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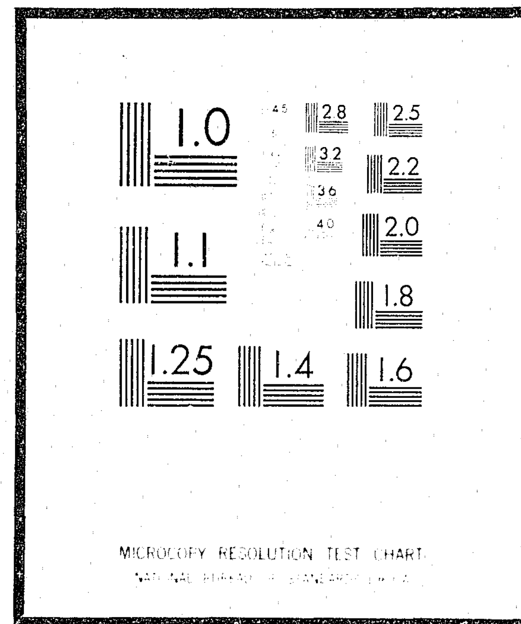

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CASES AND MATERIALS ON PRISON INMATE LEGAL ASSISTANCE

By
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PREFACE

Just a short time ago, professional legal assistance for prison inmates was almost totally nonexistent. But legal problems were nonetheless prevalent, and because of that, inmates sought to fend for themselves in the world of law or to turn over their cases to nonprofessional jailhouse lawyers. Sometimes, assistance was sought from social workers connected with correctional institutions. Recently, however, there has been a marked tendency for lawyers and particularly for law students under faculty supervision to become involved in the representation of prison inmates. Today, there is still much jailhouse lawyering, but legal assistance to prison inmates is now rather widely provided by law school clinics and occasionally by bar association groups and legal aid and defender organizations.

The following materials explore the nature of typical inmate legal claims and trace the increasing involvement of the legal profession in the assertion of those claims. They also discuss the important question, too often ignored in law school education and by lawyers and convicted clients alike, of the legal risks that occasionally accompany the overturning of a criminal conviction.

It is hoped that these materials will prove useful not olny to inmates and the lawyers and law students who represent them, but also to members of the correctional field and of the public who wish to keep abreast of an area of great concern to prison populations.

One final word: Because of the inevitable time lag between the preparation of these materials and their printing and dissemination, one important Supreme Court decision, Colten v. Kentucky, 92 S. Ct. 1953 (1972), was announced and inserted after the principal manuscript had already been prepared. Colten deals with one risk of seeking relief from a criminal conviction and has been inserted as an "additional case" at the end of Chapter 3, which deals with the overall problem of risk. Chapter 3 should accordingly be read in conjunction with the recent developments wrought by Colten.

DAVID B. WEXLER

CHAPTER 1

THE TRADITIONAL PICTURE OF INMATE LEGAL ASSISTANCE: SELF-HELP AND JAIL HOUSE LAWYERS

"A Prisoner Looks at Writ-Writing"--Charles Larsen. 56 California Law Review 343, 344-56 (1968). Copyright (c) 1968, California Law Review, Inc., Reprinted by Permission.

If the term "writ-writer" were to be defined in a dictionary of American-English usage, the following definitions would possibly be included:

> WRIT-WRITER (rit-rit er) n. (1) an indigent person confined in a prison or jail under judgment of a court of law who prepares and files with a court those pleadings he believes will void such judgment. (2) a person who acts as his own lawyer while in prison. (3) Colloq. a person who repeatedly files frivolous legal actions in a court of law to harass his jailers. (4) a "jailhouse lawyer" is a writ-writer who does legal work for other prisoners for a fee.

These four definitions encompass most of the prisoners litigating their cases in propria persona. Despite the fact that the majority of writ-writers possess intrinsic faith in the merits of their individual cases, they believe that prison officials have adopted the third definition. Prison authorities, they feel, have suspicioned writ-writing as a subterfuge through which inmates seek to shirk responsibility for the acts which brought them to prison, to escape punishment, and to rattle the cage in doing so. The breech between the two is exacerbated by the writ-writers' common belief that prison officials deliberately coined the phrase "writ-writer" to degrade them. This attitude is at odds with the writ-writers' conception of themselves and causes ill feeling, hostility, and a breakdown of communication between them and prison officials.

Normally, a two-valued orientation exists with the prison; prisoners are either good or bad, good parole risks or bad parole risks, model prisoners or recalcitrants. However, because prison officials have

adopted the third definition of writ-writers, this two-valued orientation breaks down in the case of prisoners who act as their own counsel. The writ-writers feel that prison officials entertain a single value judgment about them: There are no good writ-writers or bad writ-writers; writ-writers are simply writ-writers.

I

PRISONERS' MOTIVES IN WRITING WRITS

Why do men in prison write writs if their objective is simply to "escape from prison? One misconception should be clarified. The old saying that "typewriters have replaced the hacksaw" for breaking out of prison creates a prejudicial conception about writ-writers—more men still escape from prison than gain freedom through writs of habeas corpus! Litigating one's case is certainly much more time consuming than sawing out a heavy steel bar in a prison window and fleeing into the night.

Lawyers generally require at least a fifty dollar fee to travel to the prisons to consult with a prisoner. The ones not able to pay this sum must resort to the next best course of action—act as their own lawyers. The disadvantages to the prisoner are obvious. A lawyer, after examining the prisoner's transcripts or conducting an independent investigation of the facts, could immediately advise him on a course of action. Lacking the money to hire a lawyer, the prisoner must spend considerable time researching the law, preparing the required legal documents, and filing them. Sometimes years pass before the prisoner discovers what a lawyer could have told him in several weeks—that his case either has or lacks merit. The prisoners who have militantly prosecuted frivolous actions have wasted time they could have devoted to preparing themselves for release from prison. The state, by shouldering these indigent prisoners with the responsibility of acting as their own counsel, has dissipated the taxpayers' money in wasted manpower and court costs.

If an analysis were to be made of the reasons prisoners elect to litigate their cases in pro per against seemingly insurmountable odds, the results would astound judges and lawyers. It is not the rash of decisions such as People v. Dorado, Escobedo v. Illinois, and Gideon v. Wainwright that send countless writ-writers to read barren case law in the prisons' scanty law libraries and to hover for hours over their typewriters. Three important factors are contributing to the ever-increasing flood of legal actions emanating from the state prisons. They fall into the following loose categories: legal, psychological, and economic.

A. Legal Factors

A large percentage of writ-writers are not satisfied that they received due process of law when arrested, tried, and convicted. One common complaint is that they were represented by inadequate counsel. Many were impoverished, living at a bare subsistence level at the time of their arrest. Not having the money to employ private counsel, they were required to accept the services of a court-appointed public defender. Others, not represented by a public defender, employed inexpensive private counsel. Finally, some unsuccessfully defended themselves. In any of the above situations, the state is almost certain to obtain a conviction.

Because a large number of inmates have been represented by a public defender, prisoners have a very low regard for this type of counsel. They believe that the appointment of a public defender is but token compliance with the constitutional right to counsel. The indigent defendant for whom the court appoints a public defender is convinced from the beginning he will not receive a fair and impartial trial. For example, a defendant having but several hundred dollars in the jail's booking office was arraigned in the San Francisco superior court on a robbery charge. When the court assigned the public defender to represent him, the defendant objected to the appointment. He explained to the court that confined in jail awaiting trial on felony charges were approximately forty men who were also to be represented by the same public defender. It was impossible, he told the court, for one lawyer adequately to defend all forty defendants. The defendant, therefore, asked to be allowed to represent himself and petitioned the court for an order authorizing him to purchase and maintain in the county jail a typewriter, law books, and the necessary supplies. The judge refused his request on the ground that the orderly functioning of the county jail could not be disturbed because one defendant wished to handle his own defense. The court then appointed the public defender to act in the capacity of "legal advisor" to the defendant.

After a trial the defendant was found guilty, and the court sentenced him to the state prison. Nearly five years later this defendant refuses to believe that he was accorded his right to appear and defend in person as guaranteed by the California Constitution. Despite the record supporting his contention, state and federal courts have consistently refused to issue a writ of habeas corpus in his favor. Cases like this contribute to the unrest in the state prisons. One prisoner quite succinctly summed up his view of the problem by referring to the famed Washington lawyer, Edward Bennett Williams. "For a hundred grand," said the cynical writ-writer, "Williams will guarantee that you don't go to the joint. If you're

going to do wrong, make a bundle and buy justice like you would a hundred grand loaf of bread."

For every one that challenges the adequacy of the court-appointed counsel, there are ten or more writ-writers contesting the infringement of their constitutional and statutory rights. Prisoners today are more literate than their counterparts of twenty or thirty years ago. Today, prisoners have a keener awareness of their rights under the law, and any variance during the criminal proceedings with what they think to be their rights will impel them to seek relief in the courts. Possessing a better fundamental education, the prisoners have been able to penetrate the heretofore impregnable fabric of the law. They have mastered legal semantics and simplified it to their own needs. The law has become the panzer movement they use to strike out toward their elusive goals—to redress the deprivation of their rights.

It is not unusual, then, in a subculture created by the criminal law, wherein prisoners exist as creatures of the law, that they should use the law to try to reclaim their previously enjoyed status in society. The upheavals occurring in the American social structure are reflected within the prison environment. Prisoners, having real or imagined grievances, cannot demonstrate in protest against them. The right peaceably to assemble is denied to them. The only avenue open to prisoners is taking their case to court. Prison writ-writers would compare themselves to the dissenters outside prison, with one exception—their grievances are real or they imagine they are real. They are personally involved.

B. Psychological Factors

There are two obvious psychological motives for prosecuting legal actions from prison. The first is an outgrowth of the prison's social environment. Sentenced to serve a term in the state prison under what is termed the "Indeterminate Sentence Law," the prisoner is caught in a dilemma which causes him considerable frustration and despair. He does not know when his sentence will terminate, and must therefore choose between taking his case to court or waiting for the Adult Authority[5] to fix his term of imprisonment. If he chooses to write writs, it is only because the remote possibility of winning his case offers him better odds than waiting for the Adult Authority to set a definite sentence. On the other hand, he may fear that the authorities would disfavor anyone who denies his guilt by continuing to litigate his case. If the prisoner does not write writs, he may never get out; if he does write writs, he may never receive parole.

Many writ-writers have said that they would be able to make positive plans for the future if they knew when their sentences would end. They seem to feel that they are living in a vacuum where their fates are determined arbitrarily rather than by rule of law. One writ-writer very aptly summed up the majority's view with these words: "When I arrived at the prison and discovered that no one, including the prison officials, knew how long my sentence was, I had to resort to fighting my case to keep my sanity." This writ-writer, after twenty years in prison for the offense of robbery, still does not know how much time he will be required to serve. Psychologically, the writ-writer, in seeking relief from the courts, is pursuing a course of action which relieves the tensions and anxieties created by the sentence system.

The second psychological type is the prisoner who writes writs to be "in." He is introduced to writ-writing by acquaintances who are writ-writers. Men falling into this category are not the perennial writ-writers whose names continually appear on documents streaming into the courts. Usually, after a few unsuccessful forays into the legal realm, they stable their white chargers, hang their lances on the wall, and go about the business of serving their sentences.

C. Economic Factors

The last type of writ-writer to be discussed writes writs for economic gain. This group is comprised of a few unscrupulous manipulators who are interested only in acquiring from other prisoners money, cigarettes, or merchandise purchased in the inmate canteen. Once they have a "client's" interest aroused and determine his ability to pay, they must keep him on the "hook." This is commonly done by deliberately misstating the facts of his case so that it appears, at least on the surface, that the inmate is entitled to relief. The documents drafted for the client cast the writ-writer in the role of a sympathetic protagonist. After reading them, the inmate is elated that he has found someone able to present his case favorably. He is willing to pay to maintain the lie that has been created for him. After years of futilely applying to the court for various writs, he will leave prison certain that he has not been accorded justice. On the other hand, when a prisoner turns his case over to a writ-writer he is left free to devote his time to serving his sentence. Prisoners who do this maintain an objective outlook.

[5] Cal. Pen. Code §3020 (West 1956) expressly confers upon the Adult Authority the function of determining and redetermining the length of time a prisoner is to be confined in the state prison.

They do not become so emotionally involved with prosecuting their cases that they are unable to take advantage of the prison's self-betterment programs.

* * * *

II

COMMON PROBLEMS CONFRONTING WRIT-WRITERS

A. The Subjective Point of View

When a prisoner first attempts to utilize post-conviction remedies to attack his conviction, he views his case subjectively. In many instances, this prevents him from bringing his case to a successful conclusion. The subjective viewpoint distorts the prisoner's conception of the pertinent facts; he is unable to identify the facts that are required to establish a prima facie violation of his rights. With such a self-centered orientation, the prisoner invariably confuses his notion of the rights and limitations defined by constitutional law with those rights and limitations actually secured by the Constitution. The subjective inmate is the first to resentfully proclaim that his constitutional "rights" have been violated. If asked to relate the substance of the infringement, he will elaborate at great lengths on a number of grievances. However, a close scrutiny of the notice writ-writer's complaints reveal that few of them come under the protection of either the state or federal constitution. Unable to distinguish between grievances and constitutionally protected rights, the prisoner is unable to make a showing which would warrant a court to intervene in the execution of his sentence. The tragedy is that many futile pleadings which wind up on court dockets have no merit. Over the years, if the writ-writer is persistent, he will acquire both an objective overview and a working knowledge of law and will eventually abandon his legalistic pursuits when he is able to measure the conduct of his trial against valid constitutional provisions. In the event a denial of due process has occurred during his trial, he is then better equipped to present the issues fairly.

B. Inadequate Education

Another major stumbling block encountered by many prisoners desiring to assault their convictions is the lack of adequate education. The

uneducated writ-writer is not capable of intelligently analyzing the function of law in our society or of interpreting the court decisions construing the law. He commonly makes the mistake of selecting dictum from a decision and interpreting it as the absolute rule of the case. Many writ-writers spend long hours in the prison law library hovering over the well-thumbed tomes. They may copy quite extensively from a number of decisions and emerge from the library clutching a handful of notes and citations which they believe will support their allegations of denials of constitutional rights. Ask one at random: "What are the facts of People v. Doakes? Is there any similarity between the facts of your case and the Doakes case?" He will look at you with a puzzled expression and reply: "Hell, I don't know, but this is what the court said."

The second aspect of this problem is the novice writ-writer's inability to understand what is required to present a prima facie case entitling him to the relief he seeks. Few prisoners realize that the burden of proof is on them, and the complexities of this requirement present a formidable precipice few writ-writers ever scale. It remains an insurmountable problem to the writ-writer until he has several years experience behind him. Many writ-writers turn to others for help, seeking, perhaps, another writ-writer's copy of a habeas corpus petition. If the copy received is itself faulty, the copier's petition will also lack the essentials to state a cause of action. Armed with this inadequate tool, the newly indoctrinated writ-writer, filled with enthusiasm at having been permitted a glimpse into the heretofore inaccessible legal realm, prepares his "writ" and files it. When notified by the clerk of the court that his petition has been denied, his belief in his case is reinforced. It is not long before he becomes convinced that a conspiracy is afoot to keep him in prison. A common reference among writ-writers is that "judges are all slopping out of the same trough." This attitude defeats the prisoner because as he doggedly pursues his writ-writing career, each writ that is denied reaffirms his belief that he was never destined to be afforded his constitutional rights—such "rights" become abstractions only the wealthy can afford. It is impossible to calculate the social harm generated by prisoners' lack of respect for the law stemming from being denied the assistance of counsel while litigating their cases in prison.

While some courts appear to recognize the problems writ-writers encounter in doing their own legal work, none have yet made a definitive declaration regarding the assistance of counsel for prisoners seeking extraordinary writs. It was not until 1963 that the United

States Supreme Court finally made definitive declaration of the right to counsel for criminal defendants on appeal. Having found, in that year, that indigent criminal defendants are entitled to counsel on appeal, the Court should now consider the rights of indigents to counsel in seeking postconviction relief from prison.

Several years ago, a federal judge, in lieu of appointing counsel to a habeas corpus petitioner, took a step which he thought would help writ-writers. He rendered an opinion setting forth specifically, step-by-step, the requirements that he expected of writ-writers in submitting petitions for the writ to his court. The decision was received with two reactions at the state prison at Folsom where the action originated. The petitioner in the case felt insulted that the court would be so presumptuous as to tell him how to write a "writ." The other writ-writers gleefully looked upon the opinion as an unprecedented windfall—here at last was the key to the front gate! Their revised petitions swelled the postal stream to the court only to be denied as rapidly as their preceding applications. Chaos reigned in the prison's legal world. Here was a federal judge who spelled out the requirements he expected in a petition for a writ of habeas corpus, yet not one of the subsequent petitioners was able to meet the court's criteria. That prison's legal-eagles ultimately looked upon the decision as a deliberate subterfuge to encourage the filing of worthless petitions.

C. Inadequate Legal Source Materials

The prison law libraries are a constant source of discontent among writ-writers. Like newly landed immigrants who do not speak the language, they must use law libraries to become conversant with law. Antiquated law books and insufficient time allocated for legal research ill prepares prisoners to handle their own cases. The ancient law books obstruct rather than assist them in their research. Without other legal reference sources, prisoners with no money must dig out decisions to use as citations. Unknown to them, many of the citations they collect have been overruled or modified by later decisions.

In San Quentin prisoners are admitted to the law library for a limited period each week. However, legal volumes available in the library are severely limited.[24]

D. Prisoners' Attempts to Defeat the System

Because of the impediments outlined above, few writ-writers are able to communicate effectively their grievances by making out a prima facie case. To do this it is necessary to allege ultimate facts; and, it is preferable, though not necessary, to cite authorities supporting their contentions. Since the prison law library is not a very fertile source of relevant citations, writ-writers have for many years purchased individual printed decisions from the West Publishing Company. For a nominal fee that company makes available any printed decision it has in stock. Because prison restrictions on some types of legal publications have recently been relaxed, prisoners with funds can now subscribe to several legal periodicals: the Sacramento Legal Press and the Advanced California Reports. Writ-writers coming into possession of these publications are able to keep their fingers on the pulse of the law. Quite a number of them zealously read them awaiting an opinion they can use. Another source yielding good dividends is the daily newspapers. When a news item appears about an important decision containing a hint of its applicability, writ-writers dash off letters seeking complimentary copies of it from the clerk of the court.

Legal documents filed by an attorney representing an imprisoned client usually provide a bonanza of legal nuggets. Fortunate is the writ-writer who discovers another prisoner with a similar case who is represented by counsel. He simply presents his case the way the lawyer has done it for the other prisoner. Yet, the sources of law available to the writ-writer do not actually help him prepare his case. Absent are current texts on pleading and procedure. McKinney's Digest (1st series) and California Jurisprudence (1st series), while on the

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[24] The San Quentin Prison Library is grossly inadequate for the comprehensive legal research needed to prepare legal actions adequately. For example, the California Appellate Reports and the California Supreme Court Reports terminate at 1955; California Jurisprudence, McKinney's California Digest, and Corpus Juris have not been replaced by their respective second series; Shepards Citations terminate at 1954; and there are no United States Supreme Court Reports.

shelves of the law library at San Quentin, are shunned by most writ-writers. They have been "burned" too often in using authorities cited in these volumes, because many cases in both sets have been modified or overruled by subsequent decisions.

When decisions do not help a writ-writer, he may employ a handful of tricks which damage his image in the state courts. Some of the not too subtle subterfuges used by a small minority of writ-writers would tax the credulity of any lawyer. One writ-writer made up his own legal citations when he ran short of actual ones. In one action against the California Adult Authority involving the application of administrative law, one writ-writer used the following citations: Aesop v. Fables, First Baptist Church v. Sally Stanford, Doda v. One Forty-four Inch Chest, and Dogood v. The Planet Earth. The references to the volumes and page numbers of the nonexistent publications were equally fantastic, such as 901 Penal Review, page 17,240. To accompany each case, he composed an eloquent decision which, if good law, would make selected acts of the Adult Authority unconstitutional. In time the "decisions" freely circulated among other writ-writers, and several gullible ones began citing them also.

Sometimes the knavery employed by writ-writers becomes an administrative problem which must be unraveled by the prison officials. Once a prisoner is paroled, he acts under the threat of being returned to prison for violating the conditions of his parole. When a parolee is returned to prison by the Division of Adult Paroles, he is entitled to a hearing before the Adult Authority which has the power either to revoke the parole or to reinstate it. During the hearing the parolee is denied counsel and the right to present witnesses and evidence in his behalf. The revocation procedure presents a sore spot to most of the hundreds of parolees returned to prison each year. They like to believe that the constitutional guarantee to counsel and the right to present evidence in their behalf applies during this administrative hearing. One writ-writer composed a fictitious decision which held that a parolee is entitled to counsel when appearing before the Adult Authority on charges of violating his parole. The decision declared that failure to observe this requirement amounted to a denial of due process of law which invalidated the action taken by the Adult Authority. The "decision" ran like spilled mercury around the prison yard. Prisoners swamped the prison officials with hopeful inquiries regarding when the Adult Authority was going to reschedule their cases for hearing in light of the "decision." The associate warden of the prison finally had to address the prisoners over the prison radio.

He explained that the state's attorney general had conducted an investigation and found no evidence of such a case being decided by the courts. Of course, the prisoners refused to accept this bit of adverse news. It was nearly six months before the furor died down.

* * * *

CASE: Johnson v. Avery, 393 U.S. 483 (1969).

Mr. Justice Fortas delivered the opinion of the Court.

I

Petitioner is serving a life sentence in the Tennessee State Penitentiary. In February 1965 he was transferred to the maximum security building in the prison for violation of a prison regulation which provides:

> "No inmate will advise, assist or otherwise contract to aid another, either with or without a fee, to prepare Writs or other legal matters. It is not intended that an innocent man be punished. When a man believes he is unlawfully held or illegally convicted, he should prepare a brief or state his complaint in letter form and address it to his lawyer or a judge. A formal Writ is not necessary to receive a hearing. False charges or untrue complaints may be punished. Inmates are forbidden to set themselves up as practitioners for the purpose of promoting a business of writing Writs."

In July 1965, petitioner filed in the United States District Court for the Middle District of Tennessee a "motion for law books and a typewriter," in which he sought relief from his confinement in the maximum security building. The District Court treated this motion as a petition for a writ of habeas corpus and, after a hearing, ordered him released from disciplinary confinement and restored to the status of an ordinary prisoner. The District Court held that the regulation was void because it in effect barred illiterate prisoners from access to federal habeas corpus and conflicted with 28 U.S.C. §2242[1] 252 F. Supp. 783.

[1] 28 U.S.C. §2242 provides in part: "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf."

