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Retrial Of The Successful Criminal Appellant: Harsher Punishment And Denial Of Credit For Time Served

Patton v. North Carolina

The defendant was convicted by a North Carolina court of armed robbery on a plea of nolo contendere and was sentenced to twenty years. After the Supreme Court decision in Gideon v. Wainwright, the defendant applied for post-conviction relief and was awarded a new trial because of the trial court's failure to appoint a lawyer to represent him. At the second trial, the defendant was again convicted and was sentenced to twenty-five years.

The trial judge stated that twenty years of this sentence remained to be served since the defendant was entitled to credit for the five

1. 381 F.2d 636 (4th Cir. 1967), cert. denied, 88 S. Ct. 818 (1968). The Fourth Circuit opinion was written by Judge Sobeloff.
2. 372 U.S. 335 (1963). Gideon enunciated the rule that all indigent defendants charged with a felony must be given court-appointed counsel to represent them at trial.
years he had already served. While serving his sentence under the second conviction, the defendant applied to a federal district court for habeas corpus. The district court, recognizing that the defendant's second sentence could be interpreted either as a harsher punishment than that imposed at the first trial or as a denial of credit for time served under the original conviction, held that in either case the sentence imposed at the second trial violated the due process and equal protection clauses of the fourteenth amendment.

Affirming on appeal, the Court of Appeals for the Fourth Circuit held that at retrial for the same offense a trial judge may not impose a sentence harsher than that imposed at the first trial nor may he deny credit for any time served under the original unlawful conviction, because the practical effect of either is "to compel the defendant to serve... longer to become eligible for parole than he would have been required to serve" had he refrained from attacking his original conviction.

The court reasoned that, "[t]he risk of a denial of credit or the risk of a greater sentence, or both, on retrial may prevent defendants who have been unconstitutionally convicted from attempting to seek redress." The court explained that to deprive a defendant of his right to a fair trial, and subsequently to threaten him with a harsher sentence or a denial of credit for time served if he sought to exercise his right to attack the invalid conviction, would unfairly condition the defendant's enjoyment of the rights provided him by the law.

The court found that the notion of protection against multiple punishment, implicit in the con-

3. Patton v. North Carolina, 256 F. Supp. 225, 236 (W.D.N.C. 1966): "Since the form of Patton's sentence may be considered either as a denial of credit for time served or an imposition of harsher punishment, it is necessary to rule on both questions: they are but jaws of the same vise."

4. U.S. Const. amend. XIV, § 1: "... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The district court found that the denial of credit for time served under the invalid sentence was "so fundamentally unfair as to constitute a violation of the Due Process and Equal Protection Clauses." 256 F. Supp. at 236. The court further concluded that since the first sentence sufficiently ensured the protection of society, the limitation on defendant's constitutional right to appeal which resulted from the threat of a harsher sentence at retrial was supported by "no compelling unprotected interest of society." 256 F. Supp. at 237. Conspicuously absent from the district court opinion was the double jeopardy argument which the court of appeals later used in support of its holding.

5. 381 F.2d at 637.

6. 381 F.2d at 639. The court explained that to deprive a defendant of his right to a fair trial, and subsequently to threaten him with a harsher sentence or a denial of credit for time served if he sought to exercise his right to attack the invalid conviction, would unfairly condition the defendant's enjoyment of the rights provided him by the law.

7. U.S. Const. amend. V: "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb..."
The institutional concept of double jeopardy, forbade the imposition of a heavier sentence or the denial of credit at retrial.8

**Harsher Sentence at Retrial**

The *Patton* holding synthesized, with some variations, the three principal theories which have developed in opposition to the practice of imposing harsher sentences at the retrial of criminal defendants who have successfully appealed an earlier conviction of the same offense. Historically, the theory most often advocated was that this practice violated the double jeopardy prohibition. In the very recent cases, the emphasis has shifted from the double jeopardy argument to the notion that such a practice violated due process in that a defendant's right to appeal is impaired when he must fear a harsher sentence at his retrial in the event his appeal is successful. *Patton's* alternative holding that a heavier sentence at retrial is a denial of equal protection of the laws illustrates the third theory. The *Patton* opinion incorporated these three major arguments into the most persuasive attack on harsher sentencing at retrial which has yet been formulated.

8. Palko v. Connecticut, 302 U.S. 319 (1937), which has never been overruled by the Supreme Court, held that the double jeopardy clause of the fifth amendment did not apply to the states through the due process clause of the fourteenth amendment. In *Patton*, however, the court clearly held that the imposition of a harsher punishment by a state court violates some constitutional prohibition against double jeopardy. In doing so, the court relied on United States *ex rel. Hetenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965), *cert. denied*, Mancusi *v. Hetenyi*, 383 U.S. 913 (1966), in which it was held that:

The Due Process Clause of the Fourteenth Amendment imposes some limitations on a state's power to re prosecute an individual for the same crime. Abhorrence to successive reprosecutions ... reveals a societal understanding that certain reprosecutions by a state are incompatible with due process of law. 348 F.2d at 849-50.

