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Intervening Convictions as Support for Enhanced Sentences Following Appeal and Retrial

INTERVENING CONVICTIONS AS SUPPORT FOR ENHANCED SENTENCES FOLLOWING APPEAL AND RETRIAL

Sentencing is a critically important phase of the criminal justice process.[1]

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1. *See* United States v. DiFrancesco, 449 U.S. 117, 150 (1980) (Brennan, J., dissenting) (sentencing phase as critical as guilt-innocence phase); *see also* Estelle v. Smith, 451 U.S. 454, 462-63 (1981) (guilt and penalty phase equally critical for fifth amendment purposes); Mempa v. Rhay, 389 U.S. 128, 134 (1967) (sentencing is critical phase entitling defendant to sixth amendment right to counsel). *See generally* M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER vii (1973) (imposition of sentences most critical phase of criminal justice system); Special Project, *Eleventh Annual Review of Criminal Procedure* 1980-81, 70 GEO. L.J. 465, 721 (1981) [hereinafter cited as *Criminal Procedure* 1980-81]; Note, *Past Arrests and Perceived Perjury as Sentencing Factors in Illinois*, 13 LOY. U. CHI. L.J. 935 (1982) (reviewing sentencing law) [hereinafter cited as *Past Arrests*].

The primary purpose of sentencing and incarceration is the rehabilitation of the offender. United States v. Grayson, 438 U.S. 41, 46 (1978); *see* Williams v. New York, 337 U.S. 241, 247-48 (1949) (rehabilitation of offender important objective of sentencing). The Supreme Court has stated that the best means to accomplish the objective of rehabilitation is to allow judges a wide range of discretion to tailor the sentence to fit the offender as well as the offense. *Williams*, 337 U.S. at 247. To support judges in the task of imposing the appropriate sentence on each offender, Congress has mandated that judges shall have available the fullest possible information for consideration in the presentence investigation. Organized Crime Control Act of 1970, § 1001(a), 18 U.S.C. § 3577 (1976). In the Organized Crime Control Act of 1970, Congress provided that information concerning the background, character, and conduct of a person convicted of an offense shall be available for the court's consideration in imposing a sentence. *Id.* The presentence report submitted to the sentencing judge contains background information concerning the defendant. FED. R. CRIM. P. 32(c)(2). Under the Federal Rules of Criminal Procedure, the report may contain any prior criminal history of the defendant, as well as information about the financial condition, personal characteristics, circumstances affecting his behavior, and other information as required by the court. *Id.* Moreover, a sentencing judge may consider criminal history other than convictions. *See* United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972) (sentencing judge may consider charges resulting in acquittal of defendant); United States v. Cafarelli, 401 F.2d 512, 514 (2d Cir.) (sentencing judge may consider evidence of crimes for which state did not try defendant), *cert. denied*, 393 U.S. 987 (1968); United States v. Doyle, 348 F.2d 715, 721 (2d Cir.) (sentencing judge may consider charges dismissed at trial), *cert. denied*, 382 U.S. 843 (1965).

The sentencing judge's inquiry, though broad, is not unlimited in scope. A judge may not consider false or unreliable information contained in a presentence report. *See* Townsend v. Burke, 334 U.S. 736, 740-41 (1948) (Court held trial judge's sentencing procedure violated due process because judge imposed sentence based on record of eight prior convictions without allowing uncounseled defendant opportunity to object to record's inaccuracy); *see also* United States v. Weston, 448 F.2d 626, 629-31 (9th Cir. 1971) (court vacated sentence based on unverifiable and unreliable charges of serious criminal conduct), *cert. denied*, 404 U.S. 1061 (1972). A judge also may not consider prior convictions obtained in violation of the right to counsel. United States v. Tucker, 404 U.S. 443, 448-49 (1972). *But cf.* Portillo v. United States, 588 F.2d 714, 717 (9th Cir. 1978) (en banc) (*Tucker* inapplicable when trial court considered prior conviction resulting from fourth amendment violation in imposing sentence). Moreover, a sentencing judge may not consider information obtained through an illegal warrantless search when imposing a sentence. Verdugo v. United States, 402 F.2d 599, 611-12 (9th Cir. 1968), *cert. denied*, 397 U.S. 925 (1970); *see* Armpriester v. United States, 256 F.2d 294, 297 (4th Cir.) (court cannot consider illegally seized evidence in determining sentence), *cert. denied*, 358 U.S. 856 (1958). *But cf.* United States v.

Although due process[2] protections extend to the sentencing procedure,[3] they have developed more slowly at the sentencing stage than at other stages of the trial process, preserving the wide discretion traditionally accorded judges in sentencing decisions.[4] The Supreme Court has determined that due process requires that vindictiveness toward a defendant for successfully challenging a prior conviction play no part in the sentencing decision upon retrial and reconviction.[5] One perceived manifestation of judicial vindictiveness is the imposition of an enhanced sentence upon reconviction.[6] In *North Carolina v. Pearce*,[7] the Supreme Court formulated a prophylactic rule to ensure that courts comply with due process standards and that vindictiveness does not influence a resentencing decision.[8] The federal circuit courts, however, have applied the

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Larios, 640 F.2d 938, 941-42 (9th Cir. 1981) (sentencing judge may consider evidence illegally seized when illegality caused by technical error in warrant and search not inappropriate).

2. U.S. CONST. amend. V, XIV. The fifth amendment provides that the federal government cannot deprive an individual of constitutional rights without due process of law. U.S. CONST. amend. V. The fourteenth amendment to the Constitution forbids any state from depriving a citizen of the United States of life, liberty or property without due process of law. U.S. CONST. amend. XIV. Due process of law requires that deprivation of life, liberty or property by adjudication be preceded by notice and an opportunity for a hearing appropriate to the nature of the case. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

3. *See* Gardner v. Florida, 430 U.S. 349, 358 (1977) (sentencing process must satisfy requirements of due process clause); *see also supra* note 2 (due process clause requirements). The Supreme Court has established guidelines to ensure that defendants receive due process protections at the sentencing stage. Due process entitles a defendant to representation by counsel at the sentencing hearing, and to have counsel speak on his behalf. Mempa v. Rhay, 389 U.S. 128, 134 (1967); *see* Townsend v. Burke, 334 U.S. 736, 740-41 (1948) (due process violated when defendant lacked counsel to rebut false accusations in presentence report). A defendant has the right to imposition of a sentence without purposeful or oppressive delay. *See* Pollard v. United States, 352 U.S. 354, 361 (1957) (sixth amendment guarantee of speedy trial extends to imposition of sentence). The sentencing court must allow the defendant an opportunity to speak in his own behalf. Hill v. United States, 368 U.S. 424, 426 (1962). A defendant has the right to be present during sentencing. United States v. Horton, 646 F.2d 181, 188-89 (5th Cir.), *cert. denied*, 454 U.S. 970 (1981).

4. *See Past Arrests, supra* note 1, at 937 n.4 (due process protections at sentencing slow to develop and remain unsettled).

5. North Carolina v. Pearce, 395 U.S. 711, 725-26 (1969); *see* United States v. Goodwin, 457 U.S. 368, 372 (1982) (individual may not be punished for exercising protected statutory or constitutional right); *see also* United States v. Jackson, 390 U.S. 570, 581 (1968) (Court declared that imposition of punishment to penalize those who choose to exercise constitutional rights patently unconstitutional).

6. *See* North Carolina v. Pearce, 395 U.S. 711, 723-26 n.20 (1969) (imposition of harsher sentence to penalize defendants' challenges to original conviction would threaten defendants and chill exercise of right to appeal); United States v. Coke, 404 F.2d 836, 845 (2d Cir. 1968) (prospect of increased sentence threatens defendants' assertion of rights). *See generally* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965) (discussion of enhancement of penalties following challenge of conviction) [hereinafter cited as *In Gideon's Wake*]; Aplin, *Sentence Increases on Retrial After* North Carolina v. Pearce, 39 U. CIN. L. REV. 427 (1970) (discussion of possible perception of vindictiveness in sentence enhancement after retrial) [hereinafter cited as *Sentence Increases*].

7. 395 U.S. 711 (1969).

8. *See id.* at 726. In *Pearce*, the Supreme Court held that whenever a judge imposes an enhanced sentence after retrial, the judge must set forth reasons for the enhancement. *Id.* In

Pearce Court's guidelines inconsistently in determining what circumstances justify an enhanced sentence on reconviction.[9]

The litigation in *Pearce* arose when a North Carolina state court convicted the defendant of assault with intent to rape and sentenced him to twelve to fifteen years imprisonment.[10] The defendant appealed his conviction on the ground that the court had violated his constitutional rights by admitting an involuntary confession into evidence against him.[11] The North Carolina Supreme Court reversed his conviction and ordered the lower court to retry Pearce without evidence of the confession.[12] After retrial and reconviction, the same North Carolina state court that heard Pearce's original case imposed an eight-year term of incarceration.[13] Because Pearce already had served several years of his original term, the second sentence actually constituted a harsher penalty.[14] The North Carolina Supreme Court affirmed the reconviction and resentencing on appeal.[15]

Pearce initiated a habeas corpus proceeding in the United States District

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addition, the *Pearce* Court stated that a judge must base the reasons for the enhancement upon specific conduct on the defendant's part occurring after the time of the original sentencing. *Id.* Further, the *Pearce* Court mandated that the judge make the information upon which the judge based the sentence enhancement part of the trial record so that a reviewing court could examine the information to determine its validity. *Id.; see infra* text accompanying notes 21-30 (discussion of *Pearce* Court's rationale).

9. *Compare* United States v. Wasman, 700 F.2d 663, 668 (11th Cir.) (intervening convictions for conduct predating original sentencing sufficient support for enhanced sentence under *Pearce*), *cert. granted*, 104 S.Ct. 334 (1983) *with* United States v. Williams, 651 F.2d 644, 648 (9th Cir. 1981) (intervening conviction in state court could not support enhanced sentence on retrial under *Pearce*) *and* United States v. Markus, 603 F.2d 409, 414 (2d Cir. 1979) (intervening conviction on charges pending at time of original sentencing not conduct supporting enhanced sentence under *Pearce*).

10. State v. Pearce, 266 N.C. 234, 236, 145 S.E.2d 918, 920, *aff'd*, 268 N.C. 707, 151 S.E.2d 571 (1966).

11. *Id.* at 237, 145 S.E.2d at 919.

