishment in meting out sentence, as he has found that rehabilitation is unlikely.[26]

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15. House Report, supra note 2, at 3983.

16. 18 U.S.C. § 5005 (1970). The Division functions under the authority of the Attorney General, id., and in conjunction with the Director of the Bureau of Prisons. Id. § 5007.

17. House Report, supra note 2, at 3983.

18. The Borstal program, initiated in Great Britain in the late nineteenth century, served as the model and hope for FYCA. For a review of the major features of the English system, see id. at 3987-89.

19. Id. at 3983.

20. 18 U.S.C. § 5010(a).

21. Id. § 5010(b).

22. Id. § 5017(c).

23. Id. § 5010(c).

24. Id. § 5017(d).

25. Id. § 5010(d).

26. See United States v. Butler, 481 F.2d 531 (D.C. Cir. 1973), wherein the appellate court

III. APPELLATE REVIEW OF FYCA SENTENCES BEFORE *Dorszynski*

While FYCA created an alternative method of sentencing, it did not overrule the long-standing federal rule precluding appellate review of sentences. Prior to 1891, federal courts of appeal were empowered to review and modify excessive sentences.[27] In the reorganization of the federal appellate system, the specific language allowing such review was deleted.[28] As a consequence of this omission, some early federal cases after 1891 concluded that appellate power to review and modify sentences had been implicitly repealed.[29] This view, adopted by the Supreme Court,[30] is still in effect, despite criticism from the bench,[31] Congress,[32] and the ABA.[33]

Although this broad restriction against review has been vigorously applied, appellate courts may properly examine the judicial process involved in imposing sentence to ensure that no irregularity has occurred which would

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refused to vacate an adult sentence imposed after the district court found the defendant would not benefit from treatment under the Act. The trial court listed as its reasons for the sentence the defendant's lack of remorse; the brutal crime involved (murder); and the violence in defendant's life, which continued even after his arrest (he struck a guard and escaped from jail). Id. at 536-37. These findings supported the adult sentence, precluding any appellate review. Id. at 537. See also United States v. Foss, 501 F.2d 522 (1st Cir. 1974).

27. "[I]n case of an affirmance of the judgment of the district court, the circuit court shall proceed to pronounce final sentence and to award execution thereon. . . ." Act of March 3, 1879, ch. 176, § 3, 20 Stat. 354.

28. The present law omits this express language. 28 U.S.C. § 2106 (1970).

29. Gurera v. United States, 40 F.2d 338, 341 (8th Cir. 1930); Freeman v. United States, 243 F. 353, 357 (9th Cir. 1917), cert. denied, 249 U.S. 600 (1919); Jackson v. United States, 102 F. 473, 487 (9th Cir. 1900).

30. Dorszynski v. United States, 418 U.S. 424 (1974); Gore v. United States, 357 U.S 386, 393 (1958); Blockburger v. United States, 284 U.S. 299, 305 (1932).

31. "To review the exercise of judicial discretion in the sentencing process is not that difficult a task—the appellate process involves similar appraisals in many areas of the law. I suggest the main difficulty in reviewing lawful discretion on appeal comes not in measuring the exercised judgment against the marked boundaries of the field, but in the all too human predilection of judges to routinely 'rubber stamp' the questioned discretion of a district judge without making a qualitative review of the actual decision. It is as erroneous to substitute conclusory agreement as it is to voice opinionated disagreement." United States v. Dace, 502 F.2d 897, 903-04 (8th Cir. 1974) (Lay, J., dissenting), cert. denied, 419 U.S. 1121 (1975). One commentator believes that appellate justices would tend toward greater moderation in sentencing, while the public would demand stiffer sentences for the lawbreakers. In essence, the trial court would be placed in the position of justifying its sentencing discretion to the public at large, the community which it serves, and its peers, the appellate court justices. This would be "an enormous role reversal to a group accustomed to its own style of authoritarianism," and could explain its continued resistance to review. Robin, supra note 12, at 208.