The *Wilkins* holding appears to be based heavily on an interpretation of *Palko* which is best represented in Bartkus *v. Illinois*, 359 U.S. 121 (1959). In *Bartkus*, the Supreme Court, in a four to four decision, discussed Justice Cardozo's opinion in *Palko*:

About the meaning of due process, in broad perspective unrelated to the first eight amendments, he suggested that it prohibited to the States only those practices "repugnant to the conscience of mankind." 302 U.S. at 323. In applying these principles in *Palko*, the Court ruled that, while at some point the cruelty of harassment by multiple prosecutions by a State would offend due process, the specific limitation imposed on the Federal Government by the Double Jeopardy Clause of the Fifth Amendment did not bind the States. 395 U.S. at 127.

The *Wilkins* court went even further, suggesting that the strict *Palko* holding was that not all of the fifth amendment prohibition against double jeopardy is absorbed by the due process clause. Under this reasoning, the *Palko* ruling would not prohibit the incorporation of part of that prohibition into the concept of due process. Thus by accepting the reasoning of the *Wilkins* case and by holding that harsher punishment at retrial is "a hardship so acute and shocking that our policy will not endure it," *Palko v. Connecticut*, 302 U.S. 319, 328 (1937), the *Patton* court felt justified in reaching a fourteenth amendment double jeopardy holding in spite of the refusal of the Supreme Court in *Palko* to apply the double jeopardy clause to the states. It should be noted that certiorari has recently been denied by the Supreme Court in a case presenting the issue of the applicability of the fifth amendment double jeopardy clause to the states. State *v. Lemongello*, 50 N.J. 87, 232 A.2d 149 (1967), *cert. denied*, 389 U.S. 858 (1967).
Until quite recently it was universally acknowledged that a harsher sentence could be imposed at retrial upon a defendant who had succeeded in having his original conviction overturned on appeal. Whether the defendant attacked the original judgment directly by appeal or collaterally by habeas corpus was not considered to be material. The rule was applied to cases in which the error at the first trial was in the sentence only, as well as to those involving error as to the conviction itself. A contention that the imposition of a heavier sentence was precluded by the protection against double jeopardy was rejected on the theory that the defendant, by voluntarily attacking his conviction, had waived the defense of double jeopardy. Courts buttressed this concept of waiver with the corollary principle that the original sentence and conviction had been nullified by a successful appeal and thus could not support a double jeopardy claim.

9. In Stroud v. United States, 251 U.S. 15 (1919), the defendant was originally convicted of first degree murder and given the death sentence. This conviction was reversed upon confession of error; the defendant was retried, reconvicted, and sentenced to life imprisonment. Once again the judgment was vacated upon confession of error, and the defendant was awarded a new trial. At the third trial the defendant was convicted and sentenced to be executed. The Supreme Court held that the defendant had not been placed in double jeopardy.

In Robinson v. United States, 144 F.2d 392 (6th Cir. 1944), aff'd, 324 U.S. 282 (1945), the defendant, a convicted kidnapper, was sentenced to life imprisonment. His original conviction was overturned in federal habeas corpus proceedings; at his second trial for the same offense, the defendant, again found guilty, was given the death penalty. The second sentence was upheld on appeal.

In King v. United States, 98 F.2d 291 (D.C. Cir. 1938), the defendant received a harsher sentence after successfully attacking his original judgment on the basis of error in the sentence. Kohlfuss v. Warden of Connecticut State Prison, 149 Conn. 692, 183 A.2d 626 (1962), held that an increase in defendant's sentence at a sentence review proceeding allowed by Connecticut Statute did not subject him to double jeopardy. Bohannon v. District of Columbia, 99 A.2d 647 (D.C. Mun. Ct. 1953), found that defendant assumed the risk of receiving a greater fine at a second trial for failure to yield the right of way when he attacked his original sentence. In Tilghman v. Culver, 99 So. 2d 282 (Fla. 1957), the defendant had his judgment vacated on habeas corpus and was resentenced to an additional five years at his second trial for the same offense. The court held that a trial judge could increase a sentence at retrial as long as the second sentence was within the statutory limits. State v. Kneeskern, 203 Iowa 929, 210 N.W. 465 (1926), held that the court was not precluded from imposing the death sentence at defendant's retrial for murder, even though defendant received only a life sentence as a result of his first conviction. Defendant's punishment in Hobbs v. State, 231 Md. 533, 191 A.2d 238 (1963), cert. denied, 375 U.S. 914 (1963), was increased at retrial from concurrent twenty year sentences to consecutive sentences of twenty and five years. In Sander v. State, 239 Miss. 874, 125 So. 2d 923 (1961), defendant's successful appeal resulted in reconviction and a two year increase in sentence.

10. See, e.g., Robinson v. United States, 144 F.2d 392 (6th Cir. 1944), aff'd, 324 U.S. 282 (1945) (habeas corpus); King v. United States, 98 F.2d 291 (D.C. Cir. 1938) (appeal). In Robinson the court stated that "it is not material that appellant attacked the original judgment and sentence collaterally by habeas corpus instead of directly by appeal." 144 F.2d at 397. Cf. Bryant v. United States, 214 F. 51 (8th Cir. 1914).

