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Increased Sentence Upon Retrial

court in *Logan Valley* failed to recognize the burdens concomitant to those rights when that property changes from private to quasi-public.

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INCREASED SENTENCE UPON RETRIAL

Under current criminal practice whenever a defendant seeks reversal of his conviction and a retrial,[1] he subjects himself to the risk of an increased sentence upon retrial. The Supreme Court of the United States recently described a defendant's dilemma: "For Noia to have appealed in 1942 would have been to run a substantial risk of electrocution. His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to retrial and death sentence."[2] In *Patton v. North Carolina*[3] the United States Court of Appeals for the Fourth Circuit recognized that risk and found that a defendant should not have to face the possibility of augmented punishment on retrial.

In *Patton* the defendant was convicted in the Superior Court of Bladen County, North Carolina in October, 1960, of armed robbery and sentenced to twenty years in prison. He was unrepresented by counsel at trial and did not appeal. In April, 1964, he obtained a post-conviction hearing and was awarded a new trial. On February 17, 1965, defendant was retried, convicted, and again sentenced to twenty years in prison. At the time of defendant's reconviction he had served nearly five years of his original sentence. The judge in pronouncing sentence stated that he would give defendant five more years than he had been given originally, but since he had served nearly five years he would credit that time against the new sentence.[4] Thus, defendant was again sentenced to twenty years.

In August, 1965, defendant sought and obtained federal habeas

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[1]A defendant who obtains a reversal of his conviction is not put twice in jeopardy by being retried. United States v. Tateo, 377 U.S. 463 (1964); United States v. Ball, 163 U.S. 662 (1896).

[2]Fay v. Noia, 372 U.S. 391, 439-40 (1963).

[3]381 F.2d 636 (4th Cir. 1967).

[4]The trial judge said: "Before I announce punishment, I will take into consideration the fact that he has served four years, or nearly five years.... I would give you five more years than what I am giving you, but I am allowing you credit for the time that you have served. Judgment of the Court is that the Defendant be imprisoned in the State's Prison for a term of twenty years...." 381 F.2d at 637 n.1.

corpus relief.[5] On the state's appeal the court held that it was a violation of the due process, equal protection, and double jeopardy clauses of the United States Constitution to increase the defendant's sentence on retrial. Therefore, the court concluded that the defendant must be given credit for all time served under the invalidated sentence and that his original sentence could not be increased.

A trial judge[6] may increase a defendant's sentence following his conviction on retrial in two ways: (1) by increasing the length of the original sentence[7] and (2) by denying the defendant credit for time served under the invalidated sentence.[8] There are various reasons why the judge might increase the defendant's sentence. The state may have presented more damaging evidence against the defendant at the new trial;[9] the defendant's conduct before and during his new trial, or

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[5]Patton v. North Carolina, 256 F. Supp. 225 (W.D.N.C. 1966). Defendant did not appeal from his second conviction. However, the court of appeals held that defendant had exhausted his state remedies because it would be "futile" to seek state appellate review in view of the law of North Carolina. 381 F.2d at 637.

[6]In certain circumstances the jury may be the sentencing authority. *See, e.g.,* State v. Aston, 412 S.W.2d 175 (Mo. 1967). Nevertheless, the rule of *Patton* should still apply.

[7]*See, e.g.,* Hobbs v. State, 231 Md. 533, 191 A.2d 238 (1963); State v. Slade, 264 N.C. 70, 140 S.E.2d 723 (1965).

[8]In *Patton* the court recognized the effect of the trial judge's sentencing decision stating: "Regardless of whether the action of the sentencing judge is verbalized as a twenty-year sentence without credit for the five years already served, or as a twenty-five-year sentence with credit, the practical effect of the second judge's sentence is to compel the defendant to serve five years longer...." 381 F.2d at 637. The court held that a harsher sentence was impermissible whether it was the result of an increase in the original sentence or of a denial of credit. However, the denial of credit does not always result in an increase in defendant's sentence. For example, if defendant is originally sentenced to twenty years, serves four years and then, after being retried, is sentenced to ten years without credit, his sentence has not been increased. Only if the defendant's new sentence exceeds sixteen years will the denial of credit result in an actual increased sentence.

