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Constitutional Law--Criminal Procedure--Double Jeopardy Held No Bar to Imposition of Harsher Penalty Upon Retrial--Due Process Mandates Credit for Time Previously Served (North Carolina v. Pearce, U.S. 1969)

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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — DOUBLE JEOPARDY HELD NO BAR TO IMPOSITION OF HARSHER PENALTY UPON RE-TRIAL — DUE PROCESS MANDATES CREDIT FOR TIME PREVIOUSLY SERVED. — *North Carolina v. Pearce*, 395 U.S. 711 (1969).

Respondent Pearce was convicted of assault with intent to commit rape and sentenced to a term of 12 to 15 years in prison. Upon seeking post-conviction relief, he was awarded a new trial at which he was again convicted and sentenced to an 8 year prison term which, when complemented by the time previously served, amounted to a greater penalty than that originally imposed. Similarly, respondent Rice pleaded guilty to four counts of second degree burglary, and was sentenced to prison for an aggregate term of 10 years for all 4 counts. These judgments were later set aside; respondent was retried on 3 of the original counts, convicted and sentenced to prison for a total of 25 years without compensation for time already served.

On appeal, the Supreme Court, upholding the lower courts' reversals of both sentences, *held* that while neither the double jeopardy nor the equal protection clause imposes an absolute bar to a more severe sentence, the constitutional guarantee against multiple punishment requires that the punishment already exacted be fully credited upon resentencing, and that the sentencing court include affirmative findings to support their action when augmenting the original sentence.

The problems illuminated by the companion cases of *North Carolina v. Pearce*[1] and *Simpson v. Rice*[2] are not of recent conception. As early as 1873, the Court construed the double jeopardy clause to prohibit more than one punishment for the same offense. In *Ex parte Lange*,[3] the defendant, sentenced to a prison term and fined, had paid the fine before discovering that state law provided for *either* imprisonment *or* fine. Recognizing that no man lawfully can be twice punished for the same offense, the Court ordered the defendant's release from prison. Similarly, in *United States v. Benz*,[4] the defendant successfully petitioned to have his sentence reduced from 10 months to 6. While the issue presented involved the district court's power to decrease a convict's sentence, the Supreme Court observed by way of strong dicta,

1 395 U.S. 711 (1969).

2 *Id.* The Supreme Court consolidated the two appeals and rendered one opinion.

3 85 U.S. (18 Wall.) 163 (1873). The *Lange* Court established a defendant's immunity from an increased sentence in the absence of a self-initiated appeal. This right, in the Court's view, was founded upon the constitutional prohibition against double jeopardy.

4 282 U.S. 304 (1931).

that an increase affecting the sentence upon a valid conviction would be violative of the double jeopardy clause in that the defendant would be subjected to double punishment for the same offense.[5]

Despite such broad propositions, the Court has never squarely held the imposition of an increased penalty upon retrial to be per se violative of the Constitution. For example, in *Murphy v. Massachusetts*,[6] upon vacation of the original sentence, the defendant received a sentence greater than that which had been set aside. On appeal, the Court, ignoring the "chilling effects" of such a rationale upon the defendant's right of appeal, held that as the second sentence resulted from the defendant's own initiative, the former conviction and partial service of sentence constituted no bar to the imposition of a greater sentence.

The *Murphy* rationale was invoked and implicitly reaffirmed in *Stroud v. United States*,[7] wherein the defendant received the death penalty upon retrial following the successful appeal of a life sentence. That case, however, argued on the theory that the defendant was twice put in jeopardy for the identical offense, did not present the Court with the question of whether risk of an increased penalty on retrial constitutes a second punishment for the same offense. So distinguished, *Stroud* is assertive of the proposition that a sustained attack upon an original conviction does not, by force of the double jeopardy clause, absolutely immunize the defendant from reprosecution.

Green v. United States[8] greatly clarified the intention of the Court in *Stroud*. A conviction of second degree murder was reversed on

[5] *Id.* at 307. The defendant's sentence may not be increased once it has commenced. To compel him to risk an increased sentence in order to exercise his right to a fair trial is equivalent to requiring that the defendant relinquish the immunity accorded the prior sentence in order to exercise his constitutional rights.

[6] 177 U.S. 155 (1900).