32. See generally Tydings, Ensuring Rational Sentences—The Case for Appellate Review, 53 J. Am. Jud. Soc'y 68 (1969). For a listing of the various bills introduced in Congress to permit appellate review, see Comment, Appellate Review of Sentences: A Survey, 17 St. Louis U.L.J. 221, 229 n.62, 230 nn.63-67 (1972).

33. "As a matter of principle, the Advisory Committee is convinced that review of the sentence should be available in every case in which review of a trial leading to conviction would be available." ABA Draft, supra note 5, at 3.

invalidate the sentence.[34] This distinction permits appellate courts to examine indirectly and to overturn those sentences which they find excessive without fear of contravening Supreme Court guidelines in this area.

A. *Abuse of Discretion or Failure to Exercise Discretion in Sentencing*

In *United States v. Waters,*[35] a nineteen year old defendant pleaded guilty to various counts of robbery and assault with a deadly weapon. Although the offender moved for sentencing under FYCA, he was nevertheless sentenced as an adult. However, the district court recommended that it be served in a youth institution.[36] This recommendation was ignored, and defendant was transferred to a penitentiary, where he suffered severe injuries after an attack by a fellow inmate.[37]

On appeal, the District of Columbia Court of Appeals vacated the sentence. The court held that the district court had abused its discretion in failing to make an implicit or explicit finding that the defendant would not benefit from FYCA treatment.[38] A refusal by the lower court to utilize the preferred sentencing procedure established by Congress, without furnishing adequate reasons for this refusal, evidenced an abuse of discretion.[39] Although the sentence imposed was within statutory limits, the judicial process employed by the lower court was flawed. The appellate court could, therefore, properly intervene.

In *United States v. Riley,*[40] a statutorily authorized presentence report[41] urged the imposition of an adult sentence in large part because the local youth center was overcrowded.[42] In vacating the adult sentence, the court of

34. Dorszynski v. United States, 418 U.S. 424, 443 (1974); United States v. Hopkins, 531 F.2d 576, 579-80 (D.C. Cir. 1976); United States v. Hartford, 489 F.2d 652 (5th Cir. 1974).

35. 437 F.2d 722 (D.C. Cir. 1970).

36. Id. at 725.

37. Id.

38. Id. at 726-27.

39. Id. at 727.

40. 481 F.2d 1127 (D.C. Cir. 1973).

41. 18 U.S.C. § 5010(e) (1970). Such a report may be authorized if the district court wishes to acquire additional information about the defendant before sentencing. The court may order the youth to be committed to the custody of the Attorney General for "observation and study" at a Classification Center or agency. The Lorton Committee, composed of a parole officer, a clinical psychologist and an administrator of the unit, evaluates the youth's background and produces a "medical and psychological" profile of the offender. Id. § 5014. The Committee's ultimate recommendation as to a youth's amenability to FYCA treatment is the most influential and complete § 5010(e) document. This study must be presented to the Director of the Bureau and the Youth Correction Division of the Board of Parole within thirty days. Id. The Division must submit its findings and make its recommendations within sixty days of the authorization. Id. § 5010(e).

42. 481 F.2d at 1132. The report indicated that adult sentencing was recommended primarily because of the overcrowded conditions at the local youth center. Such a reason was found to be insufficient to support an adult sentence, because under the Act, the Attorney General may place youth offenders anywhere in the United States. Id. Moreover, statistics indicated that only some

appeals held that the acceptance by the district court of the recommendations contained in the presentence report evidenced a failure by the court to exercise its statutory duty.[43] Here again, the judicial process by which sentence was imposed was scrutinized and found lacking since overcrowding at a local youth facility is not a cognizable reason for denying FYCA sentencing.[44] Therefore, the usual restrictions against appellate review were not applicable.[45]

In both *Waters* and *Riley* the appellate court made it clear that it was not reviewing the sentence per se; rather, it was reviewing the process utilized by the lower court in arriving at such a sentence. As the Supreme Court has recognized, this latter step is merely a "necessary incident of what has always been appropriate appellate review of criminal cases."[46]