11. See, e.g., King v. United States, 98 F.2d 291 (D.C. Cir. 1938); Tilghman v. Culver, 99 So. 2d 282 (Fla. 1957). These cases upheld harsher sentences imposed at the second trial of defendants whose original judgments were overturned because of error in the sentence imposed at the first trial. In King, the court explained: "It can make no difference whether the error which avoids the first sentence goes to the conviction ... or to the sentence alone." 98 F.2d at 295.


13. See, e.g., Robinson v. United States, 144 F.2d 392 (6th Cir. 1944), aff'd, 324 U.S. 282 (1945); Commonwealth v. Murphy, 174 Mass. 369, 54 N.E. 860 (1899), aff'd, 177 U.S. 155 (1900).
The waiver doctrine was somewhat eroded in *Green v. United States*, in which the Supreme Court held that conviction of a successful appellant at his retrial for an offense greater than that for which he had been convicted at the first trial violated the double jeopardy principle. The *Green* holding rested on the theory that conviction of a lesser offense at the first trial implied acquittal of all greater offenses with which defendant had been charged and that the benefit of this implied acquittal was not waived when the defendant attacked his conviction for the lesser offense. Although the scope of the *Green* decision was limited to cases involving reconviction for a greater offense and did not include those dealing with harsher punishment at retrial, the implied acquittal exception to the waiver doctrine therein enunciated provided artillery for later courts which would hold the practice of increasing sentences at retrial to be impermissible on double jeopardy grounds.

The California Supreme Court in *People v. Henderson* utilized the implied acquittal doctrine of *Green* to support its finding that a harsher punishment could not be imposed at the retrial of a successful appellant. Drawing an analogy between the conviction of a greater offense at retrial and the imposition of a harsher sentence for the same offense, the California court quoted Justice Frankfurter's dissenting opinion in *Green*: "As a practical matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carried a significantly different punishment. . . ."

While the *Patton* court also held that an increase of sentence on retrial offended the prohibition against double jeopardy, it rejected the implied acquittal argument upon which *Henderson* relied so heavily. Judge Sobeloff, although admitting the validity of the doctrine in the factual situation presented by *Green*, where it could reasonably be said that conviction of a lesser offense implied an acquittal of all

14. 355 U.S. 184 (1957). Defendant, charged with first degree murder, was convicted of only second degree murder; the conviction was reversed on appeal. On remand defendant was again tried for first degree murder and was convicted and sentenced to death. The court held that implicit in defendant's conviction of second degree murder at the first trial was his acquittal of the first degree murder charge; therefore, his conviction for the greater offense at the second trial violated his right not to be placed twice in jeopardy. *Accord*, United States *ex rel.* Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965); cert. denied, Mancusi v. Hetenyi, 383 U.S. 913 (1966); Gomez v. Superior Court, 30 Cal. 2d 640, 328 P.2d 976 (1958). *Contra*, Trono v. United States, 199 U.S. 521 (1905); see Annot., 61 A.L.R.2d 1141 (1958).

15. 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963). The defendant was originally convicted of first degree murder on a plea of guilty and sentenced to life imprisonment. After overturning his conviction on appeal, *Henderson* was reconvicted of first degree murder and given the death sentence. While the appellate court conceded that the defendant, by attacking the judgment, had subjected himself to a retrial which might reach the same result, it held that the defendant's original sentence could not be increased at that retrial.

16. *Green* v. United States, 355 U.S. 184, 213 (1957) (dissenting opinion). Judge Traynor's opinion in *Henderson* quoted this passage from Justice Frankfurter's dissent in *Green* to support his conclusion that a defendant's sentence could not be increased at retrial. 386 P.2d at 686. Ironically, Justice Frankfurter had originally used this passage to demonstrate the applicability of the *Stroud* rule that harsher punishment could be imposed on retrial to the facts in *Green*. 
greater ones with which defendant had been charged, contended that its application to the facts of Patton would be a "fiction." The Patton holding relied, rather, on "the prohibition against multiple punishment" implicit in the concept of double jeopardy.17

Although the Henderson holding was based primarily on double jeopardy grounds, the court noted that the "right of appeal from an erroneous judgment is unreasonably impaired"18 by the threat of a harsher punishment. This concept was not altogether new; the Supreme Court had articulated this rationale as early as 1882 by way of dictum in Kring v. Missouri.19 Similar reasoning was used in Fay v. Noia20 to support the Court's finding that a defendant could obtain federal habeas corpus without exhausting state remedies: "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 im-

17. Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874), was cited as authority for this principle. In Lange the trial court sentenced the defendant to one year's imprisonment and a $200 fine. After the fine had been paid, the trial court discovered that the correct sentence for the offense of which the defendant had been convicted was one year's imprisonment or a $200 fine and, accordingly, corrected the sentence to one year's imprisonment alone. The appellate court held that this violated the principle "that no person shall be twice punished for the same offense." Id. at 169. Lange has been cited most often in cases in which a defendant's sentence is increased after he has commenced service under it. See, e.g., United States v. Sacco, 367 F.2d 368 (2d Cir. 1966); United States v. Adams, 362 F.2d 210 (6th Cir. 1966); United States v. Walker, 346 F.2d 428 (4th Cir. 1965). Cf. United States v. Benz, 282 U.S. 304 (1931). These cases held that an increase of sentence after service had begun violated the constitutional prohibition against multiple punishment expounded in Lange. In Whaley v. North Carolina, 379 F.2d 221 (4th Cir. 1967), decided on the same day as Patton, the Fourth Circuit used the multiple punishment principle to strike down a North Carolina Supreme Court decision affirming an increase in defendant's valid sentence. The defendant had been given several concurrent sentences, the service of which was to begin at the expiration of the sentence imposed under an "anchor charge." The judgment on the anchor charge was set aside on appeal, and the case was remanded to the trial court for clarification of the remaining sentences. The trial court increased these sentences, thus depriving the defendant of any benefit he would have received from the obliteration of the anchor charge. The court, in an opinion by Judge Sobeloff, deemed this increase a violation of defendant's protection against multiple punishment. Before the Patton decision the multiple punishment principle contained in Lange had not been applied to cases where harsher punishment was imposed at a defendant's second trial. In Murphy v. Massachusetts, 177 U.S. 155, 160 (1900), the Supreme Court distinguished the Lange case from cases involving increased punishment at retrial on the apparent grounds that the prohibition against multiple punishment advocated in Lange applied only to cases where the original sentence had been fully satisfied.


19. 107 U.S. 221 (1882). The facts in Kring were similar to those in Green. The defendant, charged with first degree murder at his first trial, was convicted of only second degree murder. Having had conviction reversed by writ of error, he was convicted at retrial of first degree murder. The defendant's predicament was described as follows:

That he prosecuted his legal right to a review of that sentence with a halter around his neck, when, if he succeeded in reversing it, the same court could tighten it to strangulation, and if he failed, it did him no good. And this is precisely what has occurred. His reward for proving the sentence of the court of twenty-five years' imprisonment . . . to be erroneous, is that he is now to be hanged instead of imprisoned. Id. at 234-35. Kring held that the defendant had been acquitted of first degree murder at his first trial. The holding was based on a state rule which had been overruled by a new provision in the state constitution, while the defendant's case was pending. The court applied the old rule, reasoning that the use of the new rule in this case would violate the ex post facto prohibition of the federal constitution.

prisonment or to travel the uncertain avenue of appeal which, if successful, might have led to a retrial and death sentence. . . . He declined to play Russian roulette in this fashion."  

The theory that harsher punishment impairs the right of appeal, while subsidiary in *Henderson*, was the principal foundation for the decision of the New Jersey Supreme Court in *State v. Wolf*. In that case, the defendant was sentenced to life imprisonment at his first trial for first degree murder. After the defendant had successfully attacked his original conviction on appeal, the State sought the death penalty at a second trial for the same offense. The court held that such harsher punishment could not be imposed. The court recognized the possible applicability of the implied acquittal doctrine to the facts in the case, but expressly declined to rest its decision on double jeopardy grounds. The holding in *Wolf* was founded on "standards of procedural fairness" which prohibited the infliction of a heavier sentence at retrial. The court concluded that such "standards of procedural fairness" would not permit the restriction of the right to appeal "by requiring the defendant to barter with his life for the opportunity of exercising it."  

The double jeopardy issue was ignored completely in *Marano v. United States*, a First Circuit decision in which a heavier sentence, allegedly based on new evidence and a new presentence report produced at the second trial, was declared invalid. The court refused to sustain the heavier sentence, stating that a "defendant's right of appeal must be unfettered." The decision concluded that the danger that new evidence might be discovered at retrial was just as great a restriction on the right of appeal as the imposition of a harsher sentence; while...

21. *Id.* at 439-40.
23. The *Wolf* opinion contained a lengthy discussion and analysis of the *Henderson* and *Green* holdings, but the court expressly refused to follow these cases.
24. The court reasoned that: In a choice between forcing the defendant either to surrender his right to an error free trial as well as his right of appeal, and to accept the life imprisonment sentence, or to put his life at stake again on retrial following a successful appeal, justice can follow only one course. That course is the one demanded by procedural fairness and principles of public policy, namely, prohibition of such a fearsome election, and the restriction of available punishment at a new trial to life imprisonment, if a second conviction results. 46 N.J. 301, 216 A.2d at 591. The facts in *Wolf* differed in two ways from those in the instant case: (1) the original sentence was recommended by the jury; and (2) the right to appeal was automatic in convictions of first degree murder. The *Wolf* court retreated from its stand against increased sentences near the end of the opinion by providing an exception to its holding for cases in which defendant at his first trial had entered a plea of *non-vult*, since such a plea in the New Jersey law precluded the imposition of the death sentence. In such cases, defendant, his life not threatened at the first trial, is placed in the same position at retrial that he occupied before the first trial. It seems incongruous that the New Jersey court should so adamantly refuse to base its holding on double jeopardy grounds and then provide an exception to that holding for cases in which the defendant was not placed in jeopardy at the first trial. In effect, *Wolf* reserved a double jeopardy exception to a holding which did not rest on a double jeopardy theory.
25. 46 N.J. 301, 216 A.2d at 590. Although the court expressly declined to invoke the due process clause in support of its decision, the argument it employed under the label of "standards of procedural fairness" is almost identical to the due process theory espoused in *Patton*.
26. 374 F.2d 583 (1st Cir. 1967). Defendant's sentence under a conviction of conspiring to receive stolen goods was increased at retrial from three to five years.
27. *Id.* at 585.
such new evidence could support a reconviction of a successful appellant, it could not be used as a basis for imposing a harsher sentence. However, the court did not subscribe to the same sweeping prohibition of harsher sentences at retrial as that enunciated in *Patton*. Holding that a harsher sentence could not be imposed where there was no indication that the judge had relied completely on the new presentence report in imposing the harsher punishment, *Marano* left open the possibility that harsher punishment might be permissible in a case in which such a sentence was clearly based entirely on the new report and not on a change of heart on the part of the judge. 28 The *Patton* holding recognizes no such exception:

In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old. Seldom will this policy result in inadequate punishment. Against the rare possibility of inadequacy, greater weight must be given to the danger inherent in a system permitting stiffer sentences on retrial — that the added punishment was in reaction to the defendant's temerity in attacking the original conviction. 29

However, the exception left open by *Marano* was expanded in the recent case of *United States v. White* 30 in which the Court of Appeals for the Seventh Circuit held that the imposition of a heavier sentence on the basis of an evaluation of a new presentence report was within the discretion afforded the trial judge. Accordingly, under the *White* view, the judge need not disclose the particular facts underlying his decision to impose a harsher sentence. The court suggested that an absolute prohibition against the increase of sentence at retrial could be imposed only by the Supreme Court. 31

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28. The *Marano* court would require positive and unequivocal showing that the increase in sentence was based entirely on a rational evaluation of the new presentence report in order to ensure that the judge fully appreciated "the substantial justification that is needed to support such an increase." *Id.* at 585. The distinction drawn in *Marano* between new evidence and a new presentence report is by no means self-evident. The reasoning that the threat of discovery of new evidence at retrial restricts a defendant's right of appeal, if accepted, would seem equally applicable to the preparation of a new presentence report at retrial. The distinction appears to be based on the possible danger to society which might result from ignoring additional unfavorable information about defendant's background contained in the new presentence report. Since this information was not available to the first sentencing judge, the original sentence might not, in the light of this new information, be sufficient to protect society from harm resulting from the criminal activities of the defendant.

29. 381 F.2d at 641. It is interesting to note that the district court opinion in *Patton* did not advocate such a broad prohibition of harsher sentences. The district court holding was closer to that of *Marano*; it suggested that "Harsher punishment may be imposed at a second trial — but there must be a reason for it, and the reason must be discernible." 256 F. Supp. at 236.

30. 382 F.2d 445 (7th Cir. 1967).

31. A similar conclusion was expressed in the recent decision of *Moon v. State*, 1 Md. App. 569, 232 A.2d 277 (1967), where the Maryland Court of Appeals held that an increased sentence at retrial was not precluded by the due process clause. In the absence of an authoritative ruling by the Supreme Court, the Maryland court concluded, the traditional rule permitting harsher sentences on retrial adopted in *State v. Hobbs*, 231 Md. 533, 191 A.2d 238 (1963), *cert. denied*, 373 U.S. 914 (1963), should be followed.
More directly opposed to the *Patton* holding is *Starner v. Russell*\(^{32}\) in which the Court of Appeals for the Third Circuit registered a deep concern for the inroads that a prohibition against harsher sentences at retrial would make in the discretionary sentencing power of the trial court. For this reason, *Starner* endorsed the traditional waiver theory that by attacking his conviction a defendant must accept the risk that the trial judge at retrial might increase his sentence: "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 entered."\(^{33}\)

The *Starner* court articulated a new argument in opposition to the principle expressed in *Marano* and *Patton* by suggesting that a prohibition against harsher punishment would be inapplicable to cases in which the defendant had entered a plea of guilty in the original action. The court felt that since leniency in punishment is usually extended to defendants who admit their guilt, the trial judge at the second trial should be given the discretion to compensate for such leniency when the defendant elects to attack his original conviction and submit to a new trial.\(^{34}\)

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32. 378 F.2d 808 (3d Cir. 1967). Convicted of forgery and burglary on a plea of guilty, defendant in this case obtained reversal of that conviction by habeas corpus and was promptly re-indicted and reconvicted. As a result of his second conviction, the defendant's sentence was increased. The court held that such an increase was within the discretionary power of the trial judge.

