Journal of Criminal Law and Criminology

Volume 77 | Issue 3 Article 14

1987

Reexamining Judicial Vindictiveness--Fourteenth Amendment: Texas v. McCullough, 106 S. Ct. 976 (1986)

Glenn H. Kobayashi

0091-4169/86/7703-867
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 77, No. 3
 Printed in U.S.A.

FOURTEENTH AMENDMENT—REEXAMINING JUDICIAL VINDICTIVENESS

Texas v. McCullough, 106 S. Ct. 976 (1986).

I. INTRODUCTION

The United States Supreme Court held in *North Carolina v. Pearce*[1] that a presumption of judicial vindictiveness attaches to a sentence imposed upon reconviction which is longer than the original sentence and imposed by the same trial court judge. If vindictiveness and/or retaliation motivates the imposition of a more severe sentence on reconviction, that sentence is imposed in violation of the fourteenth amendment guarantee of due process of law.[2] On appeal, a reviewing court will invalidate the sentence.[3] A sentencing judge may nevertheless rebut a presumption of judicial vindictiveness with reasons affirmatively appearing from the record and based upon the defendant's conduct after the original sentencing proceeding.[4] A presumption of judicial vindictiveness controls as a matter of law in the absence of such rebutting evidence.[5]

Since *Pearce*, the Court has reexamined the constitutionality of

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1 395 U.S. 711 (1969).

2 "No State . . . shall deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § I.

3 *Pearce*, 395 U.S. at 723-24. *See also* Texas v. McCullough, 106 S. Ct. 976 (1986)(a presumption of judicial vindictiveness is inappropriate if a different sentencing authority imposed the harsher sentence); Wasman v. United States, 468 U.S. 559 (1984)(a presumption of judicial vindictiveness is adequately rebutted by reasons based on an intervening conviction between original sentencing proceeding and new sentence); Chaffin v. Stynchombe, 412 U.S. 17 (1973)(harsher resentencing by a jury is not presumptively vindictive); Colten v. Kentucky, 407 U.S. 104 (1972)(harsher resentencing on trial de novo does not violate due process of law). *Pearce* became the first Supreme Court decision to limit the prerogative of imposing a harsher sentence on retrial, a prerogative which the Court recognized with no restrictions in Stroud v. United States, 251 U.S. 15 (1919). Some federal circuits had, prior to *Pearce*, already begun limiting the power to impose a harsher sentence on reconviction. *See, e.g.*, United States v. Coke, 404 F.2d 836 (2d Cir. 1968); United States v. White, 382 F.2d 445 (7th Cir. 1967); United States v. Russell, 378 F.2d 808 (3d Cir. 1967); Marano v. United States, 374 F.2d 583 (1st Cir. 1967).

4 *Pearce*, 395 U.S. at 726.

5 *See, e.g.*, *Wasman*, 468 U.S. at 569-70.

harsher resentencing under various other circumstances.[6] Most recently, in *Texas v. McCullough*,[7] the Court considered whether or not to presume judicial vindictiveness under *Pearce* even though a different sentencing authority imposed the more severe sentence on reconviction.[8] The Court held that the imposition of a more severe sentence by a different sentencing authority on reconviction does not create a presumption of judicial vindictiveness[9]—a presumption which imposes a burden upon the sentencing judge to justify the increased penalty.[10] Moreover, because the petitioner in *McCullough* failed to otherwise show actual vindictiveness, the Court did not question the constitutionality of the harsher sentence.[11]

The Court in *McCullough* concluded that a more severe sentence on reconviction does not automatically trigger a presumption of judicial vindictiveness.[12] Instead, a reviewing court must weigh the facts of each case to determine whether or not the probability of judicial vindictiveness warrants such a presumption.[13] Unless the facts warrant, the law does not require a trial court judge to justify an increased sentence.[14]

The *Pearce* Court failed to establish a clear standard for determining when a presumption of judicial vindictiveness is appropriate. The *Pearce* Court, therefore, left trial court judges inadequately informed of their obligations during resentencing under *Pearce*.[15] This Note identifies the rough contours of the standard for determining when a presumption of judicial vindictiveness is applicable. Next, this Note ascertains the present scope of the *Pearce* rule[16] and

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6 *See supra* note 3 and accompanying text.

7 106 S. Ct. 976 (1986).

8 In *McCullough*, the jury fixed the defendant's original sentence; the presiding judge at the first trial subsequently imposed the more severe sentence on reconviction. *McCullough*, 106 S. Ct. at 978.

9 *Id.* at 979-80 ("The facts of this case provide no basis for a presumption of vindictiveness."). *See also infra* notes 104 & 106 and accompanying text.

10 *Pearce*, 395 U.S. at 726.

11 *McCullough*, 106 S. Ct. at 979. *See also Wasman*, 468 U.S. at 567-68; United States v. Goodwin, 457 U.S. 368, 384 (1982).

12 *E.g.*, *Wasman*, 468 U.S. 559 (1984); *Chaffin*, 412 U.S. 17 (1973) (a harsher sentence by a jury on reconviction does not deprive a defendant of due process of law); *Colten*, 407 U.S. 104 (1972); *infra* notes 104 & 106 and accompanying text.

13 *See supra* note 12 and accompanying text.

14 In *McCullough*, Judge Harney set out reasons for imposing the more severe sentence even though the reviewing court subsequently determined that a presumption of judicial vindictiveness was not in fact warranted. Under *Pearce*, the sentencing judge must offer reasons for the enhanced sentence prior to appellate review unless the resentencing judge is absolutely convinced that a presumption is not warranted. *Pearce*, 395 U.S. at 726.

15 *Id.* at 982. *See also infra* notes 73 & 147 and accompanying text.

16 *Pearce*, 395 U.S. at 726.

argues that its treatment in *McCullough* conforms with both precedent and sound public policy. This Note concludes that the Court in *McCullough* correctly chose to limit *Pearce* to those circumstances in which criminal appellants are most likely to fear judicial vindictiveness.

II. FACTS

A jury convicted defendant Sanford James McCullough of murder,[17] and imposed upon him a twenty year prison term.[18] Presiding Judge Naomi Harney subsequently granted McCullough's motion for a new trial on the basis of prosecutorial misconduct.[19]

Three months later, with Judge Harney again presiding, a jury retried and reconvicted McCullough.[20] This time McCullough elected to have the trial judge fix his sentence.[21] Judge Harney sentenced McCullough to fifty years in prison and filed findings of fact as to why a longer sentence on retrial was necessary.[22] According to Judge Harney, new information on retrial implicated McCullough in the slashing of the victim's throat, and not merely in assisting in the murder. In addition, the fact that McCullough was released from prison just four months before the murder in question combined to warrant an extra thirty-year sentence.[23]

On appeal, the Texas Court of Appeals reversed and reinstated McCullough's original twenty year sentence.[24] Even though the court of appeals noted nothing in the record to indicate that vindictiveness motivated the increased punishment, it nonetheless invoked the *Pearce* presumption of judicial vindictiveness.[25] The court of appeals also considered itself bound by the Supreme Court's decision in *Pearce* and held that a longer sentence on retrial could be imposed only if based upon the defendant's conduct occurring after the original trial.[26] According to the court of appeals, Judge Harney failed to observe the *Pearce* rule's literal requirements by erroneously relying upon *events* occurring *before* the original sentencing

17 McCullough v. Texas, 680 S.W.2d 493, 494 (Tex. App. 1983).
18 *McCullough*, 106 S. Ct. at 978.
19 *Id.*
20 *Id.*
21 *McCullough*, 680 S.W.2d at 494.
22 *McCullough*, 106 S. Ct. at 978.
23 *Id.*
24 *McCullough*, 680 S.W.2d at 496.
25 *McCullough*, 106 S. Ct. at 978 n.2.
26 *Id.*

proceeding to justify the enhanced sentence.[27] Thus, the court concluded that a failure to comply with the *Pearce* rule was sufficient grounds for overturning the enhanced sentence, even though the record failed to "indicate that the increased punishment resulted from vindictiveness."[28] The United States Supreme Court subsequently granted a writ of certiorari to determine whether Judge Harney's sentence did in fact violate the due process clause.[29]

III. *TEXAS V. MCCULLOUGH*

A. THE MAJORITY OPINION

Chief Justice Burger's opinion for the Court in *McCullough* turned significantly upon an initial determination that judicial vindictiveness could not have played a role in the resentencing process.[30] Absent a presumption of judicial vindictiveness, the reviewing court had no obligation to scrutinize Judge Harney's reasons for imposing the more severe sentence on reconviction.[31] Accordingly, the Texas Court of Appeals should have upheld McCullough's more severe sentence.

