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Fifth Amendment--Sentence Enhancement: Rethinking the Pearce Prophylactic Rule

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FIFTH AMENDMENT—SENTENCE ENHANCEMENT: RETHINKING THE *PEARCE* PROPHYLACTIC RULE

Wasman v. United States, 104 S. Ct. 3217 (1984).

I. INTRODUCTION

In *Wasman v. United States*,[1] the Supreme Court held that imposing a harsher sentence on a defendant following a successful appeal and retrial does not violate the due process clause of the fifth amendment if the court imposing the second sentence considered an intervening criminal conviction for acts committed prior to the original sentencing.[2] The Court's holding is consistent with the Court's earlier determination in *North Carolina v. Pearce*[3] that a sentence enhancement offends due process only if the sentencing body is motivated by actual vindictiveness or if the enhancement will lead to the apprehension of vindictiveness.[4] The Supreme Court's decision in *Wasman*, however, is not consistent with the Court's prior concerns with free and unfettered access to appeals.[5]

This Note argues that for the purposes of justifying an enhanced sentence, a defendant's conduct subsequent to the original sentencing can be distinguished logically from intervening criminal convictions for defendant's conduct prior to the original sentencing. This Note recognizes, however, that this distinction is grounded in policy and not law.

The Supreme Court's determination that events such as intervening criminal convictions may justify sentence enhancements in-

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[1] 104 S. Ct. 3217 (1984).

[2] *Id.* at 3225.

[3] 395 U.S. 711 (1969).

[4] *Id.* at 725.

[5] *See, e.g.*, Green v. United States, 355 U.S. 184, 193 (1957) (law should not place defendants in dilemma of having to take a "desperate chance" and barter their "constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction"); Chichos v. Indiana, 385 U.S. 76, 82 (1966) (Fortas, J., dissenting) ("Fourteenth Amendment's requirement of due process, in my view, certainly and clearly includes a prohibition of this kind of heads-you-lose, tails-you-lose trial and appellate process," in that it has the effect of burdening and penalizing the exercise of the right to seek review of criminal conviction).

creases the "opportunity for unfairness."[6] It will allow vindictive judges to retaliate against criminals who have successfully appealed their convictions by enhancing the criminals' sentences. Judges can then justify the sentence enhancements by citing the criminals' conduct that occurred before the criminals' original sentencing. The ability of judges to mask their true intentions behind events such as intervening convictions may cause defendants to fear vindictiveness and ultimately may chill defendants' decisions to appeal their convictions.

II. BACKGROUND

A well-established part of American jurisprudence is that the government may retry defendants who have succeeded in having their convictions set aside on appeal.[7] The Supreme Court first approved of sentence enhancement after reconviction in the landmark case of *Stroud v. United States*.[8]

Robert Stroud was convicted of the murder of a prison guard and sentenced to be hanged.[9] The United States District Attorney confessed error, and the Circuit Court of Appeals granted Stroud a new trial.[10] The jury at the second trial found Stroud guilty of murder, but recommended against capital punishment.[11] On appeal, the district court reversed the judgment once more for error, and Stroud was tried a third time.[12] The jury found Stroud guilty one last time, but made no recommendation for his sentence. The judge sentenced Stroud to death.[13] The Supreme Court affirmed the trial court's imposition of the death penalty, finding that the sentence enhancement did not violate the defendant's constitutional right against double jeopardy.[14] The Court relied on a waiver theory and reasoned that because the defendant initiated the action to reverse the original conviction, he could claim no right to the original

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6 Patton v. North Carolina, 381 F.2d 636, 641 (4th Cir. 1967), *cert. denied*, 390 U.S. 905 (1968).

7 *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 719-20 (1969) (this is the seminal sentence enhancement case); United States v. Tateo, 377 U.S. 463, 465 (1963) (fifth amendment double jeopardy provision does not preclude government from retrying a defendant whose conviction is set aside because of trial error).

8 251 U.S. 15 (1919).

9 *Id.* at 16. *See also* T. GADDIS, BIRDMAN OF ALCATRAZ (1955) (biography of the extraordinary life of Robert Stroud, who was more popularly known as the Birdman of Alcatraz).

10 *Stroud*, 251 U.S. at 16-17.

11 *Id.* at 17.

