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No. 912

In the Supreme Court of the United States

OCTOBER TERM, 1942

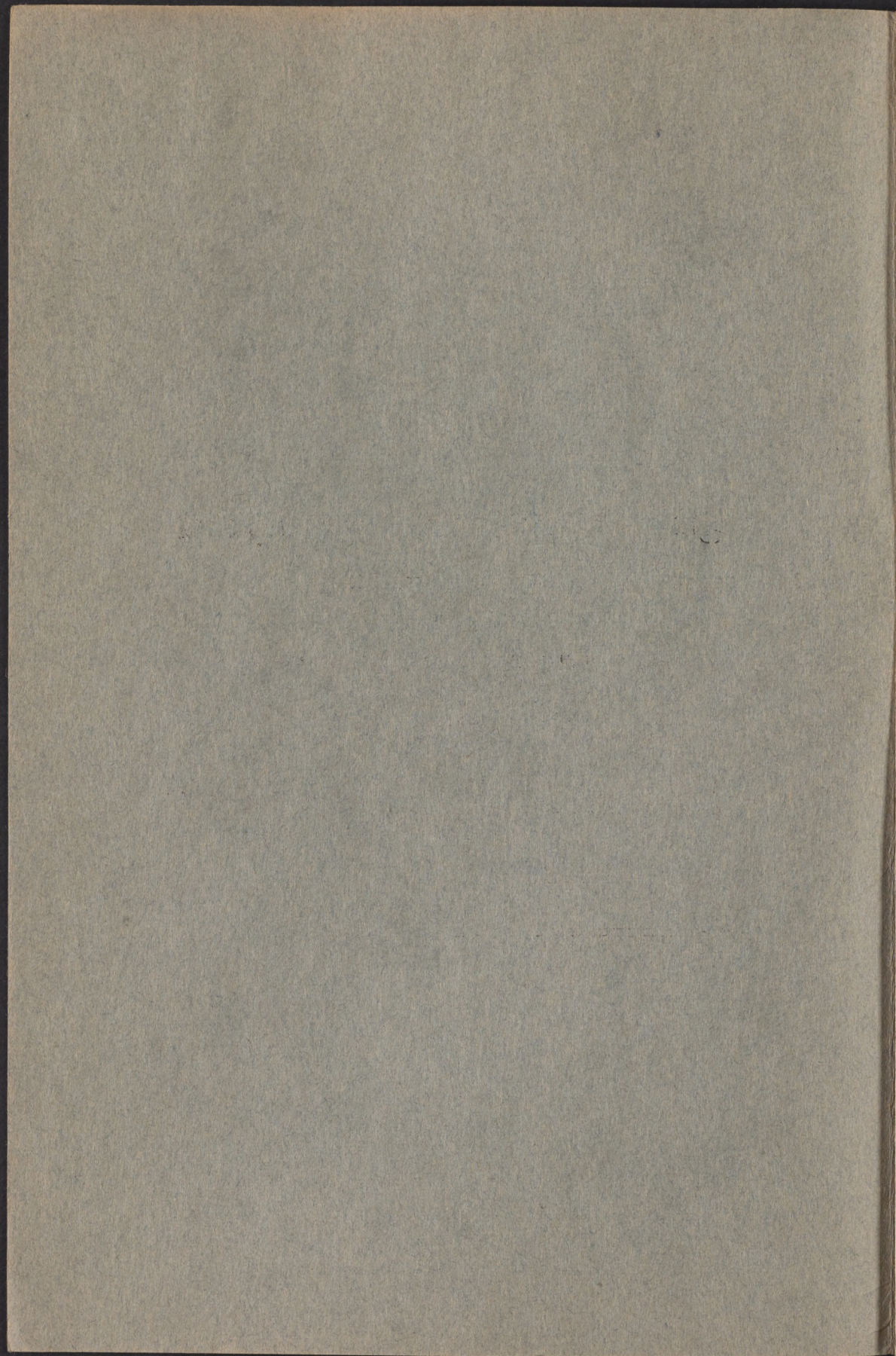
FRED TOYOSABURO KOREMATSU

v.

UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES



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*ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The certificate does not disclose that any opinion was rendered by the trial court.

JURISDICTION

The certificate stating a question of law upon which the Circuit Court of Appeals desires instruction for the proper decision of this case was filed on April 12, 1943. An order of this Court filed on April 12, 1943, refused the defendant's application that the court below be directed to send the entire record to this Court for decision of the whole matter in controversy. The jurisdic-

tion of this Court rests on Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION CERTIFIED

Whether, after a waiver of a jury and a finding of guilt by the trial court and in the absence of a sentence of fine or imprisonment, an order that the "pronouncing of judgment be suspended" and that the convicted defendant "be placed on probation for a period of five (5) years" is a "final decision" reviewable on appeal by a circuit court of appeals.

STATUTES INVOLVED

These are set forth in the Appendix, *infra*, pp. 19-21.

STATEMENT

The following facts are stated in the certificate:

An information filed in the District Court for the Northern District of California charged the defendant, a person of Japanese ancestry, with having knowingly remained in the city of San Leandro, Alameda County, California, from which all such persons had been ordered excluded by General DeWitt's Public Proclamation No. 1 dated March 2, 1942, and Civilian Exclusion Order No. 34 dated May 3, 1942, issued pursuant to Executive Order No. 9066 dated February 19, 1942.¹ (C. 1-2.)

¹ The information consequently charged a violation of the Act of March 21, 1942 (18 U. S. C. A. 97A).

The order of the District Court filed September 8, 1942, a jury having been waived and the court having found the defendant guilty, provided that (C. 2):

* * * the defendant, Fred Toyosaburo Korematsu, be placed on probation for the period of five (5) years, the terms and conditions of the probation to be stated to the said defendant by the Probation Officer of this Court. Further ordered that the bond heretofore given for the appearance of the defendant be exonerated. Ordered pronouncing of judgment be suspended.

The defendant appealed from this order, and the certificate of the Circuit Court of Appeals states that the appeal was "duly taken if we have the jurisdiction to consider it." (C. 2.)

After the appeal was taken the defendant moved in the District Court "that sentence now be passed upon him." The District Court found that "no request was made for the imposition of sentence at the time of trial." The record shows no request of defendant to be placed on probation. The District Court denied the motion.

The Government, the certificate states (C. 2), has raised in the Circuit Court of Appeals the question whether the order of the District Court imposing probation without imposing sentence constitutes a "final decision," of which the Circuit Court of Appeals has appellate jurisdiction, within the meaning of Section 128 of the Judicial

Code,² and that is the question which the court has certified.³

DISCUSSION

THE DIVERGENT CONSIDERATIONS AS TO WHETHER THE ORDER OF THE DISTRICT COURT WAS APPEALABLE

The Second Circuit in a number of cases (*United States v. Mook*, 125 F. (2d) 706, *United States v. Albers*, 115 F. (2d) 833, *United States v. Knickerbocker Fur Coat Co.*, 66 F. (2d) 388, certiorari denied, *sub nom. Zuckerkandel v. United States*, 290 U. S. 673, *United States v. Levinson*, 54 F. (2d) 363, certiorari denied, 284 U. S. 685, *United States v. Messina*, 36 F. (2d) 699, *United States v. Lecato*, 29 F. (2d) 694⁴), and the Fourth Circuit in one case (*Birnbaum v. United States*, 107 F. (2d) 885) have held that an order suspending the imposition of sentence and placing the defendant on probation is not a "final decision"

² This motion, and the defendant's appeal on the merits, were argued before the court below sitting *en banc* together with the cases of *Hirabayashi v. United States* and *Yasui v. United States*, Nos. 870 and 871, in which legal questions were certified to this Court and in which this Court in an order filed April 5, 1943, directed that the entire record be sent to this Court for decision of the whole matter in controversy.

³ An order of this Court dated April 12, 1943, denied the defendant's application to bring the entire record before this Court for decision of the whole matter in controversy.

⁴ This decision refers to numerous state decisions entertaining the same view.

within the meaning of Section 128 of the Judicial Code (28 U. S. C. 225) ⁵ and hence not appealable to a circuit court of appeals.