1. The Pearce *Presumption Does Not Apply*

The Court cited several factual reasons why it refused to invoke the *Pearce* presumption of judicial vindictiveness in *McCullough*. First, Judge Harney agreed with McCullough that a new trial was necessary.[32] On this basis, the Court concluded that Judge Harney could not have harbored vindictive or retaliatory motives against McCullough for initiating his post-conviction proceeding.[33]

Second, the Court determined that a purported institutional interest in discouraging meritless appeals[34] could not have influenced Judge Harney's decision to impose the more severe sentence upon

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[27] *McCullough*, 680 S.W.2d at 496. *See also McCullough*, 106 S. Ct. at 987 (Marshall, J., dissenting).

[28] *McCullough*, 106 S. Ct. at 978 n.2.

[29] *Id.* at 977.

[30] *See supra* notes 11-12 and accompanying text.

[31] *See supra* notes 11-12 and accompanying text.

[32] *McCullough*, 106 S. Ct. at 979.

[33] *Id.* Because McCullough was entitled to choose his sentencer at the time of retrial, Judge Harney had no way of knowing that she would impose McCullough's subsequent sentence on reconviction. Judge Harney could not have granted the motion in anticipation of imposing a harsher sentence upon McCullough.

[34] If defendants were immunized from the possibility of receiving a more severe sentence on retrial, they would have nothing to lose and everything to gain by appealing. A blanket prohibition on harsher resentencing would therefore encourage poor judicial administration. *See* Fay v. Noia, 372 U.S. 391, 445-46 (1963) (Clark, J., dissenting). *See also* Comment, *Criminal Law—Sentence—On Retrial After Collateral Attack, Imposition of Har-*

McCullough's reconviction.[35] The Court recognized that an "institutional interest" explanation for the sentence applies to sentencing in all appellate settings, without regard to the existence of judicial vindictiveness.[36] The Court feared that "[p]resuming vindictiveness on this basis alone would be tantamount to presuming that a judge will be vindictive towards a defendant merely because he seeks an acquittal."[37] The Court refused to apply the *Pearce* rule to circumstances in which an argument for the requisite presumption of judicial vindictiveness was this speculative and its ramifications this overreaching.[38]

Finally, the Court would not presume judicial vindictiveness if a different sentencing authority imposed the more severe sentence on reconviction.[39] The Court noted that a likelihood of vindictiveness did not exist in *McCullough* since the original sentencing proceeding involved a jury,[40] not Judge Harney.[41] The trial court nullified the initial sentence when it overturned McCullough's original conviction.[42] Judge Harney, therefore, exercised her sentencing discretion for the first time upon McCullough's reconviction.

The Court required, as a precondition to presuming judicial vindictiveness, evidence that the resentencing judge personally fixed the appellant's original sentence.[43] Since the original sentencing proceeding in *McCullough* did not personally involve Judge Harney, the Court found no reason to suspect vindictive or retaliatory motivation for the sentence increase.[44]

2. *Compliance With the* Pearce *Rule Requirements*

The Court found that even if it had presumed judicial vindictiveness in *McCullough*, Judge Harney adequately complied with the *Pearce* requirements.[45] The Court reached this conclusion, however, only after rejecting the *Pearce* rule's literal mandates.[46] The Court reasoned that strict compliance with the *Pearce* rule requirements

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sher Sentence Without Justification, or Denial of Credit for Time Served, Violates Due Process of Law and Equal Protection Clauses—Patton v. North Carolina, 80 HARV. L. REV. 891, 893 (1967).

35 *McCullough*, 106 S. Ct. at 979.

36 *Id.*

37 *Id.*

38 *Id.* at 980.

39 *Id.*

40 *Id.* at 978.

41 *Id.* at 980.

42 *Id.* at 978. *See, e.g., infra* note 86.

43 *McCullough*, 106 S. Ct. at 978. *See also Pearce*, 395 U.S. 711 (1969).

44 *McCullough*, 106 S. Ct. at 979-80.

45 *Id.* at 980-81.

46 *See Pearce*, 395 U.S. at 726.

could compel "absurd" results and should therefore be avoided where its purpose would not be served.[47]

The Court specifically noted that by limiting reasons for a sentence increase to events occuring after the original sentencing proceeding, the *Pearce* rule would systematically preclude a sentencing authority from considering all relevant information in assessing the defendant's proper punishment upon reconviction.[48] A more sound application of the *Pearce* rule would not preclude a sentencing authority from considering new information related to events prior to the original sentencing proceeding.[49] In the Court's view, Judge Harney adequately complied with the *Pearce* rule when she identified, for the record, facts relevant to assessing McCullough's punishment which were not available for the jury's consideration in the original sentencing proceeding.[50]

B. JUSTICE BRENNAN'S CONCURRENCE

In his concurring opinion, Justice Brennan agreed with the majority that judicial vindictiveness was only remotely possible in *McCullough*.[51] Justice Brennan, however, stated that, under *Pearce*, Judge Harney's reasons for the sentence increase would have been inadequate to rebut a presumption of judicial vindictiveness.[52] In any event, Justice Brennan agreed with the majority that the burden of establishing judicial vindictiveness in *McCullough* did not shift to Judge Harney because the facts failed to compel a *Pearce* presumption of judicial vindictiveness.[53]

C. THE DISSENTING OPINION

Justice Marshall, writing for the dissent, found that the facts in

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[47] *McCullough*, 106 S. Ct. at 981.

> Suppose . . . that a defendant is convicted of burglary, a non-violent, and apparently first, offense. He is sentenced to a short prison term or perhaps placed on probation. Following a successful appeal and a conviction on retrial, it is learned that the defendant has been using an alias and in fact has a long criminal record that includes other burglaries, several armed robbery convictions, and a conviction for murder committed in the course of a burglary. None of the reasons underlying *Pearce* in any way justifies the perverse result that the defendant receive no greater sentence in light of this information than he originally received when he was thought to be a first offender.

Id. (quoting brief of Amicus Curiae at 26). *See also Wasman*, 468 U.S. at 573 (Powell, J., concurring).

[48] *McCullough*, 106 S. Ct. at 981.

[49] *See Wasman*, 468 U.S. 559, 571-72 (1984).

[50] *McCullough*, 106 S. Ct. at 982.

[51] *Id.* at 982 (Brennan, J., concurring).

[52] *Id.* (Brennan, J., concurring).

[53] *Id.* (Brennan, J., concurring).

McCullough warranted a presumption of judicial vindictiveness.[54] He first noted that the prosecuting attorney and Judge Harney made post-trial statements indicating their belief that the jury had been too lenient in sentencing McCullough to twenty years in jail.[55] According to Justice Marshall, these statements should have invoked a presumption of judicial vindictiveness.[56]

The prosecutor publicly admitted that he sought a new trial in anticipation of securing a more severe sentence on reconviction.[57] A local newspaper quoted the prosecutor as commenting, "A guy's life ought to be worth more than that."[58] Likewise, Judge Harney said that she would have given McCullough a more severe punishment had she sentenced him after the first trial rather than the jury.[59] The dissent noted that these statements should have cast doubt on the appropriateness of Judge Harney's reasons for granting McCullough a new trial.[60]

Second, Justice Marshall questioned the propriety of interpreting McCullough's election of Judge Harney as the sentencing authority on retrial, as any indication that McCullough believed in Judge Harney's fairness.[61] Since McCullough could have chosen Judge Harney involuntarily, "the fact that McCullough elected to be sentenced by Judge Harney [may have no] relevance to the question whether *Pearce* requires . . .[the Court] to presume" that judicial vindictiveness motivated the enhanced sentence.[62] The difficulty of finding an impartial jury supports this inference.[63]

Third, Justice Marshall disputed the majority's findings that judicial vindictiveness was only remotely possible.[64] For instance, the

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54 *Id.* at 983 (Marshall, J., dissenting).

55 *Id.* at 983-84 (Marshall, J., dissenting).

56 *Id.* at 986 (Marshall, J., dissenting).

57 *Id.* at 983 (Marshall, J., dissenting).

58 *Id.* (Marshall, J., dissenting). In this quote, the prosecutor is referring to the victim's life being worth more than the twenty years McCullough received from the jury.

59 *Id.* at 984 (Marshall, J., dissenting)(If McCullough "elected to have the Court set his punishment at the first trial, the court would have assessed more than the (20) year sentence imposed by the jury.").

60 *Id.* at 985-86 (Marshall, J., dissenting).

61 *Id.* at 984-85 (Marshall, J., dissenting).

62 *Id.* at 984 (Marshall, J., dissenting).