12. *Id.* at 238, 145 S.E.2d at 921. In *Pearce*, the North Carolina Supreme Court reversed Pearce's conviction because the trial court admitted evidence of the defendant's statements that the Supreme Court determined were involuntary and were made without the presence of counsel. *Id.* In refusing to admit the defendant's statements, the North Carolina Supreme Court relied on the Supreme Court's decision in *Powell v. Alabama*, 287 U.S. 45 (1932), which held that the fourteenth amendment required appointment of counsel to represent defendants incapable of defending themselves in capital cases. 266 N.C. at 238, 145 S.E.2d at 921. The North Carolina Supreme Court also relied on *State v. Simpson*, 243 N.C. 436, 90 S.E.2d 708 (1956), which held that the North Carolina constitution required appointment of counsel to represent defendants in capital cases. 266 N.C. at 238, 145 S.E.2d at 921.

13. North Carolina v. Pearce, 395 U.S. at 713.

14. *Id.* In *Pearce*, the Court stated that because the defendant would spend a longer time in prison under the new sentence than under the original sentence, the new sentence was more severe. *Id.* Accordingly, the *Pearce* rule is implicated if the defendant must spend an increased time in prison. *See id.* at 713, 726. *See, e.g.*, United States v. Williams, 651 F.2d 644, 647 (9th Cir. 1981) (court implicated *Pearce* rule because second sentence increased time defendant served in prison); United States v. Markus, 603 F.2d 409, 413 (2d Cir. 1979) (actual effect of new sentence relevant inquiry for determining applicability of *Pearce* standard).

15. State v. Pearce, 268 N.C. 707, 708, 151 S.E.2d 571, 572 (1966).

Court for the Eastern District of North Carolina.[16] The district court granted the writ,[17] relying on an earlier holding of the United States Circuit Court of Appeals for the Fourth Circuit that an enhanced sentence imposed on retrial was unconstitutional.[18] The Fourth Circuit affirmed the district court's order.[19] North Carolina appealed the Fourth Circuit's decision, and the Supreme Court granted certiorari to decide whether the Constitution limited the imposition of a harsher sentence upon retrial.[20]

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16. *See* Pearce v. North Carolina, 397 F.2d 253, 253 (4th Cir. 1968).

17. *Id.*

18. *See id.* at 253-54. The federal district court in *Pearce* based the grant of Pearce's petition for habeas corpus on the Fourth Circuit's prior decision in *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967), *cert. denied*, 390 U.S. 905 (1968). *Id.* In *Patton*, the Fourth Circuit held that an enhanced sentence on retrial violated the due process, equal protection, and double jeopardy provisions of the Constitution. 381 F.2d at 646. The litigation in *Patton* arose when the defendant petitioned the federal district court for a writ of habeas corpus after a North Carolina state court imposed an enhanced sentence following retrial and reconviction for armed robbery. *Id.* at 636-37. The Fourth Circuit affirmed the district court's decision to grant Patton's petition for a writ of habeas corpus, holding that to force an accused to risk increased punishment as a condition for exercise of a constitutional right violated due process. *Id.* at 640.

19. Pearce v. North Carolina, 397 F.2d 253, 254 (4th Cir. 1968) (Fourth Circuit held *Pearce* strictly governed by holding of *Patton*); *see supra* note 18 (discussion of Fourth Circuit's holding in *Patton*).

20. North Carolina v. Pearce, 393 U.S. 922 (1968). The Supreme Court granted certiorari in *Pearce* to resolve the conflicts among federal circuit courts and state courts concerning whether imposing an enhanced sentence on retrial violated constitutional protections. North Carolina v. Pearce, 395 U.S. 711, 715 n.5 (1969). *Compare* Marano v. United States, 374 F.2d 583, 585 (1st Cir. 1967) (defendant should not have to fear possibility that exercise of right to appeal will result in penalty in form of higher sentence) *and* State v. Turner, 247 Or. 301, ____, 429 P.2d 565, 571 (1967) (state court's procedural policy should not limit right of appeal by requiring defendant to risk more severe sentence to exercise right) *with* Newman v. Rodriguez, 375 F.2d 712, 714 (10th Cir. 1967) (risk of incurring greater prison sentence after retrial is risk defendant takes when defendant chooses to appeal) *and* United States *ex. rel.* Starner v. Russell, 378 F.2d 808, 811-12 (3d Cir. 1967) (trial judge may impose sentence greater than originally imposed without violating due process protection).

Prior to *Pearce*, the development of a constitutional theory suggesting that the imposition of a harsher sentence upon retrial might violate due process principles may have originated with an article by Professor William Van Alstyne entitled *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant. See In Gideon's Wake supra* note 6 (harsher resentencing for criminal defendants who appeal denies fundamental rights to fair trial and discourages right to appeal). In *United States v. Coke,* Judge Friendly attributed the origin of the argument that the Constitution prohibited the imposition of a harsher sentence upon retrial to the Van Alstyne article. 404 F.2d 836, 843 (2d Cir. 1968). The *Coke* court prohibited the imposition of a harsher sentence upon retrial unless warranted either by the defendant's conduct after the time of the original sentencing or by new information unrecognized by the sentencing judge at the time of the first sentencing proceeding. *Id.* at 845. The Second Circuit formulated the *Coke* rule prior to *Pearce* as an exercise of supervisory powers. *Id.* at 845-46; *see Sentence Increases, supra* note 6, at 447-49 (history of development of arguments leading to *Pearce* decision). Van Alstyne later proved an effective advocate for his theory that due process prohibited enhancement of sentence upon retrial. As assigned counsel, he argued against the defendant's increased sentence in *Patton* and prevailed, creating the precedent which North Carolina subsequently appealed in *Pearce. See* United States v. Coke, 404 F.2d at 843 (discussion of Van Alstyne's representation of Patton); *supra* note 18 (discussion of *Patton* court's reasoning).

The Supreme Court affirmed the Fourth Circuit's decision in *Pearce*.[21] The *Pearce* Court held that imposition of heavier sentences on reconvicted defendants for the purpose of penalizing those who successfully attack prior convictions would violate the due process guarantees of the fourteenth amendment.[22] Accordingly, the Court stated that vindictiveness against a defendant for exercising a right to appeal[23] was not a legitimate basis for the imposition of a second enhanced sentence.[24] The *Pearce* Court recognized, however, that a defendant would have difficulty proving a retaliatory motive on the part of a sentencing judge.[25] The *Pearce* Court, therefore, formulated

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

22. *See id.* at 724-25. The petitioners in *Pearce* and the companion case, Simpson v. Rice, 274 F. Supp. 116 (M.D. Ala. 1967), *aff'd*, 396 F.2d 499 (5th Cir. 1968), *aff'd sub nom.* North Carolina v. Pearce, 395 U.S. 711 (1969), argued that the enhanced punishment on retrial violated the double jeopardy clause of the fifth amendment as binding on the states through the fourteenth amendment, and the equal protection clause of the fourteenth amendment. 395 U.S. at 719, 722. The litigation in *Simpson v. Rice* arose when Rice's original conviction and ten-year sentence were reversed on the ground that Rice had not been accorded his constitutional right to counsel. *Id.* at 714. The same court retried and reconvicted Rice, and sentenced him to 25 years in prison. *Id.* The resentencing judge refused to give the defendant credit for time served in prison under the original sentence. *Id.* Rice brought a petition for a writ of habeas corpus in the United States District Court for the Middle District of Alabama. *Id.* The district court judge granted Rice's petition, concluding that the State of Alabama imposed the enhanced sentences to punish the defendant for exercising his post-conviction right of review. *Id.* at 715. The Fifth Circuit affirmed the district court's judgement, and the State of Alabama appealed to the Supreme Court. *Id.*

In *Pearce*, the Supreme Court rejected the double jeopardy argument, holding that double jeopardy did not preclude retrying a defendant after an original conviction is set aside because of error, and that the power to retry the defendant included the power to impose whatever sentence was legally available. *Id.* at 720. The double jeopardy clause of the fifth amendment to the Constitution protects individuals from the hazards of trial and possible conviction more than once for the same offense. Green v. United States, 355 U.S. 184, 187 (1957); *see* Comment, *Double Jeopardy and Post-Verdict Judgements of Acquittal*, 40 WASH. & LEE L. REV. 669, 670 (1983) (double jeopardy principles prohibit government from prosecuting defendant twice for same offense when prosecution failed to obtain conviction in previous trial.) The *Pearce* Court also rejected the contention that the equal protection clause of the fourteenth amendment prohibited an increased sentence upon retrial, holding that a state has not classified defendants who receive enhanced sentences upon retrial, because so many variables affect the outcome of the retrial and resentencing. 395 U.S. at 722-23. The Court determined, however, that imposition of an enhanced sentence on retrial violated the due process clause of the fourteenth amendment because a possible perception of a vindictive motive for the increased sentence impermissibly would chill defendants' exercise of the right to appeal. *Id.* at 719-24; *see infra* notes 21-30 and accompanying text (discussion of *Pearce* Court's rationale).

23. *See Pearce,* 395 U.S. at 724 (defendants' right to appeal must be free and unfettered). The Constitution does not require that states provide a mechanism for appeal of criminal conviction. Ross v. Moffett, 417 U.S. 600, 606 (1974); McKane v. Durston, 153 U.S. 684, 687 (1894). Once a state establishes review procedures, however, the due process clause of the fourteenth amendment protects the free exercise of the statutory right of appeal. Blackledge v. Perry, 417 U.S. 21, 25 n.4, 28 (1974); *see* Rinaldi v. Yeager, 384 U.S. 305, 309-10 (1966) (avenues of appellate review must be equally accessible to all); Griffin v. Illinois, 351 U.S. 12, 18-19 (1956) (state that grants appellate review cannot provide review so as to discriminate against some defendants).

24. 395 U.S. at 725.

25. *Id.* at 725 n.20.

a three-prong rule designed to eliminate prospective appellants' apprehension that a successful challenge to an original conviction might result in the vindictive imposition of a harsher sentence on retrial.[26] First, the *Pearce* Court mandated that whenever a judge imposes an enhanced sentence upon retrial, the reasons for the increased sentence must appear in the opinion.[27] Second, the judge must base the reasons for the enhanced sentence on objective information concerning specific, identifiable conduct by the defendant which occurred after the time of the original sentencing proceeding.[28] Third, the resentencing judge must include the information supporting an enhanced sentence in the record of the proceeding so that a reviewing court may assess fully the legitimacy of the enhanced sentence upon appeal.[29] Justice White concurred in the Court's decision in *Pearce*, but in a separate opinion suggested that any objective, identifiable factual data not known to the trial judge at the time of the original sentencing should support an enhanced sentence upon retrial.[30]

Although the *Pearce* Court established guidelines to prevent vindictive resentencing, the Court recognized that the Constitution does not preclude absolutely the trial judge's imposition of a harsher sentence on retrial.[31] The possibility thus exists that a court may impose increased punishment upon resentencing after *Pearce* if vindictiveness is not a factor.[32] While most courts have applied the *Pearce* Court's standards to prohibit the imposition of harsher

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26. *Id.* at 725-26.

27. *Id.* at 726.