12 *Id.*

13 *Id.*

14 *Id.* at 18.

sentence.[15]

Although the Supreme Court has never overruled *Stroud*, the Supreme Court has held, in a case with a very similar fact pattern, that the constitutional guarantee against double jeopardy will be violated if a defendant is found guilty of second degree murder in the first trial and found guilty of first degree murder in the second trial.[16] The Supreme Court in *Green v. United States* held that a conviction for second degree murder is an implied acquittal of first degree murder.[17] The Court found that it would constitute double jeopardy to force the defendant to stand trial for first degree murder after having been acquitted of that offense.[18] The *Green* decision effectively eliminated sentence enhancements where the judge justified the enhancement by citing new findings of fact that may lead to conviction of a greater offense.

The lawfulness of sentence enhancements was questioned following the retroactive application of the Supreme Court's landmark decision in *Gideon v. Wainwright*,[19] which granted new trials to all felons who were denied their right to counsel at trial.[20] Following *Gideon*, many petitioners were retried and reconvicted. Courts sentenced many petitioners to longer prison terms than they had received at their first trial or denied petitioners credit for time already served.[21] Other petitioners, fearing increased sentences following retrial, did not exercise their right to new trials.[22]

The judiciary, the American Bar Association, and the academic community responded to what they perceived to be an unjust chilling of prisoners' rights to free and unfettered appeals. One state judiciary reacted by declaring sentence enhancements following reconviction unconstitutional,[23] while others found them simply to be against judicial policy.[24] The American Bar Association Advisory

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15 *Id.*

16 Green v. United States, 355 U.S. 184 (1957).

17 *Id.* at 190-91.

18 *Id.* at 190.

19 372 U.S. 335 (1963).

20 *Id.* at 345.

21 In Florida alone, over 5500 inmates had filed petitions seeking new trials within 20 months of the Supreme Court decision in *Gideon*. Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606, 606 n.4 (1965); Comment, *Constitutional Law: Increased Sentence and Denial of Credit on Retrial Sustained Under Traditional Waiver Theory*, 1965 DUKE L.J. 395, 395 n.2.

22 *See infra* note 67.

23 People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963) (sentence enhancements violated state double jeopardy clause).

24 State v. Holmes, 281 Minn. 294, 161 N.W.2d 650 (1968) (fundamentally unfair to discourage appeals through threat of enhanced sentence); State v. Wolf, 46 N.J. 301, 216 A.2d 586 (1966) (sentence enhancements violate public policy of judicial adminis-

Committee on Sentencing and Review,[25] as well as legal commentators,[26] published articles and studies condemning the injustice of placing defendants in a dilemma with regard to their right to appeal. The Bar Association Committee and legal commentators called for legislation to eliminate sentence enhancements altogether.[27]

The Supreme Court considered the question of the constitutionality of sentence enhancements in *North Carolina v. Pearce*.[28] A North Carolina court convicted Pearce of assault with intent to commit rape and sentenced him to prison for a term of twelve to fifteen years.[29] Several years later, Pearce appealed on the ground that the court had acted unconstitutionally by admitting an involuntary confession into evidence.[30] Pearce was granted a new trial, reconvicted, and given a new sentence. The new sentence, when added to the time that Pearce had already served in prison, amounted to a sentence greater than the one that originally had been imposed.[31] Pearce then filed a habeas corpus petition alleging that the longer sentence imposed upon reconviction was "unconstitutional and void."[32]

The United States Supreme Court in *Pearce* rejected the argument that it was dealing with increases in existing sentences. The Court instead reasoned that the new trial resulted in a new sentence because it eliminated the first sentence.[33] The Court held, moreover, that neither the double jeopardy provision nor the equal protection clause imposes an absolute bar to a harsher sentence upon

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tration); State v. Turner, 247 Or. 301, 429 P.2d 565 (1967) (adopting theory against sentence enhancements espoused by New Jersey).

25 *See* STANDARDS RELATING TO POST-CONVICTION REMEDIES § 6.3 (Tent. Draft 1967) (calling for complete elimination of sentence enhancements).