[7] 251 U.S. 15 (1919). Robinson v. United States, 324 U.S. 282 (1945), has also been cited as supportive of the validity of increased sentences upon retrial. In *Robinson*, the defendant's sentence was increased upon retrial from life imprisonment to death. The court of appeals judgment was affirmed on certiorari without reference to the increased sentence. Indeed, the sole question presented and resolved related to the court's statutory authority to impose the death sentence under the Federal Kidnapping Act, 18 U.S.C. §§ 408, 414(a), 419(a)(b) (1940), *as amended*, 18 U.S.C. §§ 10, 1201-02 (1964). Accordingly, *Robinson* would be of doubtful force as authority for allowing an increase upon retrial.

[8] 355 U.S. 184 (1957). The Court had earlier held that a defendant, successful on appeal, may be exposed to a sentence *as severe* as that previously imposed, but neither condoned nor prohibited a more severe penalty. *See* United States v. Ball, 163 U.S. 622 (1896).

A second trial after the defendant's appeal had been justified on the grounds that the accused had "waived" his plea of former jeopardy. *See Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873). However, in the circumstances of *Green* a new trial would be barred following a successful appeal. Insofar as the first verdict was "an implicit acquittal" of the original charge, the Court rejected arguments that Green had "waived" the constitutional prohibition against double jeopardy. *See generally* Mayers & Yarborough, *Bis Vexari, New Trials and Successful Prosecutions*, 74 HARV. L. REV. 1 (1960).

appeal, and the defendant was retried, found guilty of first degree murder and sentenced to death. The Supreme Court, reasoning that the initial conviction implied acquittal of any higher degree of the same crime, reversed, holding the second conviction violative of the double jeopardy protection against reprosecution. Green could be reprosecuted, but for no crime greater than second degree murder. While the issue of reprosecution had been determined, the question of resentencing remained for future resolution.

The guarantee against double jeopardy was held to impose no restrictions upon the length of a sentence imposed upon reconviction. Indeed, as *Stroud* had previously demonstrated, it had been long established that the courts were authorized to impose whatever sentence the law prescribed. *Marano v. United States*[9] was the first decision to take issue with what had theretofore remained within the unfettered discretionary power of the courts. The defendant had been sentenced to three years in prison upon conviction in a district court for receiving stolen goods in interstate commerce. Upon appeal, the conviction was vacated[10] and a new trial awarded at which the defendant was reconvicted and sentenced to a five year term. The judge, who had presided at both trials, noted, as the basis for the longer sentence, the evaluation of the presentence report and the additional testimony produced at the second trial.[11] However, reversing on appeal, the First Circuit held that the increased term was improper since the introduction of the additional testimony impinged upon the defendant's unfettered right of appeal.[12] Manifestly, absent "substantial justification" a defendant should not be deterred in the exercise of this right due to the danger that this might result in the imposition of a direct penalty. Presaging things to come, however, the court further concluded by way of dicta that it was not inappropriate for a trial court to consider subsequent

9 374 F.2d 583 (1st Cir. 1967).

10 Kitchell v. United States, 354 F.2d 715 (1st Cir. 1965). Marano was tried and convicted along with several other defendants; all but one were successful on appeal.

11 It is not without significance that where a subsequent plea of not guilty is interposed at the second trial, the state, in view of such contested facts, is compelled to present further independent evidence of the defendant's guilt. Nevertheless, the *Marano* court rejected such additional testimony as a basis of an increased sentence, despite the settled doctrine that the state may enter new evidence against the defendant at retrial. While such a distinction may appear overly refined, it is indeed constitutionally sound. *See* United States v. Shatwell Mfg. Co., 355 U.S. 233 (1957).

12 374 F.2d at 585. *Accord*, Worcester v. Commissioner, 370 F.2d 713 (1st Cir. 1966). While it is generally accepted that a defendant has no constitutional right of appeal, it has been held that where such a right has been provided, it must be neither conditioned nor hindered by unreasoned or irrational distinctions. Indeed, access to the courts must be equal for all convicted. *See* Rinaldi v. Yeager, 384 U.S. 305 (1966).

events, so long as the grounds for any increased sentence affirmatively appear.[13]