By the time the District Court Order was entered, petitioner had been transferred from the maximum security building, but he had been put in a disciplinary cell block in which he was entitled to fewer privileges than were given ordinary prisoners. Only when he promised to refrain from assistance to other inmates was he restored to regular prison conditions and privileges. At a second hearing, held in March 1966, the District Court explored these issues concerning the compliance of the prison officials with its initial order. After the hearing, it reaffirmed its earlier order.

The State appealed. The Court of Appeals for the Sixth Circuit reversed, concluding that the regulation did not unlawfully conflict with the federal right of habeas corpus. According to the Sixth District, the interest of the State in preserving prison discipline and in limiting the practice of law to licensed attorneys justified whatever burden the regulation might place on access to Federal habeas corpus. 382 F. 2d 353.

II.

This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme, and the Congress has demonstrated its solicitude for the vigor of the Great Writ. The Court has steadfastly insisted that "there is no higher duty than to maintain it unimpaired." Bowen v. Johnston, 306 U.S. 19.26 (1939).

Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed. For example, the Court has held that a State may not validly make the writ available only to prisoners who could pay a $4 filing fee. Smith v. Bennett, 365 U.S. 708 (1961). And it has insisted that, for the indigent as well as for the affluent prisoner, post-conviction proceedings must be more than a formality. For instance, the State is obligated to furnish prisoners not otherwise able to obtain it, with a transcript or equivalent recordation of prior habeas hearings for use in further proceedings. Long v. District Court, 385 U.S. 192 (1966). Cf. Griffin v. Illinois, 351 U.S. 12 (1956).

Tennessee urges, however, that the contested regulation in this case is justified as a part of the State's disciplinary administration of the prisons. There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated.

For example, in Lee v. Washington, 390 U.S. 333 (1968), the practice of racial segregation of prisoners was justified by the State as necessary to maintain good order and discipline. We held, however, that the practice was constitutionally prohibited, although we were careful to point out that the order of the District Court, which we affirmed, made allowance for "the necessities of prison security and discipline." Id., at 334. And in Ex parte Hull, 312 U.S. 546 (1941), this Court invalidated a state regulation which required that habeas corpus petitions first be submitted to prison authorities and then approved by the "legal investigator" to the parole board as "properly drawn" before being transmitted to the court. Here again, the State urged that the requirement was necessary to maintain prison discipline. But this Court held that the regulation violated the principle that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." 312 U.S., at 549. Cf. Cochran v. Kansas, 316 U.S. 255, 257 (1942).

There can be no doubt that Tennessee could not constitutionally adopt and enforce a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions. Here Tennessee has adopted a rule which, in the absence of any other source of assistance for such prisoners, effectively does just that. The District Court concluded that "For all practical purposes, if such prisoners cannot have the assistance of a 'jailhouse lawyer' their possibly valid constitutional claims will never be heard in any court." 252 F. Supp., at 784. The record supports this conclusion.

Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited. This appears to be equally true of Tennessee's prison facilities.

In most federal courts, it is the practice to appoint counsel in post-conviction proceedings only after a petition for post-conviction relief passes initial judicial evaluation and the court has determined that issues are presented calling for an evidentiary hearing. E.G. Taylor v. Pegelow, 335 F. 2d 147 (C.A. 4th Cir. 1964), United States ex rel. Marshall v. Wilkins, 338 F. 2d 404 (C.A. 2d Cir. 1964). See 28 U.S.C. § 1915 (d) Sokol, A Handbook of Federal Habeas Corpus 71-7 (1965).

It has not been held that there is any general obligation of the courts, state or federal, to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief. See, e.g., Barker v. Ohio, 330 F. 2d 594 (C.A. 6th Cir. 1964). Accordingly, the initial burden of presenting a claim to post-conviction relief usually rests upon the indigent prisoner himself with such help as he can obtain within the prison walls or the prison system. In the case of all except those who are able to help themselves—usually a few old hands or exceptionally gifted prisoners—the prisoner is, in effect, denied access to the courts unless such help is available.

It is indisputable that prison "writ writers" like petitioner are sometimes a menace to prison discipline and that their petitions are often so unskillful as to be a burden on the courts which receive them. But, as the Court held in Ex parte Hull, supra, in declaring invalid a state prison regulation which required that prisoners' legal pleadings be screened by state officials.

> "The considerations that prompted [the regulation's] formulation are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for writ of habeas corpus." 312 U.S., at 549.

Tennessee does not provide an available alternative to the assistance provided by other inmates. The warden of the prison in which petitioner was confined stated that the prison provided free notarization of prisoners' petitions. That obviously meets only a formal requirement. He also indicated that he sometimes allowed prisoners to examine the listing of attorneys in the Nashville telephone directory so they could select one to write to in an effort to interest him in taking the case, and that "on several occasions" he had contacted the public defender at the request of an inmate. There is no contention, however, that there is any regular system of assistance by public defenders. In its brief the State contends that "[t]here is absolutely

no reason to believe that prison officials would fail to notify the court should an inmate advise them of a complete inability, either mental or physical, to prepare a habeas application on his own behalf," but there is no contention that they have in fact ever done so.

This is obviously far short of the showing required to demonstrate that, in depriving prisoners of the assistance of fellow inmates, Tennessee has not, in substance, deprived those unable themselves, with reasonable adequacy, to prepare their petitions, of access to the constitutionally and statutorily protected availability of the writ of habeas corpus. By contrast, in several States, the public defender system supplies trained attorneys, paid from public funds, who are available to consult with prisoners regarding their habeas petitions. At least one State employs senior law students to interview and advise inmates in state prisons. Another State has a voluntary program whereby members of the local bar association make periodic visits to the prison to consult with prisoners concerning their cases. We express no judgment concerning these plans, but their existence indicates that techniques are available to provide alternatives if the State elects to prohibit mutual assistance among inmates.

Even in the absence of such alternatives, the State may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of assistance in the preparation of applications for relief; for example, by limitations on the time and location of such activities and the imposition of punishment for the giving or receipt of consideration in connection with such activities. Cf. Hatfield v. Bailleaux, 290 F. 2d 632 (C.A. 9th Cir. 1961) (sustaining as reasonable regulations on the time and location of prisoner work on their own petitions). But unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners.[11]

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[11] In reversing the District Court, the Court of Appeals relied on the power of the State to restrict the practice of law to licensed attorneys as a source of authority for the prison regulation. The power of the States to control the practice of law cannot be exercised as to so abrogate federally protected rights. NAACP v. Button, 371 U.S. 415 (1963); Sperry v. Florida, 373 U.S. 379 (1963). In any event, the type of activity involved here—preparation of petitions for post-conviction relief—historically and traditionally is one which may benefit from the services of a trained and dedicated lawyer but it is a function often, perhaps generally, performed by laymen. Title 28 U.S.C., § 2242, apparently contemplates that in many situations petitions for federal habeas corpus relief will be prepared by laymen.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice Douglas, concurring.

While I join the opinion of the Court, I will add a few words in emphasis of the important thesis of the case.

The increasing complexities of our governmental apparatus both at the local and federal levels have made it difficult for a person to process a claim or even to make a complaint. Social security is a virtual maze; the hierarchy that governs urban housing is often so intricate that it takes an expert to know what agency has jurisdiction over a particular complaint; the office to call or official to see for noise abatement, for a broken sewer line, or a down tree is a mystery to many in our metropolitan areas.

A person who has a claim assertable in faraway Washington, D. C., is even more helpless, as evident by the increasing tendency of constituents to rely on their congressional delegation to identify, press, and process their claims.

We think of claims as grist of the mill for the lawyers. But it is becoming abundantly clear that more and more of the effort in ferreting out the basis of claims and the agencies responsible for them and in preparing the almost endless paperwork for their prosecution is work for laymen. There are not enough lawyers to manage or supervise all of these affairs; and much of the basic work done requires no special legal talent. Yet there is a closed-shop philosophy in the legal profession that cuts down drastically active roles for laymen. It was expressed by a New York court in denying an application from the Neighborhood Legal Services for permission to offer a broad legal aid type of service to indigents:

> "...in any legal assistance corporation, supported by Federal antipoverty funds, the executive staff, and those with the responsibility to hire and discharge staff from the very top to the lowest lay echelon must be lawyers." Matter of Action for Legal Services, 26 App. Div. 354, 360 (1966).

That traditional, closed-shop attitude is utterly out of place in the modern world where claims pile high and much of the work of tracing and pursuing them requires the patience and wisdom of a layman rather than the legal skills of a member of the bar.

> "If poverty lawyers are overworked, some of the work can be delegated to sub-professionals. New York law permits senior law students to practice law under certain supervised conditions. Approval must first be granted by the appellate division. A rung or two lower on the legal profession's ladder are laymen legal technicians, comparable to nurses and lab assistants in the medical profession. Large law firms employ them, and there seems to be no reason why they cannot be used in legal services programs to relieve attorneys for more professional tasks." Samore, Legal Services for the Poor, 32 Albany L. Rev. 509, 515-516 (1968). And see Sparer, Thorkeson, and Weiss, The Lay Advocate. 43 U. Det. L. J. 493, 510-514 (1966).

The plight of a man in prison may in these respects be even more acute than the plight of a person on the outside. He may need collateral proceedings to test the legality of his detention or relief against management of the parole system or against defective detainers lodged against him which create burdens in the manner of his incarcerated status. He may have grievances of a civil nature against those outside the prison. His imprisonment may give his wife grounds for divorce and be a factor in determining the custody of his children; and he may have pressing social security, workmen's compensation, or veterans' claims.

While the demand for legal counsel in prison is heavy, the supply is light. For private matters of a civil nature, legal counsel for the indigent in prison is almost nonexistent. Even for criminal proceedings, it is sparse. While a few States have post-conviction statutes providing such counsel, most States do not. Some States like California do appoint counsel to represent the indigent prisoner in his collateral hearings, once he succeeds in making out a prima facie case. But as a result, counsel is not on hand for preparation of the papers or for the initial decision by the prisoner that his claim has substance.

Many think that the prisoner needs help at an early stage to weed out frivolous claims. Some States have Legal Aid Societies, sponsored in part by the National Legal Aid and Defender Association, that provide post-conviction counsel to prisoners. Most legal

aid offices, however, have so many pressing obligations of civil and criminal nature in their own communities and among freedmen, as not to be able to provide any satisfactory assistance to prisoners. The same thing is true of OEO-sponsored Neighborhood Legal Services offices, which see their function as providing legal counsel for a particular community, which a member leaves as soon as he is taken to prison. In some cases, state public defenders will represent a man even after he passes beyond prison walls. But more often, the public defender has no general authorization to process post-conviction matters.

Some States have experimented with programs designed especially for the prison community. The Bureau of Prisons led the way with a program of allowing senior law students to service the federal penitentiary at Leavenworth, Kansas. Since then, it has encouraged similar programs at Lewisburg (University of Pennsylvania Law School), and elsewhere. The program of the law school at U.C.L.A. is now about to reach inside federal prisons. In describing the University of Kansas Law School program at Leavenworth, legal counsel for the Bureau of Prisons has said:

> "The experience at Leavenworth has shown that there have been very few attacks upon the (prison) administration; that prospective frivolous litigation has been screened out and that where the law school felt that the prisoner had a good cause of action, relief was granted in a great percentage of cases. A large part of the activity was disposing of long outstanding detainers lodged against the inmates. In addition, the program handles civil matters such as domestic relations problems and compensation claims. Even where there has been no tangible success, the fact that the inmate had someone on the outside listen to him and analyze his problems had a most beneficial effect .... We think that these programs have been beneficial not only to the inmates but to the students, the staff and the courts."

The difficulty with an ad hoc program resting on a shifting law school population is that, worthy though it be, it often cannot meet the daily prison demands. In desperation, at least one State has allowed a selected inmate to act as "jailhouse" counsel for the remaining inmates. The way of legal aid, public defenders, and assigned counsel has been spread too thinly to service prisons adequately. Some federal courts have begun to provide prisons with

standardized habeas corpus forms, in the hope that they can be used by laymen. But the prison population has not found that satisfactory.

Where government fails to provide the prisons with the legal counsel it demands, the prison generates its own. In a community where illiteracy and mental deficiency is notoriously high, it is not enough to ask the prisoner to be his own lawyer. Without the assistance of fellow prisoners, some meritorious claims would never see the light of a courtroom. In cases where that assistance succeeds, it speaks for itself. And even in cases where it fails, it may provide a necessary medium of expression [.] * * *

In that view, which many share, the preparation of these endless petitions within the prisons is a useful form of therapy. Apart from that, their preparation must never be considered the exclusive prerogative of the lawyer. Laymen—in and out of prison—should be allowed to act as "next of friend" to any person in the preparation of any paper or document or claim, so long as he does not hold himself out as practicing law or as being a member of the Bar.

The cooperation and help of laymen, as well as of lawyers, is necessary if the right of "reasonable access to the courts"[24] is to be available to the indigents among us.

Mr. Justice White, with whom Mr. Justice Black joins, dissenting.

It is true, as the majority says, that habeas corpus is the Great Writ, and that access through it to the courts cannot be denied simply because a man is indigent or illiterate. It is also true that the illiterate or poorly educated and inexperienced indigent cannot adequately help himself and that unless he secures aid from some other source he is effectively denied the opportunity to present to the courts what may be valid claims for post-conviction relief.

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[24] Reasonable access to the courts is ... a right [secured by the Constitution and laws of the United States], being guaranteed as against state action by the due process clause of the fourteenth amendment. In so far as access by state prisoners to federal courts is concerned, this right was recognized in Ex Parte Hull, 312 U.S. 546, 549. The right of access by state prisoners to state courts was recognized in White v. Ragen, 324 U.S. 760, 702, n.1." Hatfield v. Bailleaux, 290 F. 2d 632, 636 (C.A. 9th Cir. 1961).

Having in mind these matters, which seem too clear for argument, the Court rules that unless the State provides a reasonably adequate alternative, it may not enforce its rule against inmates furnishing help to others in preparing post-conviction petitions. The Court does not say so in so many words, but apparently the extent of the State's duty is not to interfere with indigents seeking advice from other prisoners. It seems to me, however, that unless the help the indigent gets from other inmates is reasonably adequate for the task, he will be as surely and effectively barred from the courts as if he were accorded no help at all. It may be that those who could help effectively refuse to do so because the indigent cannot pay, that there is actually no fellow inmate who is competent to help, or that the realities of prison life leave the indigent to the mercies of those who should not be advising others at all. In this event the problem of the incompetent needing help is only exacerbated as is the difficulty of the courts in dealing with a mounting flow of inadequate and misconceived petitions.

The majority admits that jailhouse lawyers like petitioner "are sometimes a menace to prison discipline and that their petitions are often so unskillful as to be a burden on the courts which receive them is indisputable." That is putting it mildly. The disciplinary problems are severe, the burden on the courts serious, and the disadvantages to prisoner clients of the jailhouse lawyer are unacceptable.

Although some jailhouse lawyers are no doubt very capable, it is not necessarily the best amateur legal minds which are devoted to jailhouse lawyering. Rather, the most aggressive and domineering personalities may predominate. And it may not be those with the best claims to relief who are served as clients, but those who are weaker, and more gullible. Many assert that the aim of the jailhouse lawyer is not the service of truth and justice, but rather self-aggrandizement, profit, and power. According to prison officials, whose expertise in such matters should be given some consideration, the jailhouse lawyer often succeeds in establishing his own power structure, quite apart from the formal system of warden, guards, and trusties which the prison seeks to maintain. Those whom the jailhouse lawyer serves may come morally under his sway as the one hope of their release, and repay him not only with obedience but with what minor gifts and other favors are available to them. When a client refuses to pay, violence may result, in which case the jailhouse lawyer may be aided by his other clients.

It cannot be expected that the petitions which emerge from such a process will be of the highest quality. Codes of ethics, champerty,

and maintenance, frequently have little meaning to the jailhouse lawyer, who solicits business as vigorously as he can. In the petition itself, outright lies may serve the jailhouse lawyer's purpose since by procuring for a prisoner client a short trip out of jail for a hearing on his contentions the petition writer's credibility with the other convicts is improved.

Habeas corpus petitions, as the majority notes, are relatively easy to prepare; they need only set out the facts giving rise to a claim for relief and the judge will apply the law, appointing a lawyer for the prisoner and giving him a hearing when appropriate. This fact does not buttress the unregulated jailhouse lawyer system, but undermines it. To the extent that it is easy to state a claim, any prisoner can do it, and need not submit to the mercies of a jailhouse lawyer. To the extent that it is difficult—and it is necessary to understand what one's rights are before it is possible to set out in a petition the facts which support them—there may be no fellow prisoner adequate to the task. There are some well informed and articulate prisoners and some (not necessarily the same) who give advice and aid out of altruism. When the two qualities are combined in one man, as they sometimes are, he can be a perfectly adequate source of help. But the jails are not characteristically populated with the intelligent or the benign, and capable altruists must be rare indeed. On the other hand, some jailhouse clients are illiterate and whether illiterate or not, there are others who are unable to prepare their own petitions. They need help, but I doubt that the problem of the indigent convict will be solved by subjecting him to the false hopes, dominance, and inept representation of the averaged unsupervised jailhouse lawyer.

I cannot say therefore, that petitioner Johnson, who is a convicted rapist serving a life sentence and whose prison conduct the State has wide discretion in regulating, cannot be disciplined for violating a prison rule against aiding other prisoners in seeking post-conviction relief, particularly when there is no showing that any prisoner in the Tennessee State Prison has been denied access to the courts, that Johnson has confined his services to those who need it, or that Johnson is himself competent to give the advice which he offers. No prisoner testified that Johnson was the only person available who would write out a writ for him or that guards or other prison functionaries would not furnish the necessary help. And it is really the prisoner client's rights, not the jailhouse lawyer's, which are most in need of protection.

If the problem of the indigent and ignorant convict in seeking post-conviction relief is substantial, which I think it is, the better course is not in effect to sanction and encourage spontaneous jailhouse lawyer systems but to decide the matter directly in the case of a man who himself needs help and in that case to rule that the State must provide access to the courts by ensuring that those who cannot help themselves have reasonably adequate assistance in preparing their post-conviction papers. Ideally, perhaps professional help should be furnished and prisoners encouraged to seek it so that any possible claims receive early and complete examination. But I am inclined to agree with Mr. Justice Douglas that is it neither practical nor necessary to require the help of lawyers. As the opinions in this case indicate, the alternatives are various and the burden on the States would not be impossible to discharge. This requirement might even be met by the establishment of a system of regulated trusties of the prison who would advise prisoners of their legal rights. Selection of the jailhouse lawyers by the prison officials for scholarship and character might assure that the inmate client received advice which would actually help him, and regulation of the "practice" oy the authorities would reduce the likelihood of coerced fees or blackmail. The same legislative judgment which should be sustained in concluding that the evils of jailhouse lawyering justify its proscription might also support a legislative judgment that jailhouse lawyering under carefully controlled conditions satisfies the prisoner's constitutional right to help.

Regretfully, therefore, I dissent.

Notes

1) For a further discussion of the pros and cons of jailhouse lawyering, see Wexler, The Jailhouse Lawyer as a Paraprofessional: Problems and Prospects, 7 Crim. L. Bull. 139 (1971).

2) In Hackin v. State, 102 Ariz. 218, 427 P. 2d 910 (1967), a nonlawyer who had graduated from an unaccredited law school was convicted of the unauthorized practice of law after appearing in a state habeas corpus proceeding on behalf of an indigent prisoner. Prior to that court appearance, Hackin had tried in vain to secure the services of a licensed attorney to argue the indigent's case in court. The Supreme Court of Arizona in Hackin read the local habeas corpus act to permit a layman to prepare and file a habeas

corpus petition on another's behalf, but held the in-court representation to constitute unauthorized practice.

On appeal to the United States Supreme Court, the case was dismissed, over Justice Douglas' dissent, for want of a substantial federal question. Hackin v. Arizona, 389 U.S. 143 (1967). Concerned that in the absence of lay or paraprofessional assistance many meritorious claims would never be pressed, and "by no means sure that the [unauthorized practice] line was properly drawn by the court below where no lawyer could be found and this layman apparently served without a fee," 389 U.S. at 150, Justice Douglas would have heard the appeal.

To what extent does footnote 11 of Johnson v. Avery, supra, asserting that "the power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights," now cast constitutional doubt on Hackin's unauthorized practice conviction?

CHAPTER 2

THE ROLE OF COUNSEL AND EMERGING ATTEMPTS TO MEET THE LEGAL NEEDS OF INMATES

Note, "Legal Services for Prison Inmates". 1967 Wisconsin Law Review, 514, 515-19. Reprinted by Permission.

I. THE NEED FOR LEGAL COUNSEL

In assessing the need for legal counselling within a prison, reference should be made to two types of needs: (1) The need of the inmate who has a meritorious claim. It seems apparent that he ought to be afforded sufficient access to counsel to enable him to raise the issue. (2) The need of the inmate who believes his claim to be meritorious when it is in fact groundless. Denied access to counsel, this inmate feels the same sense of injustice as does the inmate with the meritorious claim. The need in the latter situation is for counselling which, hopefully, will persuade the inmate that he does not have a basis for a postconviction remedy. To the extent that this can be done, legal counselling should make a major contribution to the correctional objective of rehabilitation.

In describing the range of legal issues raised by inmates, it is helpful to classify them on the basis of whether the inmate is challenging: (1) his conviction; (2) his treatment in the correctional institution; or (3) other things, as the existence of detainers filed by another state.

A. Conviction Claims

Of the inmates interviewed, almost two-thirds were concerned about the propriety of their convictions. Often their questions would relate to how to start an appeal or habeas corpus proceeding, or how to obtain a lawyer if they were indigent.

Illustration No. 1: An inmate wrote the court asking that an attorney be appointed to represent him on appeal. The Court replied that they had learned he had an insurance

claim of about $1000 pending and requested that he assign it over to his county of residence. This was the man's only asset. He did not know exactly what this meant, why it was necessary, or even how to go about fulfilling the request.

There is no person or agency in the prison to advise an inmate on such questions. Sometimes an inmate will go to his assigned social worker with these and related legal questions, but, as social workers are ordinarily untrained in law, they do not wish to get involved in giving legal advice.

In other cases the prisoners wanted advice on a particular legal point. Occasionally, an inmate thought he had observed an error in his trial and wondered if he could gain a reversal of his conviction on that basis. In most cases the possibility of error was suggested to the inmate either by newspaper accounts of recent cases or by rumors circulating in the prison.

Illustration No. 2: After Miranda v. Arizona was handed down, several prisoners, simply having read the newspaper accounts of the decision, hoped it would apply to them.

Illustration No. 3: A common rumor in the prison last summer was that a case had held that it was double jeopardy to be tried for an escape after you had lost good time and had been placed in solitary confinement for it.

