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Higher Punishment for a Successful Appellant on Retrial: Defining the Gantlet

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III. Conclusion

The *Tinker* decision may cause school officials to be unsure of the limits of their authority to prevent disruption. Indeed, it may cause such officials to be unsure as to what constitutes disruption. The Court has clearly held that disruption of school activities is not protected by the first amendment and may be curtailed, but has not adequately defined disruption. Although physical disruption of school activities is clearly subject to prohibition,[32] mere controversy is not. However, it is possible that situations might occur in which controversy could "materially and substantially" interfere with the operation of a school.

Another result of the *Tinker* decision may be that school officials in the future will have their administrative decisions subjected to judicial hindsight, to be upheld or overruled on the basis of the facts of the specific case. As in *Burnside* and *Blackwell*, the courts in future cases are likely to look to the degree of disruption which occurred after the regulation was violated, rather than to the reasonableness of the fears of the school officials that disruption would result. Although the Court has clearly affirmed the constitutional rights of students in the public schools, the lack of clarity as to the circumstances in which the right of free expression may be curtailed diminishes the effect of the case. Because school officials may be uncertain as to the legality of their acts, and as to the limits of their authority, they will probably continue to act as they have in the past, leaving the determination of validity to the courts.

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Higher Punishment for a Successful Appellant on Retrial: Defining the Gantlet

Pearce was convicted of assault with intent to commit rape and given a twelve- to fifteen-year sentence. On appeal, the decision was reversed because an involuntary confession had been used against him.[1] On retrial, he was again found guilty. Although credit was given for time already served under the first conviction, his new sentence, added to that time, was longer than the original sentence. The Court of Appeals for the Fourth Circuit affirmed the decision of the federal district court, finding the new sentence unconstitutional and void.[2] The Supreme Court granted certiorari.[3]

from their classwork was disruptive in itself. He also expressed the opinion that the first amendment does not extend the right to address any group at any public place, at any time. He also stated that he felt the Court was returning to a "reasonableness" test for striking down acts of state governments. *Id.* at 517-19.

[32] *See* Mr. Justice Fortas' concurring statement denying certiorari in Barker v. Hardway, 394 U.S. 905 (1969).

[1] State v. Pearce, 266 N.C. 234, 145 S.E.2d 918 (1965).

[2] Pearce v. North Carolina, 397 F.2d 253 (4th Cir. 1968). The court relied on its former decision in Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967), *cert. denied*, 390 U.S. 905 (1968). There the Fourth Circuit held that the constitutional protection against double jeopardy is violated if an increased sentence is permitted on retrial to a defendant who had served time on an invalid sentence. Patton v. North Carolina, *supra* at 643.

[3] North Carolina v. Pearce, 393 U.S. 922 (1969).

The Court also granted certiorari in a similar case from the Fifth Circuit. In this case Rice, the appellant, had been convicted of burglary and sentenced to ten years. His conviction was reversed on appeal because he had been denied right to counsel. On retrial, two and one-half years after the first conviction, he was again found guilty. However, he was assessed twenty-five years, and no credit was given for time already served. The federal district court overturned his new sentence because it was evident that he was being punished for appealing; the court of appeals affirmed.[4]

The Supreme Court decided both cases in the same opinion. *Held, affirmed*: Assessment of a higher punishment on retrial for the same offense after a successful appeal is not prohibited by the double jeopardy provision of the fifth amendment as long as punishment already exacted has been fully credited. However, to satisfy the requirements of due process of law, it must affirmatively appear on the record that the higher sentence is based on identifiable conduct since the original sentencing, not on vindictiveness. *North Carolina v. Pearce*, 395 U.S. 711 (1969).[5]

I. The Basic Protection Against Double Jeopardy

Even an erroneous and illegal sentence could not be corrected by a new trial under English common law.[6] This may have been what caused the founding fathers to change Madison's first proposal for a double jeopardy provision in the Constitution. Madison's proposal was that "[n]o person shall be subject . . . to more than one punishment or one trial for the same offense."[7] It was changed to read, as it does today, to "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[8] The double jeopardy protection prevents governmental appeal[9] and multiple punishments for the same offense,[10] but it does not prevent retrial of a defendant whose conviction is reversed on appeal.[11]

In 1900 the Supreme Court affirmed a decision which gave an appellant a more severe sentence on retrial than he had received in the trial from which he had first appealed.[12] The Court rejected the argument that to resentence the appellant at all would place him in double jeopardy and

[4] Rice v. Simpson, 274 F. Supp. 116 (M.D. Ala. 1967), *aff'd*, 396 F.2d 499 (5th Cir. 1968).