The *Marano* dicta was amplified in *Patton v. North Carolina.*[14] Patton, an indigent not represented by counsel, was tried and convicted for armed robbery and sentenced to 20 years in prison. Although he initially took no appeal, he subsequently sought post-conviction relief and was granted a new trial on the basis of *Gideon v. Wainwright.*[15] Patton, though assisted by counsel at the second trial, was reconvicted and sentenced to 20 years. In a subsequent habeas corpus proceeding[16] the court, noting that credit had not effectively been allowed for previous servitude, focused upon the motivation of the trial court in imposing the harsher sentence. Stating that no facts appeared in the record which would warrant the imposition of a more severe penalty, the court found a denial of both due process and equal protection. In addition, since no other rational support offered a sound basis for such a sentence, affirmation would either inhibit an individual's right to appeal or, at best, unconstitutionally condition it. The Court of Appeals for the Fourth Circuit affirmed,[17] holding that the

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13 374 F.2d at 583. State and federal courts have been badly divided upon the question of whether a trial judge must articulate his reasons for increased sentence upon retrial. Contrary to *Marano*, the Third Circuit in United States *ex rel* Starner v. Russell, 378 F.2d 808 (3d Cir. 1967), while endorsing the traditional waiver theory, was fearful of undermining the role of the trial judge and restated the view that the imposition of a greater sentence upon retrial need not be accompanied by affirmative findings supportive of such action. *Cf.* United States v. White, 382 F.2d 445 (7th Cir. 1967), wherein the Seventh Circuit, agreeing with the *Starner* court, found that the trial judge was not required to disclose the particular facts relating to his decision to impose a harsher sentence. *Marano* dealt with an increase in sentence imposed by a federal court. The court held that the increase could not be founded upon additional testimony adduced at the second trial, but revived the problem and possibly undermined the original holding by adding, *in dictum*, that *an increase could be validly based on the presentence report. See also* United States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir. 1967); United States v. White, 382 F.2d 445 (7th Cir. 1967).

14 381 F.2d 636 (4th Cir.), *cert. denied*, 390 U.S. 905 (1967).

15 372 U.S. 335 (1963). *Gideon* enunciated that the sixth amendment, as applied to the states through the fourteenth, requires all indigent defendants charged with a felony be provided with court-appointed counsel to represent them at trial.

16 Patton v. North Carolina, 256 F. Supp. 225 (W.D.N.C. 1966), *aff'd*, 381 F.2d 636 (4th Cir. 1967). While the defendant had failed to exercise his right of appeal, the court of appeals nevertheless held that he had exhausted his state remedies; for it would be "futile" to seek state appellate review in view of the law of North Carolina. 381 F.2d at 637.

17 381 F.2d 636 (4th Cir. 1967). The court, noting the realities of the trial judge's sentencing decision, held that a harsher sentence was impermissible whether it was the result of an increase in the orignal sentence or of a denial of credit. The trial judge had stated:

> Before I announce punishment, I will take into consideration the fact that he has served four years, or nearly five years. . . . I would give you five more years

due process clause, the equal protection clause, and the constitutional prohibition against double jeopardy all mandate a uniform rule prohibiting subsequent imposition of a sentence more severe than that rendered invalid by an appellate court. The court, rejecting the reasoning of *Marano, i.e.*, that subsequent events may provide justification for the imposition of an increased sentence, stated that in order to prevent abuse, the fixed policy must necessarily be that the new sentence shall not exceed the old.

In the companion cases of *Pearce* and *Rice*, the Supreme Court refused to accede to the position of the Fourth Circuit. In *Pearce*, the defendant was awarded a new trial by the Supreme Court of North Carolina[18] upon the ground that an involuntary confession had been admitted in evidence against him. The sentencing judge at the second trial imposed an eight year prison term, announcing the intention to give Pearce a fifteen year sentence but taking into consideration the time already served. Although the new sentence combined with the time already served exceeded that originally imposed, it was affirmed by the highest state court.[19] Pearce then instituted a habeas corpus proceeding in which the district court, relying upon *Patton*, held the longer sentence unconstitutional and void, and upon the state court's failure to resentence Pearce, ordered his release. The Fourth Circuit, in a brief per curiam opinion,[20] affirmed on the basis of *Patton*. On certiorari, the Supreme Court affirmed, holding that a sentencing court must give effective credit to a reconvicted defendant for time already spent in prison. Invoking the proposition that no man lawfully can be punished twice for the same offense, the Court noted that the constitutional prohibition against multiple prosecution also forbade multiple punishment for the same offense. Such multiple punishment is clearly demonstrated when a maximum sentence for an offense is imposed upon retrial without compensation for time previously served.