Generally, when credit is denied most courts approach the problem merely as a matter of credit without regard to the fact that the denial of credit often increases defendant's sentence. *See, e.g.,* Newman v. Rodriguez, 375 F.2d 712 (10th Cir. 1967); McDowell v. State, 225 Ind. 495, 76 N.E.2d 249 (1947). The problem of credit also arises in non-retrial cases where defendant only seeks review of the sentence. *See, e.g.,* People v. Williams, 404 Ill. 624, 89 N.E.2d 822 (1950). For discussions of denial of credit see Agata, *Time Served Under a Reversed Sentence or Conviction—A Proposal and a Basis for Decision,* 25 MONT. L. REV. 1 (1963); Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws,* 35 MINN. L. REV. 239 (1951).

[9]*See, e.g.,* Marano v. United States, 374 F.2d 583 (1st Cir. 1967) (additional testimony rejected as basis for increase); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 687, 35 Cal. Rptr. 77 (1963) (dictum, dissenting opinion). Quite often, much more evidence is presented at the second trial because defendant changes his plea to not guilty and the state has to present more evidence to convict him. United

similar matters brought out in the presentence report, may have merited an increase;[10] the judge at the second trial may have ideas about sentencing different from those of the judge at the first trial;[11] or the defendant may have been convicted of different charges on retrial.[12] When faced with the question of the propriety of the increase, whatever the reason, courts generally have held that an increase is permissible.[13]

The explanation most often given by courts for upholding increased sentences is that the new trial stands in the trial court as if there had never been an earlier trial.[14] The first trial is said to be a

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States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir. 1967). There is no question that the state may enter new evidence against the defendant at retrail. United States v. Shotwell Mfg. Co., 355 U.S. 233 (1957).

[10]United States v. White, 382 F.2d 445 (7th Cir. 1967). It may be found, for example, that rehabilitation may take longer than calculated when defendant was first sentenced.

[11]*See, e.g.,* Marano v. United States, 374 F.2d 583 (1st Cir. 1967); Gainey v. Turner, 266 F. Supp. 95 (E.D.N.C. 1967).

[12]*See, e.g.,* United States v. Boyce, 352 F.2d 786 (4th Cir. 1965); State v. Squires, 248 S.C. 239, 149 S.E.2d 601 (1966).

[13] Stroud v. United States, 251 U.S. 15 (1919); Fay v. Noia, 372 U.S. 391, 471-72 (1963) (dictum, dissenting opinion); United States v. White, 382 F.2d 445 (7th Cir. 1967); United States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir. 1967) (increase allowed on fewer counts); Marano v. United States, 374 F.2d 583 (1st Cir. 1967) (dictum) (increase allowed if based on presentence report); Short v. United States, 344 F.2d 550 (D.C. Cir. 1965) (if the "increase serves a valid purpose"); King v. United States, 98 F.2d 291 (D.C. Cir. 1938) (dictum); Rice v. Simpson, 2 CRIM. L. REP. 2068 (D. Ala. Sept. 26, 1967) (if there is "legal justification" for the increase); Bohannon v. District of Columbia, 99 A.2d 647 (D.C. Mun. Ct. App. 1953); Hobbs v. State, 231 Md. 533, 191 A.2d 238 (1963); Moon v. State, 232 A.2d 277 (Md. Ct. Spec. App. 1967); Hicks v. Commonwealth, 345 Mass. 89, 185 N.E.2d 739 (1962) (dictum); Sanders v. State, 241 Miss. 894, 125 So. 2d 923 (1961) (dictum) (permitting increase when judge determined sentence but suggesting different result if jury fixed the punishment); State v. Pearce, 268 N.C. 707, 151 S.E.2d 571 (1966); State v. Slade, 264 N.C. 70, 140 S.E.2d 723 (1965); State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964); State v. Williams, 261 N.C. 172, 134 S.E.2d 163 (1964); Commonwealth v. Davis, 203 Pa. Super. 79, 198 A.2d 649 (1964); State v. Squires, 248 S.C. 239, 149 S.E.2d 601 (1962) (dictum).