28. *Id.*

29. *Id.*

30. *Id.* at 751 (White, J., concurring in part).

31. *Id.* at 720, 723. In *Pearce*, the Court recognized that the government enjoys a well-established power to retry a defendant when an appeals court reverses the conviction because of error. *Id.* at 720; *see* United States v. Tateo, 377 U.S. 463, 465 (1964) (double jeopardy imposes no limitation on government's power to retry defendant when appellate court sets aside conviction because of error). The *Pearce* Court further noted that historically the power to retry a defendant after reversal of his conviction on grounds of error included the power to impose whatever sentence was appropriate at retrial, without reference to the original punishment. 395 U.S. at 720. Accordingly, the *Pearce* Court explicitly refused to overrule the broad judicial power to set sentences that the Court established in *Stroud v. United States*, 251 U.S. 15 (1919). *Id.* *Stroud* involved a challenge to a death sentence imposed on retrial after reversal of the original conviction and sentence of life imprisonment. Stroud v. United States, 251 U.S. 15, 17 (1919). The defendant in *Stroud* claimed that imposition of the enhanced sentence violated the double jeopardy clause of the fifth amendment. *Id.; see* U.S. CONST. amend. V (double jeopardy clause of fifth amendment prohibits federal government from subjecting individuals more than once to trial for same offense); *supra* note 22 (discussion of double jeopardy protection). The Court, however, rejected the defendant's challenge, holding that a sentencing judge has the power to impose at retrial any sentence authorized by statute. Stroud v. United States, 251 U.S. 15, 18 (1919).

32. *See* Chaffin v. Stynchcombe, 412 U.S. 17, 28 (1973) (enhanced sentence imposed by jury after reconviction permissible under *Pearce* because jury resentencing bears no inherent likelihood of vindictiveness); *infra* note 65 (discussion of *Chaffin* Court's reasoning); *see also* Colten v. Kentucky, 407 U.S. 104, 116 (1972) (enhanced sentence imposed after trial de novo permissible under *Pearce* because no inherent risk of vindictiveness exists in de novo trial process); *infra* note 64 (discussion of *Colten* Court's reasoning).

sentences on retrial,[33] a minority of courts have imposed enhanced sentences that the courts claim are consistent with the *Pearce* rule.[34] Inconsistent applications of the *Pearce* Court's prophylactic rule result from differing interpretations of the *Pearce* rule, which restricts the bases for an enhanced sentence to information concerning conduct occurring after the original sentencing proceeding.[35] When the conduct in question is unrelated criminal activity oc-

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33. *See, e.g.*, Barnes v. United States, 419 F.2d 753, 754-55 (D.C. Cir. 1969) (per curiam) (remanded for resentencing in light of *Pearce* because trial court failed to state valid reason for enhanced sentence); United States v. Gross, 416 F.2d 1205, 1215 (8th Cir. 1969) (remanded for resentencing because trial court did not affirmatively show reasons for enhanced sentence), *cert. denied*, 397 U.S. 1013 (1970); United States v. King, 415 F.2d 737, 740 (6th Cir.) (remanded for resentencing because district court did not state reason for imposition of more severe sentence), *cert. denied*, 396 U.S. 974 (1969); United States v. Wood, 413 F.2d 437, 438 (5th Cir.) (enhanced sentence vacated under *Pearce* because record silent on reasons for harsher penalty), *cert. denied*, 396 U.S. 925 (1969); Stonom v. Wainwright, 235 So.2d 545, 547 (Fla. App. 1970) (sentence reduced to length of original sentence because no reasons or data supporting more severe sentence presented); State v. Shak, 51 Hawaii 626, ____, 466 P.2d 420, 421 (original sentence reimposed because no data in record concerning identifiable conduct on defendant's part as required by *Pearce, cert. denied*, 400 U.S. 930 (1970); People v. Smith, 44 Ill. 2d 272, 277, 255 N.E.2d 450, 452 (1970) (remanded for hearing on justification for enhanced sentence because no reasons existed for more severe penalty); People v. Baze, 43 Ill. 2d 298, 305, 253 N.E.2d 392, 395 (1969) (sentence vacated because no conduct on defendant's part supported enhanced sentence as required by *Pearce*); State v. Pilcher, 171 N.W.2d 251, 254-55 (Iowa 1969) (sentence reduced to length of original term because no basis for enhanced sentence presented). *But see* United States v. Wasman, 700 F.2d 663, 669-70 (11th Cir.) (enhanced sentence on retrial upheld because *Pearce* rule inapplicable to circumstances of resentencing), *cert. granted*, 104 S.Ct. 334 (1983); *infra* notes 49-69 and accompanying text (discussion of *Wasman* court's reasoning); *see also infra* note 35 (discussion of cases upholding enhanced sentences after *Pearce*).

34. *See* United States v. Wasman, 700 F.2d 663, 670 (11th Cir.) (upholding enhanced sentence on retrial based on intervening conviction), *cert. granted*, 104 S.Ct. 334 (1983); *cf.* United States v. Kienlen, 415 F.2d 557, 559-60 (10th Cir. 1969) (court held defendant's retrial testimony indicating "brutal nature" of defendant was sufficient conduct to justify enhanced sentence).

35. Courts have reached different conclusions on the question of whether conduct supporting an enhanced sentence must have occurred after the original sentencing proceeding to satisfy the *Pearce* rule. *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 sentence); 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 not valid basis for sentence enhancement under *Pearce* rule); United States v. Markus, 603 F.2d 409, 414 (2d Cir. 1979) (intervening conviction based upon indictment pending at time of original sentencing fails to satisfy *Pearce* rule). *But see* United States v. Wasman, 700 F.2d 663, 670 (11th Cir.) (intervening conviction for conduct predating original sentencing sufficient conduct to justify enhanced sentence under *Pearce*), *cert. granted*, 104 S.Ct. 334 (1983). Similarly, courts have interpreted the *Pearce* rule to include different types of conduct as supporting an enhanced sentence on retrial. *Compare* United States v. Kienlen, 415 F.2d 557, 559-60 (10th Cir. 1969) (court held that defendant's retrial testimony indicating "brutal nature" of defendant was sufficient conduct to justify enhanced sentence) *and* People v. Bernette, 45 Ill. 2d 227, 239, 258 N.E.2d 793, 799 (1970) (court held that defendant's testimony at second trial was sufficient conduct under *Pearce* to justify enhanced sentence since testimony revealed details of crime, *rev'd on other grounds*, 403 U.S. 947 (1971) *with* United States v. Lopez, 428 F.2d 1135, 1139 (2d. Cir. 1970) (increase in defendant's net worth between trials not sufficient conduct to justify increased fine under *Pearce*) *and* United States v. Gross, 416

curring before the original trial but resulting in a conviction only after the first sentencing proceeding, the federal circuit courts have reached different conclusions on whether the conduct can support imposition of an enhanced sentence.[36] In the most recent application of the *Pearce* rule, the Eleventh Circuit departed from established precedent by allowing an intervening conviction for conduct predating the original sentencing to support imposition of an increased punishment after reconviction.[37]

In *United States v. Wasman*,[38] a jury convicted Milton Wasman of making false statements in a passport application.[39] The judge for the United States District Court of the Southern District of Florida subsequently sentenced Wasman to two years imprisonment, with all but six months suspended and three years probation substituted.[40] On appeal, Wasman contended that the judge's refusal to admit certain evidence of his motive constituted reversible error.[41] The Fifth Circuit reversed, holding that the evidence was admissible as indicative of circumstances surrounding Wasman's defense, and remanded the case for a new trial.[42]

F.2d 1205, 1215 (8th Cir. 1969) (court reversed sentence because trial court did not cite conduct to justify enhancement), *cert. denied*, 397 U.S. 1013 (1970).

36. *Compare* United States v. Wasman, 700 F.2d 663, 668 (11th Cir.) (court determined that enhanced sentence based on intervening conviction was consistent with *Pearce*), *cert. granted*, 104 S.Ct. 334 (1983) *with* United States v. Williams, 651 F.2d 644, 648 (9th Cir. 1981) (intervening conviction did not justify enhanced sentence under *Pearce*) *and* United States v. Markus, 603 F.2d 409, 414 (2d Cir. 1979) (intervening conviction did not justify enhanced sentence under *Pearce*).

37. *See* United States v. Wasman, 700 F.2d 663, 668 (11th Cir.) (court determined that enhanced sentence based on intervening conviction was consistent with *Pearce*), *cert. granted*, 104 S.Ct. 334 (1983).

38. 700 F.2d 663 (11th Cir.), *cert. granted*, 104 S.Ct. 334 (1983).

39. *Id.* at 664-65; *see* 18 U.S.C. § 1542 (1976) (felony to make knowingly and willfully false statement in order to secure United States' passport). In *Wasman*, the government's evidence at trial showed that Milton Wasman, a Florida attorney, applied for and received a passport in the name of David Hendrick, a deceased law school classmate. United States v. Wasman, 484 F. Supp. 54, 56 (S.D. Fla. 1979), *rev'd*, 641 F.2d 326 (5th Cir. 1981). Wasman admitted applying for the passport under the assumed name, but attempted to introduce evidence to show that his purpose in adopting the new name was not fraudulent. *See id.* at 57 (Wasman claimed reason for adopting false name was to employ non-Semitic name in business dealings with Arab investors); *see also infra* note 42 (discussion of evidentiary issue concerning Wasman's motive for adopting false name). Wasman contended that common-law principles allowed anyone to assume a new name so long as the person did not have any fraudulent intent. 484 F. Supp. at 57; *see* United States v. Cox, 593 F.2d 46, 48 (6th Cir. 1979) (common law allows an individual to adopt any name without any legal proceedings provided assumption of new name is not for fraudulent purposes). The district court judge excluded the proffered evidence of motive as irrelevant. 484 F. Supp. at 56-58.

40. 700 F.2d at 665; *see* United States v. Wasman, 484 F. Supp. 54 (S.D. Fla. 1979) *rev'd*, 641 F.2d 326 (5th Cir. 1981).

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

42. *Id.* at 330. In *Wasman*, the Fifth Circuit stated that if Wasman had evidence tending to show that he legally had assumed a different name, that evidence would be relevant to establish a valid defense to the charge of falsely stating his name in the application for a passport. *Id.* at 329. The Fifth Circuit acknowledged in *Wasman* that a trial judge has wide discretion to determine whether proffered evidence is relevant. *Id.* The *Wasman* court determined that the evidence

On remand, the jury convicted Wasman a second time.[43] The same district court judge presided at the second trial and set a new sentence of two years confinement.[44] The judge attributed the enhanced sentence to Wasman's intervening conviction after a plea of nolo contendere to a charge of possessing counterfeit certificates of deposit.[45] The sentencing judge was aware that charges were pending on a separate indictment for mail fraud at the time of the first trial.[46] In accordance with his own policy and at the express request of the defendant, however, the judge did not consider the pending charges when imposing the original sentence.[47] Wasman appealed the second conviction, asserting that the enhancement of the sentence on retrial violated the due process protections established in *Pearce*.[48]

On appeal, the Eleventh Circuit affirmed both the second conviction and the enhanced sentence.[49] The *Wasman* court reasoned that the district court had complied with the requirements of the *Pearce* rule by stating the reasons

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rejected by the trial court did not go solely to motive, but rather dealt with whether the statement of the name was false. *Id.* The Fifth Circuit, therefore, found that the trial court in *Wasman* abused its discretion by excluding the proffered evidence and reversed and remanded the case for a new trial. *Id.* at 329-30.