As to Rice, despite an obvious reluctance to drastically alter the current state of the law, the decision was deeper and infinitely broader. Rice had served 2½ years of an original 10 year sentence when his conviction was set aside in a state *coram nobis* proceeding on the ground

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than what I am giving you, but I am allowing you credit for the time that you have served. Judgment . . . is that the Defendant be imprisoned . . . for a term of twenty years. . . .

Id. at 637 n.1.

18 266 N.C. 234, 145 S.E.2d 918 (1966).

19 State v. Pearce, 268 N.C. 707, 151 S.E.2d 571 (1966). The North Carolina Supreme Court had acknowledged that the evidence at the second trial was essentially identical to the evidence presented at the original trial.

20 397 F.2d 253 (4th Cir. 1968).

that he had not been accorded his constitutional right to counsel. Upon reconviction, he was sentenced to a prison term of 25 years, with no consideration given for previous imprisonment. In a subsequent habeas corpus proceeding, Rice alleged that the state trial court had acted unconstitutionally in failing to credit him with time previously served, and in imposing a harsher sentence upon retrial. Agreeing with both contentions, the district court held that insofar as the petitioner had been punished for exercising his postconviction right of review, he had been denied due process of law.

The Supreme Court, in an obvious effort to preserve the trial court's power to impose a lawful sentence, affirmed, but did not agree that a more severe sentence on retrial constituted a per se violation of the due process clause. While the Court recognized the inequities of a "clean slate" in relation to imprisonment prior to retrial, it concluded that insofar as the conviction itself is concerned, the slate actually had been wiped clean. The conviction had been invalidated and the remainder of that sentence would not be served. However, since reprosecution is not prohibited in such instances, the Court believed that the constitutional prohibition against double jeopardy did not place any restriction upon the imposition of a lawful single punishment for the offense committed. In addition, the Court, expressing its fear that a different holding would cast doubt upon the right of reprosecution enunciated in *United States v. Ball*,[21] refused to risk such a disturbance of settled doctrine.[22]

The theory that the equal protection clause prohibits the imposition of a more severe sentence, since only that class of convicts who successfully obtain vacation of their original sentence are exposed to the risk of harsher penalty, was likewise rejected by the Court. Instead, it reasoned that the problem was not one of lengthened terms imposed only upon those who are retried, but involved merely longer *new* sentences arising from new trials. Since each defendant could be acquitted, or if convicted, receive a sentence shorter, equal to or longer than that which had been vacated, the Court disagreed that this amounted to a malignant classification of those successful upon review. Thus, where the opportunity for acquittal or lesser sentence upon reconviction is afforded the successful appellant, no equal protection problem exists.

Rejecting the double jeopardy and equal protection arguments, the

21 163 U.S. 662 (1896). For a brief discussion and analysis of *Ball* see note 8 *supra*.

22 North Carolina v. Pearce, 395 U.S. 711, 714-15 (1969). For a detailed discussion of the "void sentence" and "waiver" doctrines and their effect on reprosecution, see Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws*, 35 MINN. L. REV. 239, 240-44 (1951).

Court recognized that due process of law would be offended if a state court adopted a rigid policy of levying more stringent penalties upon the reconviction of each defendant who had been successful in obtaining a reversal of his original conviction. Clearly, the objective of such a practice would be to discourage attacks upon unlawful convictions, thus "penalizing those who choose to exercise constitutional rights."[23] The "chilling effect" upon those who might otherwise choose to exercise their constitutional rights is evident.[24] No court may levy a price on an appeal; this right must be preserved, free and unconditioned.[25] Thus, in order to prevent vindictiveness and to eliminate the fear of retaliation, *Pearce* mandates that where a more severe sentence is imposed on retrial, the trial court's reasons for such action must affirmatively appear to be

> based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.[26]

Mr. Justice Douglas, in a brief concurrence arguing that a defendant who risks the maximum punishment during his first trial need not be confronted by that risk a second time, viewed the double jeopardy clause as an effective bar to the imposition of a harsher sentence upon retrial. He rejected the contention that events subsequent to the first trial might justify an increased penalty, noting that such justification may be present in *any* case, not merely in those instances in which a defendant has successfully appealed his conviction. Simply stated, since the state cannot increase the sentences of those who do not appeal, it should not be permitted to subject those who do appeal to the risk of such augmentation.[27]

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23 395 U.S. at 724, *quoting* United States v. Jackson, 390 U.S. 570, 581 (1968). For a compilation of data demonstrating the high incidence of harsher penalties upon reconviction, see Note, *Constitutional Law: Increased Sentences and Denial of Credit Upon Retrial Sustained Under The Traditional Waiver Theory*, 1965 DUKE L.J. 395.