Illustration No. 4: An inmate had been convicted of a crime; sentence was withheld and he was placed on probation for two years. Eighteen months later, his probation was revoked and he was sentenced to prison for two years. He had not had counsel at the latter sentencing hearing and had not been informed that he had a right to counsel. In prison he was told by other inmates that he had a right to a lawyer if he was indigent. (The Wisconsin Supreme Court recently held that there is a right to counsel at sentencing when probation is revoked and the sentence had originally been stayed.)

Sometimes, prisoners have read cases but do not fully understand them or their implications, giving no attention to significant fact distinctions or to the lack of precedent value given cases from other jurisdictions.

Illustration No. 5: Several inmates at the state prison who were serving time under the sex crimes act in Wisconsin could not understand why the Michigan case of In re Maddox does not apply here. That case held that men under the Michigan Sexual Psychopath Law could not be imprisoned with and treated like men under the criminal code in a state prison. Under that act, however, it was not required that a man be first convicted of a crime as the Wisconsin act requires.

In a few cases, the prisoners were concerned about the propriety of their trial, or had second thoughts about whether they should have pleaded guilty, without having any idea as to whether any legal issue might be involved. They simply wanted someone to evaluate their case and search for errors. This reflects a common situation in a maximum security prison. When a convicted person steps through the prison gates, he first begins to realize fully what has happened to him. As the first few months pass he begins to look for a way out. He knows or finds out that he can appeal, that he can have free legal help if he is indigent, and that he has nothing to lose by trying.

B. Treatment Complaints

Other issues that came up fairly frequently concerned complaints about prison administration. Occasionally, prisoners felt prison officials had acted unfairly in transferring them from one institution to another, or in refusing a transfer.

Illustration No. 6: An inmate was convicted of a crime and sent to the Diagnostic Center in Madison for an examination under the sex crimes act. It was recommended that he be sentenced under that act and be placed in Central State Hospital. The man was sent to Waupun State Prison. He requested to be transferred to Central State, but the request was refused.

Several inmates felt prison officials had acted illegally in taking some possessions, such as books, from their cells. More often, the complaints concerned the prison's computation of their sentence. The

inmates felt the length of their sentence had not been correctly determined, or that they had not received the proper amount of "good time." In most cases it was found that the complaints of the prisoners were without substance, or that they were complaints that were not cognizable in court. However, it was found that a number of such complaints had some merit.

Illustration No. 7: An inmate had been convicted and sentenced under the sex crimes act. He was paroled, but later his parole was revoked. At the same time he was convicted of another crime and sentenced under the criminal code; this sentence was to run consecutively to his sentence under the sex crimes act. Sometime later, the inmate was granted parole by the Special Review Board in regards to his sex crimes act violation; however the Regular Parole Board refused to parole him for the other crime. Prison authorities informed him that his criminal code sentence could not start until he reached his discharge date under the sex crimes law, which was about two years away. So, the inmate was, in effect, serving his sex crimes law parole in prison, and receiving no credit for his sentence under the criminal code. (After proper administrative appeals by the Public Defender, it was determined that the criminal code sentence should have begun at the time that the inmate was paroled by the Special Review Board.)

Illustration No. 8: Mr. X was brought up to Wisconsin to face charges while incarcerated in Illinois. He pleaded guilty and was sentenced to the Wisconsin State Prison for two years. However, the sentence was to run concurrently with his Illinois sentence. If he was released within two years from prison in Illinois, he was to finish the sentence in Wisconsin. Mr. X was released five months later from prison in Illinois and came to Wisconsin to finish his sentence. He was told by prison officials that his sentence was illegal and that it did not start until he reached the Wisconsin prison. It would seem that either the sentence was illegal and he should be resentenced, or else it was legal and the prison should not have ignored it. (Through the efforts of the Public Defender and Wisconsin Correctional Service, the inmate was eventually granted a pardon.)

In the illustrations and in like situations, the inmates were at a loss as to how to pursue the administrative or court remedy. The usual judicial remedy, if any, would be habeas corpus, but no legal help was available to inform the inmate how to proceed, or to help the inmate present his complaint intelligently in a habeas corpus petition.

C. Detainers and Miscellaneous Problems

A significant number of prisoners have charges pending against them in jurisdictions outside the state. These men frequently requested advice and legal help in connection with pending detainers placed by these other jurisdictions. Unless the detainers are dropped, the inmate will be delivered to the demanding state at the termination of his imprisonment. The prisoners usually want the detainers dropped or, alternatively, to be brought to trial at once. A detainer may have the immediate effect of precluding the extension of some privileges, such as assignments outside the prison or transfer to a minimum security institution, as well as having an adverse effect on the rehabilitation of the inmate. Because of this, some social workers will write the particular jurisdiction and ask that the detainers be dropped; but otherwise, no help is available to the prisoners. Dealing with detainers is a complex legal problem. Apparently, some inroads are being made on the doctrine that a man does not have a right to be brought to trial in another jurisdiction until his release from incarceration.

Another common request was for help with clemency petitions. The inmate is required to complete the documents himself. Usually, the inmate desired advice on what areas or issues to emphasize in the petition, although a few did not even know where to procure the documents. (They were available at the prison records office).

Other miscellaneous problems also arose occasionally.

Illustration No. 9: An inmate was serving under the Wisconsin sex crimes statute. His sentence had been extended for 5 years under section 959.15(14) of the Wisconsin statutes. The inmate applied several times by letter to the trial court for a reexamination of his mental condition. (He had an absolute right semiannually to such an examination under section 959.15(15)(c) of the statutes). Each time he would receive back a letter from the assistant district attorney, who apparently had been given the letters, denying his request. (It is possible the request had been misconstrued.) The inmate then wrote the court appointed attorney who had represented him at the first extension hearing. The attorney replied that he had no right to an examination for five years. The inmate was, quite naturally, at a loss as to what to do.

"Counseling Convicts: The Lawyer's Role in Uncovering Legitimate Claims"—David B. Wexler. 11 Arizona Law Review 629 (1969). Copyright (c) 1969 by the Arizona Board of Regents.

I.

Now that the right to counsel at the pretrial, trial, and appellate phases of the criminal process is rather firmly established, the legal profession seems finally to be directing its attention to the redress of legal grievances in the post-conviction setting—a segment of law practice previously occupied with the Supreme Court's explicit condonation, almost exclusively by writ-writers and jailhouse lawyers. Though there is still no constitutional right to legal assistance at the post-conviction phase, various groups concerned with the plight of prisoners—including public defenders, bar associations, and especially law school clinics—are now seeking for the first time to provide this assistance.

Efforts to fill the void are documented by recent periodical literature and by other indica—such as the recent sponsorship by the National Council on Crime and Delinquency of a nationwide Law Student in Correction Conference. In light of the Arkansas penal investigation, the Virginia penal situation, and Senator Dodd's much publicized congressional hearings on the severe inadequacies of prison conditions, the trend toward prisoner legal assistance can be expected to proceed rapidly.

Most of the existing prisoner legal assistance clinics seem to be similarly structured: inmates desiring legal assistance are encouraged to contact the clinic by mail or, in some cases, to sign

up for an interview with a clinic participant. In many cases, the inmate is also asked, as a matter of routine, to fill out a standard questionnaire that seeks to elicit facts relevant to the legality of his confinement. After obtaining the initial factual account, the clinic will perform legal research, conduct investigations, and, where appropriate, draft petitions and motions for court filing.

As might be expected, most existing programs are also alike with respect to the types of legal matters encountered. Most of the claims are without merit, and the inmates are so advised. But there are also a surprising number of cases with at least arguable merit, and in those cases the legal clinics will file, often with success, state and federal habeas corpus petitions, delayed appeal applications, resentencing motions, demands for speedy trials on (or for the dismissal of) out-of-state charges, and other called-for documents.

Given the sudden widespread interest in extending adequate legal services to prison inmates, it seems appropriate at this time to review the existing programs, and to determine whether any operational changes could be made to improve the services now being rendered. The apparent success of many of the present programs should not delude us into thinking we are doing all we can in terms of providing prison inmates with legal assistance. Indeed, as the following section of this article indicates, the legal clinics as currently constituted seem to fall far short of the ideal with respect to one of their major goals—that of uncovering legitimate claims. In short, though the legal clinics have plainly done much good since their recent genesis, it is what they have not done that is this article's principal subject of inquiry.

II.

It is generally agreed that inmate legal services projects should function principally to unearth and present meritorious claims and to discourage the pursuit of frivolous contentions. With respect to discouraging the pursuit of meritless cases, existing clinics are probably performing as well as can be expected. Although no systematic data has yet been collected to support the conclusion, it seems that an inmate will generally respect a no-merit evaluation of his case if made by a legal specialist acting in his behalf. To the extent that a no-merit clinic evaluation is acquiesced in by an inmate, he will presumably refrain from proceeding with his case pro se, and may even concede that he has not been denied justice after all.

But so far as the other goal—the uncovering of legitimate claims—is concerned, existing clinics seem not to be performing at a maximal level. It is common to hear critics berate the frivolity of inmate legal claims. Yet, it is ironic that the attitude may be fostered by the failure of many meritorious claims ever to reach the surface. Under present schemes of operations, the legal clinics are not geared toward uncovering valid claims of inmates who are themselves unaware of the existence of those claims, and who therefore do not request legal assistance. In consequence, many an inmate may linger in prison without asserting his right to retrial, to resentencing, to sentence reduction, or even to outright release. Perhaps the situation can best be illuminated by discussing a few concrete illustrations. Most of the examples presented below are drawn from Arizona, where the author directs a legal clinic for prison inmates, but the scope of the problem is plainly nationwide.

The most obvious type of valid claim likely to go unnoticed is one created by a new decision entitled to retroactive effect. During the recent criminal procedure revolution, several important and far-reaching decisions were held deserving of retroactive application. Yet, there is no assurance or even likelihood that the intended beneficiaries of those decisions—the prison inmates to whom the decisions apply—are in the least bit aware of their existence. An inmate whose conviction was valid when imposed (and perhaps valid when challenged on appeal) may never seek legal assistance from a clinic and hence may never learn that recent decisions of retroactive import may entitle him, for example, to a new trial under Gideon v. Wainwright or Bruton v. United States, to a new opportunity to plead under White v. Maryland, to a confession suppression hearing meeting standards set by Jackson v. Denno, or to re-imposition of sentence in conformity with Mempa v. Rhay. A retroactive decision may affect an inmate's confinement either by calling into question the validity of his present conviction, or by rendering vulnerable a prior conviction which, if successfully set aside, might legally advance the inmate's parole eligibility date or might convert a current recidivist sentence to a lesser first offender sentence.

Decisions given retrospective force may emanate, of course, from state as well as from federal courts. A dramatic example of the injustice that can result from inmate unfamiliarity with retroactive decisions can be seen by examining, in its broad context, the Arizona case of Rosthenhausler v. State ex rel. Eyman, a habeas corpus proceeding involving the propriety of a recidivist sentence.

In April, 1968, prior to Rosthenhausler, the Supreme Court of Arizona held in State v. Reagan that when a prior misdemeanor conviction is used under a recidivist statute to enhance the punishment for a later offense, the prior misdemeanor in effect becomes a "serious offense" within the meaning of the right-to-counsel clause of the Constitution. Reagan required, in other words, that the record of a prior misdemeanor conviction reflect the defendant's representation by counsel—or an express waiver of the right to counsel—before the misdemeanor conviction could constitutionally be used as a "prior" in a subsequent recidivist proceeding. Though Reagan arose on direct review, it took the intermediate appellate court less than two weeks to permit the Reagan rationale to form the basis for collateral relief; in Garcia v. State ex rel. Eyman, the Court of Appeals of Arizona, in an original habeas corpus proceeding, set aside a recidivist sentence based on a prior petty theft conviction at which the petitioner was neither represented by counsel nor advised of his right to the same.

Shortly thereafter, Samuel Rosthenhausler filed pro se a habeas corpus petition with the court of appeals. Expressly relying on Reagan and Garcia, Rosthenhausler asked the court to void that portion of his joy-riding recidivist sentence attributable to a prior misdemeanor conviction obtained in violation of his right to counsel. Recognizing the applicability of Reagan, the court of appeals in Rosthenhausler nevertheless denied the writ by expressly overruling its own six-month-old precedent in Garcia, which had permitted collateral invocation of Reagan. By restricting Reagan to its facts—that is, permitting challenge of an invalid prior only on direct appeal of a conviction—the court seemed to leave Rosthenhausler without a remedy.

But Rosthenhausler's plight can be fully appreciated only when it is disclosed that, only months later, the Supreme Court of Arizona in Smith v. Eyman, citing Garcia but omitting any reference to Rosthenhausler, held the collateral remedy of habeas corpus a proper procedural vehicle for raising Reagan claims.

Since Rosthenhausler had never contacted the legal clinic for assistance, and since the clinic's policy at that time was to render assistance only on request, Rosthenhausler's awareness of the superseding Smith v. Eyman decision—and of the fact that the filing of a renewed habeas corpus petition in his case would presumably lead to relief—was dependent solely on the effectiveness of the

jailhouse grapevine. In other words, under ordinary operations of existing legal clinics, where advice is offered only to inmates who have sought the clinic's services, this type of valid claim would go unnoticed, and an inmate entitled to serve a sentence as a first offender might well serve instead and enhanced penalty as a recidivist.

Closely related—but not identical—to the Rosthenhausler problem is the existence in probably every jurisdiction of judicial decisions which favorably affect the appropriate length of confinement of certain inmates but which, because of inmate ignorance, are likely to be largely without impact. If Arizona is again looked to for illustrations, Ard v. State ex rel. Superior Court, and Walsh v. State ex rel. Eyman, can be found as cases in point.

In Ard, the Supreme Court of Arizona, construing the state indeterminate sentencing statute, ruled that for offenses other than first degree murder, the convicting court must impose an indeterminate sentence. Such a sentence must have a stated minimum, which sets a parole eligibility date, and a stated maximum, which sets the date of sentence expiration. Since the petitioner in Ard had been given a determinate life sentence (with no parole eligibility date) for second degree murder, the court remanded the petitioner for resentencing in accordance with the indeterminate sentence law.

Though Ard was decided as long ago as May, 1967, it is likely that some inmates, unaware of Ard, are still serving improperly imposed determinate sentences for second degree murder or for other offenses. The Post-Conviction Legal Assistance Clinic of the University of Arizona, for example, has recently been successful in obtaining a resentencing order for an inmate sentenced in 1964 to a determinate life sentence for second degree rape. Significantly, that inmate had, prior to Ard, filed an unsuccessful habeas corpus petition raising several issues, including the absence of a minimum sentence; when he contacted the legal clinic for assistance in May of 1969, he was concerned with certain other aspects of his case and was unaware of the two-year-old Ard development.

In addition, it is known that several inmates ignorant of Ard have become Ard beneficiaries by the fortuity of filing habeas corpus petitions raising non-meritorious grounds. For example, in one case typical of this group, an inmate filed pro se a habeas petition claiming his conviction was secured by the introduction into evidence of a coerced confession. The Attorney General's response to the petition

demonstrated the lack of merit in the coerced confession contention, but noted that the petitioner had been given an improper determinate life sentence for second degree murder, and suggested that the court remand the petitioner for resentencing, which it did.

These examples of the major role chance plays in the invocation of Ard demonstrate the likelihood that, despite the availability of a legal services program, inmates entitled to the benefits of Ard may continue to serve determinate sentences, never realizing they have valid grounds for an action that would result in the imposition of an indeterminate sentence with a parole eligibility date.

Like Ard, the Walsh decision seems to have the potential for going unnoticed by inmates. In Walsh, petitioner was serving a sentence in the Arizona State Prison, and requested a speedy trial on an outstanding California charge. He was extradited to California and, six months later, after conviction in California, was returned to serve out his Arizona sentence, which had been administratively recomputed to exclude the six-month period spent in California. Through counsel, petitioner then initiated a habeas corpus proceeding. Though the court rejected his basic contention and accordingly denied the writ, it nevertheless held partially in his favor by ruling invalid the sentence recomputation: the court held that inmates tried on out-of-state charges are entitled to credit on their Arizona sentences for time spent in out-of-state custody. In addition, Walsh held the standard good behavior allowances applicable during these periods of out-of-state custody, but held the liberal "double-time" credits for working as a trusty inapplicable, since the extradited inmates while standing trial out-of-state were not performing appropriate services.

Because of their unfamiliarity with the decision and its doctrine, however, inmates deserving sentence credit under Walsh may well serve prison terms in excess of those which they are legally required to serve. There is, of course, no reason to assume that inmates who have been denied sentence credit after a lengthy trial in another state know of the recent Walsh ruling entitling them to a sentence reduction. And what of the inmates who have been transferred from the prison to county jails to defend in-state charges? If those inmates have been denied sentence credit or good behavior allowances for the time so spent, they would seem a fortiori to have sentence reduction claims under Walsh, but they too may be unaware of the decision.

Finally, the Walsh rationale would seem to demand that an inmate be given good behavior allowances, and not simply "flat time" credit, for the portion of an Arizona sentence served out-of-state concurrently with a sentence imposed by another jurisdiction. And if such an inmate held a position of trust while serving his Arizona sentence in that other jurisdiction, the implication of Walsh is that he would be entitled as well to "double time" credit for that period. For example, if an inmate, following conviction in Arizona, was given a sentence to run concurrent with a federal sentence and was then turned over to the federal authorities for a two-year period in order to serve the federal sentence, he should, upon his return to the state prison to complete the remainder of his state sentence, be given credit for the two years actually served plus good time allowances, which would amount to four months time for good behavior and, if he held a position of trust during his federal stay, to two years credit under the "double-time" provision. If, as seems to have been the practice at least before Walsh, such an inmate were given credit simply for the flat two years and was denied good time credits for that period, he would now have a claim for sentence reduction under Walsh, which holds specifically that good time may be earned beyond the state borders. But such a valid claim is likely to escape notice. Indeed, the probable application of Walsh in such a case is subtle enough that even an inmate familiar with the facts and holding of Walsh might not recognize its relevance.

Despite the many possible ramifications of Walsh, it is obvious its actual impact will be negligible if inmates remain unaware of its consequences; ignorant of the decision, inmates affected by its ruling will in all probability not seek assistance from the existing legal clinic. This possibility, with the result that inmates serve sentences longer than they are legally obliged to serve, should encourage the legal clinic to review critically its operations with the hope of finding a means of unearthing and reaching this type of meritorious claim.

The facts of Walsh illustrate another important area where rights are probably often forfeited solely because of inmate ignorance—the disposition of out-of-state charges. It is well known that the lodging of an out-of-state detainer against a prisoner has an adverse effect on his institutional life and his attitude towards rehabilitation. Moreover, after the inmate has completed his prison term with diminished institutional privileges, the detainer is often simply dropped. If the detainer is executed, the inmate will be forced to defend stale charges and, if he is convicted, will probably be able to look forward only to another term in a different prison. Many of these harsh results,

however, might be averted if prison inmates were aware of certain legal developments relating to the disposition of detainers.

For example, the United States Supreme Court in Smith v. Hooey recently held that the constitutional right to a speedy trial applies to interjurisdictional detainer situations. Under Smith, a jurisdiction that has placed a detainer on an inmate is constitutionally required, upon proper demand by the inmate, to try immediately to obtain temporary custody of the inmate for the purpose of granting him a speedy trial on the charge for which the detainer was issued. If the inmate does demand a speedy trial, the foreign jurisdiction is in essence given the choice of starting the extradition process or of dropping the detainer. Should the detainer be dropped at that early time, the inmate will, of course, benefit by the resulting increase in institutional privileges and, more importantly, by the knowledge that he will regain his liberty at the end of his present prison term. But it is important to note that a demand for a speedy trial may benefit the inmate even if it results in his extradition rather than in the dismissal of the detainer: In addition to the advantage of being able to defend a fresh rather than a stale charge, the defendant, even if convicted, may well be given a sentence to run concurrently with the sentence he is presently serving—a possibility which would, of course, be nonexistent if the defendant were not even tried on the charge until his first sentence had expired.

Despite the distinct advantages in most cases of demanding speedy trials on out-of-state charges, many inmates against whom detainers have been lodged fail to invoke Smith v. Hooey; instead, they passively serve their sentences and await the time of sentence expiration for a dispositional decision concerning the detainers. It seems safe to conclude that much of this acquiescence is attributable simply to lack of knowledge on the part of many inmates either that they are entitled to a speedy trial or to sentence credit for time spent out-of-state or both.

One final example, relating to the fortuitous discovery of a valid claim by the Post-Conviction Legal Assistance Clinic in Arizona, should illustrate convincingly the extent to which even indisputably legitimate claims may go unnoticed. In response to an inmate's request for assistance in preparing a habeas corpus petition alleging the involuntariness of his guilty plea, the inmate was interviewed by a clinic volunteer assigned to investigate the facts surrounding the plea. During the course of the interview, the inmate offhandedly

remarked that he had only decided to draft the petition and fight his case when the institution, a few weeks earlier, changed his scheduled release date from April, 1969, to May, 1970. Surprised and interested by the latter statement, the volunteer pursued the release date problem.

He learned that the inmate, a narcotics violator, was convicted in 1961 and, when sent to prison, was given a release date of April, 1969. A few months prior to his scheduled release date, however, the inmate was informed by the institutional authorities that his original release date had been inadvertently computed without regard to a 1961 legislative enactment which provided heavy mandatory penalties for most narcotics violations, and that his proper release date, computed by taking that statute into account, was in May, 1970. Checking further, however, the volunteer learned that the 1961 statute could not properly be applied to the inmate since its effective date was in October, 1961, whereas the inmate had been sentenced in September, 1961. When notified of the error, the authorities promptly reinstated the inmate's original release date, thereby sparing him 13 months of improper confinement. But it is frightening to realize that this important claim came to light only by a fluke.

III.

After examining the illustrations in the preceding section, the conclusion is inescapable that, notwithstanding the emergence of legal clinics eager to assist indigent inmates, a large number of valid claims become visible simply by chance, and, because of inmate unawareness, many more obviously remain wholly dormant and unasserted. With this in mind, the problem for focal concern should be the development of means to best reach the valid claims that currently escape detection.

To date, discussions of post-conviction practice have not been addressed squarely to that question. Rather, the commentators have urged the establishment of legal clinics along the lines of the traditional model; that is, providing for the availability of professional legal assistance through a panel of visiting lawyers and law students or through a public defender or resident legal counsel, to those indigent inmates who feel themselves in need of such assistance. Only one writer, apparently aware that the traditional model is an insufficient device for uncovering many claims, has suggested—albeit in an oblique footnote—that the profession may

have a responsibility to search for dormant claims, perhaps by giving incoming inmates "legal checkups" in addition to the standard medical and social checkups.

While attractive in principle, the legal checkup notion poses some serious problems. As a purely practical matter, for example, it would seem virtually impossible, because of the sheer volume of work entailed, to run such checkups on the existing prison population; at best, such an approach could be implemented prospectively, by reviewing the legal status of each new inmate as he enters the institution. Even apart from the possible unfairness this procedure would entail for the existing prison population, the task of keeping current in the examination and evaluation of numerous bulky legal files of incoming inmates might well prove overwhelming and unmanageable.