The evidence excluded by the trial court was Wasman's testimony that he obtained a passport in a different name on the advice of real estate dealers who represented Arabs interested in investing in South Florida property. 700 F.2d at 665. The real estate dealer allegedly counselled Wasman to use a non-Semitic name in transactions with the Arab clients. *Id.* On remand, the district court followed the Fifth Circuit's decision in *Wasman*, and admitted the evidence at issue. *Id.* To rebut Wasman's testimony that he legitimately assumed the new name, however, the government offered evidence showing that Wasman continued to use his own name in other dealings after obtaining the false passport. *Id.*

43. 700 F.2d at 665.

44. *Id.*

45. *Id.*

46. *Id.* at 667. In *Wasman*, at the time of the defendant's first trial on the charges of making a false statement to obtain a passport, Wasman also was under indictment for mail fraud in connection with a plan to finance real estate developments. Transcript of hearing, Supplemental Record on Appeal, Appendix to Appellant's Brief, United States v. Wasman, 700 F.2d 663 (11th Cir. 1983). The government dismissed the indictment for mail fraud in return for Wasman's plea of nolo contendere to a charge of possession of false certificates of deposit. *Id.; see* 18 U.S.C. § 480 (1976) (felony to possess false or forged obligations or securities issued on foreign bank).

47. 700 F.2d at 667, 670.

48. *Id.* at 666; *see supra* note 8 (specific provisions of *Pearce* rule); *supra* notes 26-29 and accompanying text (discussion of *Pearce* Court's prophylactic rule). In *Wasman*, the defendant advanced two arguments for reversal in addition to his claim that the enhanced sentence on retrial violated the *Pearce* due process standard. 700 F.2d at 665. Wasman contended that the trial judge erred by excluding evidence that Wasman attempted to introduce at retrial in order to show that his continued use of his own name after issuance of the false passport was not indicative of a fraudulent intent with regard to the passport. *Id.* Wasman also claimed that comments made by the trial judge reflected the judge's bias against Wasman, thus entitling Wasman to a new trial before a different judge. *Id.* The Eleventh Circuit, however, rejected both of Wasman's claims. *Id.* at 666. First, the *Wasman* court held that the trial judge's exclusion of the proffered evidence, if any error existed, was harmless error. *Id.* Second, the Eleventh Circuit rejected Wasman's claim of bias as totally without merit. *Id.*

49. 700 F.2d at 670.

for increasing the sentence on the record.[50] Further, the *Wasman* court noted that the intervening conviction for possession of counterfeit certificates of deposit provided an objective basis for the district court's imposition of the enhanced sentence.[51] Since the sentencing judge had not considered the pending charges in the imposition of the first sentence, the *Wasman* court concluded that the judge correctly considered the conviction when imposing the second sentence.[52]

In affirming the district court's enhanced sentence, the Eleventh Circuit in *Wasman* focused on the possibility of actual vindictiveness toward a defendant for exercising the defendant's right to appeal[53] as the motivation for the Supreme Court's rule in *Pearce*.[54] Equally compelling to the *Pearce* Court, however, was the concern that a perception of possible vindictiveness resulting in harsher sentences upon retrial might deter defendants from pursuing a valid avenue of appeal.[55] The Eleventh Circuit identified the *Pearce* rule as the means to avoid judicial vindictiveness and its inhibiting potential.[56] Consequently, the *Wasman* court reasoned that compliance with the *Pearce* rule, which requires that the reasons for an enhanced sentence appear on the trial record, removed any possibility of vindictiveness.[57] The Eleventh Circuit emphasized that the absence of any specified factual basis for the enhanced sentence in *Pearce* led to the reversal of Pearce's second sentence.[58] Accordingly, the

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50. *Id.* at 666-68; *see infra* notes 57-59 and accompanying text (*Wasman* court stated that trial judge eliminated hazard of vindictiveness by offering reasons for enhancement of sentence upon retrial). *But see infra* notes 113-16 and 127-35 and accompanying text (*Wasman* court incorrectly applied *Pearce* rule).

51. 700 F.2d at 667.

52. *Id.* at 669-70.

53. *See supra* note 23 (due process protects statutory right to appeal once state establishes procedures for appeal).

54. *See* 700 F.2d at 666-69 (*Wasman* court's interpretation of *Pearce* Court's purpose in establishing the *Pearce* rule). *But see* North Carolina v. Pearce, 395 U.S. at 724-26, 725 n.20 (*Pearce* Court formulated prophylactic rule to eliminate chilling effect of possibility of vindictiveness because actual vindictive motive difficult for defendants to prove); *see also supra* text accompanying notes 25-26 (discussion of *Pearce* Court's rationale in formulating prophylactic rule).

55. *See* 395 U.S. at 725, 725 n.20; *cf.* Blackledge v. Perry, 417 U.S. 21, 28 (1974) (*Blackledge* Court stated that application of *Pearce* rule not dependent on existence of actual retaliatory motive). The *Blackledge* Court determined that a fear of vindictiveness was sufficient to present an unconstitutional deterrent to a defendant's exercise of his right to appeal. *Id.; see infra* note 67 (discussion of *Blackledge* Court's reasoning).

56. 700 F.2d at 666. *But cf.* Blackledge v. Perry, 417 U.S. 21, 28 (1974). The *Blackledge* Court noted that although the purpose of the *Pearce* rule was to eliminate any motive for retaliation toward a defendant who appealed a prior conviction, the rule actually removed only a court's ability to penalize a defendant who challenged his original conviction and sentence. *Id.* A defendant, therefore, need not fear the imposition of an enhanced sentence as a penalty for challenging a prior conviction because the *Pearce* rule limits the resentencing judge's ability to impose a harsher penalty. *Id.*

57. 700 F.2d at 667-68.

58. *Id.* at 668 n.6. The *Wasman* court stated that *Pearce* cannot preclude basing an enhanced sentence on an intervening conviction because, in *Pearce*, North Carolina presented no reasons for the enhanced sentence on retrial. *Id.* The *Pearce* Court, thus, never addressed the issue of whether an intervening conviction could support an increased sentence on retrial. *See id.* The *Wasman* Court, thus, declined to apply the *Pearce* rule to the facts of the *Wasman* resentencing. *Id.*

Wasman court held that no threat of vindictiveness existed if a sentencing judge documented reasons for the increased second sentence.[59]

The *Wasman* court supported its narrow interpretation of *Pearce* by tracing subsequent Supreme Court applications of the *Pearce* prophylactic rule.[60] The Eleventh Circuit first pointed to the Supreme Court's language in *Moon v. Maryland*.[61] In *Moon*, the petitioner claimed that the imposition of an enhanced sentence after reconviction did not comply with the due process protections established in *Pearce*.[62] The Supreme Court, however, declined to scrutinize Moon's due process claim because Moon did not allege that his increased sentence resulted from actual vindictiveness.[63] Similarly, the Eleventh Circuit asserted that subsequent Supreme Court opinions holding the *Pearce* guidelines inapplicable to enhanced sentences imposed on trial de novo[64] and by juries[65]

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59. *Id.* at 669.

60. *Id.* at 668-69.

61. 398 U.S. 319 (1970) (per curiam); *see* 700 F.2d at 668.

62. 398 U.S. at 320. The Supreme Court originally granted certiorari in *Moon* to hear arguments on whether to apply the *Pearce* rule retroactively. *Id.* The Court reconsidered the grant of certiorari before hearing arguments and dismissed the writ as improvidently granted. *Id.* The *Moon* Court stated that the reason for dismissal was the absence of any allegation on Moon's part that his enhanced sentence was the result of judicial vindictiveness. *Id.*

63. *Id.*; *see supra* note 62 (discussion of Court's dismissal of *Moon* without hearing arguments).

64. Colten v. Kentucky, 407 U.S. 104 (1972). In *Colten*, the Court addressed the question whether a retrial obtained as an exercise of a statutory right to a trial de novo under a two-tier system should be subject to the *Pearce* resentencing strictures. *Id.* at 105-06. Under the Kentucky system, a defendant may apply for a trial de novo in a court of general criminal jurisdiction if convicted in an inferior court after a trial or a guilty plea. *Id.* at 112-13; *see* Ky. Rev. Stat. § 23A.080 (1976 & Supp. 1980) (defendant may apply for trial de novo after conviction or guilty plea in inferior court). The defendant need not allege error in the lower court proceeding. 407 U.S. at 112-13. The litigation in *Colten* arose when the defendant refused to leave a gathering of student protesters after a police officer ordered the group to disperse. *Id.* at 106-07. The Kentucky inferior court convicted Colten of disorderly conduct and fined him $10.00. *Id.* at 108. At the de novo proceeding, the Kentucky court of general jurisdiction reconvicted Colten and fined him $50.00. *Id.* Colten appealed to the state appellate court, claiming that the increased fine violated the *Pearce* rule. *Id.* The appellate court affirmed the reconviction and the enhanced fine, and Colten appealed to the Supreme Court. *Id.* The *Colten* Court held that the hazard of vindictiveness which was present in *Pearce* did not inhere in the de novo trial proceeding, since the *Colten* retrial procedure was distinguishable from the procedure in *Pearce*. *Id.* at 116. For example, the court that conducted the trial de novo and imposed the second and higher sentence in *Colten* was a different court from the one that conducted the original trial. *Id.* at 116-17. The de novo proceeding followed in *Colten* involved no assignment of error to the original court. *Id.* at 117. Further, the defendant in *Colten* presented no reason or motivation for the de novo court to deal more harshly in imposing sentence than did the trial court. *Id.* Consequently, the *Colten* Court refused to apply the *Pearce* guidelines to the sentencing process following a trial de novo. *Id.* at 118. *See generally* Note, *Increased Sentences on an Appeal by Right from Inferior Courts*, 51 N.C. L. Rev. 882 (1973) (discussion of *Colten* reasoning).