33. *Id.* at 811. A similar fear of undermining the role of the trial judge was expressed in *Shear v. Boles*, 263 F. Supp. 855 (N.D. W.Va. 1967), in which the federal district court for the district of West Virginia sustained an increase of sentence at retrial. The court called for an exercise of judicial restraint in the consideration of such cases on the appellate level, arguing that the trial judge, with his first-hand exposure to the circumstances of the case and the demeanor of the defendant, was singularly qualified to pass sentence on a defendant. The *Shear* court drew a distinction "between those cases where the second sentencing judge has acted with retributive intent, or as an inquisitor, from those cases where he has conscientiously fulfilled his role as a trial or sentencing judge." 263 F. Supp. at 860. When the trial judge rested his decision on factors which were unavailable at the first trial and there was no evidence of hostility toward the defendant, the court concluded that imposition of a harsher penalty at retrial was permissible. The *Shear* court suggested the criteria with which to determine when the trial judge had overstepped the limits of his traditional role:

1. Was the second sentence greater than the first?
2. Did the trial judge manifest a hostile attitude toward the defendant?
3. Was the second judge connected to the first by family relationship or close social connection?
4. Was the second judge the same judge that presided at the first trial?

The court suggested that no one of these criteria should be controlling and that all of them should be examined *in toto* in reaching a determination. Using these criteria, the court found that the judge at Shear's second trial had acted within the discretion afforded him as part of his traditional role. It should be noted, however, that the *Patton* decision is binding on the federal district courts of West Virginia since that state lies within the Fourth Circuit. Thus, the *Shear* decision has been superseded by the *Patton* ruling.

34. The tendency of trial courts to "go easy" on defendants who plead guilty is illustrated by United States v. Wiley, 278 F.2d 500 (7th Cir. 1960), in which the trial court gave a hardened criminal who pleaded guilty a two year sentence while imposing a three year sentence on his accomplice, a first offender, who pleaded not guilty. The sentences were later set aside on appeal. In *Euziere v. United States*, 249 F.2d 293 (10th Cir. 1957), the trial judge induced a defendant to plead guilty by warning him that a plea of not guilty would elicit the maximum sentence from the court because of the expense to which the government would be put in trying him. On appeal it was held that defendant's guilty plea had been coerced.
Finally, by holding that the increase of a defendant's sentence at retrial violates the equal protection clause, the *Patton* court increased the arsenal of arguments which support the basic position against heavier sentences at retrial. It is almost universally held that once a defendant commences service of his sentence, that sentence may not be increased if the conviction or sentence is not set aside. As a result, the possibility of an increased sentence threatens only those who attack their original convictions. The court thus reasoned that in the absence of any rational policy requiring the preservation of such a situation, the existence of the threat of harsher punishment arbitrarily discriminates against those who seek post-conviction relief. Judge Sobeloff attacked the North Carolina practice, which permitted increased sentences at retrial: "The inequity of such a system is apparent when it is realized that only prisoners whose appeals have been found meritorious are subjected to the perils of a higher resentence. Ironically, those whom the State admits having initially denied a fair trial are the only ones who stand to receive greater punishment."  

*Patton*, therefore, represents the culmination of the trend which began with the California decision in *Henderson* away from the traditional waiver theory which had been relied upon as the justification for permitting harsher punishment to be imposed at the retrial of successful criminal appellants. It abandoned the strained implied acquittal doctrine relied on in *Henderson* and substituted for it a more persuasive double jeopardy theory based on the protection against multiple punishment for the same offense. It incorporated the rather vague concepts of fairness enunciated in *Wolf* and *Marano* into a fully developed theory of due process. To these arguments, *Patton* added the principle that harsher punishment at retrial was a denial of the equal protection of the

35. United States v. Benz, 282 U.S. 304 (1931); United States v. Sacco, 367 F.2d 368 (2d Cir. 1966); United States v. Adams, 362 F.2d 210 (6th Cir. 1966); United States v. Walker, 346 F.2d 428 (4th Cir. 1965); Kennedy v. United States, 330 F.2d 26 (9th Cir. 1964); Blackman v. United States, 250 F. 449 (5th Cir. 1918); State v. Meyer, 86 Kan. 793, 122 P. 101 (1912). An exception to the rule that a defendant's sentence may not be increased once service has begun was made in Williams v. New York, 337 U.S. 241 (1949), in which the court was allowed to increase a defendant's sentence on the basis of new information as to his past criminal record. In State v. Matlack, 49 N.J. 491, 231 A.2d 369 (1967), it was held that a trial judge could correct a clerical error in defendant's sentence after service had commenced, even though an increase in the sentence resulted.

36. 381 F.2d at 643. In support of its conclusion that the increase of sentence at retrial offends the equal protection clause, the district court drew an analogy to Dowd v. United States, 340 U.S. 206 (1951) and Cochran v. Kansas, 316 U.S. 255 (1942), in which the suppression of prisoners' habeas corpus petitions by prison officials was held to be a violation of the equal protection clause, an unconstitutional denial of the right to appeal. 256 F. Supp. at 236.