Robinson v. United States, 324 U.S. 282 (1945), has also been cited for the proposition that a sentence can be increased on retrial. There defendant's sentence was increased from life imprisonment to death on retrial. On writ of certiorari the court of appeal's judgment was affirmed but without reference to the increased sentence. The Court only entertained the question of the court's statutory authority to impose the death sentence under the Federal Kidnapping Act. Therefore, *Robinson* is questionable authority for allowing an increase on retrial.

[14]*See, e.g.,* United States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir. 1967); Hobbs v. State, 231 Md. 533, 191 A.2d 238 (1963); State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964). In *Starner* the court said: "When he appeared and entered a plea of not guilty at the second trial, the slate had been wiped clean and it was an entirely new case and bore no relationship whatsoever to his previous plea of guilty which he had entered." 378 F.2d at 811.

nullity[15] and, therefore, cannot limit the new trial or sentence.[16] The defendant is held to have waived all the consequences of the first trial and "takes a chance after conviction on the trial judge's discretion in sentencing him."[17] By electing to appeal he is held to have accepted the benefits and the risks of a new trial.[18]

A factor which has led some appellate courts to permit increased sentences is the trial judge's discretion in sentencing matters. The general rule is that the length of the sentence is a matter within the trial judge's discretion.[19] Therefore, courts are reluctant to interfere with the trial judge's sentencing decision because they feel that he is in the best position to determine the appropriate sentence and that his evaluation should be honored.[20] However, courts have failed to recognize that the same rationale should apply to prohibit the judge at the new trial from changing or increasing the original sentence. The rule is that a judge's discretionary evaluation should be honored; therefore, the judge at the new trial should not be allowed to alter the original sentencing decision of the judge at the first trial. To do so would be to interfere with the discretion vested in the judge at the first trial. However, this problem has been circumvented by the rule that a new trial "results in a retrial of the whole case, verdict, judgment, and sentence."[21]

In some jurisdictions the appellate court will not intervene to prohibit an increase as long as the sentence is within the statutory limit.[22] Futhermore, the trial judge does not have to give any reason for the imposition of a harsher sentence on retrial.[23]

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[15]Commonwealth v. Davis, 203 Pa. Super. 79, 198 A.2d 649 (1964).

[16]Other courts have sought to justify an increase on grounds that the risk of an increase is necessary to discourage frivolous appeals. *See* People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 691, 35 Cal. Rptr. 77 (1963) (dissent). *Contra,* State v. Wolf, 46 N.J. 301, 216 A.2d 586 (1966).

As to the problem of increasing a sentence where defendant appeals from an inferior court to a court of general jurisdiction see Moulden v. State, 217 Md. 351, 142 A.2d 595 (1958).

[17]United States *ex rel.* Starner v. Russell, 378 F.2d 808, 811 (3d Cir. 1967); *accord,* State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964). *Contra,* Short v. United States, 344 F.2d 550 (D.C. Cir. 1965).

[18]Hobbs v. State, 231 Md. 533, 191 A.2d 238 (1963); Bohannon v. District of Columbia, 99 A.2d 647 (D.C. Mun. Ct. App. 1953).

[19]Leach v. United States, 353 F.2d 451 (D.C. Cir. 1965); Miller v. Gladden, 341 F.2d 972 (9th Cir. 1965); United States v. Pruitt, 341 F.2d 700 (4th Cir. 1965).

[20]United States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir. 1967); Shear v. Boles, 263 F. Supp. 855 (N.D. W. Va. 1967).

[21]State v. White, 262 N.C. 52, 136 S.E.2d 205, 206 (1964).

[22]Bohannon v. District of Columbia, 99 A.2d 647 (D.C. Mun. Ct. App. 1953); State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964); Commonwealth v. Davis, 203 Pa. Super. 79, 198 A.2d 649 (1964).

[23]United States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir. 1967); United

Regardless of the grounds used to justify the increase most courts have been quick to denounce any retributive intent on the part of the judge.[24] The problem of retributive intent usually has arisen where there is a possibility that the judge increased the defendant's sentence for exercising his right of appeal.[25] If that is the reason for the increase, then it must be struck down.[26] However, it is almost impossible for the defendant to show any misconduct or vindictive attitude of the judge toward the defendant in order to upset the increase.[27] The difficulty in showing the judge's prejudicial conduct is especially acute where the judiciary is held to be above such conduct.[28]

The propriety of increasing a defendant's sentence after a retrial is presented most keenly in those cases where the defendant was given a life sentence at the first trial and was sentenced to death upon retrial. The courts have not been reluctant to sanction an increase even under these circumstances.[29] The possibility of reconviction and sentence to death is held to be one of the "risks" the defendant takes by exercising his right of appeal.[30] However, recent cases indicate a trend against permitting an increase from life imprisonment to death.[31]

Some courts have recognized that the prospect of an increase

States v. White, 382 F.2d 445 (7th Cir. 1967). *Contra,* Rice v. Simpson, 2 CRIM. L. REP. 2068 (D. Ala. Sept. 26, 1967).