24 For a complete discussion of the possible due process violations present in these cases, see Brief for ACLU and North Carolina CLU as Amici Curiae at 16, North Carolina v. Pearce, 395 U.S. 711 (1969).

25 The price of exposure to a harsher penalty may be more than a defendant would be willing to pay in the assertion of his constitutional right to a fair trial. The presence of such a risk would seem to have a restraining effect upon those who would otherwise attempt to vindicate suppressed rights. *See generally* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965). *See also* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 595 (1960).

26 North Carolina v. Pearce, 395 U.S. 711, 726 (1969).

27 *Id.* at 731-32 (concurring opinion by Douglas, J.). Mr. Justice Harlan, concurring and dissenting in part, adopted a similar position. Scrutinizing the situation, he found that the defendants were confronted with a "desperate choice" as to whether or not to appeal. He thus contended that the increased sentences upon retrial effectively penalized the defendants for exercising their constitutional rights. *Id.* at 746 (separate opinion, Harlan, J.).

The holding in these cases demonstrates a continued reluctance on the part of the Supreme Court to interfere with state criminal procedure,[28] absent a clearly delineated and flagrant violation of constitutional protections. Here, the due process violations and opportunities for abuse of a defendant's rights are patently obvious; yet the Court remains quite restrained in formulating standards to which states would be obliged to adhere.[29] The decision rests upon the firm belief that judicial discretion in the sentencing process must not be overly restricted.[30] Underlying this view is the rationale that the sentencing process is not directly related to the substantive issue of guilt,[31] and accordingly, should not be made the object of uniform standards. Indeed, each particular case, with its concomitant sentence, is determined by a proliferation of variable factors which may not be amenable to measurement according to a fixed scale.[32]

The equal protection argument was cogently discussed in Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967), wherein the court concluded that the threat of a more severe sentence falls only upon those exercising the post-conviction procedures provided by the state.

> If the State wishes to institute a system permitting upward revision of sentences . . . it may not discriminate in this regard against those who have availed themselves of the right to a fair trial. This is an arbitrary classification, offensive to the equal protection clause.

Id. at 642. *See also* Green v. United States, 355 U.S. 184, 186 (1957). "The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." North Carolina v. Pearce, 395 U.S. 711, 726 (1969).

28 *See generally* Comment, *Federal Intrusions in State Criminal Proceedings—New Approaches in The Abstention Doctrine*, 3 U. SAN FRAN. L. REV. 450 (1969).

29 *Id.* at 455. *See also* Dombrowski v. Pfister, 380 U.S. 479 (1965), in which the defendants were continually subjected to prosecutions by local and state authorities. The Court recognized that although the petitioners might eventually prevail in the state courts, the ability of the authorities to continue utilizing a given statute, in bad faith, for the purpose of harassment would not be impeded. *Id.* at 490. *Pearce* is analogous to *Dombrowski* in that the possibility of a greater sentence may inhibit a defendant's assertion of his right to a fair trial in the same manner that the authorities in *Dombrowski* might have exerted a "chilling effect" on the assertion of first amendment rights.

30 The Court cited the principle, approved in Williams v. New York, 337 U.S. 241 (1949), that the judge, as an extension of the state, may adopt the philosophy of penology which holds that punishment should be determined by the offender and not merely by the crime. It is contended that the judge is in the most advantageous position to determine, on the basis of testimony, presentence and other reports, what punishment would most properly be imposed upon the defendant involved. Thus, as long as the defendant's constitutional rights are not violated, the sentencing judge should be free to choose the most appropriate punishment from among those prescribed, and any restrictions placed upon his power to impose penalties should further the desired result so as to override the interest of society in levying the most effective sanctions. For a detailed discussion of the role of discretion in sentencing, see Vasoli, *Growth and Consequences of Judicial Discretion in Sentencing*, 40 NOTRE DAME LAW. 404 (1965).

31 An example of this doctrine is the distinction between treatment of a first offender and a recidivist convicted of the same offense. *See generally* Institute on Sentencing, 42 F.R.D. 175 (1967). *See also* Agata, *Time Served Under a Reversed Sentence or Conviction—A Proposal and a Basis for Decision*, 25 MONT. L. REV. 1 (1963).