In a case in the Fifth Circuit, *Cooper v. United States*, 91 F. (2d) 195, characterized by the court below as presenting a divergence of view (C. 3, 4), the court examined into the merits of an appeal from an order suspending sentence and placing defendants on probation, but did not consider, at least specifically, the question of the appealability of the judgment.⁶ If this decision may be considered as in point it is, so far as we know, the only decision which supports the appealability of such an order, except for a dictum in *Nix v. United States*, 131 F. (2d) 857 (C. C. A. 5), certiorari denied, March 1, 1943 (No. 664 present Term).

The question has, however, never been passed upon by this Court, although this Court has

⁵ This section so far as pertinent provides:

"(a) The circuit courts of appeals shall have appellate jurisdiction to review by appeal final decisions—

"First. In the district courts [with an exception not here material]."

⁶ In that case the trial court had imposed a sentence of two years on a conspiracy count and suspended the imposition of sentence on substantive counts and ordered probation. The defendants' motion for imposition of sentence on the substantive counts was denied. On appeal the defendants urged that the refusal to impose sentence denied them the speedy trial guaranteed by the Sixth Amendment. The circuit court of appeals considered the contention and affirmed, holding that the Probation Act expressly authorized the suspension of imposition of sentence.

held, upon confession of error by the Government, in the case of *Berman v. United States*, 302 U. S. 211, a case from the Second Circuit, that as to the related question whether an appeal may be taken from a judgment the execution of which has been suspended and the defendant placed on probation, such a judgment is a final and therefore an appealable order. In view of the great weight of authority in favor of the view that an order suspending the imposition of sentence and placing a defendant upon probation is not appealable and the learning of the judges who have espoused that view, we hesitate to question it, but the problem presented seems to us a closer one than the numerical weight of the decisions would seem to make it. We hence present the dominant considerations stated in those cases in support of the lack of appealability of such an order together with the opposing considerations, which we are inclined to think are more persuasive. We utilize primarily for this purpose the decision of Judge Parker in the *Birnbaum* case, 107 F. (2d) 885, which gives a good résumé of the arguments against appellate jurisdiction.

(1) An order suspending sentence and releasing a prisoner on probation is not a final decision because it is the mere deferring of sentence, which in a criminal case is the final judgment. “‘Final judgment in a criminal case means sentence.’ *Berman v. United States*, 302

U. S. 211, 212; *Miller v. Aderhold*, 288 U. S. 206, 210." (*Birnbaum*, 107 F. (2d), at 886.)

It is true that where the prosecution prevails in criminal litigation the litigation ordinarily comes to a conclusion by sentence, but the oft-repeated aphorism that the sentence is the judgment is not, it seems to us, dispositive when consideration is given to the test of finality of decisions for appeal purposes enunciated by this Court and the ineluctable premise upon which is based an order suspending sentence and placing the defendant upon probation.

In the *Berman* case this Court said that (pp. 212-213) "In criminal cases, as well as civil, the judgment is final for the purpose of appeal 'when it terminates the litigation * * * on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined'. *St. Louis, I. M. & S. R. Co. v. Southern Express Co.*, 108 U. S. 24, 28; *United States v. Pile*, 130 U. S. 280, 283; *Heike v. United States*, 217 U. S. 423, 429." No less than does a sentence the execution of which has been suspended incident to the granting of probation, an order suspending sentence and releasing a defendant on probation places, it seems to us, the stamp of judicial approval upon a verdict or finding of guilt or a plea of guilty and hence "terminates the litigation on the merits" and leaves nothing further to be done but to carry into operation that which has been determined. Section 1 of the Probation Act

(App., p. 19) permits a court of the United States to suspend the imposition or execution of sentence and to place the defendant upon probation only "after conviction or after a plea of guilty or *nolo contendere*." In other words, a court may grant probation and order the imposition or execution of sentence suspended only if the defendant is a "convict." *Burns v. United States*, 287 U. S. 216, 220, 222; *Escoe v. Zerbst*, 295 U. S. 490, 492. The court must have satisfied itself before placing the defendant on probation that he has properly been convicted; it must, of course, have listened to such motions urging against judicial approval of conviction as the defendant may be entitled to make, such as motions for a new trial or in arrest of judgment.⁷

Only after such motions have been disposed of and the court considers the defendant properly a "convict" may it grant probation. Although not labeled as such, an order placing a defendant upon probation and suspending sentence is, it would seem, just as much a judgment of conviction as is a sentence the execution of which has been suspended because the defendant has been placed on probation.