[24]*See, e.g.,* Shear v. Boles, 263 F. Supp. 855 (N.D. W. Va. 1967).

[25]Meaders v. State, 96 Ga. 299, 22 S.E. 527 (1895) (fine increased on defendant's notice of motion for new trial—appellate court expressed disapproval); State v. Patton, 221 N.C. 117, 19 S.E.2d 142 (1942) (sentence increased after notice of appeal given—sentence stricken since it appeared that sentence was increased because defendant expressed desire to appeal). *But see* State v. Bostic, 242 N.C. 639, 89 S.E.2d 261 (1955) (imprisonment increased on defendant's rejection of sentence and notice of appeal—no penalization by trial court found).

[26]United States v. White, 382 F.2d 445 (7th Cir. 1967); Short v. United States, 344 F.2d 550 (D.C. Cir. 1965); State v. Patton, 221 N.C. 117, 19 S.E.2d 142 (1942). *See also* United States v. Boyce, 352 F.2d 786 (4th Cir. 1965). In *Boyce* the court said: "If it had been the intent of the trial judge to dissuade the exercise of the right of appeal we should be quick to condemn the practice, but such was not the case here." 352 F.2d at 787 (dictum).

[27]*See, e.g.,* United States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir. 1967); Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967); United States v. White, 382 F.2d 445 (7th Cir. 1967).

[28]*See, e.g.,* Shear v. Boles, 263 F. Supp. 855 (N.D. W. Va. 1967).

[29]*See, e.g.,* Stroud v. United States, 251 U.S. 15 (1919); Mann v. State, 23 Fla. 610, 3 So. 207 (1887) (dictum); State v. Kneeskern, 203 Iowa 929, 210 N.W. 465 (1926); State v. Morgan, 145 La. 585, 82 So. 711 (1919); Commonwealth v. Alessio, 313 Pa. 537, 169 A. 764 (1934) (dictum); Greer v. State, 62 Tenn. (3 Baxter) 321 (1874).

[30]Mann v. State, 23 Fla. 610, 3 So. 207 (1887).

[31]Rush v. State, 239 Ark. 878, 395 S.W.2d 3 (1965) (interpreting statute); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963); State v. Wolf, 46 N.J. 301, 216 A.2d 586 (1966).

hinders defendant's right of appeal.[32] In *Marano v. United States*[33] the court stated that "a defendant's right of appeal must be unfettered"[34] and that defendant "should not have to fear even the possibility that his exercise of his right to appeal will result in the imposition of a direct penalty for so doing."[35] The court, without saying so, apparently based its unfettered appeal approach on the due process and equal protection clauses of the Constitution.[36]

There are four constitutional objections that might be directed against an increase in sentence. It may be said an increase in sentence imposes cruel and unusual punishment,[37] denies defendant due process,[38] denies defendant equal protection of the laws,[39] and puts defendant twice in jeopardy.[40] Where the eighth amendment provision

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[32]Marano v. United States, 374 F.2d 583 (1st Cir. 1967); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963); State v. Wolf, 46 N.J. 301, 216 A.2d 586 (1965). In *Henderson* and *Wolf*, where increases from life to death were prohibited, the courts, though basing their decisions on other grounds, suggested that the unfettered appeal approach would require the same result. In an analogous situation the court in *In re Ferguson*, 233 Cal. App. 2d 79, 43 Cal. Rptr. 325 (1965), held that defendant's sentence could not be increased because to hold otherwise would discourage motions for new trial.

[33]374 F.2d 583 (1st Cir. 1967). *Marano* delt with an increase in sentence imposed by a federal court.