But an even more fundamental objection to the legal checkup as the principal means of ferreting out unknown claims is its built-in finality. Many inmates who pass the legal checkup at one point in time may, by virtue of subsequently rendered judicial decisions, later have many valid claims for relief that may go unrecognized. For example, claims under such recent decisions as Smith v. Eyman, Ard, Walsh, and Smith v. Hooey could not have been revealed by a legal checkup conducted a few years ago, before those decisions were rendered.

A more practical and probably more effective way of detecting unrecognized meritorious claims, whether utilized alone or in conjunction with some form of legal checkup, would be to attempt to educate the general prison populace about legal developments that create new legitimate grounds for post-conviction relief. More particularly, it is suggested that the legal clinics ought to try to establish communicative channels whereby all inmates—whether they have contacted the clinic for assistance or not—can be informed, in nontechnical terms, of legal matters that may have significance within the prison walls.

An ideal method of accomplishing that task would be for the clinics to secure permission to publish periodically a legal section in the inmate newspaper. Such a section could, in simple language, communicate to concerned inmates many matters of legal significance to them: that a recent decision has held a recidivist sentence subject to attack by prisoners if the sentence was based partly on a prior misdemeanor conviction at which the prisoner was not offered the assistance of counsel; that state law requires, for all offenses

other than first degree murder, that the defendant be given a sentence with a stated minimum (which fixes the parole eligibility date) as well as a stated maximum, and that inmates sentenced in violation of that principle are entitled to be resentenced; that the state supreme court has recently ruled that a prisoner taken from the prison to another jurisdiction for trial on an out-of-state charge is entitled to credit and good time allowances on his state sentence for time spent in custody outside the jurisdiction; that inmates may be able to secure speedy trials on out-of-state charges; and that a sentence resulting from such a trial might, in the sentencing court's discretion, be made to run concurrently with the sentence presently being served. Interestingly, at least one inmate publication—the well-known Stretch of the Kansas State Penitentiary—publishes a "Legal Opinions" section, though presumably without professional assistance.

This approach to uncovering claims can be supported both ethically and by analogy to existing practice. Ethically, according to the new Code of Professional Responsibility, a lawyer is expressly permitted to educate laymen to recognize legal problems, to prepare professional articles for lay publications, to give under certain circumstances unsolicited advice to a layman that he may have a meritorious legal action, and to handle legal clinic cases resulting from activities designed to educate laymen to recognize legal problems or to utilize available legal services. In practice, some lawyers involved in counseling inmates have used the educational approach by preparing for inmate use, pamphlets outlining the procedural scope of post-conviction relief. While the emphasis of those pamphlets is on the procedural limitations of post-conviction remedies, and while their primary purpose is to discourage the filing of meritless claims, the practice is obviously only a short step removed from this article's suggestion that the educational aspect deal as well with meritorious substantive bases for relief.

In summary, if the various existing and newly emerging prisoner legal assistance clinics hope to provide thoroughly effective representation, they must depart from the traditional clinic model, which is not geared toward assisting those inmates who are unaware that they are even in need of assistance. Many valid claims can only be detected if the clinics are willing also to provide an educational program designed to help inmates recognize meritorious grounds for relief. Obviously, institutional cooperation will be necessary in order to implement properly the educational function, particularly if inmate newspapers are to be the principal forum for communicating

significant legal developments. Hopefully, if correctional administrators agree that no inmate deserves, because of ignorance, to serve a legally unwarranted period of confinement, their cooperation will be forthcoming.

NOTES

1) For an exhaustive description of various existing programs and approaches for providing legal assistance to inmates, see Jacob & Sharma, Justice After Trial: Prisoners' Need for Legal Services in the Criminal — Correctional Process, 18 Kan. L. Rev. 493, 589 et seq. (1970).

2) Though legal services programs for inmates are widely recognized as being worthwhile, there is an interesting—but unverified—argument that, so far as rehabilitation is concerned, they may do more harm than good. Cf. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 452 (1963).

Professor Bator, in a somewhat different context, makes the interesting suggestion that societal inducements to reopen criminal convictions may be inconsistent with a rehabilitative philosophy, which demands "a realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation . . . ."

Even if valid, however, Bator's speculative argument depends on the premise that the peno-correctional system does indeed rehabilitate, which Bator of course concedes not to be the case with respect to our present system. Moreover, the relevance of Bator's remarks is diluted considerably by the fact that they were directed toward attempts to upset convictions, whereas a large proportion—perhaps the bulk—of meritorious inmate claims deal not with the validity or invalidity of convictions, but, as will be seen, deal instead with the appropriate length of lawful confinement—and surely no legitimate interest can be served by confining a convicted individual for a period of time longer than the lawful limit.

Wexler, Counseling Convicts: The Lawyer's Role in Uncovering Legitimate Claims, 11 Ariz. L. Rev. 629, 630 n. 7 (1969). Moreover, as Justice Douglas noted in Johnson v. Avery, supra, there is some support for the view that writ-writing—and, by implication, fighting one's case with the assistance of counsel—is actually therapeutic.

CHAPTER 3

THE RISKS OF SEEKING RELIEF FROM A CRIMINAL CONVICTION

Note

For many reasons, it is important for lawyers and law students engaged in counseling and representing inmates to be familiar with the various possible risks that can accompany the setting aside of a criminal conviction. Initially, any substantial risk should, of course, be communicated to the client to enable him to balance his desire to upset his conviction against the possible adverse consequences that may flow from such a course of action. Further, the legal advisor who fails to convey to his client information relating to risk may be guilty of malpractice. Finally, even if an inmate's claim is found to be wholly without merit, he may be more willing to live with such a disappointing professional prognosis if he is also told that, even in the almost inconceivable event that his conviction could be set aside, he might then find himself in a more dire situation than that which he is currently enduring.

CASE: North Carolina v. Pearce, 395 U.S. 711 (1969)

Mr. Justice Stewart delivered the opinion of the Court.

When at the behest of the defendant a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial? That is the question presented by these two cases.

In No. 413 the respondent Pearce was convicted in a North Carolina court upon a charge of assault with intent to commit rape. The trial judge sentenced him to prison for a term of 12 to 15 years. Several years later he initiated a state post-conviction proceeding which culminated in the reversal of his conviction by the Supreme Court of North Carolina, upon the ground that an involuntary confession had unconstitutionally been admitted in evidence against him, 266 N.C. 234, 145 S.E. 2d 918. He was retried, convicted, and sentenced by the trial judge to an eight-year prison term, which, when added to

the time Pearce had already spent in prison, the parties agree amounted to a longer total sentence than that originally imposed. The conviction and sentence were affirmed on appeal. 268 N.C. 707, 151 S.E. 2d 571. Pearce then began this habeas corpus proceeding in the United States District Court for the Eastern District of North Carolina. That court held, upon the authority of a then very recent Fourth Circuit decision, Patton v. North Carolina, 381 F. 2d 636, cert. denied, 390 U.S. 905, that the longer sentence imposed upon retrial was "unconstitutional and void." Upon the failure of the state court to resentence Pearce within 60 days, the federal court ordered his release. This order was affirmed by the United States Court of Appeals for the Fourth Circuit, 397 F. 2d 253, in a brief per curiam judgment citing its Patton decision, and we granted certiorari. 393 U.S. 922.

In No. 418 the respondent Rice pleaded guilty in an Alabama trial court to four separate charges of second degree burglary. He was sentenced to prison terms aggregating 10 years. Two and one-half years later the judgments were set aside in a state coram nobis proceeding, upon the ground that Rice had not been accorded his constitutional right to counsel. See Gideon v. Wainwright, 372 U.S. 335. He was retried upon three of the charges, convicted, and sentenced to prison terms aggregating 25 years. No credit was given for the time he had spent in prison on the original judgments. He then brought this habeas corpus proceeding in the United States District Court for the Middle District of Alabama, alleging that the state trial court had acted unconstitutionally in failing to give him credit for the time he had already served in prison, and in imposing grossly harsher sentences upon retrial. United States District Judge Frank M. Johnson, Jr., agreed with both contentions. While stating that he did "not believe that it is constitutionally impermissible to impose a harsher sentence upon retrial if there is recorded in the court record some legal justification for it," Judge Johnson found that Rice had been denied due process of law, because "[u]nder the evidence in this case, the conclusion is inescapable that the State of Alabama is punishing petitioner Rice for his having exercised his post-conviction right of review and for having the original sentences declared unconstitutional." 274 F. Supp. 116, 121, 122. The judgment of the District Court was affirmed by the United States Court of Appeals for the Fifth Circuit, "on the basis of Judge Johnson's opinion," 396 F. 2d 499, 500, and we granted certiorari. 393 U.S. 932.

The problem before us involves two related but analytically separate issues. One concerns the constitutional limitations upon

the imposition of a more severe punishment after conviction for the same offense upon retrial. The other is the more limited question whether, in computing the new sentence, the Constitution requires that credit must be given for that part of the original sentence already served. The second question is not presented in Pearce, for in North Carolina it appears to be the law that a defendant must be given full credit for all time served under the previous sentence. State v. Stafford, 274 N.C. 519, 164 S.E. 2d 371; State v. Paige, 272 N.C. 417, 158 S.E. 2d 522; State v. Weaver, 264 N.C. 681, 142 S.E. 2d 633. In any event, Pearce was given such credit. Alabama law, however, seems to reflect a different view. Aaron v. State, 43 Ala. App. 450, 192 So. 2d 456; Ex parte Merkes, 43 Ala. App. 640, 198 So. 2d 789. And respondent Rice, upon being resentenced, was given no credit at all for the two and one-half years he had already spent in prison.

We turn first to the more limited aspect of the question before us—whether the Constitution requires that, in computing the sentence imposed after conviction upon retrial, credit must be given for time served under the original sentence. We then consider the broader question of what constitutional limitations there may be upon the imposition of a more severe sentence after reconviction.

I.

The Court has held today, in Benton v. Maryland, ante, p.__, that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. That guarantee has been said to consist of three separate 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. This last protection is what is necessarily implicated in any consideration of the question whether, in the imposition of sentence for the same offense after retrial, the Constitution requires that credit must be given for punishment already endured. The Court stated the controlling constitutional principle almost 100 years ago, in the landmark case of Ex parte Lange, 18 Wall. 163, 168:

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And ... there

has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

. . . . . .

"[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." Id., at 173.

We think it is clear that this basic constitutional guarantee is violated when punishment already exacted for an offense is not fully "credited" in imposing sentence upon a new conviction for the same offense. The constitutional violation is flagrantly apparent in a case involving the imposition of a maximum sentence after reconviction. Suppose, for example, in a jurisdiction where the maximum allowable sentence for larceny is 10 years imprisonment, a man succeeds in getting his larceny conviction set aside after serving three years in prison. If, upon reconviction, he is given a 10-year sentence, then, quite clearly, he will have received multiple punishments for the same offense. For he will have been compelled to serve separate prison terms of three years and 10 years, although the maximum single punishment for the offense is 10 years imprisonment. Though not so dramatically evident, the same principle obviously holds true whenever punishment already endured is not fully subtracted from any new sentence imposed.[12]

We hold that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully "credited"[13] in imposing sentence upon a new conviction for the same offense. If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is reconvicted, those years can and must be returned—by subtracting them from whatever new sentence is imposed.

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[12] We have spoken in terms of imprisonment, but the same rule would be equally applicable where a fine had been actually paid upon the first conviction. Any new fine imposed upon reconviction would have to be decreased by the amount previously paid.

[13] Such credit must, of course, include the time credited during service of the first prison sentence for good behavior, etc.

II.

To hold that the second sentence must be reduced by the time served under the first is, however, to give but a partial answer to the question before us. We turn, therefore, to consideration of the broader problem of what constitutional limitations there may be upon the general power of a judge to impose upon reconviction a longer prison sentence than the defendant originally received.

A.

Long-established constitutional doctrine makes clear that, beyond the requirement already discussed, the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction. At least since 1896, when United States v. Ball, 163 U.S. 662, was decided, it has been settled that this constitutional guarantee imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside. "The principle that this provision does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence." United States v. Tateo, 377 U.S. 463, 465. And at least since 1919, when Stroud v. United States, 251 U.S. 15, was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction.[16] "That a defendant's conviction is overturned on collateral rather than direct attack is irrelevant for these purposes, see Robinson v. United States, 144 F. 2d 392, 396, 397, aff'd on another ground, 324 U.S. 282." United States v. Tateo, supra, at 466.

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[16] In Stroud the defendant was convicted for first degree murder and sentenced to life imprisonment. After reversal of this conviction, the defendant was retried, reconvicted of the same offense, and sentenced to death. This Court upheld the conviction against the defendant's claim that his constitutional right not to be twice put in jeopardy had been violated. See also Murphy v. Massachusetts, 177 U.S. 155; Robinson v. United States, 324 U.S. 282, affirming, 144 F. 2d 392. The Court's decision in Green v. United States, 355 U.S. 184, is of no applicability to the present problem. The Green decision was based upon the double jeopardy provision's guarantee against retrial for an offense of which the defendant was acquitted.

Although the rationale for this "well-established part of our constitutional jurisprudence" has been variously verbalized, it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean. As to whatever punishment has actually been suffered under the first conviction, that premise is, of course, an unmitigated fiction, as we have recognized in Part I of this opinion. But, so far as the conviction itself goes, and that part of the sentence that has not yet been served, it is no more than a simple statement of fact to say that the slate has been wiped clean. The conviction has been set aside, and the unexpired portion of the original sentence will never be served. A new trial may result in an acquittal. But if it does result in a conviction, we cannot say that the constitutional guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment for the offense in question. To hold to the contrary would be to cast doubt upon the whole validity of the basic principle enunciated in United States v. Ball, supra, and upon the unbroken line of decisions that have followed that principle for almost 75 years. We think those decisions are entirely sound, and we decline to depart from the concept they reflect.[18]

B.

The other argument advanced in support of the proposition that the Constitution absolutely forbids the imposition of a more severe sentence upon retrial is grounded upon the Equal Protection Clause of the Fourteenth Amendment. The theory advanced is that, since convicts who do not seek new trials cannot have their sentences

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[18] While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the Ball principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendant's rights as well as society's interest." United States v. Tateo, 377 U.S. 463, 466.

increased, it creates an invidious classification to impose that risk only upon those who succeed in getting their original convictions set aside. The argument, while not lacking in ingenuity, cannot withstand close examination. In the first place, we deal here not with increases in existing sentences, but with the imposition of wholly new sentences after wholly new trials. Putting that conceptual nicety to one side, however, the problem before us simply cannot be rationally dealt with in terms of "classifications." A man who is retried after his first conviction has been set aside may be acquitted. If convicted, he may receive a shorter sentence, he may receive the same sentence, or he may receive a longer sentence than the one originally imposed. The result may depend upon a particular combination of infinite variables peculiar to each individual trial. It simply cannot be said that a State has invidiously "classified" those who successfully seek new trials, any more than that the State has invidiously "classified" those prisoners whose convictions are not set aside by denying the members of that group the opportunity to be acquitted. To fit the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished.

C.

We hold, therefore, that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities." Williams v. New York, 337 U. S. 241, 245. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources. 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, supra, that a State may adopt the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." Id., at 247.

To say that there exists no absolute constitutional bar to the imposition of a more severe sentence upon retrial is not, however, to end

the inquiry. There remains for consideration the impact of the Due Process Clause of the Fourteenth Amendment.

It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. Where, as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, "penalizing those who choose to exercise" constitutional rights, "would be patently unconstitutional." United States v. Jackson, 390 U. S. 570, 581. And the very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to "chill the exercise of basic constitutional rights." Id., at 582. See also Griffin v. California, 380 U. S. 609; cf. Johnson v. Avery, 393 U. S. 483. But even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law. "A new sentence, with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant." Nichols v. United States, 106 F. 672, 679. A court is "without right to... put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered. . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." Worcester v. Commissioner, 370 F. 2d 713, 718. See Short v. United States, 344 F. 2d 550, 552. "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. Griffin v. Illinois, 351 U. S. 12; Douglas v. California, 372 U. S. 353; Lane v. Brown, 372 U. S. 477; Draper v. Washington, 372 U. S. 487." Rinaldi v. Yeager, 384 U. S. 305, 310-311.

Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first

conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. [20]

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

We dispose of the two cases before us in the light of these conclusions. In No. 418 Judge Johnson noted that "the State of Alabama offers no evidence attempting to justify the increase in Rice's original sentences . . . ." 274 F. Supp., at 121. He found it"shocking that the

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[20] The existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case. But data have been collected to show that increased sentences on reconviction are far from rare. See Note, Constitutional Law: Increased Sentence and Denial of Credit on Retrial Sustained Under the Traditional Waiver Theory, [1965] Duke L. J. 395. A touching bit of evidence showing the fear of such a vindictive policy was noted by the trial judge in Patton v. North Carolina, 256 F. Supp. 225, who quoted a letter he had recently received from a prisoner:

"Dear Sir:
"I am in the Mecklenburg County jail. Mr. ________________ chose to re-try me as I knew he would.

"Sir the other defendant in this case was set free after serving 15 months of his sentence, I have served 34 months and now I am to be tried again and with all probility I will receive a heavier sentence then before as you know sir my sentence at the first trile was 20 to 30 years. I know it is usuelly the courts prosedure to give a large sentence when a new trile is granted I guess this is to discourage Petitioners.

"Your Honor, I don't want a new trile I am afraid or more time . . . .
"Your Honor, I know you have tried to help me and God knows I apreceate this but please sir don't let the state re-try me if there is any way you can prevent it."

"Very truly yours"

Id., at 231, n. 7.

State of Alabama has not attempted to explain or justify the increase in Rice's punishment—in these three cases, over threefold." Id., at 121-122. And he found that "the conclusion is inescapable that the State of Alabama is punishing petitioner Rice for his having exercised his post-conviction right of review. . . ." Id., at 122. In No. 413 the situation is not so dramatically clear. Nonetheless, the fact remains that neither at the time the increased sentence was imposed upon Pearce, nor at any stage in the habeas corpus proceeding has the State offered any reason or justification for that sentence beyond the naked power to impose it. We conclude that in each of the cases before us, the judgment should be affirmed.

It is so ordered.

Mr. Justice Douglas, whom Mr. Justice Marshall joins, concurring.

Although I agree with the Court as to the reach of due process, I would go further. It is my view that if for any reason a new trial is granted and there is a conviction a second time, the second penalty imposed cannot exceed the first penalty, if respect is had for the guarantee against double jeopardy.

The theory of double jeopardy is that a person need run the gantlet only once. The gantlet is the risk of the range of punishment which the State or Federal Government imposes for that particular conduct. It may be a year to 25 years, or 20 years to life, or death. He risks the maximum permissible punishment when first tried. That risk having been faced once need not be faced again. And the fact that he takes an appeal does not waive his constitutional defense of former jeopardy to a second prosecution. Green v. United States, 355 U. S. 184, 191-193.

In the Green case, the defendant was charged with arson on one count and on a second count was charged either with first degree murder carrying a mandatory death sentence, or second degree murder carrying a maximum sentence of life imprisonment. The jury found him guilty of arson and second degree murder but the verdict was silent as to first degree murder. He appealed the conviction and obtained a reversal. On a remand he was tried again. This time he was convicted of first degree murder and sentenced to death—hence his complaint of former jeopardy. We held that the guarantee of double jeopardy applied and that the defendant, having been "in direct peril of being convicted and punished for first degree murder at his first trial" could not be "forced to run the gantlet" twice. 355 U.S., at p. 180.

It is argued that that case is different because there were two different crimes with different punishments provided by statute for each one. That, however, is a matter of semantics. "It is immaterial to the basic purpose of the constitutional provision against double jeopardy whether the Legislature divides a crime into different degrees carrying different punishments, or allows the court or jury to fix different punishments for the same crime." California v. Henderson, 60 Cal. 2d 482, 497, 35 Cal. Rptr. 77, — (1963) (Traynor, J.).

From the point of view of the individual and his liberty, the risk here of getting from one to 15 years for specified conduct is different only in degree from the risk in Green of getting a life imprisonment or capital punishment for specified conduct. Indeed, that matter was well understood by the dissenters in Green:

> "As a practical matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly different punishment, namely death rather than imprisonment." 355 U. S., at 213 (Frankfurter, J., dissenting).[1]

The defendants in the present cases at the first trial faced the risk of maximum punishment and received less. In the second trial they were made to run the gantlet twice, since the Court today holds that the penalties can be increased.

* * *

Mr. Justice White, concurring in part.

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[1] "With the benefit of Green v. United States . . . there is support emerging in favor of a broad double jeopardy rule which would protect all federal and state convicts held in prison under erroneous convictions or sentences from harsher resentencing following re-trial. . . . [T]he technical argument applying that rule would be as follows: When a particular penalty is selected from a range of penalties prescribed for a given offense, and when that penalty is imposed upon the defendant, the judge or jury is impliedly 'acquitting' the defendant of a greater penalty, just as the jury in Green impliedly acquitted the accused of a greater degree of the same offense." Van Alstyne, In Gideon's Wake: Harsher Penalties and the 'Successful' Criminal Appellant, 74 Yale L. J. 606, 634-635 (1965).

I join the Court's opinion except that in my view Part II-C should authorize an increased sentence on retrial based on any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding.

Mr. Justice Black, concurring and dissenting.

* * *

I agree with the Court that the Double Jeopardy Clause prohibits the denial of credit for time already served. I also agree with the Court's rejection of respondents' claims that the increased sentences violate the Double Jeopardy and Equal Protection Clauses of the Constitution.

* * *

The Court goes on, however, to hold that it would be a flagrant violation of due process for a "state trial court to follow an announced practice of imposing a heavy sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." Ante, at 12. This means, I take it, that a State cannot permit appeals in criminal cases and at the same time make it a crime for a convicted defendant to take or win an appeal. That would plainly deny due process of law, but not, as the Court's opinion implies, because the Court believes it to be an "unfair" practice. In the first place, the very enactment of two statutes side by side, one encouraging and granting appeals and another making it a crime to win an appeal, would be contrary to the very idea of government by law. It would create doubt, ambiguity, and uncertainty, making it impossible for citizens to know which one of the two conflicting laws to follow, and would thus violate one of the first principles of due process. Due process, moreover, is a guarantee that a man should only be tried and convicted in accordance with valid laws of the land. If a conviction is not valid under these laws, statutory and constitutional, a man has been denied due process and has a constitutional right to have the conviction set aside, without being deprived of life, liberty, or property as a result. For these two reasons, I agree that a state law imposing punishment on a defendant for taking a permissible appeal in a criminal case would violate the Due Process Clause, but not because of any supposed "unfairness." Since such a law could take effect not only by state legislative enactment but also by state judicial decision,

I also agree that it would violate the Constitution for any judge to impose a higher penalty on a defendant solely because he had taken a legally permissible appeal.