Placing a defendant upon probation, whether either the imposition or the execution of sentence be suspended, does not in any wise affect the

⁷ Cf. Rules I (Par. 1) and II (Par. 2) of the Criminal Appeals Rules.

finality of the "judgment" of conviction. As this Court stated in the *Berman* case (p. 213):

Probation is concerned with rehabilitation, not with the determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgment that has been rendered. Probation or suspension of sentence "comes as an act of grace to one convicted of a crime." *Escoe v. Zerbst*, 295 U. S. 490, 492, 493. The considerations it involves are entirely apart from any reexamination of the merits of the litigation. Probation was designed "to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable." Thus probation cannot be demanded as a right. "The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain." *Burns v. United States*, 287 U. S. 216, 220. * * *

Nor would it seem material insofar as the finality of the "judgment" of conviction for appeal purposes is concerned, that the district court retains such control over its order that it may later pronounce a sentence if it should revoke probation. The considerations which would govern the court in this respect, as well as where, upon a revocation of probation, it vacates the suspension of execution of sentence and either carries that sentence into execution or, as is permitted by the

Probation Act, imposes a new and different sentence (Sec. 2, App., p. 21), are of the same character as those which motivated it when it granted probation. Probation is revoked and a sentence is carried into execution solely because the defendant, by his conduct, has breached the trust reposed in him by the district court and has shown himself no longer worthy of receiving the benefits accorded him under the Probation Act. No reconsideration of the merits of the litigation is involved, and an appeal from such an order presents only the question whether there has been an abuse of discretion in revoking probation. *Burns v. United States*, 287 U. S. 216, 222; *Escove v. Zerbst*, 295 U. S. 490, 493. No questions involving the merits of the litigation are raisable on such an appeal. *Nix v. United States*, 131 F. (2d) 857 (C. C. A. 5), certiorari denied, March 1, 1943 (No. 664, present Term). Control is retained by the district court over its probation order solely to accomplish the objects and purposes of the probation statute. As was pointed out by this Court in the *Burns* case (p. 222):

[The defendant while on probation] is still a person convicted of an offense, and the suspension of his sentence remains within the control of the court. The continuance of that control, apparent from the terms of the statute, is essential to the accomplishment of its beneficent purpose, as otherwise probation might be more reluctantly

granted or, when granted, might be made the occasion of delays and obstruction which would bring reproach upon the administration of justice.

(2) Until sentence is imposed the whole matter of punishment rests in the court's discretion. *Birnbaum*, p. 886. But the finality of a judgment for appeal purposes does not depend upon the punishment or the terms of punishment. The question is simply whether the merits of the litigation have been concluded, leaving no such questions open for the future. Even where a sentence has been entered but execution has been suspended, and later probation is revoked, the court may enter a different sentence (Sec. 2, App. p. 21).

(3) Where sentence is suspended it can be pronounced at any time during the period of probation and hence the order is not final. *Birnbaum*, p. 886. In addition to what has been said as to the test of finality of a judgment for appeal purposes, the premise of the observation is not accurate. So long as a defendant observes the terms and conditions of his probation there is no authority in the Probation Act for sentencing and imprisoning him. He may be sentenced only if he violates his probation, and then he is entitled to notice and an opportunity to be heard as to revocation. *Escoe v. Zerbst*, *supra*.