63 *Id.* at 983-84 (Marshall, J., dissenting). *See id.* at 985 (Marshall, J., dissenting)("[D]efendant's choice might have been influenced by a desire to avoid being sentenced by a jury from a community that had been exposed to the considerable publicity surrounding the first trial."). The Court had, in an earlier case, emphatically rejected the contention that a jury was capable of vindictive resentencing. *Chaffin*, 412 U.S. 17 (1973). *See also* Note, *Harsher Resentencing by Jury on Retrial is Permissible:* Chaffin v. Stynchombe, 28 Sw. L.J. 469 (1974).

64 *McCullough*, 106 S. Ct. at 985-86 (Marshall, J., dissenting).

dissent argued that a sentencing judge may resent a defendant for requiring the judge to "publicly conced[e]" assignments of error upon which a motion for a new trial is granted.[65] The dissent also noted that Judge Harney may have weighed the jury's "comparatively light sentence"[66] against McCullough. These considerations could have played a "part in Judge Harney's decision to give McCullough a harsher sentence."[67] Judicial vindictiveness should therefore have been presumed.

Fourth, the dissent disagreed with the majority's interpretation of the *Pearce* rule. Justice Marshall argued that the *Pearce* rule's clear and unequivocal language did not permit a trial court judge, on resentencing, to consider new evidence which did not refer to events following the first trial.[68] Judge Harney therefore would have misapplied the *Pearce* rule by relying on new evidence limited in probative worth to events surrounding the murder in question. This finding sufficiently warranted reinstating McCullough's original sentence, since the new evidence would have been substantively inadequate to rebut a presumption of judicial vindictiveness.[69]

The dissent further argued that the Court's loose construction of the *Pearce* rule needlessly diluted its effectiveness because Judge Harney relied on additional evidence readily available to a trial judge on resentencing.[70] Such evidence includes a wide range of new information, from information pertaining to the defendant's participation in the offense to information providing new insights into the defendant's personal life and character.[71] If a trial judge resentences a defendant vindictively, the judge could circumvent the *Pearce* rule safeguards by referring to such readily accessible evidence in support of the sentence increase.[72]

IV. HISTORY: *NORTH CAROLINA V. PEARCE*

The constitutionality of harsher resentencing has become a much litigated and often confused field, one that has been marked by delicate and controversial distinctions.[73] Due in part to its un-

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65 *Id.* at 985 (Marshall, J., dissenting).

66 *Id.* at 986 (Marshall, J., dissenting).

67 *Id.* (Marshall, J., dissenting).

68 *Id.* (Marshall, J., dissenting).

69 *Id.* at 987 (Marshall, J., dissenting).

70 *Id.* (Marshall, J., dissenting).

71 *See id.* at 981-82. *See also* notes 154, 157, 159 & 175 and accompanying text.

72 106 S. Ct. at 986-87 (Marshall, J., dissenting).

73 The Supreme Court granted certiorari in *Pearce* to resolve a conflict among the federal and state courts concerning whether imposing an enhanced sentence on retrial violated constitutional protections. *Pearce*, 395 U.S. 711, 715 n.5 (1969). *Compare*

avoidably suspect overtones, harsher resentencing has, since *Pearce*, continued to provoke repeated constitutional litigation in all courts.[74] These developments reveal that *Pearce* is predicated on policies which need reexamination and reclarification. These developments also necessitate a reexamination of the judicially created methods for implementing the due process guarantees affirmed in *Pearce*.

In *North Carolina v. Pearce*,[75] the Court held that a trial judge resentencing a criminal defendant on retrial must justify an increased penalty by stating reasons which affirmatively appear from the record and are based on objective information about the defendant's conduct following the first sentencing proceeding.[76] In the absence of such justification, a reviewing court will sustain a presumption of judicial vindictiveness where properly warranted.[77] In *Pearce*, four Justices concurred in the Court's judgment, and the entire Court unanimously concluded that vindictive resentencing violates the due process of law.[78] Since the trial court judge in *Pearce*

Marano v. United States, 374 F.2d 583, 585 (1st Cir. 1985)(defendant should not have to fear possibility that exercise of right of appeal will result in penalty in form of higher sentence) *with* Newman v. Rodgriguez, 375 F.2d 712, 714 (10th Cir. 1967)(risk of incurring greater prison term after retrial is risk defendant takes when defendant chooses to appeal)(citing Fay v. Noia, 372 U.S. 391 (1963)) *and* United States v. Russell, 378 F.2d 808, 811-12 (3d Cir. 1967)(trial judge may impose sentence greater than original without violating due process protection).

74 *See infra* notes 104, 106 & 147 and accompanying text.

75 395 U.S. 711 (1969). In *Pearce*, the trial court convicted and sentenced Pearce to a twelve to fifteen year prison term. *Id.* at 713. Pearce subsequently initiated post-conviction proceedings and the North Carolina Supreme Court reversed his conviction. Pearce v. North Carolina, 226 N.C. 234, 145 S.E.2d 918 (1966).

On retrial, the same judge reconvicted and sentenced Pearce to an eight year prison term. The prison term, combined with the time he had already served in confinement, amounted to a longer sentence than was originally imposed. *Pearce*, 395 U.S. at 713 n.1. The record failed to disclose any reason for the increased sentence. *Id.* at 726.

Pearce thereafter appealed to the United States District Court for the Eastern District of North Carolina for writ of habeas corpus. The district court, relying primarily upon the authority of Patton v. North Carolina, 381 F.2d 636, *cert. denied*, 390 U.S. 905 (1968), held the harsher sentence void and unconstitutional. Having failed to resentence Pearce within sixty days, the district court ordered his release. The United States Supreme Court granted a writ of certiorari. 393 U.S. 922 (1968).

76 *Pearce*, 395 U.S. at 726.

77 *See, e.g., infra* notes 138 & 146.

78 In a concurring opinion, Justice Douglas, with whom Justice Marshall joined, argued that the double jeopardy clause did not permit a "State because of prior error, to have a second chance to obtain an enlarged sentence." *Pearce*, 395 U.S. at 731 (Douglas, J., concurring) (footnote omitted); Justice Black concurred in the majority's opinion that vindictive sentencing violates due process of law. *Id.* at 737 (Black, J., concurring). Justice Black, however, qualified his concurrence by stating that *Pearce* was not in fact a case in which the trial court judge resentenced the defendant vindictively. *Id.* at 740 (Black, J., concurring). Justice Harlan also agreed that vindictive sentencing had no place in the

failed to rebut a presumption of judicial vindictiveness, the Supreme Court ordered the district court to reinstate Pearce's original sentence.[79]

The *Pearce* Court, however, summarily rejected the defendant's equal protection[80] and double jeopardy claims.[81] The Court reasoned that the double jeopardy clause does not prohibit imposing an otherwise "lawful single punishment" upon reconviction.[82] A corollary to the court's power to retry a defendant is the power to impose whatever sentence may be legally authorized should the defendant be reconvicted.[83] The Court accordingly held that the double jeopardy clause does not limit the severity of the sentence imposed upon reconviction.[84]

The *Pearce* Court also determined that the imposition of an increased sentence upon reconviction does not discriminate against defendants who succeed in getting their conviction set aside merely because "convicts who do not seek new trials cannot have their sentences increased."[85] The Court found this conclusion entirely consistent with the fact that new sentences are being imposed upon reconviction and not additional sentences.[86]

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law. *Id.* at 745 (Harlan, J., concurring). Justice Harlan, however, did not agree with the Court's interpretation of the double jeopardy clause and argued that the clause protects potential appellants from fear of being "placed in jeopardy of suffering the greater punishment not imposed at the first trial." *Id.* at 749-50 (Harlan, J., concurring). Justice White also concurred in the Court's opinion with one exception. In Justice White's view, the *Pearce* rule should have authorized "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." *Id.* at 751 (White, J., concurring).

79 395 U.S. at 726.

80 "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The argument here is that equal protection is denied because successful appellants are the only defendants whose sentence could be increased.

81 "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. This clause was made applicable to the states through the fourteenth amendment in Benton v. Maryland, 395 U.S. 784 (1969).

82 *Pearce*, 395 U.S. at 721.

83 *Id.* at 720; *see also* United States v. Tateo, 377 U.S. 463 (1964); Forman v. United States, 361 U.S. 416 (1960); Stroud v. United States, 251 U.S. 15 (1919).

84 *See also* United States v. Busic, 639 F.2d 940, 948 (3d Cir. 1981)(Nothing in the history or policy of the double jeopardy clause "suggests that its purpose included protecting the finality of a sentence and thereby barring resentencing to correct a sentence entered illegally or erroneously."); United States v. Ball, 163 U.S. 662 (1896)(double jeopardy prohibition was not against twice being punished, but against being twice put in jeopardy; therefore, retrial for the same offense did not put one in jeopardy); Kuvaas v. Alaska, 717 P.2d 855 (Alaska Ct. App. 1986)(enhanced sentence imposed did not violate prohibition against double jeopardy or defendant's due process rights).