32 Since each state possesses the power to formulate a penal code reflecting the

The Court rejected both the equal protection and double jeopardy arguments which were advanced, in the first instance merely dismissing the idea of discrimination by a state against a given class of convicts, and finally, by viewing the second sentence not as an increased original sentence, but rather as a completely separate identity, incidentally greater than that originally imposed. The theory that a defendant may receive anything from acquittal to a longer term upon retrial apparently satisfied the Court that no discrimination exists, but will hardly answer the question for that segment of defendants confronted with a longer sentence upon reconviction.[33] The double jeopardy provision was found not preclusive of a more severe penalty, since it has been established that the state has and must retain the right to reprosecute a defendant whose initial conviction has been vacated upon appeal, while preserving the power to impose upon him that penalty which may be considered most beneficial.[34] Indeed, the state may subjectively prescribe "punishment which fits the offender and not merely the crime."[35] In doing this, the trial court may consider evidence adduced at the second trial itself, or the defendant's prison record under the vacated sentence.[36] In essence, then, although the double jeopardy guarantee protects the defendant from being found guilty of a graver offense, he

philosophy of penology prevalent within its jurisdiction, there exists a multiplicity of sentencing practices which gives effect to the various theories upon which punishment may be founded. The rehabilitation theory and the retribution-deterrent theory seem to be the poles between which most sentencing philosophies gravitate. One can contend, however, that whatever the basic philosophy of a jurisdiction, all differences in sentences should be based upon factors which rationally justify the distinctions in results. All convicts should be treated equally before the law, and sentences should reflect equality of imposition as well as the relevant circumstances of each case. For a general discussion of the various theories of sentencing and the concomitant problems of parole systems see George, *Sentencing Methods and Techniques in the United States*, 26 FED. PROB., 33-40 (1962); Spitzer, *Punishment Versus Treatment?*, 25 FED. PROB. 3-7 (1961); Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

33 395 U.S. at 725 n.20, *quoting* evidence reflecting such a fear which had been noted by the trial judge in Patton v. North Carolina, 256 F. Supp. 225 (W.D.N.C. 1966).

34 The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in Williams v. New York, . . . [337 U.S. 241 (1949)], that a State may adopt the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime."

395 U.S. at 723. The Court, in effect, reiterates the doctrine that states are free to choose their own goals and procedures for sentencing, without tempering the discretionary power of the judge. The only qualification which the Court would seem to impose upon this discretion would be that the absence of retaliatory motivation be assured, at least as reflected in the sentence. Accordingly, a judge who imposes a more severe sentence after retrial must make clear his reasons for doing so. 395 U.S. at 726.

35 Williams v. New York, 337 U.S. 241, 247 (1949).

36 The Federal Rules of Criminal Procedure provide for a presentence investigation and report to the court prior to the imposition of sentence. The factors which are considered in imposing sentence or other correctional treatment are: the defendant's prior criminal record, personal characteristics, and financial condition in addition to any other circumstances affecting his behavior which may aid the court. FED. R. CRIM. P. 32 (c).

may still receive a harsher penalty for that same offense if reconvicted.[37]

The majority recognized a "chilling effect" upon a convict who hesitates to assert his constitutional rights lest he be exposed to a punishment greater than that originally imposed. The solution proffered requires that the imposition of a greater penalty be supported by the affirmative findings upon which it is predicated; the premise being that the reasons will be valid, or if not, will be declared void upon appeal. Nevertheless, could not a vindictive court, motivated by a defendant's success, retaliate with a more severe sentence, cloaking a malicious will in the guise of affirmative rationality? Or conversely, could not a court, imposing a greater sentence for the welfare of both the criminal and society, be wrongfully accused of malignant motives?[38] It is often impossible to determine with accuracy the true forces which manifest themselves in the greater sentence. A prohibition against all increased sentences seems to be the sole guarantee against allegations of improper motivation. This rule currently exists in the Uniform Code of Military Justice,[39] and has been proposed in ABA Standards, Post Conviction Remedies[40] and ABA Standards, Sentencing Alternatives and Procedures.[41]

Despite this decision, the "chilling effect" subsists; the accused must choose between asserting his right to a fair trial, and thereby risking a harsher penalty, or accepting the court's error, grave as it might be. This dilemma is illustrated in *Fay v. Noia*,[42] where the Court depicted the defendant as having

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37 *See generally* Van Alstyne, *supra* note 25.