In effect, an appellate court may properly scrutinize all the circumstances which led the trial court to sentence as it did, but, once having carefully scrutinized and become familiar with these facts, it may go no further. This artificial "boundary" has been criticized by the ABA, which favors overt appellate review of the sentences themselves.[47]

B. *Mechanical Imposition of Sentences*

In *Williams v. New York*,[48] the Supreme Court accepted the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime."[49] In interpreting the *Williams* decision, appellate courts have held that they have the power to vacate a sentence if it is imposed "mechanically," *i.e.*, without reference to the defendant's particular circumstances.[50]

In *United States v. Schwarz*,[51] an eligible defendant[52] was denied FYCA sentencing in effect because of her privileged background. The trial court,

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of the youth facilities within the United States were partly occupied. Id. at 1131 n.18.

43. Id. at 1132.

44. Under the statute, the chief reason for denying FYCA sentencing must be a belief that rehabilitative treatment would not benefit the defendant. See notes 64-80 infra and accompanying text.

45. 481 F.2d at 1132 (Wright, J., concurring).

46. 418 U.S. at 443, quoting United States v. Hartford, 489 F.2d 652, 654 (5th Cir. 1974).

47. See note 14 supra.

48. 337 U.S. 241 (1949).

49. Id. at 247.

50. See United States v. Schwarz, 500 F.2d 1350 (2d Cir. 1974) (per curiam); United States v. Hartford, 489 F.2d 652 (5th Cir. 1974); cf. Woosley v. United States, 478 F.2d 139 (8th Cir. 1973) (en banc) (Selective Service action; maximum sentence imposed without regard to defendant's background or character); United States v. Daniels, 446 F.2d 967 (6th Cir. 1971) (Selective Service action; maximum sentence imposed on remand despite appellate court's admonition to reconsider severity of sentence).

51. 500 F.2d 1350 (2d Cir. 1974) (per curiam).

52. Although defendant was twenty-five years old at the time of sentencing, she could have been sentenced under the Act. 18 U.S.C. § 4209 (1970). While recognizing that the district court acted within the scope of its statutory discretion in refusing FYCA sentencing, the appellate court disapproved of the manner of refusal. 500 F.2d at 1351.

throughout the course of the trial and during the sentencing proceedings, frequently made reference to the educational and cultural advantages which defendant had enjoyed throughout her life.[53] The court's apparent bias resulted in imposition of an adult sentence, despite the recommendation of both the Government and the defense attorney that a FYCA sentence be imposed.[54] In vacating the adult sentence, the Second Circuit held that the refusal of the trial court to make a specific finding of no benefit under the Act before sentencing defendant as an adult, in conjunction with certain statements which intimated that only certain classes of persons could be considered for FYCA sentencing, violated the individualized sentencing requirement of *Williams*.[55] Again, while the sentence imposed was statutorily permissible, the process utilized to impose such a sentence was marred. The imposition of a strict sentence, without a showing that the defendant could not benefit from FYCA sentencing, indicated a desire by the district court to ignore the preferred sentencing procedures altogether.[56] Thus, the appellate court could intervene without restricting the lower court's discretionary powers.

As was often the case in FYCA situations before *Dorszynski*, reversal of a sentence was predicated not only upon abuse of discretion by the trial court, but also upon a failure to make a finding of no benefit. However, it appears that the Second Circuit could have reversed the *Schwarz* sentence solely by employing a *Williams* rationale. The lower court's statements evinced an intention to make the punishment fit the crime, regardless of any special, mitigating circumstances in the defendant's background which would justify the imposition of a lesser sentence. Such action has been found to be an abuse of discretion by appellate courts in non-FYCA situations, most notably in Selective Service cases.[57]

Appellate courts have, as a general rule, declined to review sentences which fall within the statutorily prescribed maximum.[58] In *United States v. Hartford*,[59] however, the Fifth Circuit vacated two such sentences because of the manner in which they were imposed.