85 *Pearce*, 395 U.S. at 722.

86 *Id. See also id.* at 721 ("[T]he original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean.").

The Court reasoned that if a criminal defendant successfully obtains a new trial, he has implicitly acquiesced in the court's concomitant power to impose upon him a new sentence befitting the court's independent assessment of the crime.[87] The defendant may be acquitted on retrial. If reconvicted, he may receive a new sentence that is less than, equal to, or greater in severity than his original sentence.[88]

The Court, nevertheless, recognized that procedural safeguards[89] were necessary to prevent state and federal appellate courts from "follow[ing] an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant."[90] The *Pearce* Court held that this practice violated the due process of law guaranteed by the fifth and fourteenth amendments.[91] As a preventive measure, the Court mandated a factual justification requirement for heavier sentencing on reconviction.[92]

The Court created this justification requirement in order to free defendants from fear, real or imagined, that a sentencing judge might punish them for initiating and subsequently succeeding in their post-conviction proceeding.[93] The *Pearce* Court stated this rule as:

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87 *Id.* at 720. *See also Tateo*, 377 U.S. at 466:

> 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.

88 *Pearce*, 395 U.S. at 721. *See also* Justice Black's concurring opinion in *Pearce*, 395 U.S. at 738 (Black, J., concurring)("[D]efendants are not denied equal protection when the state makes no provision for re-evaluation of sentences generally but permits the penalty set after retrials to be whatever penalty the trial judge finds to be appropriate, whether it be higher or lower than the sentence originally set.").

89 These limitations do not proscribe the length of a sentence imposed upon reconviction; rather these limitations condition the manner in which sentencing discretion is exercised. *See Pearce*, 395 U.S. 711, 725 (1969)("Due process of law requires that vindictiveness against a defendant for having successfully attacked his conviction must *play no part* in the sentence he receives . . . .")(emphasis added).

90 *Id.* at 723.

91 *Id. See also* United States v. Lundien, 769 F.2d 981, 986-87 4th Cir. 1985):

> Although the parameters of due process to be accorded at sentencing are not firmly fixed, it is beyond doubt that a sentence enhanced whether before or after commencement of service, because of vindictiveness or other plainly improper motive of the trial court would be fundamentally unfair and would deny the defendant due process.

Pearce also marks the first time that the Court has, in any case not involving a deprivation of equal protection of the laws, held unconstitutional a burden on a state right of appeal.

92 *Pearce*, 395 U.S. at 726.

93 *Id.* at 725.

> [W]henever 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 reviewable on appeal.[94]

Since the rule prohibits a sentencing authority from punishing a defendant for successfully overturning his original conviction,[95] the rule should apply to harsher resentencing in all appellate settings.[96] The Court in *McCullough*, however, limited the rule's application to those sentencing proceedings in which a presumption of judicial vindictiveness is reasonably warranted.[97] If the circumstances leading up to the new sentencing proceeding fail to provide potential grounds for judicial vindictiveness, the resentencing authority is under no obligation to justify the imposition of a more severe sentence on reconviction.[98]

V. ANALYSIS

A. WHEN DOES THE *PEARCE* PRESUMPTION APPLY?

Whether a presumption of judicial vindictiveness applies in a particular case depends on the factual context in which the more severe sentence is imposed.[99] Consequently, the facts upon which the Court in *McCullough* relied to justify withholding a presumption of judicial vindictiveness shed greater light on the parameters of *Pearce*.[100]

The facts in *Pearce* adequately compelled a presumption of judicial vindictiveness. Since *Pearce*, however, there have been several cases in which the circumstances failed to raise such a presumption, even though the defendant received a more severe sentence on reconviction.[101] The Court refused to invoke the *Pearce* presumption

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94 *Id.* at 726.

95 *Id.* at 725-26.

96 *See, e.g., McCullough*, 106 S. Ct. at 983-86 (Marshall, J., dissenting).

97 *See infra* notes 104 & 106 and accompanying text.

98 *McCullough*, 106 S. Ct. at 979.

99 See *supra* note 11 and *infra* note 106 and accompanying text for contexts in which the presumption is inapplicable.

100 *McCullough*, 106 S. Ct. at 982 ("It is appropriate that we clarify the scope and thrust of *Pearce*, and we do so here."). *See infra* note 104 and accompanying text.

101 *See supra* note 12 and accompanying text. *See also Wasman*, 468 U.S. at 565 ("In only one other circumstance [Blackledge v. Perry, 417 U.S. 21 (1974)] has the Court identified a need to indulge a presumption of vindictiveness of the kind imposed in *Pearce*."); *infra* note 104 and accompanying text.

of judicial vindictiveness in these cases because its likelihood was not as pronounced as it was in *Pearce*.[102]

An enhanced sentence on reconviction may not always raise a presumption of judicial vindictiveness.[103] Instead, only a natural inference of judicial vindictiveness will activate the presumption. As a threshold requirement, the circumstances must demonstrate either actual vindictiveness or a realistic fear of vindictiveness.[104] In *McCullough*, the Court feared that a less conservative application of the *Pearce* presumption would obstruct a legitimate response to criminal conduct.[105] Accordingly, the Court required a rational connection between the basic facts and the presumed facts in order for a presumption of judicial vindictiveness to pass muster; a mere *opportunity* for vindictiveness was considered insufficient to warrant a *Pearce* presumption.[106]

1. When To Presume Vindictiveness

A presumption of judicial vindictiveness is predicated upon the assumption that the original sentencing judge, if reversed, might

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[102] *See supra* note 101 and accompanying text. *See also Wasman*, 468 U.S. at 566-69.

[103] *See infra* note 106 and accompanying text. *See also McCullough*, 106 S. Ct. at 979.

[104] *See id.* at 979.

> The *Pearce* requirements . . . do not apply in every case where a convicted defendant receives a higher sentence on retrial. . . . [W]e have restricted application of *Pearce* to areas where "its objectives are thought to be most efficaciously served," Stone v. Powell, 428 U.S. 465, 487 (1976). Accordingly, in each case, we look to the need, under the circumstances, to "guard against vindictiveness in the resentencing process."

See also United States v. Martinez, 785 F.2d 663 (9th Cir. 1986)(legitimate concern that subsequent prosecution might deter potential appellants from exercising their constitutional rights exists only if vindictiveness is a strong possibility); *id.* at 688 ("In vindictive prosecution . . . both actual vindictiveness *and* the presumption of vindictiveness play seperate and distinct roles . . . . In this circuit, we have applied the presumption of vindictiveness when it reflects the very real likelihood of actual vindictiveness."); United States v. Lippert, 740 F.2d 457 (6th Cir. 1984); United States v. Gallegos-Curiel, 681 F.2d 164, 167 (9th Cir. 1982).

[105] *See, e.g.*, United States v. Goodwin, 457 U.S. 368, 373 (1982).

[106] Although Judge Harney's knowledge of the severity of the original sentence gave her an opportunity to impose a more severe sentence on reconviction, knowledge alone does not establish a sufficient basis for a presumption of judicial vindictiveness. *See, e.g., Goodwin*, 457 U.S. at 373 ("Given the severity of [presuming judicial vindictiveness] . . . the Court has done so only in cases in which a reasonable likelihood of vindictiveness exists."); *Chaffin*, 412 U.S. at 26-27 (*Pearce* prohylactic rule does not apply when a jury imposes the more severe sentence on reconviction. The Court found that the possibility of vindictiveness was de minimis when resentencing was by a jury in a properly controlled retrial.); Colten v. Kentucky, 407 U.S. 104, 119 (1973)(opportunity for vindictiveness is insufficient to justify application of the *Pearce* rule where a higher sentence is imposed after a trial de novo in those jurisdictions that employ a two-tier trial court system). *See also supra* note 104 and accompanying text.

impose on the defendant a more severe sentence on reconviction.[107] The possibility of such vindictive resentencing impermissibly deters defendants from exercising their right of appeal.[108] Consequently, if the resentencing judge also imposed the defendant's original sentence, the probability of actual vindictiveness on the part of the judge is high enough to impose upon him the burden of justifying the higher sentence following reconviction.[109]

If the sentencing authority differs on retrial, however, the defendant will not be entitled to a presumption of judicial vindictiveness.[110] To be entitled to a presumption of judicial vindictiveness under these circumstances, the defendant must convince the reviewing court that conferring unguarded sentencing discretion upon a judge who will sentence the defendant for the first time on retrial creates an actual risk of vindictiveness. Only then should harsher resentencing by a different sentencing authority fall under judicial scrutiny as a means of adequately implementing the due process guarantee.[111]

The majority in *McCullough* correctly determined that a threat of vindictiveness does not exist when the sentencing authority differs on retrial.[112] If the resentencing authority differs from the initial sentencer, the resentencing authority has no personal stake in the original sentencing proceeding and thus no incumbant stimulus for retaliation.[113] As a general rule, if a sentencing judge invokes his or her sentencing discretion for the first time on retrial, as did Judge Harney, the imposition of a more severe sentence on reconviction will not give rise to a *Pearce* presumption of judicial vindictiveness.[114]

A presumption of judicial vindictiveness is also inappropriate if the "would be" resentencing judge, who did not participate in the

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107 *Pearce*, 395 U.S. 711 (1969).