65. Chaffin v. Stynchcombe, 412 U.S. 17 (1973). In *Chaffin*, the Court refused to apply the *Pearce* guidelines to resentencing by a jury, because the Court found no inherent vindictiveness in a jury sentencing system. *Id.* at 28. Accordingly, the *Chaffin* Court distinguished the jury sentencing process from the imposition of a second sentence by a judge in several respects. *Id.* at 27. For example, the *Chaffin* Court stated that a resentencing jury would have no knowledge of the first sentence imposed. *Id.* The Court referred to knowledge of the prior sentence as the first prerequisite for imposition of a retaliatory penalty. *Id.* at 26. Moreover, the jury setting

further supported restricting the scope of the *Pearce* rule to cases of actual vindictiveness.[66] The *Wasman* court stated that the Supreme Court's later application of the *Pearce* rule to actions by a state prosecutor resulting in an enhanced sentence upon retrial focused on the possibility of a vindictive motive for the prosecutor's actions.[67] After analyzing the Supreme Court's application of the *Pearce* rule, the *Wasman* court stated that due process forbids only those enhanced sentences that pose a realistic likelihood of vindictiveness.[68] The *Wasman* court, therefore, maintained that an increased sentence does not offend the due process protection established in *Pearce* if the record establishes a total absence of any realistic likelihood of vindictiveness.[69]

Although the Eleventh Circuit in *Wasman* allowed the imposition of an enhanced sentence upon retrial, two other circuit courts have rejected increased sentences in cases with facts similar to those in *Wasman*.[70] In *United States*

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the sentence at retrial was not the judicial entity reversed on appeal so that the jury had no interest in having the prior conviction and sentence reimposed or enhanced. *Id.* at 27. In addition, the *Chaffin* Court stated that a jury would not be motivated by the institutional interests that might prompt a judge to impose harsher sentences in order to discourage what the judge regarded as meritless appeals that increase the judge's caseload. *Id.* at 27; *cf.* Blackledge v. Perry, 417 U.S. 21, 27 (1974) (Court stated that result in *Chaffin* might have differed if jury had known of prior sentence). *See generally* Note, *Limitations on Sentencing after Reconviction by Jury*, 87 HARV. L. REV. 233 (1973) (*Chaffin* holding does not bar reversal of enhanced sentence imposed by jury if plaintiff demonstrates actual vindictive motive).

66. 700 F.2d at 668-69. The *Wasman* court relied on *Colten* and *Chaffin* for the proposition that actual vindictiveness must be present to apply the *Pearce* rule. *Id.; see supra* notes 64-65 (Court found no inherent likelihood of vindictiveness in procedures used to resentence defendants in *Colten* and *Chaffin*). *But see infra* text accompanying notes 119-26 (*Wasman* court erred in relying on *Chaffin* and *Colten* to support decision not to apply *Pearce* rule to Wasman's enhanced sentence).

67. 700 F.2d at 669. The *Wasman* court relied upon the Court's decision in *Blackledge v. Perry*, 417 U.S. 21 (1974), as support for the proposition that the *Pearce* rule was not applicable to Wasman's enhanced sentence absent any realistic likelihood of vindictiveness. 700 F.2d at 669. *Blackledge* involved a defendant, convicted of misdemeanor assault, who exercised his statutory right to trial de novo. 417 U.S. at 23. After the defendant filed his appeal for a de novo hearing, the prosecutor obtained a felony indictment for the same conduct. *Id.* The defendant pleaded guilty to the second indictment but on petition for habeas corpus claimed a violation of *Pearce*'s due process protections. *Id.* at 25. The *Blackledge* Court applied the principles enunciated in the *Pearce* decision to the prosecutor's action to determine if an inherent likelihood of vindictiveness existed in the decision to seek conviction on the felony charge at the de novo trial. *Id.* at 27. The *Blackledge* Court stated that the defendants could perceive a vindictive motive in the prosecutor's action because a prosecutor has a stake in discouraging convicted defendants from appealing. *Id.* The Court, thus, determined that allowing the prosecutor to opt for a higher charge on retrial might deter defendants from exercising their right to appeal. *Id.* at 28-29. Consequently, the *Blackledge* Court affirmed the grant of defendant's petition for habeas corpus. *Id.* at 31. *See generally* Note, *Protection of Defendants Against Prosecutorial Vindictiveness*, 54 N.C. L. REV. 108 (1975) (discussion of adversary process and prosecutorial vindictiveness).

68. 700 F.2d at 669.

69. *Id.*

70. *See* United States v. Williams, 651 F.2d 644, 648 (9th Cir. 1981) (intervening conviction held not to support enhanced sentence on reconviction under *Pearce*); United States v. Markus, 603 F.2d 409, 414 (2d Cir. 1979) (intervening conviction held not to support enhanced sentence on reconviction under *Pearce*).

v. Markus,[71] for example, the Second Circuit invalidated a second sentence which effectively increased the total time the defendant would have spent in prison over that imposed by the original sentence.[72] In *Markus*, five federal district courts imposed sentences of varying terms on the defendant for convictions on different charges.[73] All of the sentences were to run concurrently with the exception of those imposed by the Southern District of New York.[74] The Southern District of New York sentenced the defendant on two indictments.[75] A five-year sentence on one indictment was to run consecutively to a ten-year term on the other.[76] The cumulative effect of the fifteen-year sentence subsumed completely the sentences imposed by the other four courts.[77] The defendant appealed the conviction on one charge and the accompanying ten-year sentence, and the original sentencing judge in the district court vacated the conviction.[78] A second judge resentenced the defendant after

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71. 603 F.2d 409 (2d Cir. 1979).

72. *Id.*

73. *Id.* at 411. In *Markus*, the United States District Court for the Southern District of New York indicted Markus on April 11, 1975, on three counts charging possession and sale of counterfeit Treasury Bills. *Id.* at 410; *see* 18 U.S.C. §§ 371, 472, & 473 (1976) (felony to defraud United States by selling or passing counterfeit securities of the United States). On October 2, 1975, the United States District Court for the Eastern District of Louisiana indicted Markus for conspiring to make false statements to a bank. 603 F.2d at 410; *see* 18 U.S.C. §§ 2 & 1014 (1976) (felony to make false statements to federal bank). The Louisiana court transferred the indictment to the Southern District of New York in January 1976. 603 F.2d at 410.

On April 30, 1976, Judge Werker of the Southern District of New York sentenced Markus to a total of fifteen years' imprisonment on all counts. *Id.* at 411. The sentences were to run concurrently with a five-year term imposed in the United States District Court of New Jersey on April 26, 1976 for securities fraud. *Id.* On October 22, 1976, the District Court for the Western District of Kentucky sentenced Markus to a four-year term for making false statements to a bank that was to run concurrently with the New Jersey and New York sentences. *Id.; see* 18 U.S.C. § 1014 (felony to make false statements to a federal bank). On December 8, 1976, the Eastern District of Louisiana sentenced Markus to a five-year term for interstate transportation of forged securities to run concurrently with the other sentences. 603 F.2d at 411. On March 29, 1977, the Northern District of Ohio imposed a two-year term for violation of 18 U.S.C. § 1014 to run concurrently with the other sentences. *Id.* The effect of the five sentencing schemes was to sentence Markus to fifteen years imprisonment. *See infra* note 76 (discussion of Markus' sentences).

74. 603 F.2d at 411.

75. *Id.* at 410-11; *see supra* note 73 (sentences Markus received from federal district courts).

76. 603 F.2d at 410-11; *see supra* note 73 (sentences Markus received from federal district courts). In *Markus*, Judge Werker in effect sentenced Markus to ten years imprisonment on the counts contained in the April 11, 1975 indictment. 603 F.2d at 410-11. Judge Werker imposed a five-year term on one count of the indictment that was to run concurrently with a ten-year term on another count. *Id.* The effective sentence on the counts contained in the October 2, 1975 indictment transferred from Louisiana was a term of five years that was to run consecutively to the sentences imposed on the April 1975 indictment. *Id.* Judge Werker imposed a five-year term on one count that was to run concurrently with sentences of one year on each of three other counts. *Id.* at 411. Thus, the total of the sentences imposed by the New York court was fifteen years. *Id.*

77. 603 F.2d at 411; *see supra* note 73 (procedure of Markus' indictments).

78. 603 F.2d at 411. On February 19, 1976, the defendant in *Markus* pleaded guilty to all counts of both indictments in the Southern District of New York. *Id.; see supra* note 73 (procedure of Markus' indictments). On March 14, 1978, Markus filed a motion to vacate the convic-

a guilty plea to a modified indictment[79] and imposed a five-year term to run consecutively to the other terms then being served by the defendant.[80] The result of the resentencing was to increase the total time the defendant would serve in prison by approximately seven months.[81] Markus appealed the resentencing to the Second Circuit, claiming that the enhanced sentence was impermissible under *Pearce*.[82]

On appeal, the Second Circuit in *Markus* determined that the second sentence received by the defendant increased the total amount of punishment imposed, even though the second sentence was shorter than the first sentence.[83] The *Markus* court noted that when the judge imposed the first sentences of five and ten years, the defendant had pleaded guilty to the two indictments as charged and also had received a five-year sentence in another jurisdiction.[84] Between the time the district court imposed the first sentences and the time the same court vacated the ten-year sentence, a Louisiana federal district court convicted and sentenced Markus to an additional five-year concurrent term.[85] When the New York district court vacated the ten-year sentence, the cumulative sentences no longer totally subsumed the Louisiana district court's sentence.[86] The new sentence imposed to run consecutively to all other terms thus increased the total time of Markus' incarceration.[87] The Second Circuit reasoned that the increased sentence was impermissible under *Pearce* since the interven-

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tion on both indictments. 603 F.2d at 411. Markus claimed that he had no knowledge that the Treasury Bills he passed were counterfeit, but rather he believed that the bills were stolen. *Id.* Judge Werker upheld Markus' motion to vacate the convictions, ruling that the record showed no evidence that the defendant knew the bills were counterfeit. *Id.*

79. 603 F.2d at 411. On August 25, 1978, the government filed a modified information charging Markus with conspiracy to sell purportedly stolen Treasury Bills. *Id.; see* 18 U.S.C. § 371 (1982) (felony to conspire to defraud the United States). Markus pleaded guilty to the modified charge, and on September 12, 1978, Judge Weinfeld of the District Court of the Eastern District of New York sentenced Markus to a five-year term that was to run consecutive to the other sentences then being served by the defendant. *Id.; see supra* note 73 (discussion of other sentences imposed on Markus).

80. 603 F.2d at 411.

81. *Id.* at 414; *see supra* note 14 (effect of sentence on defendant relevant inquiry for determining applicability of *Pearce* standard).

82. 603 F.2d at 412.

83. *Id.* at 413; *see supra* note 14 (effect of sentence on defendant relevant inquiry for determining applicability of *Pearce* standard).

84. 603 F.2d at 411.