On this basis there is a plausible argument for upholding the judgement in No. 418, setting aside the second sentence of respondent Rice, since the District Judge there found it "shocking" to him that the State offered no evidence to show why it had so greatly increased Rice's punishment—namely, from a 10-year sentence on four burglary charges at the first trial to a 25-year sentence on three burglary charges at the second trial. From these circumstances, the Federal District Judge appeared to find as a fact that the sentencing judge had increased Rice's sentence for the specific purpose of punishing Rice for invoking the lawfully granted post-conviction remedies. Since at this distance we should ordinarily give this finding the benefit of every doubt, I would accept the Federal District Judge's conclusion that the State in this case attempted to punish Rice for lawfully challenging his conviction and would therefore, with some reluctance, affirm the decision of the Court of Appeals in that case. But this provides no basis for affirming the judgment of the Court of Appeals in No. 413, the case involving respondent Pearce. For in that case there is not a line of evidence to support the slightest inference that the trial judge wanted or intended to punish Pearce for seeking post-conviction relief. Indeed the record shows that this trial judge meticulously computed the time Pearce had served in jail in order to give him full credit for that time.

The Court justifies affirming the release of Pearce in this language:

> "In order to assure the absence of such a motivation we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." Ante, at 14.

Of course nothing in the Due Process Clause grants this Court any such power as it is using here. Punishment based on the impermissible motivation described by the Court is, as I have said, clearly unconstitutional, and courts must of course set aside the punishment if they

find, by the normal judicial process of fact-finding, that such a motivation exists. But beyond this, the courts are not vested with any general power to prescribe particular devices "in order to assure the absence of such a motivation." Numerous different mechanisms could be thought of, any one of which would serve this function. Yet the Court does not explain why the particular detailed procedure spelled out in this case is constitutionally required, while other remedial devices are not. This is pure legislation if there ever was legislation.

I have no doubt about the power of Congress to enact such legislation under §5 of the Fourteenth Amendment, which reads:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

But should Congress enact what the Court has here enacted, a requirement that state courts articulate their reasons for imposing particular sentences, it would still be legislation only, and Congress could repeal it. In fact, since this is only a rule supplementing the Fourteenth Amendment, the Court itself might be willing to accept congressional substitutes for this supposedly "constitutional" rule which this Court today enacts. So despite the fact that the Court says that the judge's reasons "must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal," I remain unconvinced that this Court can legitimately add any additional commands to the Fourteenth or any other Amendment.

* * *

There are a whole variety of perfectly legitimate reasons that a judge might have for imposing a higher sentence. For instance, take the case of respondent Rice. Without a lawyer, he pleaded guilty to four charges of burglary and received a sentence of only 10 years. Although not shown by the record, what happened is not difficult to see. It is common knowledge that prosecutors frequently trade with defendants and agree to give them low sentences in return for pleas of guilty. Judges frequently accept such agreements without carefully scrutinizing the record of the defendant. One needs little imagination to infer that Rice's original sentence was the result of precisely such a practice. This explains both the first 10-year sentence and the fact that, after a full trial and examination of the entire record, the trial judge concluded that a 25-year sentence was called for. The Court's opinion today will—unfortunately, I think, for defendants—throw stumbling blocks in the way

of their making similar beneficial agreements in the future. Moreover, the Court's opinion may hereafter cause judges to impose heavier sentences on defendants in order to preserve their lawfully authorized discretion should defendants win reversals of their original convictions.

I would firmly adhere to the Williams principle of leaving the judges free to exercise their discretion in sentencing. I would accept the finding of fact made by the Federal District Judge in No. 418, that the higher sentence imposed on respondent Rice was motivated by constitutionally impermissible considerations. But I would not go further and promulgate detailed rules of procedure as a matter of constitutional law, and since there is no finding of actually improper motivation in No. 413, I would reverse the judgment of the Court of Appeals in that case and reinstate the second sentence imposed upon respondent Pearce.

* * *

[The opinion of Mr. Justice Harlan concurring in part and dissenting in part, is omitted.]

"Sentence Increases on Retrial after North Carolina v. Pearce"—Kenneth L. Aplin. 39 Cincinnati Law Review 427 (1970). Reprinted by Permission.

The plight of the defendant who has his conviction reversed only to have his punishment increased following retrial and conviction has received increasing attention from the courts and legal scholars. Much of that attention has been directed toward establishing that such an increase is absolutely banned as a violation of the principles of double jeopardy or equal protection. In North Carolina v. Pearce,[2] the Supreme Court of the United States refused to hold that the double jeopardy provision or the equal protection clause created an absolute ban on increased sentencing on retrial. They decided instead that the constitutional limitations on increased sentencing were to be found within the due process clause and that while due process imposed strict limits on a judge's power to increase a sentence, it did permit him to do so in certain instances.

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[2] 395 U.S. 711 (1969). The Court's opinion was joined by four of the eight justices participating in the decision. Four other justices agreed only that the defendant should be released.

The Pearce opinion expressed particular concern that if a judge were permitted to increase a defendant's sentence on retrial he would do so in a spirit of vindictiveness because the defendant had "successfully attacked his first conviction." "[T]he fear of such vindictiveness," said the court, "may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction. . . ." Thus, due process "requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."

When may a sentence be increased on retrial? The Court described the circumstances in which such an increase may occur and the procedure to be used in the following brief passage:

> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Thus due process prohibits a trial judge from increasing a defendant's sentence on retrial except when a particular case falls within the language just quoted. In view of the many factors which are usually considered in the sentencing process, Pearce's limiting of the grounds for a sentence increase to "identifiable conduct . . . occurring after" the first sentence represents a severe restriction on the instances where any increase will be proper.

In creating limits on the trial court's sentencing powers and in undertaking to establish some kind of sentencing standards the Court entered a virtually unexplored area. It may be safely predicted that they created new areas of controversy. It is the purpose of this article to explore two of the areas of uncertainty that now exist in view of the Pearce decision. First, since Pearce expressly dealt with an increase in punishment on retrial as the result of the decision of a judge, it gives no direct guidance as to the case where the increased punishment results in whole or part, from the decision of a jury. The other, broader, area

of uncertainty involves the various circumstances and procedures in which a judge may increase a defendant's punishment within the due process clause as interpreted by Pearce.

I. Increase in Punishment on Retrial as the Result of Jury Decision

The jurisdictions of this country provide for jury decision making in sentencing in three basic ways. First, twelve states involve the jury in the sentencing decision in noncapital cases.[10] Second, almost all states which impose the death penalty do so only after a decision of the jury, in some form or other, as to whether that penalty is warranted in the case before them.[11] Third, while these jury decisions in both noncapital and capital cases are usually made by the jury at the same time it decides the question of guilt, four states use a bifurcated trial procedure in capital cases. Under such a procedure the jury decides the penalty question in a separate trial, after it has resolved the guilt question. Texas has a bifurcated procedure for jury decision making in both capital and noncapital sentencing.

In cases involving a jury in the sentencing decision, may a higher sentence be imposed on a defendant on retrial without regard to the limitations spelled out in Pearce? Pearce does not answer this directly. On its face it deals only with a sentence increase imposed by a judge. It is the position of this article that this question should be answered in the negative. Even where some aspect of sentencing is entrusted to a jury, greater punishment can only be given a defendant on retrial if the case falls within the criteria spelled out in Pearce.

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[10] Nine states give a general sentencing power to juries in noncapital cases; Arkansas, Ark. Stat. Ann. § 43-2306 (1964); Georgia, Ga. Code Ann. § 27-2502 (Supp. 1969); Indiana, Ind. Ann. Stat. § 9-1819 (1956); Kentucky, Ky. R. Crim. P. 9.84; Missouri, Mo. Rev. Stat. § 546.410 (1953); Oklahoma, Okla. Stat. Ann. tit. 22, § 926 (1958); Tennessee, Tenn. Code Ann. § 40-2707 (1955); Texas, Tex. Code, Crim. Proc. art. 37.07 (Supp. 1969); Virginia, Va. Code Ann. § 19.1-291 (1960). Three states give the jury sentencing power in specific cases: Alabama, Ala. Code tit. 14. §§ 318, 322, 336, 344, 355, 395, 409 (1958) (various offenses); Mississippi, Miss. Code Ann. §§ 2359, 2361 (Supp. 1968) (rape); North Dakota, N.D. Cent. Code § 12-06-05 (1960).

[11] Examples of this type of statute are: Ill. Ann. Stat. ch. 38, § 1-7(c) (Smith-Hurd Supp. 1970); Md. Ann. Code art. 27, § 413 (1967); Ohio Rev. Code Ann. § 2901.01 (Page 1953); Pa. Stat. tit. 18, § 4701 (1963).

A. The Decisional Background

This issue has arisen in a number of cases since Pearce but no court has engaged in any real analysis of the problem. Most of the decisions have held that Pearce imposes no limits on a sentence increase by a jury. The Texas Court of Criminal Appeals reached that result in three decisions involving noncapital sentencing, reasoning that Pearce sought to prohibit increased sentences which were the product of the sentencing judge's retaliatory motivation and that since the increase in the case before them was assessed by the jury, it could not have been based on vindictiveness and thus was not banned by Pearce.[14] This was the extent of the court's discussion, although a concurring opinion by one judge indicated a reluctance "to join the flat statement of the majority that the principle of Pearce" never applies to jury sentencing. In none of these cases was the factual data upon which the increase was based made a part of the record, nor was there any indication that the increased punishment was based on the defendant's conduct after original sentencing. The Missouri Supreme Court has also upheld a jury imposed sentence increase, finding Pearce to have imposed no limitation on such an increase because Pearce involved sentencing by a judge and the case before them involved jury sentencing.[16] No explanation or analysis was offered as to why this made any difference as to Pearce's applicability.

The first instance since Pearce of a retrial resulting in a jury-imposed death penalty where the first trial had produced only a prison sentence occurred in People v. Bernette[17] where the Illinois Supreme Court upheld this drastic increase in the face of the argument that it violated due process as interpreted by Pearce. Herman Bernette and Martin Tajra were tried together for a murder perpetrated during an armed robbery. The jury fixed Bernette's punishment at death but made no recommendation as to Tajra's sentence. The court imposed

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[14] Casias v. State, 452 S.W.2d 483 (Tex. Crim. App. 1970); Gibson v. State, 448 S.W.2d 481 (Tex. Crim. App. 1969) (on appellant's motion for rehearing which was denied in 1970); Branch v. State, 445 S.W.2d 756 (Tex. Crim App. 1969) (on appellant's motion for rehearing). Texas uses a two-stage, bifurcated procedure where the defendant requests the jury to fix the punishment. See note 10 supra. None of these opinions discuss the significance of that fact.

[16] Spidle v. State, 446 S.W.2d 793 (Mo. 1969). There is dicta to the same effect in Brooks v. Commonwealth, 447 S.W.2d 614 (Ky. 1969).

[17] 258 N.E.2d 793 (Ill. 1970).

a prison term of 75 to 150 years. A reversal of both convictions led to a joint retrial in which each was convicted and in which the jury recommended the death penalty for Tajra as well as Bernette. Illinois' highest court found no violation of due process in the increase of Tajra's punishment. It is not clear whether their decision was based on the fact that the jury, rather than a judge, had determined the increase or on the fact that Tajra had testified in his own behalf at the second trial and not at the first. The court simply states the latter as a fact without explaining its significance. Presumably they were saying that his subsequent testimony amounts to the kind of "identifiable conduct" which Pearce says may be the basis for sentence increase. This aspect of the case will be discussed in Part II of this article.

The justification that jury rather than a judge had increased the sentence is presented with an almost equal lack of explanation. The court said it observed nothing in the record to show that the increased sentence resulted from vindictiveness. Instead, they state that the trial court "merely acted upon the affirmative recommendation of the jury." They provide no idea as to why they supposed this fact to qualify the increased sentence for due process blessing. Presumably their thinking was along the lines of the Texas courts: Pearce is based on judicial vindictiveness; this increase was decreed by the jury; therefore Pearce is inapplicable.

A Florida court of appeals was faced with this issue on an appeal by the state from a ruling of a trial judge that a defendant, convicted of first degree murder at the first trial and sentenced to life imprisonment when the jury recommended mercy, could not be retried on a charge punishable by death. The trial court declined jurisdiction. The appellate court reversed in an opinion finding Pearce inapplicable on the following reasoning:

> Thus, in first degree murder cases tried before a jury in Florida the jury, not the judge determines whether the sentence is death or life . . . the judge possesses no sentencing discretion as he must impose the death penalty if the jury does not recommend mercy and . . . a life sentence if they do. Thus, the "judicial vindictiveness" and "additional facts" requirements of Pearce do not appear to be applicable . . . .[19]

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[19] State v. Miller, 231 So. 2d 260, 262 (Fla. 1970).

If Pearce is based solely on judicial vindictiveness, I would agree with these decisions because I do not believe the Supreme Court would be willing to assume that a sentence increase by the jury was based on vindictiveness, absent evidence to the contrary. I say this because of my understanding and analysis of why the court was willing to make such an assumption about the trial judge's increased sentence. All of this is a very speculative process since the Court gives us no reason why an appellate court should assume vindictiveness on the part of the sentencing judge who increases a sentence on retrial. The basis for that assumption, I submit, relates to institutional considerations. The judge, as a part of the trial system, may resent having that process characterized as unfair or erroneous, as the defendant has done by obtaining a reversal. This would be true even if he had not been the judge who was reversed in the particular case. Moreover, he is acutely aware of the problem of docket congestion, a problem aggravated by the need to retry a defendant. Either of these institutional considerations could be the basis for increasing a defendant's sentence following a second conviction for the same offense—an occurrence which is likely to confirm the trial court's view of the correctness of the first conviction and the lack of need for a second trial. The trial court sees a sentence increase as a way to punish the particular defendant for making such an "unwarranted" appeal and as a way to deter others who would do the same. But the jury is not a part of the trial system. They are involved in it for a brief period of time. Thus they would not be affected by the same institutional considerations as the trial judge. They would be unlikely to resent the characterization placed on a certain judge or trial court by defendant's having obtained a reversal of his first conviction. It is unlikely that they would be aware of or concerned with docket congestion. Thus there would be no need to assume that a jury sentence increase was based on vindictiveness.

The argument that Pearce's rationale is far broader than these courts have realized will be presented after an examination of the one case which applies Pearce to jury and judge alike. In April of 1948, Issaiah Pinkard was sentenced to 20 years imprisonment for unlawful carnal knowledge of a female under 12 years of age in violation of Tennessee law. A month later his motion for a new trial was granted, but following his subsequent conviction for the same offense, a jury imposed a 99-year sentence. In 1969, a Tennessee circuit court dismissed his petition for relief under the Tennessee Post-conviction Procedure Act. This dismissal was affirmed by the court of criminal

appeals, Judge Galbreath dissenting.[20] The majority does little more than cite Pearce and "point out" that unlike Pearce, a jury assessed the punishment in the second trial. The dissenting judge felt Pearce rendered the increase unconstitutional basing this conclusion on: (1) The absence of any affirmative reason in the record justifying the increase; (2) the fact that the judge had to approve the sentence and pronounce judgment; and (3) his feeling that it was "inconceivable" that a jury in a rural community did not know of the first conviction and so its decision increasing the punishment might well have been based on the same element of vindictiveness which Pearce sought to prevent. The Tennessee Supreme Court denied certiorari without opinion.

Having exhausted his state remedies, Pinkard filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Tennessee. The court granted the writ and ordered his release. While no record from the state court trial was available, Judge Miller's opinion observes that Pinkard was incarcerated during the interval between trials and was guilty of no misconduct during that period. This leads him to conclude that the case fell "squarely within the ambit of" Pearce and its language defining the circumstances in which a sentence may be increased. He rejects the state's argument that Pearce does not apply because a jury fixed the punishment, reasoning that under Tennessee practice, the judge could charge the jury, as a matter of law, that any sentence imposed could be no greater than that imposed at the earlier trial unless evidence of supervening conduct were offered at the second trial. In the latter event Judge Miller suggests the court could charge the jury on how it is to consider this evidence in terms of a possible increase in sentence. He then explores the retroactivity of Pearce and holds that it applies retroactively.

B. Why Jury Sentencing Is Covered by Pearce

1. Due Process and the Defendant's Right to Appeal

Most of the courts that have considered the applicability of Pearce to jury sentencing have concluded that Pearce imposes no limits on the jury's decision. I think they are in error. What little analysis they have

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[20] Pinkard v. Henderson, 452 S.W.2d 908 (Tenn. 1969). The same court reached the same result in Britt v. State, 455 S.W.2d 625 (Tenn. 1970).

[22] Pinkard v. Neil, 311 F. Supp. 711 (M.D. Tenn. 1970).

applied to this question has been focused on the language of Pearce in which the Supreme Court reflected its concern with the vindictiveness of trial judges in increasing a defendant's punishment on retrial. Pearce, however, is concerned with more than judicial vindictiveness. Its rationale reaches further than the supposed retributive instincts of sentencing judges.

A further look at the Pearce opinion will demonstrate that its rationale is broader than has thus far been supposed by the cases dealing with the issue of jury sentencing. After rejecting arguments that the double jeopardy provision or equal protection clauses require an absolute ban on sentence increases, the Court explained why due process imposed limits on an increase. They began by stating the obvious: a state court would violate due process if it followed an announced policy of increasing the sentence of every defendant who was reconvicted after a successful appeal. Why? For one thing, it would chill the exercise of constitutional rights if the first conviction was based on constitutional error. But even if the first conviction was based on nonconstitutional error, such a policy would violate due process because it would penalize the defendant for having pursued a statutory right of appeal given him to prevent his conviction in a trial based on error. Any increase in sentence for the purpose of punishing a defendant for having appealed would violate due process even if it were not part of an announced policy. This is so because the knowledge of the possibility of such an increase, even if not part of an announced policy would affect a defendant's decision as to whether he should appeal from a conviction based on error. It is not just the certainty of increase but the possibility of increase which might affect his decision to appeal.

The key language in Pearce, in this respect, is as follows:

> A court is "without right to . . . put a price on appeal. A defendant's exercise of a right of appeal must be free and unfettered. . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice."

The dilemma, of course, is that the defendant must either accept an erroneously based conviction, thus assuring himself that his sentence will not be increased, or seek to obtain a reversal of such a conviction at the risk of receiving increased punishment after conviction at a second trial. While Mr. Pinkard and Mr. Tajra were speared by the

second horn of the dilemma, appellate opinions give no indication of how many persons have been impaled on the first.

It is true, of course, that Pearce goes on to permit sentence increase on retrial if based on defendant's conduct subsequent to the original sentencing. There are a number of reasons for this. For one thing, the existence of such conduct shows that something other than vindictiveness prompted the increase. Even more important, I submit, is the fact that a sentence increase can only occur if the defendant himself performs certain acts. Thus the defendant has it within his power, by his own conduct, to prevent an increase. Any "dilemma" as to greater punishment will be self-created and not the result of action by the state. If a sentence increase can only occur if such conduct is established, the defendant himself retains control over whether he will be more severely punished on retrial.

Pearce, then, stands for the proposition that if the defendant has a right to appeal to correct a conviction based on error, due process forbids limiting that right by placing the defendant in a dilemma as to whether or not to appeal because of the possibility of a higher sentence for reasons over which the defendant has no control. The possible vindictiveness of the trial court, reflected in an increased sentence to punish the defendant for having appealed, is but one way to put a price on a defendant's right to appeal in violation of due process. It is not the whole problem. Any possibility of an increased sentence based on factors over which the defendant has no control would pose a comparable dilemma for a defendant in deciding whether to appeal and a comparable violation of due process—even if the increased sentence does not result from vindictiveness.

Viewed in this light, the possibility of a jury increase in sentence represents a very great threat to defendant's right to appeal. While the jury's decision is probably not the result of vindictiveness, jury decision making in the area of sentencing is uncontrolled, unpredictable, and very often irrational. They are rarely presented with any evidence or standards to guide their determination. A defendant considering appealing would have no idea of what might motivate a jury to increase his sentence. His appeal would be at the risk that his sentence might be increased for reasons which he could not anticipate. There would be nothing he could do to protect himself. If he is faced with the possibility of such an increase he will be faced with the very dilemma from which Pearce sought to remove him. Thus, the broad purpose of

Pearce—to protect a defendant's right to appeal—requires that jury sentencing be placed within the Pearce standards so that a jury must base an increase in the defendant's punishment on identifiable conduct since the first sentencing.

2. Right To Jury

A second major reason for not exempting jury sentencing from the requirements of Pearce is that to do so would deter the exercise of a defendant's right to a jury trial. The basic argument here arises out of the Supreme Court's decision in United States v. Jackson.[27] Since a defendant could only be executed under the Federal Kidnapping Act if he elected to have a jury trial, the Court held the death penalty provision of the Act unconstitutional. The Court observed that the statute had no procedure for imposing the death penalty on a defendant who waived a jury and reasoned that since a defendant's assertion of his right to a jury trial might cost him his life, the Act was unconstitutional in that it imposed "an impermissible burden upon the exercise of a constitutional right." The effect of only imposing death on those defendants who chose a jury trial was to "deter exercise of the Sixth Amendment right to demand a jury."

That same reasoning applies to the issue raised here. If a defendant's sentence can be increased on retrial at the uncontrolled whim of a jury but can only be increased for the limited, specific reasons spelled out in Pearce if imposed by a judge, a defendant will be very reluctant to choose a jury on retrial. In a death case, if the first jury found the defendant guilty but recommended mercy, and the sentence was a term of imprisonment, the knowledge that the second jury (on retrial) might not make such a recommendation would be very likely to lead a defendant to waive a jury at the second trial since the court, bound by limits of Pearce, could only increase the punishment based on conduct subsequent to the first sentencing. In that case the defendant would have been deterred from choosing to have his guilt determined by a jury by the grim prospect that the second jury might make the decision that death was in order. Such deterrence of the defendant's right to jury seems clearly proscribed by United States v. Jackson.

Can this same argument be used in the instance of a jury increase in noncapital cases? Jackson involved the death penalty and its threat

[27] 390 U.S. 570 (1968).

to the defendant's right to jury. But Jackson's reasoning applies to prohibit any increase in punishment which can occur only if a defendant exercises his right to a jury trial.[30] While it is true that the possibility of death would be far more likely to dissuade a defendant from choosing a jury than the threat of an added term of years, the language of the opinion indicates that Jackson was not as concerned with the certainty that the prospects of increased punishment would deter the exercise of a defendant's right to jury as with the tendency of such prospects to have that effect. It would not distort Jackson to extend its reasoning to noncapital jury increase in sentencing and to hold that any such increase outside of the Pearce requirements tends to discourage a defendant from choosing a jury trial and is, therefore, unconstitutional.