108 The deterrent is the fear that the defendant might receive a harsher sentence, especially if the harsher sentence is imposed solely because the defendant chose to appeal. *Pearce*, 395 U.S. at 724-25. *See also McCullough*, 106 S. Ct. at 986-87 (Marshall, J., dissenting).

109 *Pearce*, 395 U.S. 711 (1969).

110 *McCullough*, 106 S. Ct. at 980. *See also* United States v. Lippert, 740 F.2d 457 (6th Cir. 1980).

111 The defendant alleging judicial vindictiveness must satisfy this burden in the absence of a prior judicial determination that the particular fact situation raises a presumption of judicial vindictiveness. *See McCullough*, 106 S. Ct. 979 (1986).

112 *Id.* at 980.

113 *Id. See also Chaffin*, 412 U.S. 17 (1973)(the jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication).

114 *See McCullough*, 106 S. Ct. at 979-80.

original sentencing proceeding, voluntarily orders a new trial on the defendant's behalf.[115] Voluntarily ordering a new trial is insufficient grounds for presuming judicial vindictiveness. To constitute sufficient grounds, the resentencing judge must at least be assured of an opportunity to resentence the defendant. In actuality, no such assurance exists. Instead, by ordering a new trial, the sentencing judge goes on record in support of the appeal and is therefore removed from any criticism an appellate court might otherwise direct towards the judge for the manner in which he or she conducted the original trial.[116] Accordingly, the trial court judge suffers no personal rebuke and, thus, has no reason to engage in the type of retaliatory sentencing on retrial presumed in *Pearce*.[117]

Furthermore, if a trial court judge voluntarily orders a new trial, he or she is attesting to the merit of the appeal.[118] As a result, the Court in *McCullough* properly determined that an institutional interest in discouraging criminal defendants from appealing could not have motivated the more severe sentence on retrial.[119]

The facts in *McCullough* indicate that the defendant could have feared the possibility of receiving a more severe sentence on reconviction and Judge Harney's post-trial statements could have fostered this fear.[120] Despite their questionable nature, however, these statements could hardly have constituted a natural pretext to vindictive resentencing.[121] *Pearce* did not seek to eradicate fear of an enhanced sentence.[122] Rather, *Pearce* meant to overcome the evil of judicial retribution.[123]

Members of the *McCullough* Court agreed that a presumption of judicial vindictiveness requires a more severe sentence on reconviction.[124] Vindictiveness, however, does not always inhere in a more

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115 *Id.* at 979.

116 *Id.*

117 *See, e.g., supra* note 113.

118 *McCullough*, 106 S. Ct. at 979.

119 *Id.*

120 *See id.* at 983-84.

121 *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978)(due process is not implicated when prosecutor threatens to seek a conviction of defendant on a greater offense with greater penalty if defendant does not plead guilty); Longval v. Meachum, 651 F.2d 818, 820-21 (1st Cir. 1981).

122 *McCullough*, 106 S. Ct. at 979. *See also Wasman*, 468 U.S. at 568; People v. Atkison, 125 Mich. App. 516, 336 N.W.2d 41 (1983).

123 *Pearce*, 395 U.S. at 725-26; *McCullough*, 106 S. Ct. at 979.

124 The fact that a more severe sentence on reconviction can at most raise a rebuttable presumption of judicial vindictiveness, not a conclusive presumption, compels this conclusion. *McCullough*, 106 S. Ct. at 986 (Marshall, J., dissenting). *See also* State v. Lopez, 99 N.M. 612, 613, 661 P.2d 890, 891 (1983)(presumption of judicial vindictiveness was

severe sentence.[125] Without some factual context or chronology of events from which one can reasonably infer a vindictive motive, neither an enhanced sentence on reconviction, nor a statement reflecting one's opinion that a more severe sentence should have been imposed initially,[126] will sufficiently compel a presumption of judicial vindictiveness.[127]

2. *When Does the* Pearce *Presumption Apply?: Summary*

The Court in *McCullough* revealed two factual conditions which sufficiently counteract a presumption of judicial vindictiveness.[128] As such, *McCullough* is the first Supreme Court case to clarify the proper thrust and scope of *Pearce*.[129] First, a reviewing court will not presume judicial vindictiveness if a different sentencing authority imposes a more severe sentence on retrial. Second, a presumption of judicial vindictiveness is inappropriate if the trial court judge conducting the first trial voluntarily orders a new trial. Either of these exceptions will, in any case in which a criminal appellant receives an enhanced sentence on reconviction, make appellate review of the enhanced sentence unnecessary.

B. THE *PEARCE* PRESUMPTION: ITS PROPER APPLICATION

Since the trial judge in *Pearce* failed to set forth any reasons for imposing the heavier sentence on reconviction,[130] the Court in *Pearce* found it unnecessary to explore the type of conduct that might otherwise justify a higher sentence under the *Pearce* rule. Since *Pearce*, however, the Court has had to reclarify the rule's proper scope and application.[131] The construction the Court gave the rule in *McCullough* reaffirms the Court's earlier construction of the rule in *Wasman v. United States*[132] and promotes society's interest in punishing guilty defendants.

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inappropriate where total term of imprisonment subsequently ordered on reconviction was less than defendant's original sentence).

125 *See supra* note 124. *See also McCullough*, 106 S. Ct. at 979.

126 *See, e.g., McCullough*, 106 S. Ct. at 976; Judge Harney's candid opinion regarding the inadequacy of the initial sentence does not taint her compentency as a sentencing authority on retrial. There is no authority for the proposition that a trial court judge's statements, made in the aftermath of a trial, are grounds for nullifying a sentence subsequently imposed upon reconviction.

127 *See supra* note 106 and accompanying text.

128 *McCullough*, 106 S. Ct. at 979-80.

129 See *supra* notes 12, 104 & 106 and accompanying text for a discussion of other contexts in which the *Pearce* rule would be applicable.

130 395 U.S. at 726.

131 *See McCullough*, 106 S. Ct. at 982.

132 468 U.S. 559 (1984).

In order to protect successful appellants from a threat of retribution for appealing, the *Pearce* Court stipulated that a resentencing judge must set forth legitimate reasons for increasing a sentence on retrial.[133] These 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."[134] The dissent in *McCullough* disagreed with the Court's reasons for expanding the scope of information upon which a trial court judge might rely to justify increasing a sentence upon reconviction beyond the *Pearce* rule's literal confines.

The trial court judge carries the burden of rebutting a presumption of judicial vindictiveness whenever it is warranted.[135] If a presumption arises, the law requires the trial court judge to comply with both the procedural and substantive aspects of the *Pearce* rule.[136] Failure to comply with either one of these requirements will sustain the presumption and invalidate the sentence.[137]

Procedurally, the *Pearce* rule requires a resentencing judge to substantiate an increased penalty with objective reasons. These reasons must affirmatively appear from the record and must be based upon new information acquired since the original sentencing proceeding.[138] Substantively, the new information must be compelling enough to rebut a presumption of judicial vindictiveness.[139] The information relied upon must convince the reviewing court that a rational connection exists between the new information introduced on retrial and the increase in punishment.[140] Introduction of new information alone will not overcome the presumption.[141]

The dissent in *McCullough* reasoned that a court could easily circumvent the rule's prohibitions on retrial if the court was given an opportunity to justify an increased sentence on the basis of new in-

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133 395 U.S. at 726.

134 *Id.*

135 For instance, the facts in *Pearce* represent the predominant situation in which the presumption is always warranted—the imposition of a more severe sentence on reconviction by the trial court judge who imposed the defendant's original sentence. *Pearce*, 395 U.S. 711 (1969).

136 *Id.* at 726.

137 *See infra* note 139 and accompanying text.

138 *Pearce*, 395 U.S. at 726.

139 *See, e.g.*, United States v. Tucker, 581 F.2d 602, 607 (7th Cir. 1978)(the defendant's period of employment and his pending divorce did not indicate reprehensible conduct and therefore did not justify the higher sentence); United States v. Lopez, 428 F.2d 1135 (2d Cir. 1970)(the fact that defendant had legitimately acquired additional financial assets during the intervening period was held not to justify raising the level of his fine).

