CRIMINAL LAW—SEVERITY OF SENTENCE, AS WELL AS SENTENCING PROCEDURE, IS SUBJECT TO APPELLATE REVIEW IN THE EIGHTH CIRCUIT.—*Woosley v. United States*, (8th Cir. 1973) (*en banc*).

Defendant, a Jehovah's Witness, was convicted for refusing induction into the military service in violation of 50 U.S.C. App. § 462. Defendant's religious beliefs prohibited him from serving military authority. As he viewed the Selective Service to be an arm of the military, defendant could not perform alternative service if it was ordered by his Selective Service Board. However, he was willing to perform alternative service if it was ordered by civilian authority, that is the court. Although the district judge found defendant to be a "fine young man," he imposed the maximum prison sentence in accordance with his selective service sentencing policy. On first appeal the conviction was affirmed.[1] Thereafter the district judge denied, without hearings, both defendant's petition for a reduction of his sentence and his motion to reconsider. On second appeal defendant contended that the district court's mechanical imposition of a sentence was not proper sentencing procedure and that the district judge had abused his discretion by failing to grant defendant probation and by refusing a hearing on his application for reduction of the sentence. *Held*, reversed and remanded for resentencing. Both sentencing procedure and sentence severity are subject to appellate review. A judge must use an individualized approach to sentencing. *Woosley v. United States*, 478 F.2d 139 (8th Cir. 1973) (*en banc*).

By holding that an appellate court has the power to review sentence severity where the judge has grossly abused his discretion, the Eighth Circuit Court of Appeals in *Woosley* contravened the longstanding doctrine of federal criminal practice that appellate courts are without power to review sentences which are within the statutory limits.[2] Prior to the establishment of the circuit courts of appeals in 1891,[3] the Judicature Act of 1879[4] was construed to allow modification of a sentence by an appellate court if the sentence was illegal or too severe.[5] As the provision authorizing modification of a sentence was not incorporated into the Act of 1891, it was held that the power to review sentences within the statutory limits had been abrogated,[6] except in two situa-

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1. United States v. Woosley, 440 F.2d 1280 (8th Cir.), *cert. denied*, 404 U.S. 864 (1971).

2. *See, e.g.*, United States v. Tucker, 404 U.S. 443, 447 (1972); United States v. Tobin, 429 F.2d 1261, 1265 (8th Cir. 1970); Gurera v. United States, 40 F.2d 338, 340-42 (8th Cir. 1930).

Sentences within the statutory limits have been reviewed where the statute under which the sentence was imposed was invalid. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942).

3. Act of March 3, 1891, ch. 517, 26 Stat. 826.

4. Act of March 3, 1879, ch. 176, § 1, 20 Stat. 354.

5. *See* United States v. Wynn, 11 F. 57 (C.C.E.D. Mo. 1882); Bates v. United States, 10 F. 92 (C.C.N.D. Ill. 1881).

6. *See* Freeman v. United States, 243 F. 353 (9th Cir. 1917).

tions of relatively minor importance.[7] The non-review doctrine has been articulated primarily by the courts of appeals;[8] the Supreme Court's support for the doctrine being limited to dicta.[9]

In the first portion of its opinion the court in *Woosley* criticized the sentencing procedure used by the district judge to determine that the maximum sentence should be imposed. Prior to *Woosley* other courts made inroads into the non-review doctrine by maintaining this distinction between review of sentencing procedure and review of sentence severity.[10] By confining appellate review to sentencing procedures, federal courts have continued to recognize the doctrine while avoiding it for some purposes. This distinction has allowed appellate courts to indirectly influence both sentence severity[11] and sentencing guidelines[12] by placing limitations on those factors which a district judge must or must not consider when determining a sentence. The grounds upon which courts have justified review of sentencing procedures may be divided into five categories: (1) constitutional grounds, arising from the consideration of invalid factors by the sentencing judge,[13] (2) statutory grounds, arising from statutes deemed to implicitly require the consideration of certain factors,[14] (3)

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7. There are only two exceptions to the non-review doctrine. The Court of Appeals for the District of Columbia directly reviewed and modified sentences in two cases, but carefully limited its decisions to the particular facts of the cases. Coleman v. United States, 357 F.2d 563 (D.C. Cir. 1965) (*en banc*); Frady v. United States, 348 F.2d 84 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 909 (1965). Review of criminal contempt sentences is considered permissible because there is no statutory limit to such sentences. *See* Green v. United States, 356 U.S. 165 (1958); Yates v. United States, 356 U.S. 363 (1958).

8. *See, e.g.*, United States v. Stidham, 459 F.2d 297 (10th Cir. 1972); United States v. Ramirez-Aguilar, 455 F.2d 486 (9th Cir. 1972).

9. *See, e.g.*, United States v. Tucker, 404 U.S. 443, 447 (1972); Gore v. United States, 357 U.S. 386, 393 (1958); Blockburger v. United States, 284 U.S. 299, 305 (1932).

10. *See, e.g.*, Townsend v. Burke, 334 U.S. 736, 741 (1948) (distinction implicitly made); United States v. Weston, 448 F.2d 626, 633 (9th Cir. 1971) (distinction explicitly made).

11. *See, e.g.*, United States v. Lewis, 392 F.2d 440 (4th Cir. 1968) (sentencing judge had mistakenly believed that the maximum sentence was mandatory, so the case was remanded for resentencing).

12. *See, e.g.*, Briscoe v. United States, 391 F.2d 984 (D.C. Cir. 1968) (remanded with directions that if alien defendant should be resentenced, the judge should consider the alternative of deportation).