Hartford, an eligible defendant under the Act, pleaded guilty to possession of a controlled substance. Under FYCA, he received a sentence of four years imprisonment. Had he been sentenced under the narcotics statute, the maximum penalty possible would have been one year imprisonment, a fine of $5,000, or both.[60] Bowdoin, a first offender also eligible under the Act,

53. Id. at 1351 & n.1.

54. Id. at 1351-52.

55. Id.

56. The facts indicated that this was defendant's first offense and that her background was admittedly stable and financially secure. Id. at 1351. The combination of these factors could indicate amenability to FYCA treatment.

57. See Woosley v. United States, 478 F.2d 139 (8th Cir. 1973) (en banc); United States v. Daniels, 446 F.2d 967 (6th Cir. 1971).

58. See note 5 supra.

59. 489 F.2d 652 (5th Cir. 1974).

60. Id. at 653. The defendant violated the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 844(a) (1970).

received the maximum term possible under the narcotics statute: five years imprisonment.[61] In reversing, the Fifth Circuit held that the trial court's admitted determination to impose the maximum term possible, either under the Act or the narcotics statute, was not a reasoned exercise of sentencing discretion.[62] The trial court here had failed to utilize FYCA for the purpose intended by Congress: rehabilitation and reorientation of a nascent criminal. In Hartford's case, the Act was used punitively, contrary to the goals of the legislature; in Bowdoin's case, the Act was ignored, even though the defendant's lack of a prior criminal record indicated that he could benefit from its application. While deterrence is a valid reason for imposing a strict sentence,[63] the trial court may not choose among several statutes to find the maximum sentence possible, especially in an area in which Congress has emphasized rehabilitation rather than punishment.[64]

C. *"No Benefit" Requirement Under FYCA*

By enacting FYCA, Congress made it clear that an adult sentence was to be imposed only as a last resort, *i.e.*, only if the trial court found that the defendant would derive no benefit from FYCA treatment. A frequent ground for appellate review of sentences in this area had been the failure of some lower courts to make specific findings of no benefit under the Act before imposing adult sentence.

In the years preceding *Dorszynski*, several circuit courts, interpreting the legislative intent in enacting FYCA, reached different conclusions as to the criteria a district court had to meet before imposing an adult sentence.

The Sixth Circuit, in *Brooks v. United States*,[65] held that an express determination of no benefit, as well as a statement of reasons supporting the decision, was required in FYCA situations.[66] In the court's opinion, this added requirement was necessary if appellate courts were to properly exercise their responsibility to determine "whether the sentencing court has abused the discretion conferred upon it by the Act."[67]

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61. Id. § 841(b)(1)(B).

62. 489 F.2d at 655.

63. In United States v. Foss, 501 F.2d 522 (1st Cir. 1974), defendants, each sentenced to three years imprisonment for distributing cocaine, claimed that the trial court's reason for imposing such long sentences was a desire to rid the community of drug traffickers. The defendants claimed that this violated the individualized sentencing requirements established by law. Id. at 525-27. The First Circuit affirmed, holding that the trial court did not abuse its discretion by considering general deterrence as a factor. The trial court's desire to look beyond the offender to the sentence's presumed effect upon others was not contrary to the statute as long as the trial court considers the circumstances of the particular defendant. Id. at 527-28.

64. One of the prime reasons for promulgating this preferred sentencing procedure for youthful offenders was Congress' belief that by "herding youth with maturity, the novice with the sophisticate . . . and by subjecting youth offenders to the evil influences of older criminals and their teaching of criminal techniques . . . many of our penal institutions actively spread the infection of crime and foster, rather than check, it." House Report, supra note 2, at 3985.

65. 497 F.2d 1059 (6th Cir.), rev'd, 503 F.2d 1404 (6th Cir. 1974) (on basis of Dorszynski decision).

66. 497 F.2d at 1062.

67. Id. at 1063. See United States v. Ward, 454 F.2d 992 (D.C. Cir. 1971) (per curiam),

Similarly, the Second Circuit, in *United States v. Kaylor,*[68] and the District of Columbia Circuit, in *United States v. Reed*[69] and *United States v. Coefield,*[70] held that only an explicit finding of no benefit with supporting reasons would justify imposition of an adult sentence.[71] Placing on the record the factors which led the district court to sentence the defendant as an adult would aid the appellate court in determining whether such factors were rationally related to the congressional objectives in enacting FYCA.[72]

Several circuit courts imposed less stringent requirements in FYCA situations.