140 *See, e.g., supra* note 106 and *infra* note 159 and accompanying text.

141 *See supra* note 106 and accompanying text.

formation concerning the defendant's participation in the offense.[142] Since Judge Harney relied upon new information easily available on resentencing, the *Pearce* rule could amount to a formal safeguard without substantive effect.[143] The dissent in *McCullough* accordingly asserted that requiring an on-the-record rationale for increasing the sentence will become only a perfunctory procedural necessity.[144]

1. *Clarifying the Appropriate Scope of the* Pearce *Rule*

The Court exposed and overcame the *Pearce* rule's potential inflexibility for the first time in *Wasman v. United States*.[145] In *Wasman*, the Court held that after retrial and conviction following a defendant's succesful appeal, a trial court judge may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceeding.[146] The Court in *Wasman* disregarded the rule's limitations and expanded the scope of information upon which a trial court judge could appropriately rely to justify an increased penalty under *Pearce*.[147]

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142 *McCullough*, 106 S. Ct. at 987 (Marshall, J., dissenting).

143 *Id.* (Marshall, J., dissenting).

144 *Id.* (Marshall, J., dissenting).

145 468 U.S. 559 (1984).

146 *Wasman*, 468 U.S. 559 (1984). In *Wasman*, the sentencing judge relied upon an intervening conviction for acts committed prior to the original sentencing proceeding to justify the enhanced sentence.

147 As the *McCullough* Court stated, "[W]e are not reluctant to tailor judicially-created rules when the need arises." 106 S. Ct. at 981 n.4. *See also* Michigan v. Payne, 412 U.S. 47, 51 (1973).

Prior to *Wasman*, the federal and state courts had reached different conclusions on the question whether conduct supporting an enhanced sentence must have occurred after the original sentencing proceeding to meet the *Pearce* test. The period following *Pearce* was marked by confusion and inconsistent results. *See* Robinson v. Scully, 690 F.2d 21, 24 (2d Cir. 1982)(new information exposing defendant's greater culpability will not support harsher sentence if information relates to activities predating original sentencing proceeding); United States v. Williams, 651 F.2d 644, 648 (9th Cir. 1981)(court reversed enhanced sentence on grounds that intervening conviction based on activities occurring before original sentencing proceeding were not valid bases for sentence enhancement under the *Pearce* rule); United States v. Markus, 603 F.2d 409, 414 (2d Cir. 1979)(intervening conviction based on indictment pending at time of the original sentencing fails to satisfy the *Pearce* rule); Briggs v. State, 289 Md. 23, 421 A.2d 1369 (1980)(the sentencing judge is precluded from considering interim convictions of defendant based on misbehavior occurring before original sentence). *But see* United States v. Wasman, 700 F.2d 663, 670 (11th Cir. 1983), *aff'd*, Wasman v. United States, 468 U.S. 559 (1984)(intervening conviction for conduct predating original sentencing proceeding sufficient conduct to justify enhanced sentence under *Pearce*). *See also* United States v. Kienlen, 415 F.2d 557, 559-60 (10th Cir. 1969)(court held that testimony of the defendant's wife, mother, and witnesses indicating "brutal nature" of defendant sufficiently justified increasing the sentence); People v. Burnette, 45 Ill. 2d 227, 239, 258 N.E.2d 793, 799 (1970), *rev'd on other grounds*, 403 U.S. 947 (1971)(court held that defendant's

Having deliberately avoided the *Pearce* limitations,[148] the Court in *McCullough* implicitly prioritized the state's interest in punishing guilty defendants to the fullest extent of the law. The Court's continuing attempt to justify increased penalties on reconviction, properly warranted but otherwise imposed in violation of the express language of the *Pearce* rule,[149] amply justified tempering the rule's exacting standards. Prioritizing the societal interest in this manner, however, did not require the Court to jeopardize the effectiveness of the *Pearce* rule,[150] nor compromise its commitment to safeguarding the due process rights of convicted defendants.[151] Instead, the Court's reasons set forth in *McCullough* for relaxing the confines of the rule were entirely consistent with the reasons given in *Wasman* for the Court's earlier construction of the rule.[152]

Judges need wide sentencing discretion on retrial as much as they do in assessing punishment after the first trial. In both cases, a sentencing authority must consider all information relevant to assessing the severity of the defendant's punishment.[153] The resentencing judge, with the latest information, can take a fresh look at

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testimony was sufficient conduct under *Pearce* to justify enhanced sentence since testimony revealed details of the crime); Note, *The Supreme Court, 1968 Term: Limitations on Sentencing After Reconviction—In* North Carolina v. Pearce, 83 HARV. L. REV. 187, 190 (1968).

148 *See McCullough*, 106 S. Ct. at 982. The Court in *McCullough* upheld the reasons Judge Harney offered in support of the sentence she imposed upon McCullough's reconviction. Judge Harney relied upon new information about the murder to justify the sentence increase. At trial, the state introduced the testimony of two witnesses who had not testified at the first trial. The new evidence revealed that McCullough, rather than his accomplices, slashed the victim's throat. According to Judge Harney, the testimony of the two new witnesses strengthened the state's case on both the guilt and punishment phases of the trial. Judge Harney also learned at the retrial that McCullough had been released from prison only four months before the murder. *See also Pearce*, 395 U.S. at 751 (White, J., concurring). Justice White's concurrence in *Pearce* emphasized the harsh limitation the rule placed on the kind of information that could support an enhanced sentence. If the Court in *Pearce* had intended information other than that pertaining to defendant's conduct occurring after the original sentencing proceeding to be an acceptable basis for an enhanced sentence, Justice White's partial concurrence would not have been necessary. Justice White's version of the rule, however, was ostensibly the standard adopted by the Court in *Wasman* and *McCullough*.

149 *Pearce*, 395 U.S. at 726.

150 *Id.*

151 *See, e.g., McCullough*, 106 S. Ct. at 979 (Court's opinion should not be construed as requiring more than a restriction upon the application of *Pearce* to areas where its "objectives are thought most efficaciously served.")(quoting Stone v. Powell, 428 U.S. 465, 487 (1976)).

152 *See, e.g., Wasman*, 468 U.S. at 571-72. Note that the judgment in *Wasman* received the vote of the entire Court.

153 *See* Williams v. New York, 337 U.S. 241 (1949). *See also* Lockett v. Ohio, 438 U.S. 586 (1978); McClain v. United States, 527 F.Supp. 209 (S.D.N.Y. 1981); United States v. Mitchell, 377 F.Supp. 1312 (D.D.C. 1974).

the defendant's character at retrial and make a more informed decision regarding his sentence.[154] A court's ability to consider a wide range of information ensures that the sentence suits both the crime and the criminal.[155]

The dissent mistakenly implied that such wide sentencing discretion leads to but one result: a more severe sentence on reconviction.[156] On the contrary, wide sentencing discretion is an important means of providing a potential appellant with the opportunity on retrial to reduce his sentence or establish his innocence on the basis of new information.[157]

2. *The Preferred Construction of the* Pearce *Rule*

A flexible construction of the *Pearce* rule would allow a sentencing authority to consider events and conduct occurring before as well as after the original sentencing proceeding.[158] Giving the *Pearce* rule an otherwise literalist effect will systematically foreclose a sentencing authority from considering a breadth of new information that could materially influence the degree of punishment for a reconvicted defendant.[159] Withholding such relevant information

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154 Congress has mandated that judges shall have available the fullest information possible for consideration in the presentencing investigation to aid judges in their task of imposing the appropriate sentence on each offender. Organized Crime Control Act of 1970, 18 U.S.C. §§ 3351-52 (1976). Under the Federal Rules of Criminal Procedure, the report may contain prior criminal history of the defendant, as well as information bearing on the defendant's financial status, personal character, circumstances affecting his behavior, and other information as required by the court. FED. R. CRIM. P. 32(c)(2).

155 *See infra* note 175.

156 *See, e.g., McCullough*, 106 S. Ct. at 988 (Marshall, J., dissenting)("[P]ermitting reference to new . . . information about the crime charged . . . nullifies the guarantee [against judicial vindictiveness] held out in *Pearce*.").

157 *See, e.g., Pearce*, 395 U.S at 721. *See also infra* notes 166, 169 & 179; Williams v. New York, 337 U.S. 241, 249 (1949)(Increasing discretionary powers of sentencing judges is based on "belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship.").

158 *See, e.g., Wasman*, 468 U.S. at 571-72. *See also id.* at 573 (Powell, J., concurring)(quoting United States v. Wasman, 700 F.2d at 667)(limiting new information to events, and thereby excluding conduct, would "exalt words above substance.").