13. Constitutional grounds for review have been found where the sentencing judge relied on inaccurate information. *See, e.g.*, United States v. Tucker, 404 U.S. 443 (1972) (prior unconstitutional convictions); Townsend v. Burke, 334 U.S. 736 (1948) (erroneous assumption about criminal record); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970) (confusion about prior criminal record). Courts have remanded for resentencing when defendants have been penalized for exercising the constitutionally protected right to trial. *See, e.g.*, Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969); *but see*, Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969). Similarly, cases have been remanded for resentencing when the defendant's right to appeal has been jeopardized. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711 (1969); *but see*, Chaffin v. Stynchcombe, 93 S. Ct. 1977 (1973). Constitutional bases for review have also been found when the sentencing judge considered improper information. *See, e.g.*, Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968) (illegally seized evidence); *c.f.*, Armpriester v. United States, 256 F.2d 294 (4th Cir. 1958). *Contra*, United States v. Schipani, 435 F.2d 26 (2d Cir. 1970).

14. *See, e.g.*, Leach v. United States, 334 F.2d 945 (D.C. Cir. 1964) (mental examination of defendant directed where three statutes permitted examination); Peters v. United States, 307 F.2d 193 (D.C. Cir. 1962) (pre-sentence investigation required where investigation was authorized by FED. R. CRIM. P. 32).

review based upon the supervisory power of appellate courts,[15] (4) review based upon the failure of the sentencing judge to use discretion[16] and (5) review based upon the abuse of discretion by the sentencing judge.[17]

The fifth ground for review of sentencing procedures, abuse of discretion, was recently developed in a case very similar to *Woosley*.[18] In *United States v. Daniels*,[19] defendant was also a Jehovah's Witness conscientious objector. The district judge imposed the maximum sentence solely on the basis of his selective service sentencing policy.[20] This mechanistic approach to sentencing was harshly criticized on appeal as being inconsistent with the sentencing principles announced by the Supreme Court in *Williams v. New York*[21] and *Williams v. Oklahoma*.[22] In *Williams v. New York* the Supreme Court held that it was "[h]ighly relevant—if not essential—to his selection of an appropriate sentence . . ."[23] that a judge possess as much information as possible concerning a defendant's background and characteristics[24] as the "punishment should fit the offender and not merely the crime. . . . "[25] This individualized sentencing approach was further delineated in *Williams v. Oklahoma*, where it was held that "the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime."[26] It was concluded in *Daniels* that since the district judge had failed to use an individualized sentencing approach, he had abused his discretion by failing to impose a proper sentence, justifying the imposition of a sentence by the court of appeals.[27]

In the first portion of its opinion the court in *Woosley* criticized the mechanistic imposition of the sentence by the district judge, using the same reasoning as was used in *Daniels*; such sentencing procedure was inconsistent with the Supreme Court's implied command to use an individualized sentencing approach.[28] In *Woosley*, however, it was concluded that a failure to use an individualized sentencing approach was a failure to exercise discretion. The court reasoned that the non-review doctrine is based upon the premise that a trial judge will use his discretion in imposing a sentence. If he does not, there is no need to defer to his judgment.[29] The court concluded that in reviewing a

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15. *E.g.*, United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).
16. *E.g.*, Briscoe v. United States, 391 F.2d 984 (D.C. Cir. 1968).
17. *E.g.*, United States v. Daniels, 446 F.2d 967 (6th Cir. 1971).
18. In cases which had previously used the language of "abuse of discretion," other grounds for reviewing sentencing procedure were always present. *E.g.*, Leach v. United States, 334 F.2d 945, 948 (D.C. Cir. 1964) (statutory grounds).
19. 446 F.2d 967 (6th Cir. 1971).
20. *Id.* at 969.
21. 337 U.S. 241 (1949).
22. 358 U.S. 576 (1959).
23. Williams v. New York, 337 U.S. 241, 247 (1949).
24. *Id.*
25. *Id.*
26. Williams v. Oklahoma, 358 U.S. 576, 585 (1959).
27. United States v. Daniels, 446 F.2d 967, 972 (6th Cir. 1971).
28. 478 F.2d at 143-44.
29. This reasoning was used in *Briscoe v. United States*, 391 F.2d 984 (D.C. Cir. 1968). The court there remanded for resentencing on the ground that the failure of the trial judge to consider the alternative of deportation was a failure to exercise discretion.

fact that for the overwhelming majority of those convicted, the appropriate sentence is the only issue.[50] Similarly, the non-review doctrine leaves the sentencing judge with a lack of guidelines.[51] The result is the widely recognized problem of inequitable sentence disparities.[52] Furthermore, there are indications that appellate review of sentences may decrease the overall number of appeals in criminal cases.[53] It would appear, then, that the times are more than ripe for the decision in *Woosley*.

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50. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, APPELLATE REVIEW OF SENTENCES 1 (Approved Draft 1968).

51. Burr, *Appellate Review as a Means of Controlling Criminal Sentencing Discretion—A Workable Alternative?*, 33 U. PITT. L. REV. 1 (1971).

52. Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55 (1966); Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 STAN. L. REV. 405 (1968); Zavatt, *Sentencing Procedure in the United States District Court for the Eastern District of New York*, 54 F.R.D. 327 (1972).

53. *See* Coburn, *Disparity in Sentences and Appellate Review of Sentencing*, 25 RUT. L. REV. 207 (1971).