In *Cox v. United States,*[73] the district court judge imposed an adult sentence on an eligible offender after expressly determining that the legislative history of FYCA did not require a specific finding of no benefit.[74] The Fourth Circuit reversed, holding that "the language of the statute is plain. The Youth Corrections Act must be used unless the sentencing judge finds that treatment under the Act would not be beneficial."[75] However, if such a determination were made and this could be gleaned from the record, no explicit finding was required.[76]

The Seventh Circuit, in *United States v. Dorszynski,*[77] and the Third Circuit, in *Williams v. United States,*[78] stated that an implicit finding of no benefit was sufficient to satisfy congressional directives in this area.[79] The *Williams* court, while noting that an explicit finding was desirable, expressly refused to follow the standard established by the *Coefield* court.[80]

This conflict between the circuits as to the administration of the Act was resolved by the Supreme Court in *Dorszynski v. United States.*[81]

In *Dorszynski,* an eligible defendant was indicted for selling LSD to an FBI agent. After a plea of guilty was entered, but before sentence was imposed, the defendant's attorney requested that his client be placed on probation, according to the terms of 18 U.S.C. § 5010(a). Instead, the district court

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where the appellate court held that the failure by the district court to find either implicitly or explicitly whether the defendant would benefit from the Act prevented it from exercising its supervisory powers to determine whether the judicial process utilized in sentencing was deficient. Id. at 995.

68. 491 F.2d 1133 (2d Cir.) (en banc), vacated sub nom. United States v. Hopkins, 418 U.S. 909 (1974).

69. 476 F.2d 1145 (D.C. Cir. 1973) (en banc).

70. 476 F.2d 1152 (D.C. Cir. 1973) (en banc).

71. 491 F.2d at 1138-39; 476 F.2d at 1150; 476 F.2d at 1156-57.

72. 476 F.2d at 1150.

73. 473 F.2d 334 (4th Cir.) (en banc), cert. denied, 414 U.S. 869 (1973).

74. The trial judge believed that FYCA was merely another sentencing alternative, to be given no greater deference than any other statutory provision. Id. at 337.

75. Id.

76. Id.

77. 484 F.2d 849 (7th Cir. 1973), rev'd, 418 U.S. 424 (1974).

78. 476 F.2d 970 (3d Cir. 1973).

79. 484 F.2d at 851; 476 F.2d at 971-72.

80. 476 F.2d at 972.

81. 418 U.S. 424 (1974).

sentenced the defendant as an adult.[82] At no time during the sentencing procedure did the district court mention FYCA. On appeal, the defendant claimed that the sentence was invalid because the court had not made an express finding of no benefit before imposing adult sentence. The Seventh Circuit affirmed, holding that the imposition of the adult sentence itself implied rejection of the Act.[83] The Supreme Court reversed, holding that an express finding of no benefit was required before a youth offender could be sentenced as an adult.[84] Once such a finding has been made, however, the sentencing court need not supply supporting reasons.[85]

As for appellate review of sentences, the Court reiterated the traditional view that "once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end."[86] The Court did not, however, restrict the appellate court's power to scrutinize the judicial process utilized in imposing sentence, to ensure that discretion has been exercised.[87]

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82. "Petitioner [the defendant] then received a split sentence which remitted him to the custody of the Attorney General for one year, to serve 90 days' confinement 'in a jail-type or treatment' institution . . . the execution of the remainder of the sentence was suspended and petitioner was placed on probation for two years upon release from custody." Id. at 429.

83. 484 F.2d at 851.

84. 418 U.S. at 443-44.