[5] Decided with *Simpson v. Rice*. Although *Pearce* was given credit, no reasons were given for the higher sentence. *Simpson* was not given credit, nor did the record reveal a lack of vindictiveness behind the higher sentence.

[6] Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws*, 35 MINN. L. REV. 239, 244 (1951), citing Whitehead v. Queen, 7 Q.B. 582, 115 Eng. Rep. 608 (1845); King v. Bourne, 7 A. & E. 58, 712 Eng. Rep. 393 (K.B. 1837); King v. Ellis, 5 B. & C. 395, 400, 108 Eng. Rep. 147, 151 (K.B. 1826).

[7] North Carolina v. Pearce, 395 U.S. 711, 729 (1969) (Douglas, J., concurring), citing 1 ANNALS OF CONGRESS 434 (1834) [1789-91].

[8] U.S. CONST. amend. V.

[9] Kepner v. United States, 195 U.S. 100 (1904). This prohibition was a protection from the federal government, since this provision did not apply to the states until recently. *See* Benton v. Maryland, 395 U.S. 784 (1969). Since states now must follow the standard set by the Supreme Court, it would follow that states are no longer allowed to appeal a criminal case.

[10] *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

[11] United States v. Ball, 163 U.S. 662 (1896).

[12] Murphy v. Massachusetts, 177 U.S. 155 (1900).

violate due process.[13] The Court later held in *Stroud v. United States*[14] that the reversal of a defendant's conviction for first degree murder and sentence to life imprisonment did not constitutionally bar a conviction on retrial for first degree murder with the death sentence.[15]

The constitutional authority for the retrial and resentencing of a defendant is not without limitation, however. In *Green v. United States*[16] a defendant was convicted of second degree murder under an indictment charging first degree murder. After the conviction for the lesser offense was reversed on appeal, the defendant was tried and convicted for the higher offense. The Supreme Court held the second conviction unconstitutional because conviction for the lesser offense operated as an implied acquittal of the higher crime.[17] To hold otherwise, the Court said, would place the defendant in the dilemma of going to prison on a possibly erroneous conviction or risk being found guilty of the greater offense on retrial "in plain conflict with the constitutional bar against double jeopardy."[18]

II. Benton v. Maryland: Double Jeopardy Protection Applicable to the States

Recently, in *Benton v. Maryland*,[19] the Supreme Court held the fifth amendment protection against double jeopardy to be fundamental to the American scheme of justice and applicable to the states through the fourteenth amendment.[20] In doing so it overruled *Palko v. Connecticut*[21] which held that state defendants were not protected by the double jeopardy provision as long as an examination of the totality of circumstances did not disclose a denial of fundamental fairness and due process of law.[22] Benton was found not guilty of larceny but guilty of burglary under an indictment charging both. He was given a ten-year prison sentence. On retrial, after reversal of the burglary conviction, he moved to dismiss the larceny count, claiming that it subjected him to double jeopardy. The motion was denied, and he was found guilty on both counts and given concurrent sentences of fifteen years for burglary and five years for larceny. The Supreme Court held that the larceny conviction was unconstitutional under the double jeopardy provision of the fifth amendment.[23] In so holding, the Court relied on the *Green*[24] decision.

The Court's decision in *Benton* appears to be important for more than

[13] The Court answered that his plea could not be maintained because of service of part of a sentence vacated on his own application. He was held to abide by the consequences of his appeal. *Id.* at 158.

[14] 251 U.S. 15 (1919).

[15] *Id.* Again the Court said the defendant was not placed in double jeopardy, because the award of a new trial was granted as a result of his writ of error. *Id.* at 18.

[16] 355 U.S. 184 (1957).

[17] *Id.* at 185.

[18] *Id.* at 194.

[19] 395 U.S. 784 (1969).

[20] *Id.* at 794.

[21] 302 U.S. 319 (1937).

[22] *Id.*

[23] Benton v. Maryland, 395 U.S. 784, 796 (1969).