26 *See* Honigsberg, *Limitations Upon Increasing a Defendant's Sentence Following a Successful Appeal and Reconviction*, 4 CRIM. L. BULL. 329 (1968) (judges' discretion at second trial should be limited to the imposing of an equal or lesser sentence than that given the accused at first trial); Van Alstyne, *supra* note 21 (seminal article arguing for the prohibition of sentence enhancements based on constitutional grounds); Comment, *supra* note 21 (theory that defendant waives all rights to first sentence not sufficient to justify sentence enhancements); Note, *Increased Sentence Upheld Following Invalidation of a Sentence Imposed in Defendant's Absence*, 1966 UTAH L. REV. 280 (plea for legislation to eliminate sentence enhancements); Comment, *Increased Sentence Upon Retrial*, 25 WASH. & LEE L. REV. 60 (1968) (endorsing equal protection argument as sufficient to eliminate sentence enhancements).

27 *See supra* notes 25-26.

28 395 U.S. 711 (1969).

29 *Id.* at 713.

30 *Id.*

31 *Id.*

32 *Id.* at 713-14.

33 *Id.* at 722.

reconviction.[34] Thus, the Court held that the Constitution does not preclude trial judges from using their discretion to impose new sentences based upon the defendants' "life, health, habits, conduct and mental and moral propensities."[35] Judges may base new sentences on information that has arisen since the original sentences.[36]

The Court, however, found that penalizing those who choose to exercise their constitutional rights is patently unconstitutional because it violates due process.[37] The Court held that due process of law demands 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."[38] In addition, because the fear of vindictiveness may deter defendants from freely exercising their right to appeal, due process also demands that defendants be free from the apprehension that sentencing judges will retaliate.[39]

The Court in *Pearce* then established a presumption of vindictiveness and a prophylactic rule to assure the absence of a retaliatory motivation in the harsher sentence. The Court held that unless the reason for the judge's imposition of the more severe sentence affirmatively appears, the harsher sentence will create a presumption of vindictiveness and will violate the defendant's right to due process.[40] The Court also decided that the judge's 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."[41]

The Second[42] and Ninth[43] Circuits interpreted the prophylactic rule literally and held that conduct predating the original sentencing does not satisfy the *Pearce* standard and will not overcome the presumption of vindictiveness. In *Wasman v. United States*, however, the

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[34] *Id.* at 723. Appellant argued that because the court did not have the authority to increase the sentences of those convicts who did not appeal, courts violated the equal protection clause when they enhanced the sentences of those who did appeal.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 724.

[38] *Id.* at 725.

[39] *Id.*

[40] *Id.* at 726. The Court concluded:

> Whenever a judge imposes a more severe sentence upon a defendant after a new trial, 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*.

Id. (emphasis added).

[41] *Id.*

[42] *See* United States v. Markus, 603 F.2d 409 (2d Cir. 1979).

[43] *See* United States v. Williams, 651 F.2d 644 (9th Cir. 1981).

Eleventh Circuit rejected the other two circuits' application of the *Pearce* rule.[44] The Eleventh Circuit held that because the sentence enhancement was neither motivated by judicial vindictiveness nor reasonably perceived as being retaliatory, it did not infringe on Wasman's right to due process even though the conduct considered by the sentencing court predated the original sentence.[45] In affirming the Eleventh Circuit's decision in *Wasman*, the Supreme Court provided lower courts with additional guidance in applying the *Pearce* prophylactic rule.

III. FACTS OF *WASMAN*

Milton R. Wasman, an attorney, was convicted in federal district court of "willfully and knowingly" making a false statement in an application for a United States passport.[46] At the sentencing hearing, the district court judge informed the parties that although he always considered prior convictions when sentencing a defendant, he did not consider pending charges.[47] The judge feared that if the pending charges led to a conviction, the defendant would receive a "pyramided" sentence when sentenced for the second offense.[48] Consequently, the district court judge did not consider pending mail fraud charges against Wasman when he sentenced him to two years in prison. The judge, however, suspended all but six months of the sentence in favor of three years of probation.[49]

Wasman appealed his conviction.[50] While his appeal of the passport fraud charges was pending, Wasman entered into a plea bargain regarding the mail fraud charges.[51] Wasman pleaded nolo contendere to a charge of possession of false certificates of deposits. In exchange for the plea, the government dropped the mail fraud charge.[52] Meanwhile, the court of appeals reversed and remanded the passport fraud conviction because the trial court abused its discretion when it excluded relevant evidence about Wasman's motive.[53] Wasman was retried and reconvicted in connection with the

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44 700 F.2d 663 (11th Cir. 1983).