85. 418 U.S. at 441-42. This ruling reversed the standard established in FYCA situations by various appellate courts. See notes 65-80 supra and accompanying text. While concurring with the majority that an explicit finding of no benefit was necessary in FYCA situations, Justice Marshall, joined by three others, said that furthering the purpose of the Act requires a trial court to supply supporting reasons when sentencing a youthful offender as an adult. In his view, merely requiring a trial court to state that it has considered the Act and rejected it "renders the finding requirement of § 5010(d) a nullity." Id. at 452. Recognizing the deep concern which led Congress to establish such an extensive sentencing structure for youthful offenders, Marshall would require "that the trial judge include, on the record, a statement which makes clear that he considered the provisions of the Act, weighed the treatment option available, and decided in light of his familiarity with the offender that he would not derive benefit from treatment under the Act." Id. at 452-53. Rejecting the majority's view that appellate review is the only purpose to be served by a statement of reasons, the concurring Justices enunciated other considerations requiring supporting statements. Forcing a trial court to articulate reasons for sentencing may aid in developing a set of principles on which to base its sentencing decisions. These reasons in turn could aid correctional authorities in determining the type of treatment to administer to the youth. Finally, disclosing such reasons may aid the defendant's attorney in insuring that the sentence was not based on misinformation or inaccuracies in the material relied upon by the judge in sentencing. Id. at 455. The concurring Justices also seemed to feel that a declaration of reasons would dissipate any feeling on the part of the offender that the sentence was arbitrary. Id. at 456.

86. Id. at 431.

87. Id. at 443, quoting United States v. Hartford, 489 F.2d 652, 654 (5th Cir. 1974). Even this mild endorsement of appellate review, however limited, may be viewed with hostility by some judges. Trial courts have generally been allowed to introduce new procedures themselves. When suggested reform includes curtailment of sentencing freedom, and therefore a curtailment of judicial freedom, trial courts view these proposals as particularly offensive. Robin, supra note 12, at 212.

To the dismay of some commentators,[88] the *Dorszynski* ruling has revitalized the rule of no review. However, it has not completely halted appellate attempts to review sentences.

IV. Appellate Review of FYCA Sentences After *Dorszynski*

One area in which *Dorszynski* has clearly blocked appellate attempts to review sentences has been in those jurisdictions which required a specific statement of reasons for imposing adult sentences.[89] Attempts by defendants to seek review because of the district court's failure to supply supporting reasons have been rejected.[90] However, FYCA sentences may still be reviewed in certain circumstances.

A. *Constitutional Violations in Sentencing*

In *United States v. Rogers*,[91] an eligible defendant convicted of a narcotics violation was denied FYCA sentencing because he refused to expose his co-conspirators.[92] In sentencing the defendant as an adult, the district court indicated that it would impose a FYCA sentence if the defendant would waive his fifth amendment right against self-incrimination.[93] In reversing, the Fifth Circuit held that the lower court had penalized the defendant because he was exercising his constitutionally guaranteed rights.[94] Again, the sentence itself was not invalid; rather, the judicial process by which the court imposed the sentence was constitutionally deficient.

In *United States v. Maples*,[95] two defendants, a male and a female, were denied FYCA sentencing. The male was sentenced to fifteen years imprisonment while his female companion was sentenced to ten years. The district court imposed a heavier sentence on the male because he believed that

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88. See Kutak & Gottschalk, In Search of a Rational Sentence: A Return to the Concept of Appellate Review, 53 Neb. L. Rev. 463 (1974). The authors believe that Dorszynski will have a "chilling effect" upon any efforts by appellate courts to revitalize the concept of review of sentences. Id. at 515. Despite their unhappiness with the decision, they believe it will finally force Congress to move on the issue. Id.

89. See notes 65-72 supra and accompanying text; see note 90 infra.

90. In United States v. Allen, 510 F.2d 651 (D.C. Cir. 1974), a defendant was sentenced as an adult after the district court had made the requisite finding of no benefit. On appeal, the defendant claimed that the lower court's failure to specify why the defendant would not benefit from FYCA treatment violated the circuit rules established in Coefield. The court of appeals held that the Dorszynski ruling, requiring no such reasons, overruled the circuit view and thus negated the defendant's contention. Id. at 652.

91. 504 F.2d 1079 (5th Cir.), cert. denied, 422 U.S. 1042 (1975).