[34]374 F.2d at 585; *accord*, Worcester v. Commissioner, 370 F.2d 713 (1st Cir. 1966). The Supreme Court of the United States has never held that a defendant has a constitutional right of appeal, but it has held that if that right is provided, it must be unhindered by unreasoned distinctions. "This court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

[35]374 F.2d at 585. The court held that an increase could not be based on additional testimony at the new trial but reopened the door and undermined its whole opinion concerning the right of appeal by further stating in dictum that an increase could be based on the presentence report.

[36]Courts have been reluctant to approach the matter on any constitutional basis. For example, in *United States v. White*, 382 F.2d 445, 448 (7th Cir. 1967), the court, in allowing an increased sentence, said: "We are fully aware of the recent decisions of other courts ... which have expressed views contrary in many respects to those expressed herein. We think, however, that the pronouncement of a constitutional principle as sweeping and inflexible as [a blanket prohibition against any increase in sentence on retrial] ... should await the considered judgment of the Supreme Court...."

[37]"Excessive bail shall not be required ... nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

[38]"[N]or shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. CONST. amend. XIV, § 1.

[39]"No state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[40]"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb...." U.S. CONST. amend. V.

against cruel and unusual punishment has been raised, it has been held uniformly that the augmentation of sentence on reconviction does not constitute cruel and unusual punishment.[41]

The three remaining constitutional objections were presented in *Patton* and applied as the basis for denying any increase. The court first held that an increase in sentence denies defendant due process. Encompassed as part of the court's due process argument are the unconstitutional condition doctrine and the unfettered appeal approach.[42] Under the unconstitutional condition doctrine a state cannot condition the extension of a state-bestowed right upon the relinquishment of a constitutional right.[43] However, the doctrine may be applied in the reverse. Thus, a state cannot condition the extension of a constitutional right upon the relinquishment of a state-bestowed right. In *Patton* the court applied a variation of the latter rule holding that a state cannot condition a defendant's exercise of his right to a fair trial by subjecting him to the risk of an increased sentence.[44] Other courts when presented with the due process objection have held that an increased sentence upon reconviction does not deny defendant due process.[45]

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[41]United States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir. 1967); Hobbs v. State, 231 Md. 533, 191 A.2d 238 (1963); State v. Slade, 264 N.C. 70, 140 S.E.2d 723 (1965).

[42]See text accompanying note 32 *supra.*

[43]*See* Note, *Unconstitutional Conditions,* 73 HARV. L. REV. 1595 (1960).

[44]To say that defendant has to subject himself to the risk of an increased sentence in order to exercise the right to a fair trial is the same as saying that a defendant has to relinquish the immunity accorded the prior sentence in order to exercise the right to a fair trial. Because a defendant's immunity from an increased sentence in the absence of a self-initiated appeal is a right guaranteed by the double jeopardy clause of the Constitution, *Ex Parte* Lange, 85 U.S. (18 Wall) 163 (1873); United States v. Benz, 282 U.S. 304 (1931) (dictum), the court's application of the doctrine appears fallacious. The uncontitutional condition doctrine relates only to the interplay between state and constitutional rights, not between constitutional rights alone. Furthermore, in seeking to obtain a fair trial a defendant does not have to barter his right of appeal. Instead, he exercises that right as a means of implementing the right to a fair trial. It would have been accurate if the court had simply held that it was a violation of the due process clause to require the defendant to subject himself to the risk of an increased sentence in order to obtain a fair trial and avoided the use of the unconstitutional condition doctrine.

[45]Moon v. State, 232 A.2d 277 (Md. Ct. Spec. App. 1967); State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964), *cert. denied,* 379 U.S. 1005 (1965). However, it has been held that an increase does deny defendant due process if the court does not state in the record some reason or legal justification for the increase, Rice v. Simpson, 2 CRIM. L. REP. 2068 (D. Ala. Sept. 26, 1967), or if it is to penalize defendant for exercising his right of appeal, United States v. White, 382 F.2d 445 (7th Cir. 1967).