159 *See, e.g.*, United States v. Hayes, 676 F.2d 1359 (11th Cir. 1982), *cert. denied*, Hayes v. United States, 459 U.S. 1040 (1982)(where evidence excluded at first trial showed that defendant had attempted to cover up his criminal involvement, a higher sentence was allowed; a literal application of *Pearce*'s reference to subsequent conduct is unnecessary where judge's reasons clearly negated any suggestion of vindictiveness); Robinson v. Scully, 690 F.2d 21 (2d Cir. 1982)(suggesting that the key may be what was known to the court at time of the original sentencing proceedings). *See also* Tucker v. United States, 581 F.2d 602, 608 (7th Cir. 1978)(Wood, J., concurring). One commentator has suggested that

> [t]he danger in adopting an inflexible rule is that the court in which the successful appellant is being retried will be unable to compensate for undue leniency which

from the person in whom the sentencing authority is vested will obstruct unnecessarily the duties of the trial court judge in assessing a defendant's proper punishment.[160]

Pearce stipulates that a trial court judge, from whom a defendant received his initial sentence, is presumed to have acted vindictively if the judge imposed a more severe sentence on the defendant without the aid of new information reasonably competent to justify the sentence increase.[161] Under *Pearce*, such new information is limited to the defendant's conduct after the original sentencing proceeding.[162]

There is, however, no reason why these conditions should arbitrarily preclude a trial court judge from generally considering new information upon resentencing.[163] Events occurring prior to the original sentencing proceeding can legitimately constitute acceptable new information having a significant bearing on the proper degree of punishment to be assessed.[164] The need to broadly construe the *Pearce* rule is also greatest whenever the new information becomes crucial to a disposition of the case.[165]

Similarly, when the trial record reveals new information about the defendant and his criminal activity which reasonably justifies a sentence enhancement, a presumption of vindictiveness should be deemed adequately rebutted.[166] An appellate court should uphold the harsher sentence if it can objectively conclude, on the basis of new information, that the harsher sentence actually imposed reflects reasoned sentencing discretion.[167] If the state satifies a reviewing court that such a possibility exists, reasonable doubts about the existence of judicial vindictiveness should be resolved in favor of the sentencing judge.[168]

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may have been shown by the first sentencing judge or to adjust a sentence on the basis of a rational evaluation of factors which were not available to the first judge. Note, *Retrial of the Successful Criminal Appellant: Harsher Punishment and Denial of Credit for Time Served*, 28 MD. L. REV. 64, 74 (1968).

160 *See supra* notes 153-54 and accompanying text.

161 *See supra* notes 153-54 and accompanying text.

162 *Pearce*, 395 U.S. at 726.

163 *See Wasman*, 468 U.S. at 573 (Powell, J., concurring).

164 *See supra* note 175. Moreover, these reasons must still affirmatively appear from the record. Consequently, the rule would not stand as an invitation to vindictive judges who might otherwise order a thorough investigation into the defendant's life in search of reasons to justify an enhanced sentence.

165 *See supra* note 47.

166 Deference to trial court sentencing discretion is as imperative to efficient judicial administration as it is to maintaining the limited role of the appellate courts. Appellate courts should therefore show faith and trust in the judicial discretion of the trial courts. *See Russell*, 378 F.2d at 812. *See also infra* note 170.

167 *See supra* note 166.

168 An appellate court, in its limited role, should not overturn the findings of the trial

Moreover, to argue that a reviewing court will be in the untenable position of trying to determine if new information constitutes grounds for the harsher sentence, or simply a facade for improper motivations, mistakes the appropriate extent of the inquiry under *Pearce*.[169] *Pearce* and its progeny say nothing about requiring a reviewing court to question a trial court judge's motivation for imposing an enhanced sentence on reconviction if new information reasonably and objectively qualifies the sentence increase. For a reviewing court to indulge in speculation beyond the limits set forth in *Pearce* is neither necessary nor proper.[170]

A trial court judge may rely upon new information related to conduct prior to the original sentencing proceeding to assess a defendant's guilt on retrial.[171] If resentencing is consistent with the double jeopardy clause,[172] similar information should aid resentencing.[173] Unnecessarily restricting the type of information relevant to assessing punishment on reconviction, and not limiting in a corresponding fashion similar information in assessing guilt on retrial, will invariably lead to new sentences which are artificial and arbitrarily manufactured.[174] Contrary to sound policy and settled principles of criminal law, the new sentence will neither reflect the severity of the crime nor fit the defendant's potential for rehabilitation.[175]

Furthermore, a flexible rule will still satisfy the due process requirements if the reasons for the sentence increase persuade a reviewing court that there was a sound, non-vindictive basis for the

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court judge unless clearly erroneous or otherwise a product of actual vindictiveness. *See, e.g.*, Alstyne, *In* Gideon*'s Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965). *See also supra* note 166.

169 *See, e.g., Wasman*, 468 U.S. at 572 (limiting type of factual information upon which to justify an increased penalty is not desirable; appellate court's principle concern is in enabling trial court judges access to relevant sentencing information).

170 *See* Note, *The Supreme Court, 1968 Term: Limitations on Sentencing After Reconviction*—North Carolina v. Pearce, 83 HARV. L. REV. 187, 190 (1969)("Sentencing has traditionally been a judicial black box, a realm ruled by trial court discretion insulated from appellate review. The shielding of sentencing from the normal adversary process is based in part on various arguments that each sentencing decision is unique and not susceptible to governance by specifiable standards.").

171 Because the slate is wiped clean, there is at least conceptually no new or old information on retrial. Moreover, reconvicting a defendant will never by itself raise a presumption of judicial vindictiveness. Accordingly, the safeguards applicable to assessing punishment on reconviction are inapplicable to determining guilt on retrial.

172 *See Pearce*, 395 U.S. at 719-21.

173 *See supra* notes 84 & 86.

174 *See supra* note 87 and *infra* note 175.

175 A state may adopt the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." *Williams*, 337 U.S. 241, 247 (1949). *See also supra* note 153 and accompanying text.

sentence.[176] Even without limiting the type and extent of information which may be considered in assessing punishment on retrial, appellate courts retain the ultimate authority to determine whether or not the trial court judge adequately justified the sentence increase.[177] Appellate review of resentencing decisions is further assurance that a non-vindictive rationale supports the increase.

Even if the need for a stricter application of the *Pearce* rule safeguards was clear, the question would remain whether the incremental benefit would justify the cost.[178] Employing this balancing test reveals that it is impossible to safeguard against judicial vindictiveness in every conceivable circumstance without inflicting adverse repercussions on the underlying policies of the criminal justice system.[179] In the end, rigid guidelines, despite their noble intentions, suffocate an otherwise legitimate exercise of sentencing discretion without providing corresponding assurance that vindictive resentencing is any less probable.[180]

3. The Preferred Construction of the Pearce *Rule: Summary*

The *Pearce* rule should be construed only to require a sentencing authority to articulate its reasons for increasing a defendant's punishment on reconviction. These reasons should be based upon information which was not known to the sentencing authority during the original sentencing proceeding.[181] If these reasons prove

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176 *See, e.g., Wasman*, 468 U.S. at 572. Authorities supporting flexibility in sentencing on retrial rely on four rationales: (1) a prior sentence has no legal existence because it was imposed pursuant to a void conviction; (2) by utilizing a post-conviction remedy, the defendant waived any benefit he may have had from a prior sentence; (3) the appellate court has no authority to revise a sentence imposed by a trial court within statutory limits; and (4) a new trial and sentence does not foreclose an independent consideration of the sentence at a second trial. Alstyne, *supra* note 168, at 610-11.

177 *See, e.g., supra* note 176.

178 For further discussion of this balancing test, see *infra* note 192 and *supra* note 153 and accompanying text.

179 *Id. See also* Busic v. United States, 639 F.2d 940, 952 (3d Cir. 1981):

> Balancing the defendant's right to a sentence not in excess of that prescribed by law is the societal interest in punishing them when their guilt has been established. Inherent in this societal interest is the fundamental principle that a convicted felon should receive a sentence appropriate to the gravity of the offense and the character and propensities of the offender.

180 Consider, for example, the fact that a trial court judge could sentence a defendant vindictively even if his sentence were limited by an absolute prohibition on harsher resentencing. The trial court judge could simply do so by imposing a greater sentence than that which the defendant otherwise deserved in light of "new information" produced upon retrial.

181 *Pearce*, 395 U.S. at 726; the extent of information not known to the original sentencing authority could constitute the same information relied upon in the original sentencing proceeding when different sentencing authorities are involved. The *Pearce* rule would be inapplicable in these circumstances under *McCullough*, and the enhanced sen-

satisfactory upon broad appellate review, the increased sentence should be affirmed.