92. Id. at 1084.

93. The trial court had stated that "the first step towards rehabilitation, in its opinion, was to cooperate with the authorities in bringing others involved in the conspiracy to justice, and unless and until Rogers indicated 'substantial, material, productive cooperation' the court would not consider a lesser sentence." Id.

94. Id. at 1084-85.

95. 501 F.2d 985 (4th Cir. 1974).

"[o]rdinarily . . . the man takes the lead and persuades the female, the woman."[96] In remanding for resentencing, the Fourth Circuit disclaimed any right to exercise "general appellate review over sentences."[97] The court believed it could intervene here, however, because the sentences imposed were in violation of the defendant's "constitutional or statutory rights."[98] The use of sex as a major factor in imposing disparate sentences for the same crime was unconstitutional.[99]

In both the *Rogers* and *Maples* cases, district court judges utilized impermissible standards in exercising their sentencing discretion, *i.e.*, sex and the failure to waive a constitutional right. As a result, the appellate courts, exercising their supervisory power, were duty-bound to review and reverse the lower court sentence.

B. *Abuse of Discretion*

Several circuit courts have also continued to vacate sentences because the district court either abused or failed to exercise sentencing discretion.

In *United States v. Ortiz*,[100] an eligible youth offender was convicted of conspiracy to distribute marijuana and the substantive crime of possession of marijuana with intent to distribute. On the conspiracy count the district court imposed a FYCA sentence, while on the substantive count the court imposed an adult sentence, to be served consecutively with the FYCA sentence.[101] The Ninth Circuit, sua sponte, vacated the adult sentence. The court held that the imposition of a FYCA sentence indicated that the defendant would derive benefit from treatment. An adult sentence imposed on the substantive crime was inconsistent with this view, and as such was an abuse of discretion.[102]

In *United States v. Dancy*,[103] an eligible youth offender was sentenced as an adult for the crime of first degree murder, receiving a sentence of twenty years to life imprisonment. The district court, in sentencing, relied in large part upon a pre-sentence report of the Classification Committee, recommending the lowest possible adult sentence.[104] The Committee did not know, however, that the district court had no discretion to impose a short sentence in this case; by statute, a first degree murder defendant received a mandatory minimum sentence of twenty years.[105] The report relied upon by the district court was based upon a misconception. In vacating, the District of Columbia

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96. Id. at 986.

97. Id.

98. Id.

99. See Frontiero v. Richardson, 411 U.S. 677 (1973).

100. 513 F.2d 198 (9th Cir.) (per curiam), cert. denied, 423 U.S 843 (1975).

101. Id. at 199.

102. The appellate court here merely vacated the adult sentence, while affirming the decision in all other respects. Id.

103. 510 F.2d 779 (D.C. Cir. 1975).

104. Id. at 786; see note 41 supra.

105. "Notwithstanding any other provision of law, a person convicted of first degree murder . . . shall be eligible for parole only after the expiration of twenty years from the date he commences to serve his sentence." 22 D.C. Code Encycl. Ann. § 2404 (1967).

Circuit held that this reliance upon an unreliable report invalidated the sentence.[106] The reasoned, calm exercise of discretion which is expected of a district court judge was absent here.

In *United States v. Hopkins*,[107] an eligible defendant pleaded guilty to manslaughter. Requesting a pre-sentence report, the district court received conflicting appraisals of the defendant's amenability to treatment. The Classification Committee at the local youth center recommended FYCA sentencing;[108] the Board of Parole recommended adult sentencing, primarily because the superintendent of the youth center conditioned his recommendation for FYCA sentencing upon the youth's transferrence to a federal facility.[109] At sentencing, the trial court, noting the conflicting reports as well as defendant's prior record, sentenced Hopkins as an adult.[110]

In vacating, the court of appeals found the sentencing procedure flawed in two respects: the trial court had failed to make an express finding of no benefit;[111] and the information relied upon by the court did not allow the "knowledgeable sentencing called for by . . . FYCA."[112]