45 *Id.*

46 Wasman v. United States, 104 S. Ct. 3217, 3219 (1984); *see* 18 U.S.C. § 1542 (1982).

47 *Id.*

48 *Id.* The judge feared that if he based his sentence on pending mail fraud charges and the judge at the trial for mail fraud based his sentence on the passport fraud conviction, there would be a duplicative punishment for the same offense. *Id.*

49 *Id.*

50 *Id.* The decision leading to remand is reported at 641 F.2d 326 (5th Cir. 1981).

51 *Wasman*, 104 S. Ct. at 3219.

52 *Id.*

53 United States v. Wasman, 641 F.2d 326, 329-30 (5th Cir. 1981).

passport fraud charges.[54]

The district court judge who reheard the passport fraud case then sentenced Wasman to two years in prison without suspending any part of the sentence.[55] The judge explained "[t]hat the reason for an enhanced sentence was to take into account Wasman's conviction for possession of counterfeit certificates of deposits which arose after his sentence following the first trial . . . . At this time he comes before me with two convictions. Last time he came before me with one conviction."[56]

Wasman appealed the increased sentence to the Eleventh Circuit Court of Appeals. The Eleventh Circuit affirmed, holding that the enhanced sentence "was based on objective, factual new evidence not previously considered, that it was neither motivated by judicial vindictiveness, nor reasonably perceivable as having been so motivated."[57] The Eleventh Circuit thereby declined to join the Second and Ninth Circuits in holding that the *Pearce* rule requires that a sentence be enhanced only for a defendant's misbehavior between trials.[58]

The Supreme Court granted certiorari[59] to resolve this conflict among the circuits, and to decide whether the rule set down in *North Carolina v. Pearce* and the due process clause of the fifth amendment demand that a harsher sentence following retrial be justified only by misbehavior of the defendant subsequent to the first trial.[60]

IV. Decision of the Supreme Court

Chief Justice Burger announced the opinion of the Court affirming the judgment of the Eleventh Circuit.[61] The Chief Justice began by recognizing the well-settled principle that a judge or other sentencing authority must be given wide discretion in determining appropriate sentences.[62] Chief Justice Burger also noted that it is

54 *Wasman*, 104 S. Ct. at 3219.

55 *Id.* at 3219-20.

56 *Id.*

57 *Wasman*, 700 F.2d at 670.

58 *See supra* notes 42-43 and accompanying text.

59 104 S. Ct. 334 (1983).

60 *Id.*

61 Wasman v. United States, 104 S. Ct. 3217 (1984). Although the Court affirmed the judgment of the Eleventh Circuit, the Justices disagreed as to the proper rationale. Chief Justice Burger announced the opinion of the Court, writing for himself, Justice White, Justice Rehnquist, and Justice O'Connor. Justices Powell and Blackmun joined in part and concurred in the judgment. Justices Brennan and Stevens concurred only in the judgment.

62 *Wasman*, 104 S. Ct. at 3220 (citing Williams v. New York, 337 U.S. 241, 247 (1949)).

"highly relevant—if not essential" that the sentencing authority be permitted to consider all pertinent information about the defendant's life and characteristics.[63] This enables the court to fulfill its objective of setting a sentence that not only fits the offense, but also the individual defendant.[64]

Chief Justice Burger, however, recognized that a sentencing authority's discretion is limited.[65] The Supreme Court determined in *North Carolina v. Pearce* that judges violate due process of law if the judges increase defendants' sentences after reconviction as retaliation for defendants' successful attack on their first convictions.[66] The *Pearce* Court further reasoned that fear of retaliation might chill defendants' decisions to appeal or collaterally attack their convictions.[67] The *Pearce* Court thus held that judicial conduct that leads to an apprehension of vindictiveness also violates due process.[68]

Having set the stage for his analysis with a discussion of the goals of the *Pearce* decision, the Chief Justice then discussed five Supreme Court cases in which vindictiveness, either judicial or prosecutorial, was at issue.[69] From his analysis of these cases and

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[63] *Id.* at 3220.