3. Individualization of Sentencing

A third consideration militating against exempting jury sentencing from the Pearce standards involves the principle of Williams v. New York[32] and the part it played in the Pearce opinion. In Williams, the Supreme Court placed its approval on the concept of individualizing the sentencing process. Such individualizing means that a sentence should only be imposed after the sentencing authority has obtained "the fullest information possible concerning the defendant's life and characteristics." It involves a "careful study of the lives and personalities" of convicted defendants. The punishment should be geared to "fit the offender and not merely the crime." It is clear that the court in Pearce refused to place an absolute ban on sentence increase on retrial in order to retain as much individualization in sentencing after retrial as was acceptable under due process.

> The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is not more than consonant with the principle, fully approved in Williams v. New York, supra, that a State may adopt the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime."

[30] United States v. Lewis, 300 F. Supp. 1171, 1174 (E.D. Pa. 1959).

[32] 337 U.S. 241 (1949).

The fact the Pearce Court did not accept complete individualization of sentencing on retrial resulted from an overriding concern to protect the defendant's right to appeal, which led the Court to limit sentencing increases to cases involving subsequent conduct on the part of the defendant.

The significance of this for jury increase in sentencing lies in the fact that in the usual case of jury sentencing in the nonbifurcated trial procedure, the jury exercises its discretion while being virtually uninformed about any of the factors that would permit it to individualize punishment. The rules of evidence greatly limit the admission of evidence of the type that would be useful in determining an appropriate sentence. Since this is so, there is absolutely no justification for permitting the jury to increase the sentence on retrial. The reason for giving the court the power to do so within certain limits arose from a recognition that the philosophy of individualization required the court to be given that option. But since the jury is unable to individualize sentencing because they lack the necessary information, the rationale of Pearce does not require them to have any power to increase a sentence. Thus the one reason that Pearce left a judge with some power to increase has no applicability to jury sentencing. This leads to the conclusion that a jury should have no power to increase the sentence in a non-bifurcated trial, not that they should have unlimited power to do so, as urged by most of the decisions on this point since Pearce.

C. An Absolute Ban On Jury Increase?

Thus far the issue has been whether jury sentencing is controlled by Pearce. The three considerations just discussed all lead to the conclusion that it is. This would mean that a jury could increase a sentence on retrial if its decision were based on identifiable conduct occurring after the original sentencing and its reasons for doing so affirmatively appeared on the record. Realistically, however, there may be problems with permitting any increase in sentence by a jury in a non-bifurcated procedure even within the terms of Pearce. Even assuming that evidence of a defendant's conduct since the first trial were admissible in a trial where the jury was to decide defendant's guilt at the same time as his punishment—which would be very unlikely under the usual evidentiary standards—explaining to the jury how they were to use this information would also present problems. Could this be done without informing the jury of the fact that a prior trial also resulted in conviction? It would seem difficult to explain the significance of this conduct in relation to a particular point in time (the first sentence and conviction) without also informing them of what had

occurred at that point in time (that defendant was convicted). Yet to do this would introduce an additional factor or prejudice—the fact of the first conviction. Judge Miller's opinion in Pinkard v. Neil provides some guidance for the trial judge attempting to deal with this problem in a state that provides for jury sentencing in noncapital cases. However, I don't see how his suggestions are likely to work in practice without giving the jury at least two pieces of information that will prejudice them on the question of guilt: the fact of the first conviction, and the evidence of the defendant's later conduct supposedly justifying increase under Pearce.

The concerns expressed in my last paragraph lead to the conclusion that an absolute ban should be placed on a jury's increasing a defendant's sentence in a non-bifurcated trial as a matter of policy. Such a ban would be consistent with the virtual unanimous criticism of jury sentencing in noncapital cases.[42] In capital cases such an absolute ban would be consistent with recent, although indirect, assaults on the death penalty in Witherspoon v. Illinois[43] and United States v. Jackson.[44] Where one jury has already recommended mercy or failed to return a verdict of death, the deep seated concern with the death penalty expressed so often by so many, should become paramount and, coupled with the problems of making a nonprejudicial presentation so as to comply with Pearce, cries out for a decision forbidding jury imposition of a death sentence at a second trial if it was not imposed at the first trial.[47]

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[42] See, e.g., ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures §1.1 and commentary, (1967); Jouras, On Modernizing Missouri's Criminal Punishment Procedure, 20 U. Kan. City L. Rev. 299 (1952); LaFont, Assessment of Punishment—A Judge or Jury Function?, 38 Texas L. Rev. 835 (1960); Note, Statutory Structure for Sentencing Felons to Prison, 60 Colum. L. Rev. 1134, 1154-57 (1960); Note, A Review of Sentencing in Missouri; The Need for Re-evaluation and Change; 11 St. Louis U.L.J. 69 (1966). Note, Jury Sentencing in Virginia, 53 Va. L. Rev. 968 (1967).

[43] 391 U.S. 510 (1968).

[44] 390 U.S. 570 (1968).

[47] It is not clear whether the Pearce standards are even applicable to a judge-made decision to increase a sentence to death at a second, nonjury trial. Here again, their uneasiness with the death penalty might lead the Supreme Court to impose an absolute ban on this kind of sentence increase.

D. The Bifurcated Trial

The issue of jury discretion to increase a sentence must be viewed differently when it occurs in the procedural setting of those states providing for a separate jury trial on the issue of punishment, either capital or noncapital. The considerations concerning the defendant's right to appeal and right to a jury still argue against permitting any increase by the jury uncontrolled by Pearce. In the bifurcated trial, however, the opportunity to apply the Williams philosophy of individualizing the sentence will be present. The jury can be given much of the evidence of his personal life. In the punishment part of the trial the evidence as to defendant's prior conviction and conduct subsequent thereto can be presented to the jury without prejudice to the defendant on the issue of guilt, which has already been resolved against him. This places the jury in a position approximating that of the judge and there is no reason for not permitting the jury to increase a sentence based on identifiable conduct since the first trial. In other words, if the Pearce criteria are met, the jury in a second-stage punishment hearing should be permitted to increase a sentence after being properly instructed by the court.

II. Circumstances and Procedures in Which a Judge May Increase Punishment on Retrial

In the long run most of the major issues arising from Pearce will involve the circumstances and procedures in which a judge may increase a defendant's sentence on retrial. Before turning to these issues, however, a word or two is in order concerning Pearce's reception by the various courts in this country in the two years since its appearance. Most of the courts that have thus far dealt with a "Pearce" issue appear to have applied the Pearce standards in letter and spirit.[50] Where these appellate courts have examined the record and found that

[50] Barnes v. United States, 419 F.2d 753 (D.C. Cir. 1969); United States v. Gross, 416 F.2d 1205 (8th Cir. 1969), cert. denied, 90 S. Ct. 1245 (1970); United States v. King, 415 F.2d 737 (6th Cir.), cert. denied, 396 U.S. 974 (1969); United States v. Wood, 413 F.2d 437 (5th Cir.), cert. denied, 396 U.S. 924 (1969); Stonom v. Wainwright, 235 So. 2d 545 (Fla. App. 1970); State v. Shak, 466 P.2d 420 (Hawaii 1970); People v. Smith, 44 Ill. 2d 272, 255 N.E.2d 450 (1970); People v. Baze, 43 Ill. 2d 298, 253 N.E.2d 392 (1969); State v. Pilcher, 171 N.W.2d 251 (Iowa 1969).

the trial court did not state reasons for imposing a higher sentence they have either remanded for resentencing in light of Pearce[51] or reduced the sentence to the length or terms of the initial sentence.[52] The failure to apply Pearce has occurred in cases raising one or more of the issues covered in this part of the article.

A. What Conduct Is "Conduct" Within the Meaning of Pearce?

Pearce states that an increase must be based on "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." The Court provided no indication of what they meant by "conduct" and so created one issue that has already begun to plague the lower courts.

One way in which this has arisen is that information about the defendant or the crime that was unavailable or unknown at the first sentencing comes to the attention of the court at the time of second sentencing. As will be demonstrated, Pearce does not contemplate such information as providing the basis for an increase. However, there are courts who have not interpreted Pearce in this way and have permitted, or appear to have permitted, a sentence increase based on just such information. In People v. Bernette,[54] the Supreme Court of Illinois reasoned that because the defendant testified on his own behalf at the second trial, but had not done so at the first, the jurors were in a better position to judge his complicity in the crime and this new information about the crime justified the increased penalty (death) at the second trial. A Michigan court of appeals upheld an increase in sentence where the first conviction was by guilty plea and the second followed a trial, stating that the trial afforded the second judge "more opportunity to heal all details" and "to observe and judge" the defendant

[51] Barnes v. United States, 419 F.2d 753 (D.C. Cir. 1969); United States v. Gross, 416 F.2d 1205 (8th Cir. 1969), cert. denied, 90 S. Ct. 1245 (1970); United States v. King, 415 F.2d 737 (6th Cir.), cert. denied, 396 U.S. 974 (1969); United States v. Wood, 413 F.2d 437 (5th Cir.), cert. denied, 396 U.S. 924 (1969); People v. Smith 44 Ill. 2d 272, 255 N.E.2d 450 (1970); People v. Baze, 43 Ill. 2s 298, 253 N.E.2d 392 (1969).

[52] Stonom v. Wainwright, 235 So. 2d 545 (Fla. App. 1970); State v. Shak, 466 P.2d 400 (Hawaii 1970); State v. Pilcher, 171 N.W.2d 251 (Iowa 1969).

[54] 258 N.E.2d 793 (Ill. 1970).

than did the guility plea procedure. The Tenth Circuit upheld a sentence increase, after a trial before the judge who had sentenced the defendant following an earlier guilty plea, on the grounds that the trial produced evidence of the defendant's brutal nature that had not been revealed in the presentence report in connection with the guilty plea.[56] The appellate court felt the judge's statement of this as his reason for the increase meant that the increase was proper under Pearce's standards.

The courts have misread Pearce. To begin with, the language of the opinion excludes such information as the basis for an increase. Any increase must be based on "conduct" that occurs "after the time of the original" sentence. New facts about the crime or the defendant's complicity in it all refer to conduct that occurred before the initial sentencing. This would also be true of the case where the second trial or sentencing produced evidence, unknown at the first trial, that defendant had been convicted of other offenses prior to the first sentencing. While this knowledge would usually be relevant in fixing defendant's sentence, after Pearce it may not be used to justify an increase in the sentence because these convictions had all taken place before the first sentencing. As to evidence of defendant's brutal nature, there is the additional consideration that this is not really "conduct" at all, no matter when it occurred.

A problem arises here, however, because the opinion of the Court written by Justice Stewart is actually the opinion of only four justices. While the federal and state courts dealing with "Pearce" issues have not emphasized this fact and have treated that opinion as a majority opinion, on this issue Justice White, one of the four justices joining the Court's opinion, stated that in his view a sentence increase should be authorized "based on any objective, identifiable factual data not

[55] People v. Payne, 18 Mich. App. 42 170 N.W. 2d 523 (1969). The brief majority opinion made no mention of Pearce. It was decided two days after Pearce and released for publication on Spet. 26, 1969. The dissent, however, quoted extensively from Pearce and found it controlling.

[56] United States v. Kienlen, 415 F.2d 557 (10th Cir. 1969). The court's opinion quotes only that portion of Pearce pertaining to the trial court being required to state its reasons before increasing a sentence. The effect of this single quote is to create the misleading and inaccurate impression that Pearce upholds an increase so long as the judge gives some "legitimate" reasons for it. Pearce does not so hold. The trial court must state its reasons but these reasons must be based on "conduct" occurring after the first sentence.

known to the trial judge at the time of the original sentencing proceeding."[57] This, of course, would support the reasoning and result in the cases just discussed. Justice White, however, joined in the remainder of the Court's opinion and since the rationale of that opinion, as I will show in the following paragraphs, is at odds with his views on this particular issue, I urge that his modification of the Court's criteria should not be accepted.

Pearce's broad rationale stands against the use of information concerning conduct occurring before the first conviction as a basis for increase. Pearce intended to protect defendant's right to appeal. It intended to free him from fear of appealing for fear of receiving a higher sentence on retrial as punishment for having appealed. To accomplish this it removed any factors or information from sentencing consideration (at least as to sentencing increases) which were known or knowable at the time of the first trial. Put another way, Pearce places a ceiling on the sentence as to factors or considerations in existence at the time of the first sentence, even if the court, for one reason or other, did not consider those factors in imposing that first sentence. Had Pearce not placed such a limit on the factors properly to be considered in sentence increase, any trial judge worth his salt would be able to point to factors coming to his attention for the first time at the second sentencing as a reason for the increase, especially when he was not the judge who imposed the earlier sentence. In that situtation defendant would be placed right back in the dilemma from which Pearce sought to remove him.

The preceding argument should be coupled with the analysis of Pearce set out in Part I that the basis for any increase must involve conduct whose occurrence the defendant has the ability to control after he decides to appeal. A defendant would have no control over whether new information about the crime, the defendant's involvement in the crime, or his background might come to the court's attention at the time of the second trial. Thus such information cannot form the basis

[57] The Supreme Court's per curiam opinion in Moon v. Maryland, 398 U.S. 319 (1970), should be noted in connection with Justice White's language in Pearce. The opinion, in dismissing a writ as improvidently granted in a case raising the question of Pearce's retroactivity, quoted the language of Pearce permitting an increase only on the basis of defendant's conduct after the first sentence and said this was the holding of Pearce. Justice White did not indicate his personal disagreement with that per curiam opinion, even though several other justices did so indicate.

for a sentence increase under the analysis of Pearce suggested by this article.

At least one court has recognized that this result, if not this reasoning, is required by Pearce. The Supreme Court of Illinois vacated a sentence where the increase resulted from a consideration of evidence of the defendant's prior convictions (not pursuant to a recidivist statute) and use the following language in so doing:

> Applying the Pearce rule to this case it would appear that evidence of defendant's prior convictions prompted the court, on retrial, to increase the sentence. That evidence was known at the time of the original sentencing, since the court docket recites that on defendant's original sentence evidence was heard in regard to aggravation and mitigation. However, regardless of whether such convictions were initially known, or whether they came to light on retrial when the court heard only evidence in aggravation, those convictions involved conduct of defendant occurring prior to the original sentencing. Such conduct could not be the basis for imposing a heavier sentence on retrial under the Pearce rule.[60]

In United States v. Gross,[61] the Eighth Circuit vacated an increased sentence where the trial court had the benefit of information from a second trial as well as additional presentence reports. But the trial judge had not stated his reasons for the increase and it is this omission which may have prompted the sentence vacation and not the fact that such information was not the proper basis for an increase under Pearce. However, the court also limited the new sentence to that imposed at the first trial.

This limit on the kind of conduct to which Pearce refers may be expressed in a slightly different fashion by saying "conduct" does not include any conduct on the part of the defendant occurring in connection with his second trial. Thus the fact that defendant testified at the second trial and not at the first, that he made certain remarks as part of his allocution right, that his testimony was such as to lead the judge to

[60]People v. Baze, 253 N.E.2d 392, 395 (Ill. 1969)

[61]416 F.2d 1205 (8th Cir. 1969).

believe he was lying,[62] or that new evidence of the crime or his involvement in it was introduced at the second trial does not provide a proper basis for an increase. If a defendant is to be given a right to appeal and that right to be protected, the possible result of his exercise of that right—a new trial—should also be protected. He should be able to defend himself at that trial and participate in it without fear that his defense or participation will result in increased punishment.

A number of courts who had considered this issue in terms of due process prior to Pearce reached conflicting results on the question of what factors should justify an increased sentence on retrial. In one of the earliest cases to do so, Marano v. United States,[63] the First Circuit rejected the appearance of additional testimony at the second trial as reason for increasing a defendant's sentence. They felt there should be "repose" as to the "severity of the court's view" of the appropriate punishment. On the other hand, in United States v. Coke,[64] Judge Friendly wrote that at least in terms of due process, several factors could justify an increased sentence:

> Another [reason for higher sentence] is where the new trial reveals the crime to have been more dastardly or the defendant to have played a much larger role than was first supposed. This may occur for a variety of reasons. One is where the first conviction was on a plea of guilty . . . and the judge may have had only a bare outline of the offense. Another instance would be where the defendant takes the stand at the second trial and produces an impression as to guilt contrary to that intended. A third is where evidence previously unavailable to the prosecution shows that the defendant instead of being a minor cog was the mastermind; a judge might well be disinclined to allow such a defendant to escape with a sentence lower than that given to others who were simply his tools. Instances such as these suffice to demonstrate that, despite contrary ipse dixits, the state may have an important interest in the imposition of a

[62]See United States v. Sanders, 272 F. Supp. 245 (E.D. Cal. 1967), as a pre-Pearce example of this factor.

[63]374 F.2d 583 (1st Cir. 1967).

[64]404 F.2d 836 (2d Cir. 1968).

> sentence that appears just in light of the latest and best information.

Although Judge Friendly has set out some of the strongest factors that could legitimately be used to justify an increase under due process, I think Pearce has rejected them as a basis for an increase and has rejected Judge Friendly's reason for so using them. Judge Friendly balanced the interest of the defendant in being able to appeal an erroneous conviction and obtain a new trial against the state's interest in obtaining as accurate a sentence as possible. Pearce rejects such a balancing attempt. It tips the scales in favor of the criminal defendant on this issue. It holds that the state's interest in obtaining the highest punishment appropriate to this defendant and this case must be vindicated at the time of the first sentencing. If for some reason—and Judge Friendly has set out several possible reasons—the state's interest is not fully protected because the facts as to sentencing were in existence but not considered by the first sentencing authority, those facts may not be used to increase the sentence, however great may be the state's interest in such an increase.

Moreover, Judge Friendly's discussion of due process is pure dictum in view of the subsequent disposition of the Coke case. The judgment as to the defendant was reversed with directions to reduce his sentence to that imposed after his prior conviction. While the federal Constitution was not found to have imposed many limits on higher sentences, Judge Friendly's opinion, an en banc decision of the Second Circuit, laid down limitations on sentence increases on retrial under the court's supervisory power as a federal appellate court. Coke held that a sentence increase is permissible only in light of a defendant's "conduct since sentence was initially passed," thus anticipating the language of Pearce by several months:

> We regard it as much more doubtful whether a heavier sentence is justified simply because, as here, the second judge went to more pains in investigating defendant's general behavior prior to the initial sentence than did the first. The Government could have asked Judge Dawson to defer Coke's sentence after the first conviction pending preparation of a pre-sentence report and this could have developed the additional facts of questionable significance on any view, that led Judge Cooper to increase the sentence. In these situations the important interest that appeals not to be

> deterred outweighs the Government's rather slight interest in an increased sentence because of facts that were or could have been brought before the first judge. The considerations apply a fortiori when the highest sentence simply reflects a different philosophy on the part of the second judge.

However, they stated that "new testimony at the second trial" was a factor justifying an increase. For the reasons previously discussed, I think Pearce has eliminated that factor as a justification for increase, as well as the factor of a more careful investigation by the second judge, which the Coke opinion also rejects as a basis for an increase.

Having explored what is not "conduct" justifying a sentence increase within the meaning of Pearce, what kind of conduct will permit a higher sentence? There has been little consideration of this question to date. In my judgment Pearce means conduct amounting to criminal conduct: continuous dealings in narcotics; assaults on a prison or a fellow prisoner; escape from prison; repetition of the activities forming the basis of the original charge; or conviction of another crime. A finding of probable cause that a defendant's conduct amounts to criminal conduct should be sufficient without actually deciding his guilt in that regard.

There are several reasons for supposing that only conduct amounting to criminal activity can be used as the basis for a sentence increase. First, while Pearce refused to place an absolute ban on sentence increase, the tenor and spirit of the opinion is opposed to such increases except in a very limited number of instances. The presumption of vindictive intent which Pearce attaches to any increase indicates a strong reluctance to permit higher punishment on retrial. Limiting conduct to "criminal conduct" would provide appropriately narrow boundaries within which increases may occur and so would accord with this spirit of Pearce. Second, criminal conduct, and very little other kind of conduct, strongly indicates that the first sentence was not of sufficient severity in terms of its deterrent effect. In terms of sentencing philosophy, this is a sound reason for permitting an increase in the defendant's punishment. Thirdly, criminal conduct clearly lies within the defendant's capacity to control and this, in keeping within the idea expressed in this article, would mean that the power to protect himself against a sentence increase lies within the defendant's own hands.

One court that considered this question found that the defendant's conduct in absenting himself from his later trial (he was missing for a year) was the kind of conduct justifying an increase under Pearce's language.[69] They reasoned that:

> The identifiable conduct of the defendant occurring after the first sentence identifies him as somewhat contemptuous or at least disrespectful of the courts and judicial process and the one year lapse of time perhaps characterizes him as a fugitive from justice. This, in our judgment, is identifiable conduct on the part of the defendant occurring after the original sentence which bears directly on the probability of rehabilitation by a short sentence.

This is a proper analysis of Pearce both as to the kind of conduct justifying an increase and the reason why it justifies the increase—that is, what that conduct indicates about the need for a longer sentence for rehabilitative purposes.

An issue as to the meaning of "conduct" that is certain to arise will involve the occurrence of events in the defendant's personal life since the first sentence. If a defendant has been free on bail he may have incurred marital or employment difficulties. He may have incurred large debts which he is unable to pay. In my opinion such conduct (if it can be called that) is not "conduct" as used by Pearce. It is not indicative of the lack of deterrent effect of the first sentence. It is not clearly controllable by the defendant alone.

Another problem may involve personality changes in a defendant since the first sentencing. Psychiatric or psychological studies may show a defendant to have "regressed" since the first trial. Aside from the fact that such changes do not fit within the considerations just discussed, personality changes or developments hardly fit the usual meaning of the term "conduct." They should not be used to permit a trial court to increase a sentence on retrial.

B. Prosecutorial Vindictiveness

Pearce involved defendants who were retried on the same charges at the second trial as the first and who were then given a greater sentence on those charges. Suppose, however, that at the second trial the charge against defendant was changed in some way or other. This might

occur in one of at least three ways: (a) The defendant would be charged with a new crime, carrying a higher penalty, for the same act or conduct giving rise to the first charge; (b) additional charges, arising out of the same act or conduct, could be added to the indictment or information;[73] or, (c) after defendant's appeal and the reversal of his first conviction the defendant could be charged under a recidivist statute in a case where that charge could have been, but was not, raised at the first trial. All of these involve the prosecutor's having exercised his discretion to invoke charges against the defendant which had not been raised in connection with the first trial. If sentence was imposed in any of these situations in accordance with newly raised charges, the defendant's sentence could be increased beyond what he received for his first conviction. Does Pearce prohibit an increase in these situations unless the other requirements of that opinion are met?