85. *Id.; see supra* note 73 (discussion of other sentences imposed). In *Markus*, the sentence imposed by the Eastern District of Louisiana on December 8, 1976 was the relevant sentence in the defendant's appeal, since the sentence began to run seven months after the New York court imposed the sentences of five and ten years. 602 F.2d at 413-14. Thus, the Louisiana sentence, originally subsumed by the New York sentences, was the longest sentence Markus had to serve once the New York court vacated the original sentences. *Id.* When Judge Weinfeld imposed the new five-year term after Markus' guilty plea to the modified charge to run consecutive to the other sentences being served, the judge increased the total time Markus was to spend in jail by approximately seven months. *Id.* at 414. Consequently, the sentence imposed by Judge Weinfeld effectively enhanced the original sentence imposed by the New York District Court. *Id.*

86. 603 F.2d at 413-14.

87. *Id.* at 414; *see supra* note 85 (discussion of cumulative effect of sentences).

ing conviction resulted from indictments pending at the time of the original sentencing for conduct predating that sentencing.[88] The *Markus* court held that such an intervening conviction did not comply with the *Pearce* Court's definition of identifiable conduct on the part of the defendant occurring after the original sentencing proceeding.[89]

Similarly, in *United States v. Williams*,[90] the Ninth Circuit followed the *Markus* court's reasoning in holding that an intervening conviction could not justify a sentence imposed on retrial that in effect would increase the time the defendant would have to spend in prison.[91] A federal jury convicted Williams of bank robbery and the District Court for the Southern District of California imposed a twenty-year sentence after a complete presentence investigation which revealed that the defendant was under investigation for murder.[92] Williams appealed the bank robbery conviction to the Ninth Circuit.[93] While the Ninth Circuit appeal was pending, a California state court convicted Williams for the murder to which the presentence report had referred.[94] The state court judge sentenced Williams to serve a life term concurrently with the bank robbery sentence.[95] The Ninth Circuit subsequently reversed Williams' conviction on the bank robbery charges[96] and remanded the case for a new trial.[97] The jury reconvicted Williams, and the same federal court judge imposed a ten-year sentence to run consecutively to the life term for murder.[98] Williams appealed the second sentence as an unconstitutionally enhanced sentence under the *Pearce* rule.[99]

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88. 603 F.2d at 414.

89. *Id.*

90. 651 F.2d 644 (9th Cir. 1981).

91. *Id.* at 647-48.

92. *Id.* at 646; *see supra* note 1 (presentence report may include defendant's suspected criminal activity).

93. United States v. Williams, 594 F.2d 1258 (9th Cir. 1979).

94. 651 F.2d at 646.

95. *Id.*

96. United States v. Williams, 594 F.2d 1258 (9th Cir. 1979). In *Williams*, the defendant made a motion for substitution of another appointed counsel on the grounds that an irreconcilable conflict existed between the defendant and his appointed counsel. *Id.* at 1259-60. The trial judge, however, denied Williams' request for a substitute counsel, and Williams chose to represent himself at trial. *Id.* at 1260. On appeal, the *Williams* court found that the defendant had made a sufficient showing of irreconcilable conflict. *Id.* The Ninth Circuit, therefore, held that the trial judge's denial of the motion for substituted counsel, under the circumstances, denied the defendant effective assistance of counsel as guaranteed by the sixth amendment, and reversed Williams' bank robbery conviction. *Id.* at 1260-61. The sixth amendment to the Constitution guarantees that every defendant in a criminal trial in a federal court shall enjoy the assistance of counsel for his defense. U.S. CONST. amend. VI.

97. 594 F.2d at 1261.

98. 651 F.2d at 646.

99. *See id.* In *Williams*, the defendant contended that the imposition of the second ten-year term, though shorter than the original sentence of twenty years, would result in an unconstitutionally enhanced sentence under the *Pearce* rule. *Id.* The defendant in *Williams* demonstrated the effect of the second sentence by calculating the shortest period of imprisonment he must serve under both the original and the enhanced sentence. *Id.* Under federal statute, Williams would have been eligible for parole after serving one-third of his original twenty-year sentence,

On appeal, the Ninth Circuit in *Williams* followed the *Markus* court's rationale and determined that the cumulative effect of the resentencing was to increase the length of Williams' incarceration.[100] Consequently, the *Williams* court held that the indictment and conviction occurring after the first sentence could not justify an increased sentence under the *Pearce* Court's clear language.[101] The *Williams* court then stated that under the *Pearce* rule only conduct on the defendant's part occurring after the original sentencing proceeding could support an enhanced sentence.[102] The court further stated that an intervening conviction did not constitute conduct under the *Pearce* Court's definition.[103]

In refusing to permit the enhanced sentences imposed on retrial, the *Markus* and *Williams* courts applied the *Pearce* rule consistently with the *Pearce* Court's objective of eliminating the potential chilling effect that a fear of vindictiveness would have on defendants' exercise of the right to appeal.[104] The Supreme Court did not premise the decision in *Pearce* upon an allegation of actual judicial hostility toward a defendant who successfully attacked an original conviction.[105] Rather, the possibility that the practice of allowing enhanced sentences on reconviction might deter a defendant with a valid claim of error or unconstitutional procedure from exercising a right to appeal prompted the formulation of the prophylactic rule.[106] Both the *Williams* and *Markus* courts perceived the risk of vindictiveness on the part of the resentencing judge as identical to the risk the Supreme Court identified in *Pearce*, because no identifiable conduct by the defendants supported the increased sentence.[107] Similarly, the *Wasman* court did not point to any conduct by the defendants occurring after the original sentencing that could support the imposition of a harsher penalty after retrial.[108]

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or six years and eight months. *Id.; see* 18 U.S.C. § 4205(a) (1982). Before the federal court decided Williams' appeal on the bank robbery conviction, a California state court convicted him of first degree murder and imposed a life sentence to run concurrently with the twenty-year federal sentence. 651 F.2d at 646. Under the relevant California statute, Williams was eligible for parole after seven years. *Id.; see* CAL. PENAL CODE § 3046 (Deering 1983) (parole board shall review prisoner sentenced to life imprisonment to determine suitability for parole after seven years). Thus, the shortest term Williams must have served on the concurrent sentences was seven years. 651 F.2d at 646. After resentencing, however, Williams would have to serve the minimum of one-third the new federal sentence of ten years, or three years and four months. *Id.* Williams, therefore, had to serve a minimum of ten years and four months under the district court's resentencing plan. *Id.*

100. *Id.* at 647; *see supra* text accompanying notes 83, 88-89 (rationale of *Markus* court).

101. *Id.* at 648.

102. *Id.*

103. *Id.*

104. *See* 395 U.S. at 725-26.

105. *See* Blackledge v. Perry, 417 U.S. 21, 28 (1974) (no allegation of actual malice present in *Pearce* or *Blackledge*); *see also supra* text accompanying notes 25-26 (*Pearce* rule formulated to eliminate defendants' apprehension of vindictive resentencing).

106. Blackledge v. Perry, 417 U.S. 21, 27-28 (1974); North Carolina v. Pearce, 395 U.S. at 725.

107. *See* 651 F.2d at 648 (risk of vindictiveness in *Williams* identical to that in *Pearce*); 603 F.2d at 414 (no conduct existed to support imposition of enhanced sentence under *Pearce*).

108. *See* 700 F.2d at 667-68 (*Pearce* does not limit enhanced sentences to instances where defendant has committed an offense after the first trial).

The *Wasman* court, nevertheless, refused to apply the *Markus* and *Williams* holdings, reasoning that the *Markus* and *Williams* courts implemented the *Pearce* rule without regard to whether the circumstances of the resentencing presented any risk of vindictiveness.[109] The *Wasman* court further observed that to adopt the procedure required by *Pearce* in the absence of any risk of vindictiveness unnecessarily would remove valid information from the sentencing judge's considerations in setting punishment.[110] The *Wasman* court concluded that since the resentencing judge offered reasons to support the enhanced sentence, no risk of vindictiveness existed[111] and consequently the *Pearce* resentencing restrictions did not apply.[112]

Although the *Wasman* court refused to follow the *Markus* and *Williams* holdings, the *Markus* and *Williams* cases are more relevant to the issues presented in *Wasman* than are the Supreme Court cases the Eleventh Circuit cited in support of its position.[113] The fact patterns of both *Markus* and *Williams* involved the precise question of whether an intervening conviction for unrelated criminal conduct could satisfy the requirements of the *Pearce* rule.[114] In *Wasman*, as in *Markus* and *Williams*, the sentencing judge knew of the pending charges at the time the judge imposed the original sentence.[115] The *Wasman* court acknowledged that an appellate court might have difficulty ascertaining whether the intervening conduct was an aggravating factor in imposing the first sentence, because the sentencing judge knew of the conduct at the first proceeding and because pending charges are a valid factor for a judge to consider in imposing sentence.[116] The *Markus* and *Williams* courts, in evaluating fact patterns similar to those presented in *Wasman*, held that the enhanced sentences could not stand because the resentencing judge imposed the harsher punishment under circumstances that allowed a possible perception of vindictiveness.[117] In applying the *Pearce* rule to prohibit the enhanced

109. *Id.* at 669.

110. *Id.*

111. *Id.* at 667-68; *see supra* notes 57-59 and accompanying text (*Wasman* court stated that trial judge eliminated hazard of vindictiveness by offering reasons for enhancement of sentence upon retrial). *But see infra* notes 113-18 and 132-35 (discussion of *Wasman* court's incorrect application of *Pearce* standard).

112. 700 F.2d at 669-70.

113. *Id.* at 668-69; *see supra* notes 61-67 and accompanying text (discussion of cases relied upon by *Wasman* court to support refusal to apply *Pearce* rule to defendant's enhanced sentence).

114. *See* 651 F.2d at 648 (intervening conviction could not support sentence enhancement under *Pearce*); 603 F.2d at 414 (intervening conviction could not support enhanced sentence after retrial under *Pearce*).

115. *See* 700 F.2d at 667, 670 (sentencing judge discussed pending charges at original sentencing but assured defendant that judge would not consider pending charges in imposing sentence); 651 F.2d at 646 (presentence report submitted to trial judge contained information that defendant was under investigation for conduct which culminated in indictment and conviction for murder); 603 F.2d at 410-11 (sentencing judge at original trial knew that defendant was under indictment in other jurisdictions).

116. 700 F.2d at 669; *see also supra* note 1 (presentence report contains information concerning defendant's suspected criminal activity and charges not yet adjudicated).