38 *See* Brief for Respondent at 29-31, North Carolina v. Pearce, 395 U.S. 711 (1969).

39 10 U.S.C. § 863(b) (1964).

40 ABA PROJECT ON STANDARDS RELATING TO POST CONVICTION REMEDIES § 6.3 (tent. draft Jan., 1967).

41 ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE § 3.8 (tent. draft Dec., 1967). *See generally* Brief for Respondent at 29-31, North Carolina v. Pearce, 395 U.S. 711 (1969).

42 372 U.S. 391 (1963). The issue here was whether the defendant could be granted federal habeas corpus relief when he had been denied state post-conviction relief for failure to institute a direct appeal within the statutory period. The state contended that the defendant had deliberately avoided state court remedies, in order to avail himself of a federal writ of habeas corpus. The Court stated, however, that his actions could not be viewed in this manner. The surrounding circumstances were such as to create the impression in the defendant's mind that if he was reconvicted, the risk of being sentenced to death was a distinct probability.

> The trial judge, not bound to accept the jury's recommendation of a life sentence, had said when sentencing him, "I have thought seriously about rejecting the recommendation of the jury in your case, Noia, because I feel that if the jury knew who you were and what you were and your background as a robber, they would not have made a recommendation. But you have got a good lawyer, that is my wife. The last thing she told me this morning is to give you a chance."

Record ff. 2261-62, 372 U.S. at 396-97 n.3. Such a statement on the part of the sentencing judge would surely impede the defendant in the assertion of his right to appeal in

> the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence.[43]

This deterring effect upon convicts cannot be rationalized in light of the due process requirements of the fifth and fourteenth amendments.[44]

As the doctrine of implied acquittal would seem to recognize, the double jeopardy guarantee is, in fact, violated when a harsher sentence is imposed.[45] The double jeopardy clause having been applied to the states, state courts, as have the federal courts,[46] should be restrained from imposing a harsher penalty on reconviction.[47] There exists no constitutionally significant distinction between the penalty prohibited by *Ex parte Lange*[48] and *United States v. Benz*[49] and increased punishment upon retrial. The substantive nature of the evil is not predicated upon whether the error was committed at trial or during the sentencing process.[50] The double jeopardy clause prevents the state, following con-

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vindication of the constitutional guarantees against a coerced confession. This situation graphically demonstrates the "chilling effect" which exists when a defendant might be penalized more harshly at a second trial. In *Pearce*, the defendant's fears were realized when the judge, after reconviction, imposed just such a longer sentence; this may well serve to restrain others in a similar position from asserting their right to appeal.

On voiding unconstitutional conditions on the right to a fair trial, see Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

43 372 U.S. at 440.

44 *See generally* Agata, *supra* note 31.

45 *See* Fay v. Noia, 372 U.S. 391, 408 (1963), wherein Mr. Justice Brennan discussed *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873):

> The Court held this double-sentencing procedure unconstitutional, on the ground of double jeopardy, and while conceding that the Circuit Court had a general competence in criminal cases, reasoned that it had no jurisdiction to render a patently lawless judgment.

46 *See* Benton v. Maryland, 395 U.S. 784 (1969), rendered on the same day as *Pearce*. *See generally* Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 265-66 (1966). As the Court noted in *Pearce*:

> [T]hat guarantee has been said to consist of three constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

395 U.S. at 717.

47 United States v. Benz, 282 U.S. 304 (1931) (*dictum* noting that an increase in sentence would have the effect of multiple punishment and thus be violative of the double jeopardy guarantee); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873) (prohibiting multiple punishments). It is almost universally held that once a defendant has commenced serving his sentence, that penalty may not be increased unless the conviction or sentence is vacated. United States v. Benz, 282 U.S. 304 (1931); United States v. Sacco, 367 F.2d 368 (2d Cir. 1966); United States v. Adams, 362 F.2d 210 (6th Cir. 1966); United States v. Walker, 346 F.2d 428 (4th Cir. 1965); Kennedy v. United States, 330 F.2d 26 (9th Cir. 1964); Blackman v. United States, 250 F. 449 (5th Cir. 1918). For an exception to this rule see Williams v. New York, 337 U.S. 241 (1949), in which the increase was allowed on the basis of new information as to the defendant's past criminal record.