Patton appears to be the first case to apply the equal protection clause to prohibit any increase.[46] The defendant's sentence may not be increased once he has commenced serving it.[47] Therefore, he has freedom from harsher punishment under the original sentence unless he challenges the sentence or conviction. Thus, defendant is denied equal protection of the laws because only those defendants who seek review of a sentence or obtain a reversal and a new trial are subjected to harsher punishment; and conversely, only those defendants who remain content with their judgment receive the benefit of the rule against increasing a defendant's sentence after he has begun serving it. To allow an upward revision of the sentence the state "must proceed upon a rational basis in selecting the class of prisoners it will subject to this threat."[48]

Finally, the court in *Patton* based its decision on the double jeopardy clause. The increased penalty was held to violate the "prohibition against multiple punishment."[49] Other courts have entertained this question and found that harsher punishment upon retrial does not put defendant twice in jeopardy.[50]

The effect of the court's decision in *Patton* is to place a ceiling on resentencing.[51] The original sentence acts as a maximum limita-

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[46]In *Rice v. Simpson*, 2 CRIM. L. REP. 2068 (D. Ala. Sept. 26, 1967), the court said that an increased sentence could not withstand an equal protection objection if there was no "legal justification" for the increase recorded in the court record. But in *State v. White*, 262 N.C. 52, 136 S.E.2d 205 (1964), the court completely rejected an equal protection argument.

[47]*Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873); United States v. Benz, 282 U.S. 304 (1931) (dictum); United States v. Sacco, 367 F.2d 368 (2d Cir. 1966); United States v. Adams, 362 F.2d 210 (6th Cir. 1966).

[48]381 F.2d at 642. The court found no rational basis for favoring only the defendants who do not seek post-conviction review.

[49]381 F.2d at 645. *Patton* did not follow the usual double jeopardy approach that prohibits multiple prosecutions for the same offense. Instead, the court said that allowing an increase on retrial was the equivalent of multiple punishment resulting from an increase in defendant's sentence after he has begun serving it.

[50]*See, e.g.*, United States v. White, 382 F.2d 445 (7th Cir. 1967); King v. United States, 98 F.2d 291 (D.C. Cir. 1938) (dictum). In *Stroud v. United States*, 251 U.S. 15 (1919), a double jeopardy argument was directed against the retrial, and when the Court allowed the increase in sentence from life to death, it found no double jeopardy objection on any basis. However, in *People v. Henderson*, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963), the court applied the double jeopardy clause to prohibit an increase from life imprisonment to death.

[51]That a ceiling should be imposed has been contended on several occasions. *In re* Ferguson, 233 Cal. App. 2d 79, 43 Cal. Rptr. 325 (1965); ABA, STANDARDS RELATING TO POST CONVICTION REMEDIES 96 (See discussion of the ABA report in note 52 *infra*); Agata, *Time Served Under a Reversed Sentence or Conviction—A Proposal and a Basis for Decision*, 25 MONT. L. REV. 1, 19 (1963); Van Alstyne, *In Gideon's*

tion on any sentence that may subsequently be given at the new trial.[52] Therefore, the defendant is free to appeal without fear of having harsher punishment imposed on him if he is successful in attacking the original conviction. If his incarceration is based on a defective conviction, he will be encouraged to attack it and uncover the defects. To the extent that *Patton* places a blanket prohibition on any increase, several exceptions should be noted. It is submitted that an exception should be made where the original sentence was below the statutory minimum and defendant must be resentenced as the result of a new trial. It should be within the judge's power upon re-

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Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 YALE L.J. 606 (1965) (the author of this article was defendant's counsel in *Patton*). *Contra*, State v. Pearce, 268 N.C. 707, 151 S.E.2d 571 (1966).

[52]With the credit rule, the maximum period that defendant may be required to serve upon reconviction is the unserved time remaining on the original sentence. In holding that a sentence may not be increased on retrial, the court brought about a result that has found support only in recent years. See cases prohibiting increase to death sentence on reconviction cited in note 31 *supra;* People v. Ali, 66 Adv. Cal. 271, 424 P.2d 932, 57 Cal. Rptr. 348 (1967) (concurrent sentence cannot be made consecutive on retrial); Agata, *Time Served Under a Reversed Sentence or Conviction—A Proposal and a Basis for Decision*, 25 MONT. L. REV. 1, 22 (1963); Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965).