These situations differ from that in Pearce in that the increased sentence results from the actions of the prosecutor in bringing the new charge and not directly and solely from the judge's sentencing decision (although the judge must obviously impose the new sentence in any of these instances). In my judgment Pearce is applicable to these cases and it prohibits any increase in a defendant's sentence except within its requirements. Pearce should be read to apply to any action by the government, not just to that of the trial judge. In terms of vindictiveness toward the defendant as a motivating factor in increasing his sentence, if Pearce was willing to impose rigid requirements to protect a defendant against the possibility of judicial vindictiveness, the Court would certainly be likely to do as much to prevent the defendant from suffering at the hands of prosecutorial vindictiveness brought about by his successful appeal. The chance that such vindictiveness might have motivated the prosecutor's action seems considerably greater than that it might have motivated the judge's sentence increase on his own since the prosecutor's role is an adversarial one by definition.

A more important consideration, however, is the effect that the possibility of such an increase would have on a defendant's right to appeal—a consideration which, as indicated earlier, is a vital part of

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[73] Situation (a) and (b) should, of course, be distinguished from the case where the first jury convicted defendant of a lesser included offense even though they had a chance to convict him of the greater offense. The principles of double jeopardy prevent retrial for the greater crime. Green v. United States, 355 U.S. 184 (1957). In situation (a) and (b) the jury was not given the opportunity to convict defendant of the new charge at the first trial.

Pearce's rationale. The argument need not be repeated here in full. The possibility of an increase in punishment because the prosecutor may decide to add to the previous charge or to charge a different crime after having decided not to do so before the defendant appealed is a possibility that will surely limit a defendant's right of appeal for reasons over which he has no control and place him in a dilemma very much like the one from which Pearce rescued him.

This problem was raised in Sefcheck v. Brewer[75] where a federal district court was presented with a writ of habeas corpus by a state prisoner who had been convicted on a guilty plea of altering a false check under Iowa Code Section 713. 3 and sentenced to seven years. That conviction was set aside but a new information charged the defendant with altering a forged instrument in violation of Iowa Code Section 718. 2. The new charge was based on the same check and conduct as the first charge. The jury trial resulted in a conviction and ten year sentence. The federal district court voided the second conviction and ordered defendant released to be retried under Section 713. 3. After recognizing the difference between the case before it and the Pearce situation, the court concluded that difference to be of "little importance." After quoting the language in Pearce in which the Supreme Court expressed its concern with protecting a defendant's exercise of his right to appeal, the court stated:

> This same principle must apply to all state officials, including the county attorney. Fear that the county attorney may vindictively increase the charge would act to unconstitutionally deter the exercise of the right of appeal or collateral attack as effectively as fear of a vindictive increase in sentence by the court. The respondent argues, however, that the same act can supply evidence for conviction of more than one crime, and that the county attorney has discretion as to which of several charges will be presented. The Court agrees with these general statements, and nothing in this order should be construed to limit the discretion of a prosecutor, prior to trial, as to what charge or charges will be presented. However, once, as here, a conviction has been obtained, even though it may later be voided on appeal or collateral attack, the language and holding of Pearce lead to the inescapable conclusion that the charge may not be increased so as to subject the defendant to greater punishment, unless there is some legally justified, compelling reason for so doing. It is equally unfair to use the great power to the county attorney to determine what charge a defendant will face to place a defendant in the dilemma of making an unfree choice as to whether to appeal or to make a collateral attack. As in Pearce, "the fact remains that neither at the time [the increased charge was filed], nor at any stage in this habeas corpus proceeding, has the State offered any reason or justification for that [increased charge] beyond the naked power to impose it."

The court noted that under Iowa's indeterminate sentence law the trial judge had no choice of whether to increase the sentence. Once a prison term was required, the judge could impose only the statutory maximum, which was ten years under section 718. 2. The point of this is that in such a jurisdiction it is clearly the prosecutor's decision, not that of the judge, that raises the Pearce problem.

A comparable issue arising in connection with a prosecutor's decision to invoke a state's habitual offender or recidivist statute after a defendant's successful appeal can be anticipated. Even though a majority of these statutes require a prosecutor to invoke them where applicable, they are usually used in only a small percentage of the cases to which they might apply. Thus a prosecutor may not have invoked a recidivist statute in connection with a conviction—especially if it was based on a guilty plea—but may decide to do so after that conviction has been reversed. The time limits on the use of these statutes are normally such as to not prohibit their use at the time of retrial.

While no court has dealt with this problem since Pearce, a 1968 Kansas decision, State v. Young,[81] is illustrative of the problem. Defendant was convicted of robbery in the first degree and sentenced to not less than ten nor more than 21 years. This was set aside and a new trial ordered. He was retried on the same charge but prior to the new trial the state invoked the Kansas Habitual Criminal Act and after the second conviction he was sentenced to not less than 20 nor more

[75] 301 F. Supp. 793 (D. Iowa 1969).

[81] 200 Kan. 21, 434 P.2d 820 (1968).

than 42 years, the penalty under the Habitual Criminal Act leading to the increase. This was affirmed by the Kansas Supreme Court in the face of defendant's argument, anticipating Pearce in effect, that he had been denied due process as a result of the increase.

The interesting thing about the opinion is its suggestion that if the county attorney acted willfully and in bad faith in invoking the recidivist statute, the court might not permit its use. However, they placed the burden of establishing that he had so acted on the defendant, who failed to meet the burden in Young. Pearce rejected the idea of placing on the defendant the burden of showing that the court acted vindictively in imposing a higher sentence. Because of the possibility of such vindictiveness, Pearce treats any increase as if it were based on vindictiveness unless the court gives its reasons for an increase, which reasons are limited to certain conduct. Pearce, then, undercuts the approach of the Kansas court. If Pearce applies to a prosecutor's acts of discretion (as I have argued that it does), then a sentence increase cannot stand unless the prosecutor shows he exercised his discretion because of defendant's conduct since the first sentence. The burden would no longer be on defendant to show bad faith in invoking the recidivist statute—a very difficult burden to meet. The burden would be on the prosecutor to justify his action in terms of Pearce.[83]

C. Pearce and Its Effect in Other Procedural Settings

1. Trials de Novo on Appeal from Inferior Tribunals

A "Pearce" issue that has received considerable attention from the courts involves a defendant who has been convicted of a relatively minor offense in an inferior state court, such as a traffic, county, or justice of the peace court, and then takes an appeal of right to a superior court where he receives a trial de novo, is convicted and given a higher sentence than that imposed by the inferior tribunal.[85] A majority of

[83] One problem with this argument is that most recidivist statutes are not worded so as to give the prosecutor any discretion in their use. * * * But where the practice has been for the prosecutor to exercise discretion, for purposes of Pearce the situation should be treated as if he had been given discretion by the statute.

[85] Lemieux v. Robbins, 414 F.2d 353 (1st Cir. 1969), cert. denied, 90 S. Ct. 1247 (1970); Torrance v. Henry, 304 F. Supp. 725 (E.D. N.C. 1969); Cherry v. State, 9 Md. App. 416, 264 A.2d 887 (1970); People v. Olary, 382 Mich. 559, 170 N.W.2d 842 (1969); State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); Evans V. City of Richmond, 210 Va. 403, 171 S.E.2d 247 (1969).

these courts have concluded that Pearce does not apply and have upheld the increased sentence received in the course of such a procedure. The courts refusing to apply Pearce have engaged in a more extended analysis of the problem than have their Pearce-applying counterparts. In essence they have pointed to the following distinctions as the key considerations in refusing to apply Pearce:

(i) The increased sentence was imposed by a different court than imposed the first sentence; in Pearce the increased sentence was imposed by the same court.

(ii) The second full trial (de novo) is awarded as of right without regard to whether error was committed in the course of the first trial; Pearce involved a new trial necessitated by error in the earlier conviction.

(iii) The first sentence is usually imposed by a "judge" who is not legally trained.

While there are other distinctions, these appear to be the most significant and the ones which have thus far been the most influential.

The significance of the first distinction is not entirely clear. Presumably the fact that the increase is imposed by a different court than imposed the first sentence indicates the improbability that the increase resulted from vindictiveness. Since the court imposing the new, higher sentence was not the one who imposed the first sentence, it would be unlikely to feel the need to punish the defendant for having set aside the conviction giving rise to the first sentence. However, as indicated earlier, Pearce is concerned with more than judicial vindictiveness and the absence or unlikelihood of such vindictiveness does not conclusively establish Pearce's inapplicability. Pearce's broader concern—to protect a defendant's right to appeal—may still require its applicability to any procedure where the state has provided the defendant a right to appeal, as is clearly the case in this setting.

The second distinction is a more significant one; one that ties into the question of Pearce's applicability to appellate review of sentencing,

[86] Of the cases in the preceding footnote, Lemieux, Olary, Spencer, Sparrow, and Evans have refused to apply Pearce to the case before them. Torrance and Cherry found Pearce applicable.

to be discussed in the next section. The trial de novo on appeal from an inferior tribunal is of right. The appeal may be taken and a full new trial granted without regard to whether or not there was error in the first trial. Does Pearce only apply to an appellate process designed to correct trial errors leading to the first conviction? The argument for an affirmative answer is best set out through the language of three decisions on this issue.

> In Pearce the defendant was given a new trial on his appeal from an incorrect ruling which was adverse to him. The court's error necessitated the appeal. Under those facts the imposition of additional punishment would in effect have penalized him for asking the court to correct its error.
>
> Nor, unlike the situation in Pearce, need he demonstrate error, constitutional or other, in a first trial to secure a second trial, which very proof of error gives the state the opportunity to increase the punishment.
>
> There [Pearce] it could be said that if defendant had been properly tried the first time and convicted, his sentence undoubtedly would have been the same as was imposed on him and that, therefore, with errors and violations of his constitutional rights having occurred which contributed to his first conviction, the harsher second sentence would amount to penalizing him for appealing and seeking a fair and valid trial. That this could give rise to a question of whether defendant had been accorded due process is evident. Here, under Michigan procedure then in effect, no such thing has happened. Defendant was convicted in justice court, took an appeal as of right to circuit court in which the question of possible errors in the first trial is not considered, but a trial de novo, without regard to the first, is accorded defendant.

The concept of due process is concerned with a defendant being able to achieve one fair and valid trial before conviction. Pearce's standards are based on that constitutional concept. They were designed to keep a state from preventing a defendant from obtaining one fair trial by the tactic of placing him in a dilemma as to whether or not he should appeal because he might receive a higher sentence. Pearce first holds that it would violate due process to prevent the defendant from setting aside a conviction based on constitutional error. The Court then says:

> But even if the first conviction has been set aside for non-constitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law.

The language in Pearce about defendant's right to appeal and the need to protect it stems from the need to secure an error-free trial. In discussing its concern with vindictiveness the Court said: "Due Process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial."

In a trial de novo after appeal from an inferior tribunal of right the defendant does not get a new trial because of error, constitutional or otherwise, in the first trial. His new trial is not the result of "having successfully attacked his first conviction." He gets the new trial in the superior level court of right without having to attack the first conviction at all. To read Pearce as applying to any process giving the defendant a right to appeal is to read it too broadly. It is true that any potential increase in sentence puts a defendant in the dilemma described earlier in this article—but that dilemma was unconstitutional only because it might have prevented defendant from seeking correction of an error-based conviction. If the appeal and retrial are unrelated to the correction of error, Pearce is inapplicable.

There are several reasons, however, why this distinction should not lead to the conclusion that Pearce is inapplicable here. First of all, one must decide the purpose of giving the defendant an appeal of right from an inferior court and a completely new trial at the next court level. Do statutes establishing this right do so because a trial before a nonlawyer is an inherently unfair trial and the state has provided the appeal and de novo trial to protect the defendant against conviction in an inherently unfair setting? If that can be established as

the purpose of this procedure, we are then talking about an appellate process designed to prevent an erroneously based conviction. The "error" is built into the trial process when that process is not governed by a judge trained in law. If this is so, the rationale of Pearce requires that the defendant's right to appeal from an inferior court conviction be protected once granted and that it not be limited by the prospect of an increased sentence.

Moreover, what of the defendant who claims his first conviction in the inferior tribunal resulted from error in the usual sense of that term? The appeal of right and trial de novo will be the only means open to him for correction of the error, even though he can obtain this new trial without the necessity of demonstrating error to an appellate court. Yet his appeal may actually be based on a claim of error.

Reaching a conclusion on this issue requires consideration of the third distinction between Pearce's facts and this procedure: the authority imposing the first sentence was not legally trained. Pearce is concerned, in part, with individualization of sentencing, which concept recognizes that the state as well as the defendant has an interest in sentencing. Where the first sentence was imposed by a nonlawyer, who may be the judge in the inferior courts, his lack of legal training probably prevents his having a "deep understanding with respect to proper punishment." Moreover, it is very unlikely that the inferior court imposing the first sentence was provided with much information about defendant's background by way of probation or presentence report. These would at least be available in the superior court, even if they might not be used in small cases. As will be seen in my subsequent discussion of Pearce and the guilty plea procedure, it would be an overstatement to say that Pearce requires one fully individualized sentencing determination before its prohibitions on sentence increase take effect. However, since the presence of a legally trained jurist at the first sentencing is such an essential factor in obtaining a sentence determination that is fair to the state as well as the defendant, the absence of this factor certainly is a strong argument for permitting the superior court to increase the sentence without regard to Pearce.

Despite the significant distinctions between this procedure and that involved in Pearce, I would conclude that Pearce is applicable to any sentence increase after conviction in the superior court. The second distinction has been too easily made and accepted. The first

conviction may have been erroneous either because of the judge's lack of legal background or because of error in the usual sense. As to the third distinction, while Pearce is concerned, in part, that a sentence be individualized to reflect the interest of the state, that is not its primary concern or else the Court would have permitted a sentence increase where the first sentence was based on a plea of guilty—a clear instance, in many cases, where the defendant did not receive the maximum sentence he deserved if the state's interest had been fully considered. Moreover, if the Court had been primarily concerned with individualizing sentences, it would not have placed any limits at all on sentence increase after retrial. Pearce's broad rationale—to protect a defendant's right of appeal in order to insure him one error-free trial—should be controlling here and prohibit a sentence increase by the superior court except within the terms of Pearce.

2. Appellate Review of Sentencing

Sixteen states have established a statutory procedure for an appellate review of the sentence.[97] Six of these states clearly permit that review to result in an increased sentence.[98] Does Pearce prohibit an increase in this procedural setting? The issue might again be framed in terms of whether Pearce is applicable to any appellate right which the state gives a defendant or whether it only applies to

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[97] Alaska Stat. § 12.55.120 (Supp. 1969); Ariz. Rev. Stat. Ann. § 13-1717 (1956); Cal. Penal Code § 1237 (West 1970); Conn. Gen. Stat. Rev. §§ 51-194, 51-195, 51-196 (Supp. 1970); Fla. Stat. Ann.§ 932.52 (Supp. 1969); Ill. Rev. Stat. ch. 38, § 121-9 (Smith Hurd 1964); Iowa Code Ann. § 793.18 (1966); Ky. R. Crim. P. 11.42; Me. Rev. Stat. Ann. tit, 15 §§ 2141-44 (Supp. 1970); Md. Ann. Code art. 26,§§ 132-38 (1966); Mass. Gen. Laws Ann. ch 278,§§ 28AθD (Supp. 1969); Mont. Rev. Codes Ann. §§ 95-2211, 99-2501 to 99-2504 (1969); Neb. Rev. Stat. § 29-2508 (1964); N.Y. Code Crim. Proc.§§ 513,764 (McKinney 1958); Ore. Rev. Stat.§§ 138.050, 168.090 (1969); Tenn. Code Ann. § 40-2711 (1955).

[98] Alaska Stat. § 12.55.120 (Supp. 1969); Conn. Gen. Stat. Rev.§§ 51-194-51-195, 51-196 (Supp. 1970); Me. Rev. Stat. Ann. tit. 15,§§ 2141-2144 (Supp. 1970); Md. Ann. Code art. 26, 132-138 (1966); Mass. Gen. Laws Ann. ch. 278,§§ 28A-D (Supp. 1969); Mont. Rev. Codes Ann.§§ 95-2211, 95-2501 to 95-2504 (1969).

In four states it is not clearly stated in the statute that the sentence can be increased, but it is not expressly prohibited. Cal. Penal.Code § 1239 (West 1957); Ky. R. Crim. P. 11.42; Ore. Rev. Stat.§§ 138.050, 168. 090 (1969) Tenn. Code Ann. § 40-2711 (1955).

appeals designed to overturn a conviction based on error, constitutional or otherwise. Unlike the situation in the appeal and trial de novo, it is clear that an appeal as to a sentence does not suggest or involve an unfair conviction.

A Maryland court of special appeals has upheld a sentence increase imposed following an appeal for a review of a sentence under Maryland Code article 26, Sections 132-138 with the cryptic assertion that Pearce "applies only to new trials."[100] However, a concurring opinion contained the following analysis is support of the result:

> I think it clear that the rationale [of Pearce] is that a defendant who has been improperly convicted, whether by constitutional error or nonconstitutional error, and who has been given the right to attack the conviction, either on direct appeal or collaterally, must be free, even of the apprehension, that he will be punished for attacking the conviction. For it would be a flagrant violation of due process for a defendant, given the right to attack his conviction, to be forced to stand improperly convicted by fear of additional punishment. This rationale loses its force when there is no question of an improper conviction.
>
> No question of the validity of a conviction is involved in the right to review of sentence bestowed upon a defendant by Md. Code, Art. 26 132-138.

For the reasons discussed in the preceding section on trial de novo I believe this is a proper reading of Pearce and a correct analysis of the issue before the court.

While the possibility of such an increase in sentence places a defendant in a dilemma as to whether he should exercise the right of appeal given him as to his sentence, such a dilemma is unconstitutional under Pearce only if it might serve to discourage a challenge to an erroneous conviction. Since the appellate procedures for sentence review are not designed to challenge the conviction, Pearce's holding and rationale are not broad enough to cover a sentence increase in this procedural setting.

[100] Robinson v. Warden, 8 Md. App. 111, 258 A.2d 771 (1969).

Should Pearce be extended to prohibit sentence increases here? The American Bar Association's project on Minimum Standards for Criminal Justice has dealt with the issue of whether an appellate review of sentencing should be permitted to lead to a higher sentence in its Standards Relating to Appellate Review of Sentences.[102] The product of their discussion was substantial disagreement between the Advisory Committee and the Special Committee as to whether the appellate courts should be empowered to increase the sentence. While their disagreement preceded Pearce, Pearce contains no direct answer on this issue. I would argue that in view of the strong arguments against Pearce's applicability, and in view of the substantial split of opinion within the ABA project as to the wisdom of permitting such an increase, those states providing for an increase in connection with appellate review should continue to uphold this practice pending further Supreme Court pronouncement or legislative action.[104]

3. Guilty Pleas

Although the Pearce facts did not involve a guilty plea, in Simpson v. Rice, the companion case, the defendant had pled guilty, was sentenced to 10 years in prison, had his conviction set aside, and was retried. The second conviction resulted in an aggregate sentence of 25 years. While the Supreme Court's opinion focused on Alabama's failure to give Rice credit for time already served as part of the first sentence, they affirmed the judgment of the lower federal courts that had barred an increase in sentence on retrial even though the first sentence was imposed following a guilty plea. Moreover, Justice Black's opinion is critical of the majority for having imposed these limits where the initial sentence followed a guilty plea. Thus it is clear that Pearce's criteria as to when a sentence may be increased apply to a case where the first sentence was imposed in connection

[102] ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentencing § 3.4 (1967). The standards proposed in the Tentative Draft with amendments were approved by the House of Delegates on February 19, 1968.

[104] It is interesting to note that the First Circuit, in footnote 2 in Marano v. United States, 374 F.2d 583 (1st Cir. 1967), specifically indicated that they did not wish their decision to be understood as suggesting any impropriety in the sentence review procedure established by Massachusetts which permits a greater sentence in connection with the review.

with a guilty plea as well as when it follows conviction pursuant to a full trial and full sentencing procedure.

This is troubling! Many guilty pleas are obtained as the result of an agreement that the prosecutor will recommend to the court that defendant receive favorable treatment in sentencing. When the court follows the recommendation, as it must to make the guilty plea process work, the sentence imposed will be unlikely to reflect the kind of individualization that is the goal of modern penology. There has been no trial during which the judge has observed the defendant or heard him testify. There may not have been the kind of presentence investigation obtained in nonguilty plea cases. Even if there were such an investigation, the judge would usually be unable to make full use of information detrimental to the defendant because of the plea bargain as to sentence leniency. While there are sound justifications for this leniency when the process ends with a guilty plea, in a "*Pearce*" situation it does not. There the defendant who has pled guilty gets the plea set aside, has his case remanded, enters a not guilty plea, and is retried. If he is again convicted, *Pearce* limits his sentence to that imposed at the time of conviction pursuant to the plea, absent conduct meeting the *Pearce* criteria.

The troubling aspect of this is that the first sentence was determined and limited, in part at least, by the bargain with the defendant who gave up his right to contest guilt in exchange for favorable sentence treatment. Now he has broken his part of the bargain (the guilty plea), but under *Pearce* the state is still bound to their part of the agreement (the lenient sentence). In view of this, an argument could be made that the Court should have limited the applicability of Pearce to cases where the court imposing the first sentence had a complete opportunity to individualize the sentence. This would have insured at least one sentencing process that fully considered society's interests, as well as defendant's interest insofar as the defendant was in need of more extended incarceration for purposes of rehabilitation or his own safety. This would have exempted the guilty plea procedure from the limits of *Pearce.*

I suspect there are at least three reasons why the Court included the guilty plea process within *Pearce*. First, the court was concerned with the possibility of vindictiveness towards a defendant who gets his first conviction set aside. The guilty-plea defendant who "breaks his bargain" and gets his plea set aside would seem to be a far more

likely candidate for judicial vindictiveness than the defendant who has fought his conviction from the start. Here is a fellow who has really upset the system and is, accordingly, a far more "suitable" target for judicial wrath. Secondly, to exempt the guilty-plea defendant from *Pearce's* limits on increasing his sentencing would certainly affect his decision as to whether or not to challenge an involuntary or coerced guilty plea and limit the exercise of his right to do this by appeal or collateral remedy. Thirdly, the court may have been reluctant to take a position that involved recognition of the often camouflaged fact that the sentencing judge in the guilty plea process does not fully consider the question of how long a defendant should be incarcerated from the point of view of the state.

Conclusion

Pearce represents an attempt to resolve the issue of sentence increase on retrial between the poles of unlimited increase and no increase at all, although the opinion leans toward the latter extreme. The opinion has created many more problems than it solved. However, I believe the opinion is supported by the basic rationale presented in this article and the application of that rationale holds the key to the solution of the myriad issues that have arisen and will arise. While the acceptance of an extreme position—such as a holding absolutely banning any increase—might have avoided some of these problems, I believe the opinion's more flexible approach represents a desirable method for handling one area of the criminal law. While Pearce is a beginning, not an end, it is a beginning that provides sound guidance for the solution of the problems to follow.