[24] *Id.* at 797, citing Green v. United States, 355 U.S. 184 (1957).

its extension of double jeopardy protection to state defendants. The Court's reliance upon *Green* would seem to indicate that double jeopardy protection does not extend to a more severe sentence imposed upon a defendant at retrial, but only to the offenses for which he may be retried. This becomes even clearer when one considers that the offense for which Benton could not be retried was the *lesser* of the two offenses.[25]

III. NORTH CAROLINA v. PEARCE

The Court's Opinion. In *North Carolina v. Pearce* the Court quickly resolved the question of whether credit for time served under the original sentence must be credited toward the sentence given on retrial.[26] However, the question of whether the double jeopardy provision of the fifth amendment prohibits higher punishment for the same offense on retrial after reversal was not so easily answered. The Court first cited United *States v. Ball*,[27] which held that double jeopardy does not prohibit retrial after a successful reversal.[28] The Court also cited *Stroud*[29] and *Murphy v. Massachusetts*[30] in support of the proposition that a defendant may receive a higher sentence on retrial.[31] Ultimately, however, the Court based its holding on the theory that "the slate is wiped clean" by reversal of the original conviction.[32] In so deciding, the Court dismissed the contention that the fourteenth amendment's equal protection clause precludes higher punishment after appeal. The argument was advanced that permitting higher punishment on retrial imposes risk only on convicts who appeal, thus putting them in a class separate from those who do not appeal. The Court reasoned that because the retrial could also result in an acquittal, it could not be said that an invidious classification had been created.[33] How-

[25] His sentence on retrial for larceny was five years, and for burglary, fifteen. In *Green* the defendant could not be tried for the higher offense of which he was impliedly acquitted. What of the defendant who is convicted of voluntary manslaughter on a murder indictment, has his conviction reversed, is retired on the murder indictment, and again convicted of voluntary manslaughter? If the rationale behind the *Green* and *Benton* decisions is followed will his second conviction be overturned because he was impliedly acquitted of murder at his first trial, thus making his second conviction invalid because of a faulty indictment? Will it make a difference that he was sentenced to ten-to-fifteen years the first time and ten years the second time? What effect *Benton v. Maryland* has on this set of facts, and whether *Benton* is retroactive will be argued before the Supreme Court in Price v. Georgia, 118 Ga. App. 207, 163 S.E.2d 243 (1968), *cert. granted*, 395 U.S. 975 (1969).

[26] Citing *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873), the Court emphasized that the fifth amendment guarantee against double jeopardy protects against multiple punishments for the same offense. This protection, the Court reasoned, "is what is necessarily implicated in any consideration of the question whether, in the imposition of sentence for the same offense after retrial, the Constitution requires that credit must be given for punishment already endured." North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[27] 163 U.S. 662 (1896).

[28] *Id.*

[29] Stroud v. United States, 251 U.S. 15 (1919).

[30] 177 U.S. 155 (1900).

[31] North Carolina v. Pearce, 395 U.S. 711, 719-20 (1969).

[32] *Id.* at 720-21. "A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental propensities'." *Id.* at 723, citing Williams v. New York, 337 U.S. 241, 245 (1948).

[33] 395 U.S. at 722-23. But it could be argued: Two men are in prison for the same offense; both misbehave enough so as to have, for example, their paroles cancelled or set back. Only the one who appeals may have his sentence increased.

ever, it was found that the due process clause of the fourteenth amendment *does* prohibit putting a price on appeal by penalizing those who exercise their right to appeal. The Court held that due process requires the production of records showing reasons for higher punishment, based on "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."[34]

Use of Precedent Questionable. Despite the Court's reliance on its decisions in *Ball*, *Murphy* and *Stroud*, one may question whether these cases support the principle that higher punishment on retrial after a successful appeal is constitutionally permissible. It is well accepted that *Ball* stood for no more than allowing *retrial* after reversal.[35] In *Murphy* the defendant's double jeopardy claim was that he could not be *resentenced* after he had served part of his original sentence.[36] Furthermore, double jeopardy protection did not apply to state proceedings when *Murphy* was decided in 1900. The facts and rationale in *Stroud* are closest to *Pearce*, but it is not clear whether the specific issue of higher punishment on retrial was argued, or whether the case was argued on the theory that retrial on indictment for the same crime was placing Stroud in double jeopardy.[37] However, the argument that *Green* overturns *Stroud* can be answered by distinguishing *Stroud*, as did the Court in the *Green* decision. *Green* involved two statutory offenses, and of one he was acquitted; *Stroud* involved only one.[38]

Defining the Gantlet. Mr. Justice Douglas, in his concurring opinion in *Pearce*, observed that the theory behind the double jeopardy protection is that a defendant "need run the gantlet only once."[39] *Pearce*, seen in *Benton*'s light, defines that gantlet. The gantlet is not the risk of the range of punishment, but the risk of conviction. Once a person has been acquitted or fairly convicted of a particular statutory offense, he cannot be tried again for it. If he wins an appeal, he can be tried again; he has not run the full gantlet to a fair and final judgment as to guilt or innocence. Double jeopardy protects him from multiple punishment for the same conviction only in requiring credit to be given for time already served. His only other sentencing protection comes from the due process clause of the fourteenth amendment. Due process guarantees that any increased sentence will not be imposed as punishment for exercising the right of appeal.[40]

[34] *Id.* at 723-26.