In January, 1967, the advisory committee of the American Bar Association issued its tentative draft entitled STANDARDS RELATING TO POST-CONVICTION REMEDIES as part of the ABA's Project on Minimum Standards for Criminal Justice. The committee in drafting the report recognized the problem in question and made provision therefor in § 6.3 to the same effect as *Patton*. Section 6.3 provides:

> Sentence on re-prosecution of successful applicants: credit for time served.
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> (a) Where prosecution is initiated or resumed against an applicant who has successfully sought post-conviction relief and a conviction is obtained, or where a sentence has been set aside as the result of a successful application for post-conviction relief and the defendant is to be resentenced, the sentencing court should not be empowered to impose a more severe penalty than that originally imposed.
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> (b) Credit should be given towards service of the minimum and maximum term of any any new prison sentence for time served under a sentence which has been successfully challenged in a post-conviction proceeding.

The report as yet has not been endorsed by the Board of Directors of the ABA.

In addition, the Supreme Court has intimated that credit should be given for time served. In *United States v. Ewell*, 383 U.S. 116 (1966), where defendants were reindicted under a different statutory provision after they had been convicted and incarcerated under the first indictment, the Court said: "In these circumstances, there is every reason to expect the sentencing judge to take the invalid incarcerations into account in fashioning new sentences if appellees are again convicted." 383 U.S. at 123. Futhermore, in *Rinaldi v. Yeager*, 384 U.S. 305 (1966), the Supreme Court held that the right of appeal when given should be unobstructed. See note 34 *supra*.

trial to correct the sentence to bring it in accord with the minimum statutory provision.[53] A second exception lies in what charges the defendant faces at the second trial.[54] If wholly different charges are brought against the defendant at the second trial, the judge should then be allowed to levy a greater sentence.[55]

In *Patton* the court adopted three constitutional grounds for proscribing an increase in sentence on retrial: (1) due process, (2) equal protection, and (3) double jeopardy. Although any one of the three would have been a sufficient basis for the court's decision, the equal protection argument appears to be the most compelling.[56]

C. ALTON PHILLIPS

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[53]In *Murphy v. Massachusetts*, 177 U.S. 155 (1900), defendant's original sentence was set aside as unconstitutional, and he had to be resentenced under another statute. The Court said: "And as the decision which he sought and obtained involved the determination that he had been improperly sentenced under chapter 504... but should have been sentenced under antecedent statutes... it followed that the second sentence must be a new sentence to the extent of those differences, and might turn out to be for a longer period of imprisonment." 177 U.S. at 160. In *King v. United States*, 98 F.2d 291 (D.C. Cir. 1938), the sentence was below the statutory minimum because the words "at hard labor" had been exluded. Defendant's sentence was increased partly because the words "at hard labor" were included in the second sentence and the court allowed the increase. The court said: "It is established that a sentence which has not been fully served, and no separable part of which has been fully served, and which is void because it imposes less than the statutory minimum, may be corrected to conform to the statute.... A rule might be adopted which would permit a sentence to be increased only so far as necessary to bring it into conformity with the statute." 98 F.2d at 296. *See* Bozza v. United States, 330 U.S. 160 (1947); Coy v. Johnston, 136 F.2d 818 (9th Cir. 1943); Agata, *Time Served Under a Reversed Sentence or Conviction—A Proposal and a Basis for Decision*, 25 MONT. L. REV. 1, 26, 35 (1964).

[54]An increase on a conviction of a lesser included offense for apparent reasons should be impermissible. Under the rule of *Green v. United States*, 355 U.S. 184 (1957), a defendant cannot be convicted of a greater included offense on retrial. Thus, an increase on this basis is necessarily precluded in the federal system.

[55]*See, e.g.*, United States v. Boyce, 352 F.2d 786 (4th Cir. 1965); State v. Squires, 248 S.C. 239, 149 S.E.2d 601 (1966) (increase based on conviction of three additional charges allowed). In *Boyce* the defendant obtained a new trial and, on his request, was tried for two other outstanding charges against him. The court ruled that an increase in sentence was permissible where defendant had been convicted of additional charges.

[56]The Supreme Court in dealing with unreasonable distinctions placed in the way of appellate review has often relied on the equal protection clause to remove the obstacle. *See, e.g.*, Rinaldi v. Yeager, 384 U.S. 305 (1966); Griffin v. Illinois, 351 U.S. 12 (1956).