[64] *Id.*

[65] *Id.*

[66] In *Pearce*, the Court held that penalizing defendants for exercising their constitutional rights is a flagrant violation of defendants' rights. 395 U.S. at 724. Although the Supreme Court has never required that the states establish access to appellate review, due process demands that defendants be given open and equal access once appellate review is established. *Id.*

[67] *Id.* The Court in *Pearce* believed that the defendant's apprehension of retaliation by the sentencing judge takes away defendant's free access to appeals as effectively as does retaliation itself. The Court reprinted in the footnotes this disturbing letter received by one trial judge as evidence of the apprehension of retaliation that pervades the jailhouse:

> Dear Sir:
>
> I am in the Mecklenburg [sic] County Jail. Mr. ——— chose to retry 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 will all probility [sic] I will receive a heavier sentence than before as you know Sir my first sentence at the first trile [sic] was 20 to 30 years. I know it is usually the courts prosedure [sic] to give a larger sentence when a new trile [sic] is granted I guess this is to discourage Petitioners.
>
> Your Honor, I don't want a new trile [sic] I am afraid of more time . . . .
>
> Your Honor, I know you have tried to help me and God knows I appreceate [sic] this but please sir don't let the state retry me if there is any way can prevent it.
>
> Very truly yours,

Id. at 725 n.20 (quoting Patton v. North Carolina, 256 F. Supp. 225, 231 n.7 (W.D.N.C. 1966), *aff'd*, 381 F.2d 636 (4th Cir. 1967), *cert. denied*, 390 U.S. 905 (1968)).

[68] *Id.* at 725.

[69] The five cases are United States v. Goodwin, 457 U.S. 368 (1982) (no need for *Pearce* presumption of vindictiveness where it is highly unlikely that a "prosecutor will respond to a defendant's pre-trial demand for a jury trial by bringing charges not in the

the *Pearce* decision, Chief Justice Burger concluded that only sentence enhancements that are motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights offend due process.[70] Chief Justice Burger, therefore, concluded that any "language in *Pearce* suggesting that an intervening conviction for an offense committed prior to the original sentencing may not be considered upon sentencing after retrial, is inconsistent with the *Pearce* opinion as a whole."[71] Chief Justice Burger stated that there is no logical distinction between "events" and "conduct" of the defendant "insofar as the kind of information that may be relied upon to show a nonvindictive motive."[72]

Chief Justice Burger agreed with the circuit court that "[n]o reason exists for applying a phrase in the *Pearce* guidelines to circumstances bearing no relation to the purpose of the guidelines."[73] Finding that the trial court judge affirmatively disclosed the reason for the enhanced sentence, and satisfied that the enhanced sentence was not in retaliation for the defendant's appeal, Chief Justice Burger voted to affirm the judgment of the circuit court.[74]

V. ANALYSIS

This Note does not contest the Supreme Court's consistent determination that sentence enhancements are constitutional. This Note, however, contends that the Supreme Court lost an opportunity in *Wasman v. United States* to declare sentence enhancements unlawful and void as against federal public and procedural policies.[75]

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public interest"); Brodenkircher v. Hayes, 434 U.S. 357 (1978) (for prosecutor to threaten and then seek conviction on greater charge if defendant does not plead guilty is not "punishment or retaliation" offensive to due process); Blackledge v. Perry, 417 U.S. 21 (1974) (potential for prosecutorial vindictiveness is so great that due process requires a "rule analogous to that of the *Pearce* Case"); Chaffin v. Stynchombe, 412 U.S. 17 (1973) (Court rejected *Pearce* presumption of vindictiveness in jury sentencing case where possibility of vindictiveness on part of jury was considered "de minimis"); Colten v. Kentucky, 407 U.S. 104 (1972) (small likelihood of vindictiveness in two-tiered trial de novo system precludes necessity of prophylactic rule).

70 *Wasman*, 104 S. Ct. at 3223. On this point, Chief Justice Burger disagreed with Justices Powell and Blackmun. Justices Powell and Blackmun emphasized that the *Pearce* presumption is concerned with not only protecting against actual vindictiveness but also protecting "against reasonable apprehension of vindictiveness that could deter a defendant from appealing a first conviction." *Id.* at 3226 (Powell, J., concurring in part and concurring in the judgment).

71 *Wasman*, 104 S. Ct. at 3225.

72 *Id.*

73 *Id.* (citing *Wasman*, 700 F.2d at 688).