[35] The *Pearce* Court accepts this. *Id.* at 719-20.

[36] Murphy v. Massachusetts, 177 U.S. 155 (1900). That case involved only the right to resentence at all after a part of the original sentence had been served. There was no new trial as to guilt or innocence. *See* notes 12-13 *supra*, and accompanying text.

[37] North Carolina v. Pearce, 395 U.S. 711, 732 (1969) (Douglas, J., concurring).

[38] Green v. United States, 355 U.S. 184, 194-95 n.14 (1957).

[39] North Carolina v. Pearce, 395 U.S. 711, 727 (1969) (Douglas, J., concurring). Douglas, however, defines the gantlet as the risk of the full range of punishment, not merely the risk of conviction of a specific statutory offense.

[40] In some cases it may be worse for an appellant to be in prison in one state than in another. For example, a defendant in a state in which first and second degree murder are different statutory crimes with different punishments receives greater protection than one in a state where murder is but one statutory offense with a range of punishment. Under *Pearce*, the latter takes the risk of receiving the death penalty on appealing his murder conviction and life imprisonment sentence. The former, under *Benton* and *Green*, takes no such risk appealing his second degree murder con-

Once one recognizes the distinction between conviction and punishment, the constitutional permissibility of higher punishment on retrial becomes clear. However, a problem still remains in explaining the reasoning behind the separation. The language of the Court is of little help. The Court ventured an explanation in terms of precedent,[41] but as has been shown, it is questionable that the issue had been before the Court until *Pearce*.[42] Ultimately the decision was based on the slate having been wiped clean by the successful appeal,[43] but the Court admitted that that metaphor only verbalizes the unexplained.[44]

IV. Conclusion

In *Pearce* the Court implicitly acknowledged a distinction between punishment and conviction. The decision makes clear that, except for the credit requirement, only the latter falls under the double jeopardy protection. The significance of *Pearce* lies in the effect which the decision will have rather than in the Court's rationale. The Court's decision could have been based on the long history of the separation of conviction from punishment, dating back to the early common law.[45] Balancing of equities between state and defendant[46] and deferring to the state's prerogative of enacting penal legislation and establishing sentencing procedure[47] also present plausible rationale for the separation. However, the Court declined to rest its decision on any of these bases, relying instead on questionable judicial precedent and the unpersuasive theory that the "slate is wiped clean" by the prosecution of a successful appeal.

Neither do the due process requirements laid down by the Court in *Pearce* seem to rest on an ascertainable constitutional base. They seem to stem more from the Court's theory of penology than from standards required by the due process clause of the fourteenth amendment. Modern penology does follow the theory that a defendant's character be considered when imposing a sentence. Although conduct subsequent to the original sentencing proceeding is a part of the defendant's character, it is not clear that on retrial due process requires consideration of only this conduct, to the exclusion of an opinion as to the degree of blameworthiness for

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viction and life imprisonment sentence. He has been impliedly acquitted of first degree murder; he may not receive the death sentence on retrial because that sentence in that state applies only to first degree murder. One must take the risk; the other need not. Both have committed the same wrong against society.

[41] North Carolina v. Pearce, 395 U.S. 711, 719-20 (1969).

[42] *See* notes 35-37 *supra*, and accompanying text.

[43] North Carolina v. Pearce, 395 U.S. 711, 721 (1969).

[44] *Id.*

[45] For a history of the separation of conviction from sentencing, and double jeopardy as a term of art, *see* Steele, *The Doctrine of Multiple Prosecutions in Texas*, 22 Sw. L.J. 567 (1968).

[46] The argument usually goes something like this: "If the defendant has a chance to correct the verdict as to his guilt or innocence, with the chance he may be set free, why should not the state be able to correct any mistake in sentencing?" *Cf.* Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws*, 35 Minn. L. Rev. 239, 245 (1951): "Is there any rational justification for punishing *this* defendant substantially more than others who committed the same offense, simply because *this defendant* was not given a fair trial or was not properly sentenced the first time?"

[47] Sentencing is a police power left to the states under the tenth amendment. U.S. Const. amend. X.