The failure by the district court to make an express no benefit finding before sentencing Hopkins as an adult indicated that the court had not "focused on amenability to treatment in making its sentencing determination."[113]

In scrutinizing the " '*judicial process* by which the particular punishment was determined,' "[114] the court found the documents relied upon in sentencing fatally flawed.[115] The totality of the information relied upon by the lower court, in large part consisting of conclusory, inconsistent statements, denied the lower court the "type of information to which he is entitled under the Act—information that would enable him to make a knowledgeable sentencing determination."[116]

V. CONCLUSION

The decision of the Supreme Court in *Dorszynski* has halted any serious attempts to expand the role of appellate courts in reviewing criminal sen-

106. 510 F.2d at 786. The court stressed that while recommending an adult sentence, the Classification Committee's clinical psychologist expressed concern that Dancy would not receive the " 'psychotherapy, vocational training and additional education' " he needed in an adult institution. Id.

107. 531 F.2d 576 (D.C. Cir. 1976).

108. For the makeup of the Classification Committee, see id. at 577 n.3.

109. The superintendent believed that Hopkins needed long term treatment, unavailable at the local youth center. Id. at 577-78.

110. Id. at 578.

111. Id. at 579.

112. Id. at 580.

113. Id. at 579.

114. Id. at 580, quoting Dorszynski v. United States, 418 U.S. 424, 443 (1974).

115. While acknowledging that Dorszynski restricted appellate review of FYCA sentences, the court of appeals noted that the Supreme Court affirmatively approved of appellate courts assuring themselves that information relied upon by the district court in sentencing was reliable and accurate. Id. at 579-80.

116. Id. at 582.

tences.[117] Rejecting the recommendations of the ABA and various commentators,[118] it has affirmed once again the virtually unfettered discretion of the trial court in sentencing.[119]

However, the Court emphasized the distinction between review of the sentence itself and review of the manner in which it is imposed, and expressly authorized appellate courts to scrutinize the judicial process utilized by the trial court in arriving at such a sentence.[120] This approach has been used frequently by appellate courts as justification for vacating excessive or harsh sentences.[121]

It is submitted that any reform of the criminal justice system must include appellate review of sentences. The traditional reason for rejecting such review, the ability of the trial court to study the demeanor and character of the defendant, is no longer controlling. In the vast majority of cases, guilt is not at issue, as the defendant has admitted committing the crime.[122] The trial court, then, need concern itself only with the imposition of sentence, one which will satisfy the needs of justice and the particular circumstances of the defendant. Despite the importance of the court's decision, the time allocated to sentencing—reviewing the pre-sentence report, conferring with the probation officer and arriving at a sentence—has been estimated to consume about thirty minutes.[123] Refusing to allow appellate review of sentences imposed in such a manner cannot help but destroy confidence and respect for the law.[124] Until the Court expressly adopts the position advocated by most commentators,[125] appellate courts will be forced to devise means of reviewing sentences which they believe to be excessive. It is not an overstatement to say that this complete freedom, placed in the hands of one man, the trial judge, is a condition which "[n]o other country in the free world permits . . . to exist."[126] It is to be hoped that this condition will not endure much longer.

Catherine A. Foddai

117. See generally Kutak & Gottschalk, In Search of a Rational Sentence: A Return to the Concept of Appellate Review, 53 Neb. L. Rev. 463 (1974).

118. See notes 5, 14 & 32 supra.

119. See Robin, note 12 supra.

120. See notes 6 & 87 supra and accompanying text.

121. See note 14 supra; see notes 91-116 supra and accompanying text.

122. ABA Draft, supra note 5, at 1.

123. Robin, supra note 12, at 210 and n.22.

124. ABA Draft, supra note 5, at 2.

125. See generally Kutak & Gottschalk, In Search of a Rational Sentence: A Return to the Concept of Appellate Review, 53 Neb. L. Rev. 463 (1974); Tydings, Ensuring Rational Sentences—The Case for Appellate Review, 53 J. Am. Jud. Soc'y 63 (1969); ABA Draft, supra note 5.

126. ABA Draft, supra note 5, at 2.