37. The waiver doctrine still applies to the extent that by attacking his conviction an appellant subjects himself to a second trial. People v. Henderson, supra note 14. Thus, successful appellants may still be retried without violating their double jeopardy rights. United States v. Tateo, 377 U.S. 463 (1964); Irvin v. Dowd, 366 U.S. 717 (1961); Eubanks v. Louisiana, 356 U.S. 584 (1958). The rule in *Patton* merely prevents a harsher sentence or a denial of credit at this second trial. It seems logically inconsistent that an appellant, by attacking his conviction, could waive his double jeopardy right not to be retried and at the same time, retain his double jeopardy protection against receiving a harsher sentence at retrial. Perhaps this is one of the reasons why the *Patton* court rejected the implied acquittal doctrine in favor of the less rigid prohibition against multiple punishment.
laws. These distinct theories were blended into what must be interpreted as an absolute prohibition against the infliction of harsher sentences at the second trial for the same offense of successful criminal appellants. 38

Like all absolute rules, the Patton holding is subject to the danger of inflexibility. This danger was articulated in both Starner and in White. The court in which the successful appellant is being retried will be unable to compensate for undue leniency which may have been shown by the first sentencing judge or to adjust a sentence on the basis of a rational evaluation of factors which were not available to the first judge. In its efforts to prevent the arbitrary increase of sentences, the instant case has, therefore, precluded possible rational increases which may be necessary for the protection of the public.

CREDIT FOR TIME SERVED

The early cases which considered the question of credit for time served under a prior invalid judgment were, like those dealing with harsher punishment, dominated by the prevailing idea that when a defendant succeeded in attacking his original conviction he had thereby erased all consequences of that conviction, including any time he may have served under the sentence imposed as a result of that conviction. 39

The principle was best articulated in Commonwealth v. Murphy: 40

"[A] judgment and sentence reversed are the same as if there had been no judgment and sentence . . . and this must be so even if the prisoner has served a part of the sentence." 41 As a result of widespread adherence to this principle, it was uniformly held that a trial court was not bound to take into consideration any time served under a prior invalid sentence when imposing a new sentence at retrial. 42 It was thought that any policy which would require the granting of credit for time served must be initiated by the legislature rather than by the courts. 43

The holding in Patton clearly illustrates the absurdity of overlooking the actual service of an invalid sentence. The dry academic assertion that all consequences of a conviction cease to exist upon the reversal of

38. The court's decision in Patton was foreshadowed in United States v. Boyce, 352 F.2d 786, 787 (4th Cir. 1965). In Boyce the court permitted an increase in defendant's sentence at a retrial in which additional charges were brought, but stated by way of dictum that: "Were it the case that after the successful appeal the Government lodged new charges against the defendant arising out of the same transactions as the original case we might hold differently. Such executive penalty for exercising the right of appeal should also be condemned." Additionally, it is interesting to note that since 1950 the Uniform Code of Military Justice has prohibited the increase of sentence at a second court-martial for the same offense. 10 U.S.C. § 863(b) (1964).

39. See, e.g., Minto v. State, 9 Ala. App. 95, 64 So. 369 (1913).

40. 174 Mass. 369, 54 N.E. 860 (1899), aff'd, 177 U.S. 155 (1900).

41. Id. at 862. The defendant had his former conviction reversed, was retried and sentenced without credit for the two and one-half years he had served under the original sentence.

42. See, e.g., People v. Starks, 395 Ill. 567, 71 N.E.2d 23 (1947), cert. denied, 334 U.S. 821 (1948); People v. Trezza, 128 N.Y. 523, 28 N.E. 533 (1891) (dictum); State ex rel. Drankovich v. Murphy, 248 Wis. 433, 22 N.W.2d 540 (1946).

43. See, e.g., People v. Judd, 396 Ill. 211, 71 N.E.2d 29 (1947); In re Doelle, 323 Mich. 241, 35 N.W.2d 251 (1948).
that conviction on appeal cannot, in any realistic scheme of justice, nullify the reality of actual service under that conviction. To ignore the existence of time served under an invalid judgment on the basis of such an abstract principle is, in the words of Judge Sobeloff, to “fashion legal fictions to attain unjust ends.”

A recognition of this prompted the decision in *Lewis v. Commonwealth,* in which the court ordered the deduction from a defendant’s second sentence of time he had already served under a prior erroneous sentence. Underlying this holding was the court’s realization that, “It is hardly realistic to say that nine months in the State prison amount to nothing — that since the petitioner ‘should not have been imprisoned as he was he was not imprisoned at all.’” Because the *Lewis* case involved only an error in the sentencing of the defendant at his first trial, the court limited its holding to that specific factual situation, refusing to extend it to cover cases in which the error at the first trial occurred at some earlier stage in the proceedings. The truly significant element in *Lewis,* however, was the court’s awareness of the fictional aura surrounding the doctrine that a reversal of an improper conviction wipes out any time served under that conviction.

Other state courts recognized, with some reservation, that a defendant is entitled to credit for any time served under a previous judgment. A Virginia habeas corpus decision, *Stonebreaker v. Smyth,* declared a defendant’s conviction void and remanded the case for retrial with the instruction that, should he be reconvicted, the defendant would be entitled to credit for the sixteen years he had already spent in prison. The force of this holding was somewhat tempered by the added proviso that such credit would be given if “pertinent rules and regulations of the State authorities” permitted. In *Ex parte Williams,* a defendant who was unable to post appeal bond was kept in prison pending the appeal of the judgment against him. Although successful in his appeal, the defendant was later reconvicted at a second trial. The Oklahoma court held that he was entitled to credit for the time he had served while awaiting the hearing of his appeal. *Ex parte Wall* allowed credit because the new sentence, together with the time already served, would exceed the maximum statutory punishment for the particular offense. The legislatures of several states have taken the