117. *See* 651 F.2d at 648 (risk of vindictiveness in *Williams* identical to that in *Pearce*); 603 F.2d at 414 (no conduct existed to justify imposition of enhanced sentence under *Pearce*).

sentences, both the *Markus* and *Williams* courts applied the analysis suggested by the Supreme Court in *Pearce* and later cases to determine if a realistic likelihood of vindictiveness existed.[118]

The *Wasman* court, in contrast, failed to analyze the facts of the *Wasman* case using the Supreme Court's rule in *Pearce*. A close examination of *Pearce* and the subsequent cases interpreting the *Pearce* rule reveals several elements analyzed by the Supreme Court in assessing whether a likelihood of vindictiveness exists. In *Pearce*, the same court that originally sentenced the defendant imposed the enhanced sentence on retrial.[119] The Supreme Court in later cases recognized the possible existence of two motives for vindictive sentencing when the same court imposed both sentences.[120] First, the Court acknowledged that the resentencing court was likely to have had knowledge of the original trial and its outcome as well as the sentence imposed.[121] Awareness of the prior sentence was, in the Court's view, the first prerequisite for the imposition of a retaliatory penalty.[122] Second, the Court has observed that when the same court imposes a harsher sentence after reversal and retrial, the second sentence is more likely to appear vindictive because the appeal has resulted in a finding of error committed by the court.[123] In further interpreting *Pearce*, the Court has recognized that a judge, as an officer of the judicial system, may have an institutional interest in discouraging what the judge perceives as meritless appeals when asked to retry a previously adjudicated case.[124] The Supreme Court has refused to apply the *Pearce* rule when a dif-

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118. *See* 651 F.2d at 646, 648 (*Williams* court applied *Pearce* standards to ensure that no possibility of vindictiveness resulted in enhanced sentence); 603 F.2d at 412, 414 (*Markus* court applied *Pearce* standards to remove every apprehension of retaliatory motivation in resentencing procedure); *see also infra* notes 113-18 (discussion of resentencing procedures Supreme Court noted to carry inherent risks of vindictiveness).

119. *See* Note, *A "Realistic Likelihood of Vindictiveness": Due Process Limitations on Prosecutorial Charging Discretion*, 1981 U. ILL. L.F. 693, 694 n.9 (1981) (resentencing judge in *Pearce* not judge who imposed original sentence, though both judges were members of same court). One commentator interprets the Court's language in *Pearce* and later cases to mean that the Court failed to note that a different judge imposed the enhanced sentence. *Id. But cf.* 395 U.S. at 723-24 (state court violates defendant's due process by imposing enhanced sentence motivated by vindictiveness after *Pearce*); *see infra* text accompanying notes 119-123 (discussion of inherent risks of vindictiveness when same court imposes original sentence and subsequent sentence after retrial). The First Circuit has focused on the possible perception of vindictiveness by the defendant when the same judge imposes both sentences. Longval v. Meachum, 651 F.2d 818, 820 (1st Cir. 1981), *vacated and remanded*, 458 U.S. 1102, *aff'd*, 693 F.2d 236 (1st Cir. 1982), *cert. denied*, 51 U.S.L.W. 3755 (U.S. Apr. 19, 1983) (No. 82-1157). In *Longval*, the First Circuit stated that to avoid any apprehension of vindictiveness, whenever a resentencing is necessary, a different judge than presided at the first sentencing must impose the new sentence. *Id.* at 820-21.

120. *See* Colten v. Kentucky, 407 U.S. 104, 116-17 (1972).

121. *Id.*

122. Chaffin v. Stynchcombe, 412 U.S. 17, 27 (1973).

123. Blackledge v. Perry, 417 U.S. 21, 26 (1973); *cf.* Chaffin v. Stynchcombe, 412 U.S. 17, 27 (1973) (no inherent vindictiveness in jury resentencing since resentencing jury did not commit error at first trial); Colten v. Kentucky, 407 U.S. 104, 116-17 (1972) (no inherent vindictiveness in resentencing after trial de novo since no error assigned to de novo court at first trial).

124. *See* Blackledge v. Perry, 417 U.S. 21, 27-28 (1974) (interests of prosecutor as officer of judicial system in discouraging appeals increases likelihood of vindictive motive in seeking

ferent sentencing body imposes the second sentence, when the resentencing court has no knowledge of the prior sentence, or when no institutional interests motivate the imposition of an enhanced penalty, because no inherent risk of vindictiveness exists unless these elements are present.[125] The *Wasman* court, therefore, did not apply the *Pearce* standard, and instead incorrectly relied on the Supreme Court's holding that the *Pearce* rule did not apply to resentencing when no inherent risk of vindictiveness existed.[126]

The *Wasman* court's analysis is unconvincing. Substantial procedural differences distinguish *Wasman* from the Supreme Court cases relied on by the *Wasman* court, which held *Pearce* inapplicable to a trial de novo proceeding[127] and to resentencing by a jury.[128] A de novo court is substantially less likely to know of the previous trial's outcome or the sentence imposed.[129] Similarly, a jury hearing a case on retrial would have no knowledge of the results of the original proceeding.[130] Neither a retrial by a jury nor a trial de novo involves a finding of error on the part of the sentencing authority sitting in the second proceeding.[131] Further, a jury does not hold the same institutional interest in discouraging appeals as a judge holds.[132] In contrast to the cases that the *Wasman* court relied upon, the factors recognized in *Pearce* and subsequent cases as indicating a potential risk of vindictiveness were present in the *Wasman* case.[133] The district court judge who imposed the enhanced sentence

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enhanced sentence on retrial); *cf.* Chaffin v. Stynchcombe, 412 U.S. 17, 27 (1973) (no inherent vindictiveness in jury resentencing because jury had no interest in discouraging what judge perceives as "meritless" appeals tending to increase case load).

125. *See* Chaffin v. Stynchcombe, 412 U.S. 17, 26-27 (1973) (no inherent vindictiveness in jury resentencing because resentencing jury has no knowledge of prior sentence and no interest in reducing appellate caseload by discouraging appeals); Colten v. Kentucky, 407 U.S. 104, 116-17 (1972) (no inherent vindictiveness in resentencing after trial de novo because sentencing body not judicial authority reversed on appeal).

126. *See* Chaffin v. Stynchcombe, 412 U.S. 17, 28 (1973) (jury resentencing poses no inherent risk of vindictiveness); Colten v. Kentucky, 407 U.S. 104, 119 (1972) (no inherent risk of vindictiveness in resentencing after trial de novo); *see also supra* notes 64-65 (*Colten* and *Chaffin* resentencing procedures lessen threat of vindictiveness present in resentencing by jury and after trial de novo.).

127. *See* Colten v. Kentucky, 407 U.S. 104, 119 (1972) (*Pearce* rule inapplicable to resentencing after trial de novo); *see also supra* note 64 (discussion of *Colten* Court's reasoning).

128. *See* Chaffin v. Stynchcombe, 412 U.S. 17, 35 (1973) (*Pearce* rule inapplicable to resentencing by jury); *see also supra* note 65 (discussion of *Chaffin* Court's reasoning).

129. Colten v. Kentucky, 407 U.S. 104, 118 (1972) (de novo court not likely to know of sentence imposed in original proceeding).

130. Chaffin v. Stynchcombe, 412 U.S. 17, 26 (1973) (jury would not know of sentence imposed in original proceeding).

131. *See id.* at 27 (second sentence not imposed by judicial authority reversed on appeal); Colten v. Kentucky, 407 U.S. 104, 116-17 (1972) (de novo trial involves no finding of error committed by lower court).

132. *See* Chaffin v. Stynchcombe, 412 U.S. 17, 27 (1973) (resentencing jury has no interest in discouraging appeals to lighten caseload).

133. *See supra* text accompanying notes 119-24 (enumerating factors Supreme Court held to pose inherent risk of vindictiveness).

on retrial was the same judge who imposed the original sentence.[134] Not only did the judge know the result and the sentence imposed at the original trial, but the same judge also made the erroneous evidentiary ruling that formed the basis for reversal.[135]

Although the Eleventh Circuit determined in *Wasman* that the district court fulfilled the *Pearce* Court's requirements,[136] the substance of the *Pearce* rule actually remains unsatisfied.[137] The reversal of the sentences in *Pearce* was not a result solely of the lower court's failure to record the reasons for the enhanced sentence, as the *Wasman* court claimed.[138] Rather, the *Pearce* Court invalidated the enhanced sentence because the Court could not assess the lower court's compliance with due process principles without the bases for the enhanced sentence specified on the record.[139] Specification of the reasons for an enhanced sentence was not the end sought by the *Pearce* rule, but the first step of the appellate courts' analysis to determine whether imposition of an enhanced sentence comported with due process.[140]

The *Markus* and *Williams* courts completed the substantive analysis suggested by *Pearce* and determined that the enhanced sentences were inconsistent with due process protection.[141] The information presented to support the enhanced sentences in *Markus* and *Williams* concerned an intervening conviction for unrelated criminal conduct that occurred prior to the imposition of the first sentence.[142] The language of *Pearce* explicitly provided that only specific, identifiable conduct on the defendant's part occurring after the first sentencing proceeding could support an enhanced sentence upon reconviction.[143] The *Williams* court noted that Justice White's partial concurrence in *Pearce*[144] emphasized the strict limitation the *Pearce* rule placed on conduct that could support an enhanced conviction.[145] If the *Pearce* Court had intended infor-

134. *See* 700 F.2d at 663, 665 (same judge imposed sentence following jury verdict in both *Wasman* cases).

135. *Id.* at 665; *see supra* note 42 (discussion of evidentiary ruling at original trial).

136. 700 F. 2d at 668.

137. *See supra* text accompanying notes 27-29 (substance of *Pearce* rule).

138. 700 F.2d at 668 n.6.

139. 395 U.S. at 725. The *Pearce* Court recognized that the reviewing court's task in assessing an enhanced sentence is to determine if the sentence comports with due process. *Id.* If no reasons for the enhanced sentence appear on the record, the reviewing court cannot assess the sentencing court's actions. *Id.* at 726.

140. *Id.* at 725-26.

141. *See* 651 F.2d at 650-51 (conviction occurring after original sentencing proceeding cannot serve as basis for enhanced sentence after retrial under *Pearce*); 603 F.2d at 414 (intervening conviction based upon indictment pending at time of original sentencing cannot support enhanced sentence under *Pearce*).

142. 651 F.2d at 650-51; 603 F.2d at 414.

143. 395 U.S. at 726.