C. FEAR OF JUDICIAL VINDICTIVENESS: IS *McCULLOUGH* THE BEST ANSWER?

Justice Marshall, writing for the dissent in *McCullough*, argued that a broad construction of the *Pearce* rule cannot effectively relieve defendants of fear of retaliatory or vindictive treatment on retrial.[182] The dissent concluded that the possibility of receiving a more severe sentence on reconviction unconstitutionally deters defendants from appealing[183] their prior conviction and sentence.[184] Accordingly, the dissent advocates strict compliance with the *Pearce* rule requirements whenever the possibility of vindictiveness exists.

Criminal defendants have a constitutional right to appeal their prior conviction and sentence unimpeded by burdens imposed upon that right by fear of judicial vindictiveness.[185] To the same extent, our criminal justice system has a legitimate interest in creating, in the minds of appellants and potential appellants, an awareness that if reconvicted they will incur punishment fully commensurate with the seriousness of their offense and their potential for rehabilitation.[186]

In any discussion of judicial vindictiveness, the dispositive question is not whether the risk of harsher resentencing will impair the defendant's choice to appeal to an appreciable extent.[187] As the Court in *McCullough* clarified, the proper inquiry is whether there exists a significant possibility of vindictiveness upon resentencing that will effectively deter a reasonable defendant from exercising his constitutional right to appeal.[188] Thus, a legitimately imposed

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tence, imposed upon the basis of no more information that that originally relied upon, would pass muster. *See supra* note 159 and accompanying text.

182 *McCullough*, 106 S. Ct. at 987 (Marshall, J., dissenting).

183 The term "appeal" is used here to mean either an appeal per se to the appellate court following a conviction, or a collateral attack on the conviction through application of a writ of habeas corpus in the federal district court. It makes no difference which route a defendant takes to obtain a new trial.

184 *McCullough*, 106 S. Ct. at 986 (Marshall, J., dissenting).

185 *Pearce*, 395 U.S. at 725.

186 *See id.* at 738 (Black, J., concurring):

> Those who have had former convictions set aside must, like all others who have had been convicted, be sentenced according to the law, and a trial judge will normally conduct a full inquiry into the background, disposition, and prospects for rehabilitation of each defendant in order to set the appropriate sentence.

See also supra note 34.

187 *See supra* notes 122 & 124 and accompanying text.

188 *See McCullough*, 106 S. Ct. 976 (1986). *See also supra* note 104 and accompanying text.

higher sentence should not be struck down for creating an incidental chilling effect of minimal proportions.[189]

1. *The Gamble of Retrial*

No justification exists for completely insulating a defendant from risks that are inherent in appealing a conviction and sentence.[190] The criminal justice system imposes many compelling choices on defendants, each of which will deter the exercise of a right.[191] A potential appellant must constantly balance his interest in the exercise of his rights—such as the right to choose his sentencer and the right to appeal—with the risks he must face if he decides to exercise that right.[192]

Justifying enhanced sentences on the basis of new information neither infringes upon nor contracts a defendant's right to control his own destiny on retrial.[193] The Court's analysis in *McCullough* implicitly recognized that a defendant always confronts a new spectrum of probabilities on retrial. As such, McCullough's decision to appeal weighed the probability of reconviction and harsher resentencing against the chances of an acquittal or a reduced sentence.[194] The risks that incriminating information could come to light and

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189 To be constitutionally suspect, the hindrance of the right to appeal must be unreasonable. The Court stated in Rinaldi v. Yeager, 384 U.S. 305, 310 (1966), that "once established, these avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

190 *See Pearce*, 395 U.S. 711 (1969). *See, e.g.*, *Rodgriguez*, 375 F.2d at 716.

191 *See, e.g.*, *Chaffin*, 412 U.S. at 31.

192 *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357 (1978)(A choice was available to the defendant. That choice, essentially, was to either take the sure five year sentence first offered, or to gamble on a higher sentence by choosing a jury trial to determine the forgery charge and also prior convictions that might result in a sentence enhancement.); Crampton v. Ohio, 402 U.S. 183 (1971)(where a defendant unsuccessfully contended that permitting jury to determine guilt and punishment in single trial compelled him to waive his fifth amendment rights to remain silent in the guilt phase of the trial, whereas in a bifurcated trial of guilt and punishment, defendant may remain silent in "guilt trial," but argue for mitigating punishment during the punishment phase). *See also* Parker v. North Carolina, 397 U.S. 790 (1970).

193 *Pearce*, 395 U.S. at 738 (Black, J., concurring). Although the chances of receiving a more severe sentence upon reconviction are now greater under *McCullough*, the defendant is still able to control his destiny by forgoing his right to obtain a new trial and thereby incur the risk of which the defendant is aware. *Pearce*, 395 U.S. at 721. Whether the defendant is in fact entitled to greater protection from harsher resentencing is an issue independent of the question whether a defendant is able to control his own destiny on retrial. The Court is just as adverse to a policy, in which a defendant enjoys absolute immunity from harsher resentencing, as the Court is to a policy in which a defendant is assured a harsher sentence upon reconviction. Under *McCullough*, the defendant may be exposed to a greater risk of harsher resentencing, but he is not condemned to it should he elect to appeal. *See id.* at 722.

194 *See, e.g.*, *supra* note 192 and accompanying text.

subsequently compel a harsher resentence inhered in that decision.[195]

In dealing with judicial vindictiveness, the Court has had to weigh the importance of the general privilege conferred upon criminal appellants by the *Pearce* presumption of judicial vindictiveness and its prophylactic rule, against the inroads of such a privilege on the fair administration of justice.[196] In its analysis, the Court in *McCullough* adopted a public policy rationale within which the *Pearce* presumption and its prophylactic rule are now circumscribed.[197] This policy reflects a desire to further the goals embraced in *Pearce* in juxtaposition with what the Court in *McCullough* properly regarded as the equally significant concerns of a criminal justice system in which deference to trial court sentencing discretion is a fundamental means of assessing just penalties.[198]

2. *The Gamble of Retrial: Summary*

The Court in *McCullough* has struck, in the spirit of *Wasman*, a practical balance between actions deemed to unconstitutionally chill appeals and those actions that do not.[199] This balance recognizes that a residual "chilling effect" will always inhere in the legitimate sanction of increased sentences on reconviction.[200] Apprehension will exist as long as higher sentences may be imposed. This deterrent effect, however, is a product of a criminal justice system in which difficult government imposed choices are inevitable.[201] Since a defendant's life and character significantly influence the outcome of every criminal case, it will be difficult to limit these chilling effects beyond *McCullough* without obstructing the imposition of an otherwise well-reasoned and thoroughly considered sentence.[202]

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195 *See, e.g.*, 395 U.S. at 738 (Black, J., concurring).

196 Similar balancing tests have been employed with respect to questions regarding prosecutorial vindictiveness. *See, e.g.*, Jackson v. Walker, 585 F.2d 139, 145 (5th Cir. 1978), *quoted in* United States v. Spence, 719 F.2d 358, 361-62 (11th Cir. 1983)("[W]here the circumstances show a realistic fear of vindictiveness . . . the strength of the presumption is determined by a balancing test which 'weigh[s] the need to give defendants freedom to decide whether to appeal against the need to give the prosecution freedom to decide whether to prosecute.' ").

197 The effect of *Pearce* is tempered by the Court's reluctance to restrict the discretionary authority of trial court judges unless judicial vindictiveness is sufficiently apparent. *See McCullough*, 106 S. Ct. 976 (1986).

198 *See supra* note 153 and accompanying text.

199 *McCullough*, 106 S. Ct. at 979.

200 *Id.* at 981.

201 *See supra* note 190.

202 *McCullough*, 106 S. Ct. at 981. *See also* Williams v. New York, 337 U.S. 241, 249-50 (1949).

VI. CONCLUSION

The Court in *McCullough* deemed it proper, as it did in *Wasman*, to reclarify and then redefine the essential thrust of *Pearce*. According to the Court's conclusions, public policy dictates that (1) a presumption of judicial vindictiveness only applies when a defendant receives a more severes sentence on reconviction by the same sentencing judge who imposed the defendant's original sentence; (2) the *Pearce* rule should be construed to sanction harsher resentencing on the basis of any new information obtained since the original sentencing proceeding which bears a reasonable correlation to the sentence increase; and (3) harsher resentencing should stand, whether or not it in fact deters defendants from appealing their prior conviction and sentence, in the absence of a presumption of judicial vindictiveness or a showing of actual vindictiveness.

Under *McCullough*, those who choose to exercise the rights and privileges which our Constitution and criminal justice system confer may continue doing so without fear of penalty. The Court in *McCullough* has preserved this protection for defendants while responding to the equally significant concerns of our society in which sentencing discretion remains a vital and integral component of our criminal justice system.

GLENN H. KOBAYASHI