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44. 381 F.2d at 639.
45. 329 Mass. 445, 108 N.E.2d 922 (1952). Defendant was found guilty of robbery and served nine months of a twenty-five year sentence. On appeal, the court held that the evidence at trial was insufficient to support a conviction for robbery, but might support a conviction of larceny. Accordingly, defendant was resentenced by the trial court to five years imprisonment for larceny. At the defendant’s second appeal, the Supreme Judicial Court of Massachusetts held that defendant was entitled to credit for the nine months he had served under the original conviction.
46. Id. at 923.
47. While the court in *Lewis* held that the error at the original trial was only in the sentencing of the defendant, it can be logically argued that the error actually went to the conviction itself, since the evidence at the original trial was held by the appellate court to be insufficient to support a conviction of robbery.
49. Id. at 413.
issue away from the courts by passing statutes which guarantee credit for time served. 52

The more recent decisions have almost uniformly proclaimed the absolute right of a defendant to credit for the time spent in prison under a previous void judgment. The Supreme Court of North Carolina overruled its earlier decisions by holding, in *State v. Weaver*, 53 that a defendant is entitled to credit. In *Hill v. Holman*, 54 a defendant who had already served six years of an invalid ten year sentence, and who was thereafter sentenced to one year upon conviction of a lesser offense, was given his immediate release. A Nevada statute which required that all sentences be computed from the date of imposition was found unconstitutional in *Gray v. Hocker*. 55

The decision in *Gray* rested on considerations markedly similar to those relied on by the *Patton* court; both cases concluded that any denial of credit for time served was offensive to the due process and equal protection clauses of the fourteenth amendment. The courts agreed that requiring a prisoner to forfeit the benefit of time served as a condition to the exercise of his legal right to appeal his unlawful conviction constituted a violation of due process. Both held that sentencing systems which forced an appellant to risk such forfeiture were guilty of arbitrary discrimination which denied him the equal protection of the law. 56 Unlike *Gray*, however, *Patton* additionally invoked the principle of double jeopardy to support its finding that credit must be awarded. The double jeopardy reasoning in *Patton* is based on an acknowledgment that the practical effect of a denial of credit under the circumstances present in that case would be to increase the original sentence. 57

Because of this, the *Patton* double jeopardy argument may be distinguishable in cases where denial of credit would not result in an increase of the term imposed at the first trial. Such cases would, however, fall within the due process and equal protection facets of the *Patton* holding.

The Court of Appeals for the Tenth Circuit in *Newman v. Rodriguez* 58 recently upheld a New Mexico rule which denies credit for time served under a void judgment unless such a denial would result in a

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53. 264 N.C. 681, 142 S.E.2d 633 (1965). The *Weaver* decision overruled the prior holding of the North Carolina Supreme Court in *State v. Williams*, 261 N.C. 172, 134 S.E.2d 163 (1964), to the extent that successful appellants are now entitled to credit for time served under the prior judgment as a matter of right.
56. The concept that a resentence without credit for time served violated the equal protection clause was expressed as early as 1951 by Whalen, *Resentence Without Credit For Time Served: Unequal Protection of the Laws*, 35 Minn. L. Rev. 239 (1951).
57. 381 F.2d at 637: Although the trial judge paid lip service to the idea of crediting Patton with that portion of the initial twenty-year sentence already served, he actually increased Patton's punishment by imposing, in effect, a twenty-five year sentence and then deducting five years for the time served. Thus, as a result of seeking and obtaining a new trial, the prisoner, who originally would have been eligible for parole in October 1965, now, it is agreed, will not become eligible until February 1970.
58. 375 F.2d 712 (10th Cir. 1967).
sentence in excess of the statutory maximum for the particular crime involved. In Newman, the court rested its ruling on the principle that federal courts should adhere to the interpretation of the law of a state as enunciated by the highest court of that state, provided that interpretation is consistent with "the fundamentals of liberty and justice." Absent a showing that these fundamental values have been offended, the court concluded, the New Mexico rule could not be overturned. The Newman case is, however, an exception to what appears to be a strong trend away from the practice of denying credit for time served under a void judgment.

CONCLUSION

The instant case presented a factual situation ideal for the formulation of a holding of sweeping proportions, and the Court of Appeals for the Fourth Circuit responded admirably by enunciating an absolute prohibition against both imposition of harsher sentences and denial of credit for time served at retrial. The ambiguous sentence imposed at Patton's second trial provided the court with the opportunity to pass on both issues. The court endorsed the current trend toward the granting of credit for time served to successful appellants who are reconvicted at a second trial. On the harsher punishment issue, the Fourth Circuit registered its support of the basic position already presented by the First Circuit in Marano and, in so doing, necessarily reached a conclusion contrary to the holdings of the Third and Seventh Circuits in Starner and White. The effect of the Patton decision is, thus, to intensify the disagreement which exists among the circuits on the harsher punishment issue. It appears certain that this conflict will be resolved only when the Supreme Court has spoken on the issue.

59. Id. at 713.