74 *Id.*

75 When the Court decided *North Carolina v. Pearce*, it granted certiorari on the issue of the constitutionality of sentence enhancements. Because *Pearce* was a state case involving state law, the Supreme Court did not have jurisdiction to impose its notion of

This Note argues, moreover, that sentence enhancements serve no interest of the state[76] and create an opportunity for unfairness to defendants.[77]

The *Wasman* decision expands the scope of the information that may be relied upon by a judge to justify an increased sentence after retrial and reconviction. The decision effectively declares that any new information regarding the "life, health, habits, conduct and mental and moral propensities" of the defendant may justify the imposition of a harsher sentence on retrial.[78] In addition, the *Wasman* decision clarifies that it does not matter when the events underlying the new information occurred as long as the new information is compelling enough to overcome a presumption of vindictiveness.[79]

The decision to allow any new information to justify harsher sentences makes it more difficult for reviewing courts to determine the true motivations of the trial court judges.[80] To lessen the prisoner's difficult task of proving improper motivation, the *Pearce* Court required that the reviewing court presume that the trial court judge increased the prisoner's sentence in retaliation for the appeal.[81] *Wasman*, however, effectively allows trial court judges to point to any new information to overcome the presumption of vindictiveness. Thus, reviewing courts are in the untenable position of trying to determine if new information is the reason for the judges' decisions to increase defendants' sentences or is just a mask for judges' improper motivations. Reviewing courts also are in the distasteful position of having to determine judges' real and possibly subconscious motivations.[82] Because judges can point to any new evidence to justify enhanced sentences, presumably even new testimony at trial,[83] sentencing judges first can determine that sentences

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public policy on the State of North Carolina. *Wasman*, however, involved a federal defendant and a question about the administration of the federal court system. The Supreme Court, therefore, had the opportunity to outlaw sentence enhancements on policy grounds.

76 *See infra* notes 91-94 and accompanying text.

77 *See infra* notes 80-84 and accompanying text.

78 *Wasman*, 104 S. Ct. at 3224 (quoting Williams v. New York, 337 U.S. 241, 245 (1949)).

79 *Id.* at 3224.

80 *See* Patton v. North Carolina, 381 F.2d 636, 641 (4th Cir. 1967), *cert. denied*, 390 U.S. 905 (1968). Allowing a judge to review the past to justify sentence enhancements places a heavy burden on an appellate court to assure itself that the judge was not motivated, even subconsciously, by vindictiveness. The difficulty in ascertaining a judge's true motivations makes reviewing a trial court judge's motivations "impossible and most distasteful" for the appellate courts. *Id.*

81 *Pearce*, 395 U.S. at 725-26.

82 *See supra* note 80.

83 *See* People v. Payne, 18 Mich. App. 42, 170 N.W.2d 523 (1969), *rev'd*, 386 Mich.

should be greater and then can find affirmative reasons to justify the enhancement.[84] Therefore, allowing sentencing judges to find after-the-fact justifications for harsher sentences creates an opportunity for unfairness and an apprehension of vindictiveness.

Of course, most of these difficulties in evaluating judges' motivations are also present if judges can justify enhancements only on the defendants' conduct subsequent to the first trial. The major functional difference between justifying enhancements on conduct of the defendants subsequent to the first trial rather than on new information about conduct prior to the first trial is that the former allows defendants to control their own destiny.[85] Defendants have within their own power the ability to prevent increases in their sentences. If defendants are model prisoners, they are guaranteed that their sentences upon reconviction will be no greater than their original sentences. Furthermore, defendants' own poor conduct will create any "dilemma" the defendants face when deciding to appeal or to forego appeal because of fear of an enhanced sentence.[86]

Under *Wasman*, however, defendants who have done nothing wrong since their first trial may be worse off because of their appeal. Judges have the discretion to enhance sentences based on any new facts about defendants or their offenses. Giving judges such broad discretion destroys the effectiveness of the *Pearce* prophylactic rule in eliminating vindictiveness. Further, allowing judges to justify enhancements based on events that are past history may lead defendants to perceive that judges act vindictively and may deter their free and unfettered use of the appellate system.[87]

In 1966, before *Pearce*, the Supreme Court of New Jersey declined to eliminate sentence enhancements on constitutional grounds.[88] The New Jersey Supreme Court instead outlawed sentence enhancements based on "procedural policies which are of the

84, 191 N.W.2d 375 (1971), *rev'd*, 412 U.S. 47 (1973) (defendant did not testify at first trial but testified at retrial; defendant's sentence enhanced on basis of new opinion of defendant formed because of his testimony at new trial).