Notes

1) Despite Professor Aplin's thoughtful analysis, it is important to recognize, as he of course does, that many courts have read *Pearce* restrictively, and that in those jurisdictions, a substantial risk may be incurred by upsetting a criminal conviction. In many states, for example, a harsher sentence imposed by a jury (which a defendant cannot ordinarily waive without the consent of prosecutor and court) or in a trial de novo may withstand constitutional attack. And, though Aplin argues ably that only conduct occurring after the first sentence may be used under *Pearce* to enhance a later sentence, a small number of resistant courts have found it permissible to increase the later

sentence on the basis of facts which occurred before the first sentence but which came to light only after its imposition. Moreover, his notion that subsequent conduct must be of a criminal variety to support an enhanced sentence has not yet received widespread acceptance. Accordingly, matters such as the inmate's behavior record in prison need to be considered in anticipating whether there is a substantial chance of his receiving an enlarged penalty should be successfully set aside his existing conviction. The possible use of one's prison record for Pearce purposes, incidentally, makes all the more important the need for some semblance of due process at prison disciplinary hearings.

2) With respect to "prosecutorial vindictiveness," Aplin, armed with the important district court opinion of Sefcheck v. Brewer, 301 F. Supp. 793 (D. Iowa 1969), concludes that Pearce prohibits a prosecutor from vindictively lodging additional charges against a defendant for having successfully overturned his conviction. At the least, Aplin argues, the State should be required to establish a non-vindictive justification for its action.

Once again, Aplin's approach is not universally accepted. The risk of the State filing additional charges is not an insubstantial one.*

[Reprinted from the Arizona Republic, November 7, 1969 p. 25]

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*Prosecutor accused of retaliation threats

The Yavapai County prosecutor yesterday was accused of improper threats of retaliation against a criminal defendant if the defendant persisted in appealing from his admittedly illegal prison sentence.

The defendant is Ira Datsi, a Camp Verde Yavapai Indian represented by Prescott attorney H. K. Wilhelmsen and Prof. David Wexler from the University of Arizona law college's postconviction legal assistance clinic. They asked the state Court of Appeals to nullify the prison sentence of two to threel years given Datsi in Yavapai County Superior Court for misdemeanor escape with a prior felony conviction.

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Though some, including Justice Brennan, have argued that the State ought to be precluded by double jeopardy harassment principles from withholding certain charges and saving them for a rainy day, the Supreme Court has not yet seen fit to cast in constitutional terms a rule of compulsory joinder of offenses. Ashe v. Swenson, 397 U.S. 436 (1970). If relief against such a practice is to be had, it must be sought, as Aplin suggests, under a due process Pearce rationale. Although Pearce's proscription against prosecutive vindictiveness would seem especially compelling in a situation where the defendant's challenge to his conviction did not breach a plea bargain agreement (see note 4, infra), it would be unwise at this stage to be overly confident of Pearce's reach even in that setting. Recently, for example, the University of Arizona Post-Conviction Legal Assistance Clinic filed a habeas corpus petition, without success, in a case directly on point.

To their motion to nullify the prison sentence, Yavapai County Attorney Thelton D. Beck's reply was a motion for delay in which he said:

— He would admit the sentence was erroneous if Datsi insisted on pressing his appeal for freedom from it, but hte county attorney's office then would reinstate a dismissed burglary charge against Datsi.

— On the other hand, the burglary charge would be dropped if Datsi's appeal were dropped.

Regarding Beck's motion, Wexler yesterday told the appeals court that the U.S. Supreme Court has declared that it is improper for prosecutors to "prevent through threats of retaliation the assertion of errors leading to the upsetting of a conviction."

* * *

But Presiding Judge Francis Donoirio of Department A. Division 1 of the appeals court told Beck that "your motion has some statements that may require us to comment." Donofrio and his fellow judges took the case under advisement.

Beck told the judges that he was at one time convinced that Datsi's prision sentence was a legal one for a prior offender. But he said he now agrees the sentence was erroneous.

There, the inmate had been apprehended with a pistol near the scene of a robbery and was changed with robbery, convicted, and sentenced. Three and one-half years later, his robbery conviction was reversed and he was retried for robbery and acquitted. On the eve of his robbery acquittal, he was first charged with unlawful possession of a pistol, which led to a conviction and to a four to five year sentence, beginning on the date of sentence. To the Clinic's argument that the belated filing of the pistol charge was proscribed by Pearce, the Federal District Court responded simply that "petitioner does not allege any specific facts showing that the purpose of the [pistol] charge was harassment or punishment for the use of a legal remedy. Petitioner's conclusory pleading as to the harassment and punishment involved in the [pistol] charge fails to meet the [required] specificity test." Forteson v. Eyman, Civ. No. 70-462 (D. Ariz. Nov. 2, 1970) (unreported). Though Forteson may backhandedly recognize Pearce's applicability in a case of demonstrated vindictiveness, it certainly does not follow the suggestion of Aplin or of Sefcheck v. Brewer, 301 F. Supp. 793 (D. Iowa 1969), which would have the State shoulder the burden on the vindictiveness issue.

3) It should be noted that if Pearce is not read to preclude the filing of additional charges after an inmate sets aside his conviction, those additional charges may even result in a heavier penalty than the one that had been successfully set aside. Further, unlike the situation in Pearce, where the defendant was reconvicted of the same offense and was accordingly entitled, under the double jeopardy clause, to credit for the time spent in prison under his first conviction, an inmate who sets aside his conviction only to have additional charges lodged against him is by no means clearly entitled to credit the time served under the first offense against the sentences imposed pursuant to the additional, separate offenses. In Forteson, supra, for example, the petitioner sought to have the three and one-half years served on his robbery conviction credited against the four to five year sentence imposed pursuant to the later pistol conviction, but, because of the separate nature of the two offenses, he was unable to persuade the habeas court to grant the requested relief. But cf. Summers v. Warden, 440 P. 2d 388 (Nev. 1968) (credit required where same acts constitute basis of second conviction, though charges not identical).

4) With respect to "guilty pleas," Aplin concludes, with some misgivings, that Pearce's presumptive sentence ceiling ought to apply even where the defendant entered his plea in turn for a promised sentence concession -- should the defendant later upset his plea, he should not ordinarily be subjected to a greater penalty on retrial.

Though he does not squarely address the issue, his remarks in the guilty plea section and with respect to prosecutive vindictiveness indicate that he would probably extend the thrust of Pearce to cover another variety of plea bargain situation: one where a defendant charged with several offenses will plead guilty to one of them in exchange for the dismissal of the remainder.

Arguably, Pearce might prevent the State from refiling the dismissed charges if the defendant breaks his side of the bargain and upsets his plea. Or, Pearce might be read not to preclude the refiling of the charges but might prohibit the imposition of a sentence greater than that originally imposed. But reliance on Pearce's protection in those situations is risky indeed. See Williams v. McMann, 436 F. 2d 103 (2d Cir. 1970).

Often, a plea bargain is enforced by written stipulation, signed by the defendant and his counsel, to the effect that "It is hereby stipulated by defendant and his counsel that this amended information is filed without objection for the purpose of entering a plea of guilty; it is further stipulated that if at a subsequent time, this plea be withdrawn for any reason, this information may be re-amended without objection to allege the charge contained in the original information." And a recent Arizona appellate decision is not alone in cautioning defendants that "if defendant now wants to relinquish her plea bargain and open the dismissed charges against her, she, and not this court, must so decide. Defendants involved in plea bargains should not labor under the misconception that if their bargained guilty plea is set aside they are free of all charges. At best, they may be free of their bargain." State v. Myers, 12 Ariz. App. 409, 410, 471 P. 2d 294, 295 (1970). See also United States v. Welis, 430 F. 2d 225, 230 (9th Cir. 1970).

5) In the narrow situation of pleading guilty to a lesser-included offense, one court has protected a defendant against being charged with the greater offense after he successfully attacked his plea. Mullreed v. Kropp, 425 F. 2d 1095 (6th Cir. 1970). The Mullreed court, however, did not invoke Pearce, but relied instead on the "implied acquittal" doctrine of Green v. United States, 355 U.S. 184 (1957), made binding on the States by the double jeopardy decision of Benton v. Maryland, 395 U.S. 784 (1969).

In Green, discussed supra in Justice Douglas' opinion in Pearce, the defendant had been charged with first degree murder but was convicted of murder in the second degree. After securing a reversal of

his second degree murder conviction, he was retried and this time convicted of the greater offense. The Supreme Court, on double jeopardy grounds, found the defendant to have been "impliedly acquitted" of first degree murder when, in his initial trial, the jury found him guilty of the lesser-included offense.

Mullreed drew no distinction between a trial resulting in conviction for a lesser-included offense and in a guilty plea to a lesser-included offense. Accordingly, a plea to unarmed robbery foreclosed a later prosecution of the defendant for armed robbery. But Mullreed seems so far to be law only in the Sixth Circuit. More common is the view taken by the Tenth Circuit in Ward v. Page, 424 F. 2d 491 (10th Cir. 1970), that a plea of guilty to a lesser-included offense is in no sense an acquittal of the greater offense, that jeopardy has not attached with respect to the greater offense, and that prosecution for that offense can occur without constitutional objection should the plea to the lesser offense be somehow vacated.

6) As noted in Pearce, the Fourth Circuit, through its own decisions, developed a Pearce-like doctrine even before Pearce was announced by the Supreme Court. Invoking a Pearce precursor, the Fourth Circuit in Whaley v. North Carolina, 379 F. 2d 221 (4th Cir. 1967), held unconstitutional an interesting type of resentencing. In Whaley, the defendant was sentenced on several charges, the sentence on some charges to commence at the expiration of the sentence of the "anchor" offense. When the defendant managed to overturn the anchor charge, the dependent charges were remanded for reconsideration, and the trial court enlarged them. The Fourth Circuit found the increase to be barred by the Constitution.

7) While this Note has dealt extensively with Pearce-related risks, it is important to recognize that certain risks of seeking relief from a criminal conviction involve concepts rather distinct from Pearce. For instance, though the propriety of the practice is now open to serious question on equal protection grounds in light of the recent decision in Tate v. Short, 401 U.S. 395 (1971), the prevailing practice still denies a non-bailed defendant mandatory credit on an ensuing sentence for time spent in jail pending trial. See generally Ibsen v. Warden, 471 P. 2d 229 (Nev. 1970) (trial court precluded by statute from giving credit). See also State v. Kennedy, 106 Ariz. 190, 472 P. 2d 59 (1970) (credit discretionary with trial court). In jurisdictions adhering to the traditional practice, therefore, the prospects of

overturning one's conviction must be balanced against the prospects of being unable to meet bail and the prospects of spending a considerable period of possibly non-creditable time in a county jail awaiting trial. If the time remaining to be served on the existing sentence is not considerable, the inmate may well opt to forego challenging his conviction.

Finally, though the Supreme Court in Waller v. Florida, 397 U.S. 387 (1970), prohibited successive municipal-State prosecutions, still on the books are the "separate sovereignty" cases of Bartkus v. Illinois, 359 U.S. 121 (1959) and Abbate v. United States, 359 U.S. 187 (1959). Those cases hold that the double jeopardy clause would not bar dual prosecution—by State and Federal Governments—for a criminal act — such as bank robbery or flag desecration — violative of the laws of each. In some instances it is possible, therefore, that an inmate who successfully challenges his existing conviction may find himself prosecuted by another sovereign. He may, too, find himself with a heavier penalty and without credit for time served. Though it might be possible to assert Pearce in that predicament, it is highly unlikely that a court would find prosecutive vindictiveness in the exercise of discretion by a separate sovereign.

ADDITIONAL CASE: Colten v. Kentucky, 92 S. Ct. 1953 (1972)

Mr. Justice White delivered the opinion of the Court.

This case presents two, unrelated questions. Appellant challenges his Kentucky conviction for disorderly conduct on the ground that the conviction and the State's statute are repugnant to the First and Fourteenth Amendments. He also challenges the constitutionality of the enhanced penalty he received under Kentucky's two-tier system for adjudicating certain criminal cases, whereby a person charged with a misdemeanor may be tried first in an inferior court and, if dissatisfied with the outcome, may have a trial de novo in a court of general criminal jurisdiction but must run the risk, if convicted, of receiving a greater punishment.

* * *

Kentucky, like many other States,[4] has a two-tier system for adjudicating less serious criminal cases. In Kentucky, at the option of the arresting officer, those crimes classified under state law as misdemeanors may be charged and tried in a so-called inferior court, where, as in the normal trial setting, a defendant may choose to have a trial or to plead guilty. If convicted after trial or on a guilty plea, however, he has a right to a trial de novo in a court of general criminal jurisdiction, Brown v. Hoblitzell, 307 S.W.2d 739 (Ky. 1957), so long as he applies within the statutory time. The right to a new trial is absolute. A defendant need not allege error in the inferior court proceeding. If he seeks a new trial, the Kentucky statutory scheme contemplates that the slate be wiped clean. Ky. Rule Crim. Proc. 12.06. Prosecution and defense begin anew. By the same token neither the judge nor the jury that determines guilt or fixes a penalty in the trial de novo is in any way bound by the inferior court's findings or judgment. The case is to be regarded exactly as if it had been brought there in the first instance. A convicted defendant may seek review in the state appellate courts in the same manner as a person tried initially in the general criminal court. Ky. Rev. Stat. §23.032 (1970). However, a defendant convicted after a trial or plea in an inferior court may not seek ordinary appellate review of the inferior court's ruling. His recourse is the trial de novo.

While by definition two-tier systems throughout the States have in common the trial de novo feature, there are differences in the kind of trial available in the inferior courts of first instance, whether known as county, municipal, police, or justice of the peace courts, or are

[4] E.g., Ariz. Rev. Stat. Ann. § 22-371 et seq. (1956); Ark. Stat. Ann. § 44-501 et. seq. (1947); Colo. Rules Crim. Proc. 37(f); Fla. Stat. Ann. § 932.52 et seq. (1944), F.S.A.; Ind. Code 9-713 et seq. (1971) IC 1971, 35-1-11-2; Kan. Stat. Ann. § 22-3610 et seq. (Cum. Supp. 1971); Me. Dist. Ct. Crim. Rule 37 et seq.; Md. Ann. Code Art. 5, 43 (1968 Replacement Vol.); Mich. Stat. Ann. § 28-1226 (Cum. Supp. 1972), M.C.L.A. § 774.34; Minn. Stat. §§ 488.20, 633.20 et seq. (1967); Miss. Code Ann. §§ 1201, 1202 (Supp. 1971); Mo. Sup. Ct. Rule 22, V.A.M.R.; Mont. Rev. Codes Ann. 95-2001 et seq. (1947); Neb. Stat. Ann. 29-601 et seq. (1964); Nev. Rev. Stat. 189.010 et seq. (1968); N. H. Rev. Stat. Ann. §§ 502:18, 502-A:11-12 (1968); N. H. Stat. Ann. 36-15-1 et seq. (Supp. 1971); N. C. Gen. Stat. 15-177 et seq., 20-138 (1965); N. D. Cent. Code § 33-12-40 et seq. (1960); Pa. Const. Sched. Art. 5, § 16(r) (iii), P. S.; Tex. Code Crim. Proc. Ann. Arts. 44.17, 45.10 (1966); Va. Code Ann. § 16.1-120 et seq. (1950); Wash. Rev. Code Ann. § 3.50.380 et seq. (Supp. 1971); W. Va. Code Ann. 50-18-1 et seq. (1966).

otherwise referred to. Depending upon the jurisdiction and offense charged, many such systems provide as complete protection for a criminal defendant's constitutional rights as do courts empowered to try more serious crimes. Others, however, lack some of the safeguards provided in more serious criminal cases. Although appellant here was entitled to a six-man jury, cf. Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L.Ed.2d 466 (1970), which he waived, some States do not provide for trial by jury, even in instances where the authorized punishment would entitle the accused to such tribunal. Cf. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Some, including Kentucky, do not record proceedings and the judges may not be trained for their positions either by experience or schooling.

Two justifications are asserted for such tribunals: first, in this day of increasing burdens on state judiciaries, these courts are designed, in the interest of both the defendant and the State, to provide speedier and less costly adjudications than may be possible in the criminal courts of general jurisdiction where the full range of constitutional guarantees is available; second, if the defendant is not satisfied with the results of his first trial he has the unconditional right to a new trial in a superior court, unprejudiced by the proceedings or the outcome in the inferior courts. Colten, however, considers the Kentucky system to be infirm because the judge in a trial de novo is empowered to sentence anew and is not bound to stay within the limits of the sentence imposed by the inferior court. He bases his attack both on the Due Process Clause, as interpreted in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), and on the Sixth Amendment's Double Jeopardy Clause. The issues appellant raises have produced a division among the state courts that have considered them as well as a conflict among the federal circuits.

Colten rightly reads Pearce to forbid, following a successful appeal and reconviction, the imposition of a greater punishment than was imposed after the first trial, absent specified findings that have not been made here. He insists that the Pearce rule is applicable here and that there is no relevant difference between the Pearce model and the Kentucky two-tier trial de novo system. Both, he asserts, involve reconviction and resentencing, both provide the convicted defendant with the right to "appeal" and in both—even though under the Kentucky scheme the "appeal" is in reality a trial de novo—a penalty for the same crime is fixed twice, with the same potential for an increased penalty upon a successful "appeal."

But Pearce did not turn simply on the fact of conviction, appeal, reversal, reconviction, and a greater sentence. The court was there concerned with two defendants who, after their convictions had been set aside on appeal, were reconvicted for the same offenses and sentenced to longer prison terms. In one case the term was increased from 10 to 25 years. Positing that a more severe penalty after reconviction would violate due process of law if imposed as purposeful punishment for having successfully appealed, the court concluded that such untoward sentences occurred with sufficient frequency to warrant the imposition of a prophylactic rule to ensure "that vindictiveness against a defendant for having successfully attacked his first conviction . . . [would] play no part in the sentence he receives after a new trial . . ." and to ensure that the apprehension of such vindictiveness does not "deter a defendant's exercise of the right to appeal or collaterally attack his first conviction . . . ." 395 U.S., at 725, 89 S.Ct., at 2080.

Our view of the Kentucky two-tier system of administering criminal justice, however, does not lead us to believe, and there is nothing in the record or presented in the briefs to show, that the hazard of being penalized for seeking a new trial, which underlay the holding of Pearce, also inheres in the de novo trial arrangement. Nor are we convinced that defendants convicted in Kentucky's inferior courts would be deterred from seeking a second trial out of fear of judicial vindictiveness. The possibility of vindictiveness, found to exist in Pearce, is not inherent in the Kentucky two-tier system.

We note first the obvious: that the court which conducted Colten's trial and imposed the final sentence was not the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal; and it is not the court that is asked to do over what it thought it had already done correctly. Nor is the de novo court even asked to find error in another court's work. Rather, the Kentucky court in which Colten had the unrestricted right to have a new trial was merely asked to accord the same trial, under the same rules and procedures, available to defendants whose cases are begun in that court in the first instance. It would also appear that however understandably a court of general jurisdiction might feel that the defendant who has had a due process trial ought to be satisfied with it, the de novo court in the two-tier system is much more likely to reflect the attitude of the Kentucky Court of Appeals in this case when it stated that "the inferior courts are not designed or equipped to conduct error-free trials, or to ensure full recognition of constitutional freedoms. They are courts of convenience,

to provide speedy and inexpensive means of disposition of charges of minor offenses." Colten v. Commonwealth, 467, S.W. 2d 374, 379 (Ky. 1971). We see no reason, and none is offered, to assume that the de novo court will deal any more strictly with those who insist on a trial in the superior court after conviction in the Quarterly Court than it would with those defendants whose cases are filed originally in the superior court and who choose to put the State to its proof in a trial subject to constitutional guarantees.

It may often be that the superior court will impose a punishment more severe than that received from the inferior court. But it no more follows that such a sentence is a vindictive penalty for seeking a superior court trial than that the inferior court imposed a lenient penalty. The trial de novo represents a completely fresh determination of guilt or innocence. It is not an appeal on the record. As far as we know, the record from the lower court is not before the superior court and is irrelevant to its proceedings. In all likelihood, the trial de novo court is not even informed of the sentence imposed in the inferior court and can hardly be said to have "enhanced" the sentence. In Kentucky, disorderly conduct is punishable by six months in jail and a fine of $500. The inferior court fined Colten $10, the trial de novo court $50. We have no basis for concluding that the latter court did anything other than invoke the normal processes of a criminal trial and then to sentence in accordance with the normal standards applied in that court to cases tried there in the first instance. We cannot conclude, on the basis of the present record or our understanding, that the prophylactic rule announced in Pearce is appropriate in the context of the system by which Kentucky administers criminal justice in the less serious criminal cases.

It is suggested, however, that the sentencing strictures imposed by Pearce are essential in order to minimize an asserted unfairness to criminal defendants who must endure a trial in an inferior court with less than adequate protections in order to secure a trial comporting completely with constitutional guarantees. We are not persuaded, however, that the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or any less than trials conducted in a court of general jurisdiction in the first instance, as long as the latter are always available. Proceedings in the inferior courts are simple and speedy, and, if the results in Colten's case are any evidence, the penalty is not characteristically severe. Such proceedings offer a defendant the opportunity to learn about the prosecution's case and, if he chooses, he need not reveal his own. He may also

plead guilty without a trial and promptly secure a de novo trial in a court of general criminal jurisdiction. He cannot, and will not, face the realistic threat of a prison sentence in the inferior court without having the help of counsel, whose advice will also be available in determining whether to seek a new trial, with the slate wiped clean, or to accept the penalty imposed by the inferior court. The State has no such options. Should it not prevail in the lower court, the case is terminated, whereas the defendant has the choice of beginning anew. In reality his choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court. We cannot say that the Kentucky trial de novo system, as such, is unconstitutional or that it presents hazards warranting the restraints called for in North Carolina v. Pearce, particularly since such restraints might, to the detriment of both defendant and State, diminish the likelihood that inferior courts would impose lenient sentences whose effect would be to limit the discretion of a superior court judge or jury if the defendant is retried and found guilty.

Colten's alternative contention is that the Double Jeopardy Clause prohibits the imposition of an enhanced penalty upon reconviction. The Pearce Court rejected the same contention in the context of that case, 395 U.S., at 719-720, 89 S.Ct. at 2077-2078. Colten urges that his claim is stronger because the Kentucky system forces a defendant to expose himself to jeopardy as a price for securing a trial that comports with the Constitution. That was, of course, the situation in Pearce, where reversal of the first conviction was for constitutional error. The contention also ignores that a defendant can circumnavigate the inferior court simply by pleading guilty and erasing immediately thereafter any consequence which would otherwise follow from tendering the plea.

The judgment of the Kentucky Court of Appeals is affirmed.

Affirmed.

[The dissenting opinion of Justice Marshall is omitted, as is Justice Douglas' dissent on other grounds].

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