144. *See id.* at 751 (White, J., concurring). Justice White's partial concurrence in *Pearce* maintained that any factual information not known to the trial judge at the time of original sentencing should support an enhanced sentence after reconviction. *Id.*

145. *See* 651 F.2d at 648 n.3; *see also* United States v. Lopez, 428 F.2d 1135, 1139 (2d Cir. 1970) (increase in defendant's known financial worth insufficient conduct to support enhanced fine on resentencing under *Pearce* majority rule but would have satisfied Justice White's standard

mation other than that pertaining to conduct on the defendant's part occurring after the original sentencing to be a valid basis for an enhanced sentence, Justice White's partial concurrence would have been unnecessary.[146] Both the *Williams* and *Markus* courts reasoned that an intervening conviction for conduct predating the original sentencing could not satisfy the *Pearce* requirements, since the defendant's conduct occurred before the court imposed the first sentence.[147] In contrast to the *Markus* and *Williams* courts' analyses, the *Wasman* court noted that the district court presented reasons to support the imposition of the enhanced sentence, but failed to scrutinize those reasons for compliance with the *Pearce* standard.[148] In *Wasman*, as in *Markus* and *Williams*, the intervening conviction did not constitute conduct on the defendant's part occurring after the original sentencing.[149] The Eleventh Circuit in *Wasman* thus allowed an enhanced sentence imposed on reconviction to stand even though the factual basis for an enhanced sentence required by *Pearce* did not exist.[150]

Further, the *Wasman* decision fails to implement the *Pearce* Court's objective of eliminating defendants' apprehension of vindictiveness.[151] The *Pearce* rule restricts the bases for an enhanced sentence to conduct occurring after the first conviction.[152] Policy considerations support allowing sentencing judges to impose a second enhanced sentence if a defendant has engaged in criminal conduct after the first conviction.[153] One goal of sentencing and punishment is deterrence.[154] If the first sentence fails to deter the defendant from subse-

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as information unknown to trial court at time of original sentencing). In *Wasman*, the court rejected the defendant's contention that Justice White's concurrence addressed the issue of whether an intervening conviction could support an enhanced sentence after reconviction. 700 F.2d at 669-70 n.8. The *Wasman* court noted that *Pearce* did not address the question of whether an intervening conviction could support an enhanced sentence. *Id.* The *Wasman* Court declined to speculate what type of conduct Justice White's concurrence may have included. *Id.*

146. *See* 651 F.2d at 648 n.3.

147. *See id.* at 648 (intervening conviction may not satisfy *Pearce* requirement since criminal conduct underlying conviction occurred before original sentencing proceeding); 603 F.2d at 414 (intervening conviction based upon conduct predating original sentencing cannot support enhanced sentence under *Pearce*).

148. *See* 700 F.2d at 667. (*Wasman* court noted that trial judge included reasons for enhanced sentence on record).

149. *Compare id.* at 666-67 (court permitted imposition of enhanced sentence based upon intervening conviction for conduct predating original sentencing proceeding) *with* 651 F.2d at 648 (intervening conviction may not support enhanced sentence under *Pearce* since criminal conduct underlying conviction occurred before original sentencing proceeding) *and* 603 F.2d at 414 (intervening conviction based upon conduct predating original sentencing cannot support enhanced sentence under *Pearce*).

150. *See supra* text accompanying notes 27-29 (*Pearce* rule requires that enhanced sentence be based on specific conduct on defendant's part occurring after original sentencing).

151. 395 U.S. at 725.

152. *Id.* at 726.

153. *See Sentence Increases, supra* note 6, at 449 (sentence enhancement upon reconviction may deter criminal conduct if based on defendant's actions after imposition of original punishment).

154. *See* United States v. Coke, 404 F.2d 836, 845 (1968) (deterrence of criminal conduct valid goal of sentencing policy allowing imposition of enhanced sentences after reconviction);

quent criminal conduct, an enhanced sentence on retrial may be more effective.[155] If the conduct occurred before the first sentencing, however, an enhanced sentence upon retrial has no additional deterrent effect.[156] In *Wasman*, for example, the enhanced sentence could not deter the criminal conduct that resulted in Wasman's conviction for mail fraud since that conduct had occurred prior to the original sentencing proceeding.[157] Similarly, if the defendant's conduct subsequent to the first sentencing can support an increased punishment on retrial, the defendant retains the means to protect himself from an increased sentence.[158] Unless the valid bases for an enhanced sentence are solely within the defendant's control, the apprehension of vindictiveness that *Pearce* sought to eliminate will remain.[159]

One policy consideration supports the Eleventh Circuit's holding. Although sentencing is a prerogative of the judge,[160] and the sentencing judge may consider information other than prior convictions,[161] allowing pending charges to be an aggravating circumstance increasing a defendant's sentence contradicts the presumption of innocence until proven guilty.[162] Removing intervening convictions from factors legitimately considered in imposing sentence might tend to increase judges' reliance on pending charges as aggravating factors.[163] Courts must balance the need to predicate an offender's punishment on pending charges against the potential chilling effect that a perception of vindictive resentencing could have upon a defendant's exercise of the right to appeal.

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see also Sentence Increases, supra note 6, at 449 (sentence enhancement based on criminal conduct subsequent to original sentence may serve valid deterrent purpose).

155. United States v. Coke, 404 F.2d 836, 845 (1968).

156. *See Sentence Increases, supra* note 6, at 449 (threat of sentence enhancement after reconviction can only deter criminal conduct occurring after original conviction).

157. *See* 700 F.2d at 667 (Wasman's conduct leading to intervening conviction occurred before original sentencing for violation of passport statute).

158. *Id.*

159. *See* Blackledge v. Perry, 417 U.S. 21, 28 (1974) (removal of court's ability to implement retaliatory sentence eliminated defendants' apprehension of receiving harsher penalty for exercising right to appeal).

160. *See supra* note 1 and accompanying text (judges have wide discretion in sentencing decisions).

161. *See id.* (presentence investigation report provides sentencing judge with wide range of information concerning defendant's past conduct).

162. *See* 700 F.2d at 668 n.5 (*Wasman* court noted that concept of innocent until proven guilty means courts should not punish defendants for conduct not established by adjudication).

163. *Id.* at 669. The *Wasman* court considered whether limiting the valid bases for sentence enhancement to conduct occurring before the original sentence would increase the sentencing authority's reliance on pending charges in assessing punishment. *Id.* The Eleventh Circuit observed that either courts must consider pending charges in setting sentences, or courts must exclude totally the predated offense from consideration. *Id.* The *Wasman* court stated that courts should not impose punishment based upon a mere accusation that a defendant engaged in criminal conduct. *Id.* at 668 n.5. The only other alternative that the *Wasman* court addressed was exclusion of predated offenses from consideration at any time. *Id.* at 669. The *Wasman* court concluded that adoption of a policy not to consider offenses committed prior to the original sentencing needlessly would remove valid information from the sentencing decision. *Id.* Thus, the Eleventh Circuit held that a sentencing court may consider intervening convictions for conduct predating a defendant's original sentencing in imposing a sentence following reconviction. *Id.* at 669-70.

One proposed standard for determining what conduct will permit a higher sentence consis-

The Supreme Court has recognized that constitutional guarantees of due process of law must extend to procedural protections in the sentencing phase of a criminal trial.[164] Accordingly, the *Pearce* Court formulated a prophylactic rule designed to preserve due process standards in sentencing by ensuring that any defendant who chooses to appeal a conviction need not fear the imposition of a harsher sentence if reconvicted in retaliation for exercising the defendant's right to appeal.[165] The *Pearce* rule furthers the objective of criminal sanctions by allowing an increased sentence upon reconviction if the defendant's conduct after his or her original conviction warrants additional punishment.[166] The Eleventh Circuit's decision in *Wasman* is inconsistent with decisions in other circuits, which hold that proper application of *Pearce* mandates that a conviction for conduct occurring before imposition of the original sentence cannot support an enhanced sentence upon reconviction.[167] The fundamental principle of the Court's decision in *Pearce* was that fear of vindictive resentencing created an unconstitutional deterrent to defendants' exercise of the right to appeal.[168] By refusing to uphold the imposition of enhanced sentences, the *Markus* and *Williams* courts applied *Pearce* correctly to ensure that defendants need not fear a vindictively enhanced sentence following reconviction. In contrast, the circumstances surrounding the imposition of Wasman's enhanced sentence were conducive to a perception of vindictiveness, yet the

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tent with *Pearce* favors allowing sentence enhancement based on criminal conduct occurring after the original sentence with a determination of probable cause sufficient to establish that conduct. *Sentence Increases, supra* note 6, at 449. Requiring a finding of probable cause would eliminate consideration of investigative reports or suspicion of criminal activity, but would not eliminate consideration of indictments, prosecution, or conviction. *Id.* Under the proposed standard, the trial court in *Wasman* could have considered Wasman's charges for possession of the counterfeit certificates of deposit when the court imposed the original sentence, but not when the court imposed the enhanced sentence. *See supra* text accompanying notes 149-54 (enhanced sentence following reconviction may serve valid deterrent purpose if imposed to penalize defendant's criminal conduct occurring after original conviction and sentencing).

164. *See supra* notes 2-4 and accompanying text (due process protections apply to sentencing phase of trial process).

165. *See supra* note 5-8 & 23-29 and accompanying text (*Pearce* rule designed to eliminate defendant's apprehension of vindictive resentencing after successful challenge to prior conviction).

166. *See supra* notes 32, 149-51 and accompanying text (enhanced sentences imposed after reconviction permissible under *Pearce* to deter criminal conduct subsequent to original proceeding); *see also* 395 U.S. at 726 (*Pearce* rule allows enhanced sentence following reconviction if based upon specific conduct on defendant's part occurring after imposition of original sentence).

167. *See supra* notes 49-59 and accompanying text (*Wasman* court affirmed trial court's imposition of enhanced sentence based on intervening conviction for conduct predating original sentencing as consistent with *Pearce*); *supra* notes 82-88 and accompanying text (*Markus* court held that intervening conviction for conduct predating original sentencing could not support enhanced sentence after reconviction under *Pearce*); *supra* notes 89-101 and accompanying text (*Williams* court held that intervening conviction could not support enhanced sentence after reconviction under *Pearce*).

168. *See supra* notes 24-26 and accompanying text (*Pearce* rule designed to eliminate potential chilling effect perception of vindictiveness might have upon defendant's exercise of right to appeal); *supra* notes 102-106 and accompanying text (*Markus* and *Williams* holdings implement objective of *Pearce* rule by eliminating defendants' apprehension of vindictive resentencing as penalty for challenges to original convictions).

Wasman court declined to apply the *Pearce* standard to the lower court's decision to increase the defendant's punishment after retrial.[169] Thus, the Eleventh Circuit's decision in *Wasman* fails to implement the *Pearce* Court's objective of eliminating every apprehension of vindictive sentencing by a criminal trial judge. Consequently, appellate courts faced with enhanced sentences upon retrial should reject the *Wasman* holding and instead should follow the *Markus* and *Williams* courts' application of the *Pearce* guidelines.

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169. *See supra* notes 112-33 and accompanying text (*Wasman* court refused to apply *Pearce* rule to defendant's enhanced sentence and instead relied upon holdings of cases in which no realistic likelihood of vindictiveness existed); notes 134-46 and accompanying text (no conduct on defendant's part existed in *Wasman* to support enhanced sentence under *Pearce*).