(4) "Appeal at this stage of the proceedings [i. e., from an order suspending sentence and

placing the defendant upon probation] would be fragmentary and would deny to the appellate court the advantage of having before it the complete disposition of the case by the court below. The importance of this can be readily appreciated when it is remembered how often error with respect to one count in an indictment is held to be harmless in view of concurrent punishment imposed under another count. Congress has indicated no intention to permit such fragmentary appeals in criminal cases." *Birnbaum*, p. 886. With one exception which has nothing to do with the merits of the litigation, an appeal obviously would be no more fragmentary where sentence is suspended and the defendant placed on probation than where the court pronounces sentence, suspends its execution, and grants probation.⁸ In both cases all claims of error arising during the trial of the criminal litigation would be open on appeal. In both cases those questions which arose out of any subsequent revocation of probation would, of course, be the subject of another appeal. (See p. 10, *supra*.) The doctrine of harmless error in view of concurrence of punishment under another count is without application even where a sentence is pronounced if its execution has been suspended. Such a sentence on a particular count would clearly not support a sentence on another

⁸ The exception is, of course, where the sentence exceeds that permitted by the statute.

count which is required to be executed. The convict is not serving his sentence while on probation.

(5) It cannot be denied, as was pointed out in the *Birnbaum* case, pp. 886-887, that this Court in the *Berman* case distinguished the case before it, where only the execution of sentence was suspended, from a case such as this where the imposition of sentence is suspended, and that it also stated that "To create finality it was necessary that petitioner's conviction should be followed by sentence." Undoubtedly this Court felt it necessary, or at least advisable, to distinguish the two types of cases because of the line of decisions which holds that an order such as that in the instant case is not appealable. We are, of course, more concerned with the Court's statement that conviction must be followed by sentence to create finality. The statement would not seem to have been necessary to a decision of the case before it since, of course, there was a sentence in that case. In any event, in view of the basic premise which underlies any order placing a defendant upon probation, i. e., that it is a confirmation judicially of his status as a convict (see pp. 7-8, *supra*), the Court's statement should, we believe, be subjected to reexamination.

(6) The *Birnbaum* decision (p. 887) quotes from Judge Learned Hand's opinion in the *Lecato* case, the first of the line of Second Circuit cases, thereafter followed by that court without further exposition, as follows:

when sentence is suspended there is no judgment from which to appeal. This has been substantially the uniform ruling whenever the question has arisen, in the absence of some statute allowing an appeal [citing a number of state cases] * * * When Congress passed the Probation Law it must be understood to have intended the system so established to be construed in the same sense as it had been in the states from which it was borrowed.

There is, however, nothing in the Probation Act itself which deals in any way with the appealability of the orders which it authorizes, and we have found nothing in its legislative history which indicates in any wise that Congress when it enacted that statute was concerned with such a question.

(7) In concluding his opinion in the *Birnbaum* case, Judge Parker said (p. 887):

Upon the oral argument, we were impressed, or at least the writer was, by the fact that release under probation necessarily involves a limitation upon the liberty of the accused, and also by the importance of securing a prompt review of the errors alleged to have been committed upon the trial. Further consideration, however, has convinced us that little weight should be given these considerations. An accused whose liberty is limited pending sentence is certainly in no worse case than an accused deprived of his liberty pending trial. Ordinarily he welcomes the opportunity to have sentence suspended and to be admitted

to probation. If he objects to probation and desires a sentence from which he can appeal for the purpose of reviewing the trial, all that he need do is ask that sentence be imposed. It is true, as argued, that the statute vests in the trial judge discretion either to suspend the sentence or merely to suspend its execution; but it would unquestionably amount to an abuse of the discretion thus vested for the judge to refuse to impose sentence when requested by one who desired a final judgment from which he might prosecute an appeal. Such an abuse of discretion could be corrected by mandamus or by proceeding in the nature thereof. There is little danger, however, that trial judges will refuse to pronounce final judgments from which appeals can be prosecuted, where parties desire to appeal. The danger is rather that the efficiency of the system of appellate review provided by statute may be appreciably impaired if fragmentary appeals in criminal cases are permitted.