48 85 U.S. (18 Wall.) 163 (1873).

49 282 U.S. 304 (1931).

50 Brief for Respondent at 25-26, North Carolina v. Pearce, 395 U.S. 711 (1969).

viction, from retrying the defendant in the hope of exacting a more severe penalty, regardless of evidence subsequently adduced.[51] There is no valid reason for permitting such a practice when a defendant attempts to gain the benefit of an error-free trial.[52] The Court, by its refusal to extend the double jeopardy clause to second sentences, provided the states with an opportunity to obtain an increased sentence due to its own error at the original trial. To the contrary, a state should be required to stand on its performance at the original trial, as jeopardy attaches at that point. Moreover, the permission granted to the states to use after-acquired information in determining the second sentence is patently unjust. For example, if the defendant has been guilty of misconduct in prison, he may very well receive a longer sentence at retrial. In reality, then, such punishment would be based upon an official prison report rather than upon a verdict rendered by a jury composed of his peers. In addition, although a state cannot retry a man after acquittal, despite the discovery of new evidence, if a defendant successfully asserts his rights, it may employ newly disclosed evidence in an effort to procure a harsher penalty. It does not follow logically that the state should be allowed to utilize and derive a benefit from its own error.

The equal protection problem survives despite this decision. Those convicts who seek a fair trial are exposed to the risk of a harsher penalty — a risk avoided by one convicted at an error-free trial. We are offered no reason as to why one group should be so jeopardized. Only where error is established at the initial trial is the convict confronted with the prospect of a second trial at which he must risk the imposition of a harsher penalty. Such a state of affairs seems to be contrary to the equal protection guarantee of the fourteenth amendment.[53]

The state of the law thus remains, with the minor variation that a court's discretion in enlarging punishment upon reconviction of a convict for the same offense may be employed only when it can affirmatively demonstrate reasons for such action. Although credit now must effectively be given for time already served, this generally has been done, and, in any event, sentences may still be lengthened to compensate for any credit given. It appears inevitable that the Court will gravitate towards the view that the penalty determined at the original trial must serve as a ceiling for any penalty subsequently imposed; but

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[51] *Id.*

[52] 395 U.S. at 736-37 (concurring opinion by Douglas, J.).

[53] *See generally* North Carolina v. Pearce, 395 U.S. 711, 726 (concurring opinion by Douglas, J.); Van Alstyne, *supra* note 25.

unfortunately not in a climate unfavorable to such a continued evolution in our criminal law. The incompatibility of this decision with the equal protection clause, the due process clause, and the double jeopardy clause of the Constitution is obvious, and awaits the greater influence of a more enlightened philosophy of criminal justice.

TAXATION — PROFESSIONAL CORPORATIONS — IRS RECOGNIZES CORPORATE STATUS. — *Technical Information Release No. 1019, 2 CCH Corporation Law Guide ¶ 11,482 (August 19, 1969).*

Although courts have attempted to define corporate status since *Trustees of Dartmouth College v. Woodward*,[1] the issue seems to have arisen in a tax context only since the passage of the Revenue Act of 1894.[2] Subsequently, Congress sought to provide legislative guidelines for the determination of corporate status for federal tax purposes.[3] Unfortunately, however, each of these attempts proved unsuccessful; the meaning of the term "corporation" remained uncertain. More importantly, the relationship between state incorporation statutes and corporate status under federal income tax legislation was never explored. Nevertheless, there seemed to be little difficulty in the tax treatment of corporations designated as such.

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1 17 U.S. (4 Wheat.) 518 (1819), wherein Chief Justice John Marshall defined a corporation as follows:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.

Id. at 636.

2 Act of Aug. 27, 1894, ch. 349, § 32, 28 Stat. 556. While exempting partnerships, this Act treated corporations and associations alike by imposing a 2 percent tax on their income. The legislative history preceding passage of this Act indicates a distinction between corporations and associations on the one hand, and partnerships on the other. 26 CONG. REC. 6866, 6867 (1894) (remarks of Mr. Hoar). Furthermore, the debates reveal some sentiment for treating associations organized under state law as "quasi-corporations." *Id.* at 6833 (remarks of Mr. Vest).

3 *See, e.g.*, Revenue Act of 1918, ch. 18, § 1, 40 Stat. 1057. The congressional debates preceding the passage of the Act indicate that the term "corporation" included associations, which were defined as a number of people associated together whether or not