84 One commentator goes so far as to say that any judge worth "his salt" can uncover new evidence about a defendant's conduct prior to the first trial to justify an enhancement. Aplin, *Sentence Increases on Retrial After* North Carolina v. Pearce, 39 U. CIN. L. REV. 427 (1970).

85 Aplin, *supra* note 84, at 435.

86 *Id.* at 436.

87 *See, e.g.*, State v. Eden, 163 W. Va. 370, 382, 256 S.E.2d 868, 875 (1979) ("Increased sentencing upon reconviction after successful prosecution of an appeal inherently gives rise to a fear of harsher penalties and retribution which burdens or chills the defendant's right to appeal and should not be permitted in any circumstances.")

88 State v. Wolf, 46 N.J. 301, 216 A.2d 586 (1966).

essence of the administration of criminal justice."[89] This Note contends that the United States Supreme Court in the *Wasman* decision should have followed the precedent of New Jersey and the courts that have joined New Jersey in abrogating sentence enhancement.[90]

At least one state that rejected sentence enhancements agree that enhanced sentences after retrial are not necessary to fulfill the criminal justice system's goal of having the punishment fit the person as well as the offense.[91] This state recognizes that additional punishment can be provided to defendants without resorting to sentence enhancements.[92] If defendants commit additional criminal acts, they are subject to trial and conviction on the new offense and may be subject to additional penalties stemming from habitual criminal statutes.[93] Furthermore, if criminals misbehave while in prison, they will lose good behavior sentence reduction time that will ultimately result in a more severe sentence.[94]

Intervening criminal convictions, as in the *Wasman* case, would make the defendant eligible for more penalties under habitual criminal statutes without resorting to increasing punishment on reconviction for the original offense.[95] This has the same effect as a sentence enhancement—more actual time served in prison—without putting the defendant in a dilemma as to whether or not to appeal and risk an enhanced sentence.

The Supreme Court in *Wasman* had an opportunity, while deciding a federal criminal question, to rule on the public policy of the federal courts in the administration of criminal justice.[96] The Court, however, failed to consider the approach of state courts, which have realized (1) that reviewing the motivation of trial court judges is nearly impossible and very distasteful;[97] (2) that the criminal justice system provides additional punishment for additional misbehavior;[98] (3) that all sentence enhancements lead to the appearance of vindictiveness and chill a defendant's right to appeal;[99] and (4) that justifying sentence enhancements on any new information increases

89 *Id.* at 590.

90 *See, e.g.*, State v. Turner, 247 Or. 301, 429 P.2d 565 (1967).

91 *Id.* at 570-71.

92 *Id.* at 571.

93 *Id.*

94 *Id.*

95 *Id.*

96 *See supra* note 75.

97 *See supra* note 80.

98 *See supra* notes 92-94 and accompanying text.

99 *See supra* note 87 and accompanying text.

the opportunity for unfairness.[100] The failure of Wasman's counsel to bring policy arguments to the attention of the Court is in part to blame for the Court's failure to take notice of states that have rejected sentence enhancements. Nevertheless, the policy of the federal courts that allows sentence enhancements provides few benefits that are not already guaranteed by the criminal justice system. And yet sentence enhancements place defendants in a desperate dilemma: they must decide whether to appeal and risk an increased sentence, or to accept the trial court's determination. The Supreme Court could and should have taken notice of the activities of the state courts on this issue and could have eliminated sentence enhancements on policy grounds.

VI. CONCLUSION

The Supreme Court in *Wasman v. United States* reiterated its opinion that enhancing a defendant's sentence after retrial does not violate due process of law if the sentencing judge is not motivated by actual vindictiveness when enhancing the sentence. The Court, moreover, provided needed direction in the application of the prophylactic rule established in *Pearce* by determining the scope of its usage.

The Supreme Court, however, centered its opinion on the constitutional issues and failed to consider the public policy underlying its decision. The Court in *Wasman*, in contrast to *North Carolina v. Pearce*, was not constrained by jurisdictional limitations from eliminating sentence enhancement altogether on policy grounds. The Court should have considered state court decisions eliminating sentence enhancements and would have been wise to follow the state court lead in totally eliminating sentence enhancements.

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100 *Patton*, 381 F.2d 636 at 641.