This presents more an argument of convenience than a discussion of the convict's right as a matter of law. Of course if an order such as that in the instant case is appealable as a final judgment of conviction, the convict has a right of appeal without demanding that sentence be imposed upon him. And there are considerations of convenience equally pressing why he should have a right of appeal just as much as the convict who has a sentence pronounced but instantly suspended

as a step in granting probation. He, like his companion in crime, has been branded a convict by the action of the court in judicially confirming guilt and placing him on probation. Except for the fact that the latter knows what his sentence *may be* if he violates probation, the two suffer the same kind of punishment while on probation, a punishment described in the *Cooper* case, in the Fifth Circuit, as "ambulatory punishment." Nevertheless, assuming, of course, that he has no right of appeal, the convict with the suspended sentence may never be in a position to question the validity of his conviction since he may behave himself within the period of probation and consequently never receive a sentence. But whether he does or not he should be entitled to the same prompt review of the errors alleged to have been committed at his trial as this Court has held that his brother criminal may have. The convict cannot force the imposition of sentence, since the Probation Act gives to the district judge the discretion as to whether he shall grant probation. *Cooper v. United States*, 91 F. (2d) 195, 199 (C. C. A. 5). The Act likewise gives the District Judge the discretion as to whether, in granting probation, he shall pronounce sentence and then suspend its execution or whether he shall refrain from pronouncing sentence. Presumably, in determining what he shall do in this connection, the district judge is to be actuated, as the statute indicates

(Sec. 1, App. 19), by what appear to be "the ends of justice and the best interests of the public, as well as the defendant." As is pointed out by the Fourth Circuit itself in *Riggs v. United States*, 14 F. (2d) 5, 9-10, certiorari denied, 273 U. S. 719, it may be "especially desirable and humane, by reason of affliction, infirmity, sex, or age of the particular defendant" that there be a suspension of imposition of sentence rather than the announcing of sentence and the suspension of its execution. In order to allow a defendant his right of appeal it would certainly seem that a district judge should not be required to abdicate the discretion which the Probation Act reposes in him in order to accomplish its beneficent aims and purposes.

(8) Presumably this Court in establishing in its Criminal Appeals Rules the time limit for appeals in criminal cases (Rule III) was thinking of a judgment of conviction in the ordinary sense of a sentence (cf. Paragraph 3 of Rule III, Rules V and VI). But Section 2 of the statute authorizing this Court to promulgate the rules specifically provides that "The right of appeal shall continue in those cases in which appeals are now authorized by law * * *." 18 U. S. C. 688. If an order placing a defendant upon probation and suspending sentence is a final judgment and therefore appealable under Section 128 of the Judicial Code, the situation is simply that, as was true of a failure to make provision in the rules with

reference to another type of order, there "is a *casus omissus* which left in full force § 8 (c) of the Judiciary Act of February 13, 1925, 28 U. S. C. § 230, which requires application for the allowance of appeals to the Circuit Court of Appeals to be made within three months after the entry of the order appealed from." *U. S. ex rel. Coy v. United States*, 316 U. S. 342, 345. We are not here concerned with whether the proper mode of appeal was followed since the certificate of the Circuit Court of Appeals states that the appeal was "duly taken if we have the jurisdiction to consider it" (C. 2).

CONCLUSION

The question certified is submitted upon a presentation of the divergent considerations. We think the order of the district court was appealable.

Respectfully submitted.

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MAY 1943.

APPENDIX

Section 128 of the Judicial Code (28 U. S. C. 225) provides:

(a) The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—

First. In the district courts (with an exception not here material.) * * *.

Section 1 of the Probation Act of March 4, 1925, c. 521, 43 Stat. 1259 (18 U. S. C. 724), provides:

SEC. 1. The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation. The period of probation, together with any extension thereof, shall not exceed five years.

While on probation, the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

Section 2 of the Probation Act of March 4, 1925, c. 521, 43 Stat. 1260, as amended June 16, 1933, c. 97, 48 Stat. 256 (18 U. S. C. 725), provides:

SEC. 2. When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer, while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest, which warrant may be executed by either the probation officer or the United States marshal of either the district in which the probationer was put upon probation or of any district in which the probationer shall be found and, if the probationer shall be so arrested in a district other than that in which he has been put upon probation, any of said officers may return probationer to the district out of which such warrant shall have been issued.

Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

