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Sentence and Punishment—Harsher Penalties Following Habeas Corpus Relief

Thomas Ryan Goodwin
West Virginia University College of Law

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doubt among the members of the bench and bar of West Virginia as to the state of the law with respect to the validity of special acts, when a general law, dealing at least partially with the subject of the special law, already exists.

James Edward Seibert

Sentence and Punishment—Harsher Penalties Following Habeas Corpus Relief

D was indicted and pleaded guilty to two separate counts of attempted armed robbery and received two concurrent ten year prison terms. After exhausting his state remedies, D received habeas corpus relief from a federal district court, and his case was remanded for a new trial. In the second trial before a different judge, D's case was submitted to two different juries on the separate felony charges. D was found guilty on both charges, and the sentencing judge gave two fifteen year terms which were to run consecutively. D petitioned the West Virginia Supreme Court of Appeals for a writ of habeas corpus. The petition was denied without hearing. D then petitioned the United States District Court for federal habeas corpus. Held, petition denied. The authority of the sentencing judge must not be curtailed so long as the harsher sentence imposed is not the product of retributive intent on the part of the second sentencing judge. Shear v. Boles, 263 F. Supp. 855 (N.D. W. Va. 1967).

The recent expansion of constitutional limits on state criminal proceedings\(^1\) has created difficult problems for the federal habeas corpus court. A major task confronting the court is to reconcile the broadly principled demands of the United States Constitution with the practical aspects of post-conviction relief. That is, in addition to protecting the individual's constitutional rights, a federal court must extend such protection within the existing judicial system. In the principal case, fearing a usurpation of the trial court's function, the Shear court upheld the imposition of a harsher sentence on the successful habeas corpus applicant.

Traditionally, certain related legal theories have been employed to obviate a petitioner's contention that a harsher penalty should not be imposed after a second trial for the same offense. A typical example is the so called waiver doctrine. According to this doctrine, one who voluntarily contests the first trial and conviction waives any benefits of that trial, including the particular sentence previously imposed.\(^2\) Thus, having elected to have his case retried, the petitioner submits himself anew to the trial judge's discretion in sentencing him. Other courts have reached the same result by emphasizing the status of the first trial. Specifically, after the petitioner has received habeas corpus relief the first trial is characterized as a nullity, and, is therefore void of legal effect.\(^3\) Consequently, it is argued that the original trial cannot impose any limitations upon the actions taken by the sentencing judge in a second proceeding.\(^4\)

The decision in the principal case was not predicated upon legal theories like the waiver and nullity doctrines. Rather, the court in this case forthrightly examines the role of the sentencing judge. Yet, before such an examination can be made, the court in Shear has to assume the constitutionality of imposing a harsher sentence on the successful habeas corpus applicant. But, it is this assumption of constitutionality that is being most seriously challenged by the more recent decisions which have confronted the problem.\(^5\)

The Circuit Court of Appeals for the Fourth Circuit in Patton v. North Carolina\(^6\) ruled that it would be unconstitutional, under any circumstances, to give the successful habeas corpus applicant a longer sentence after his second trial. Generally, the court advanced three constitutional arguments to substantiate its decision. First, due process of law guaranteed by the United States Constitution demands that one's right to contest an erroneous convic-


\(^4\) Characterizing as a nullity the original trial of the successful habeas corpus applicant is founded upon the nature of the habeas corpus writ. For a discussion of the nature of a habeas corpus writ as well as its differentiation from direct appeal see *Ex parte* Evans, 42 W. Va. 242, 24 S.E. 858 (1896).

\(^5\) Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967); Mann v. United States, 374 F.2d 583 (1st Cir. 1967).

\(^6\) 381 F.2d 636 (4th Cir. 1967).
tion should not be thwarted by the possibility of receiving a more severe punishment. Secondly, since those persons who contest their previous convictions would be the only individuals subjected to the risk of receiving a longer sentence, they would be denied equal protection of the laws as contemplated by the Constitution. Finally, the court concluded that had it not found constitutional deprivations relative to due process and equal protection, the same result would have been reached since a multiple punishment theory of double jeopardy would preclude the imposition of a harsher sentence.

Seemingly the genesis for these theories characterizing the possibility of increased sentences as fettering one's right to contest an erroneous conviction is found in a dissenting opinion of Mr. Justice Holmes. The United States Supreme Court's opinion in Green v. United States, declaring unconstitutional a subsequent conviction of a higher offense after direct appeal, added incentive to the due process of law arguments concerning the imposition of a harsher penalty. Significantly, however, the majority opinion in Green distinguished the question of more severe punishment from the degree of the particular offense. But, it has been pointed out that Green would proscribe the imposition of a harsher penalty, "procedural logic notwithstanding."

Implicit in the rationale advanced by those courts favoring complete prohibition of harsher sentences is a concern, not so much for the particular individual already convicted and sentenced for the second time, but for the many individuals still imprisoned who have yet to test their first convictions. For example, the Patton

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7 For a discussion of the unconstitutionality of conditioning the right of a petitioner to contest an erroneous conviction see Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 YALE L.J. 606 (1965); Note, Unconstitutional Conditions, 73 HAW. L. REV. 1935 (1980).
8 Kepner v. United States, 195 U.S. 100, 134 (1904) (dissenting opinion).
10 Stroud v. United States, 251 U.S. 15 (1919), which upheld the constitutionality of imposing a harsher sentence after appeal, was distinguished in Green v. United States, 355 U.S. 184 n.15 (1957). But, Justice Frankfurter dissenting in Green v. United States, supra, said at 213:
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 carries a significantly different punishment.
court fears most the situation where one hesitates to exercise his right to petition for habeas corpus. But, such fear is obviously unfounded as regards the person who has already brought himself before the court for a second time. Thus, the Patton court is most concerned with preserving the appearance of justice so that others presently incarcerated will freely seek review of their first convictions. In contrast to this, the court in Shear v. Boles would sacrifice the appearance of justice so that the dignity of the trial judge would not be invaded by a federal habeas corpus court.

Thus, the objectives, so far as due process of law is concerned, of the Patton and Shear decisions are diametrically opposed. While Patton adopts a rule that would extend constitutional protections to all possible habeas corpus applicants, Shear examines each case as it arises. To effectuate its objectives, the Patton court advocates an absolute prohibition on inflicting harsher penalties. The court in Shear sets up certain standards to evaluate sentencing judges' actions. The Patton decision looks to the two ends of the post-conviction spectrum—the more harshly sentenced individual at one end, and the hesitant prisoner who observes the results of another's appeal at the other. The Shear court scrutinizes the second trial, conviction and sentencing process.

As noted above, the court in Shear advances certain standards to be used in evaluating the sentencing judge's decision to impose a harsher penalty. One is to consider: the length of the second sentence; manifestations of a hostile attitude by the sentencing judge; social, business, and/or family relationship of the second sentencing judge to the first; and whether the second sentence was imposed by the same judge who gave the original sentence. No one of the four standards is to be controlling, "Rather, all the criteria must be looked at in toto and a determination made, giving to each [of the four standards] its due weight." Which of the standards should be given more consideration so as to effectuate the instruction to credit each with its "due weight" is not disclosed.

The harsh truth of the matter is that certain individuals will not seek habeas corpus relief because they fear a more severe punishment. To suppose otherwise would be most naive. It would be

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12 The court in Patton succinctly states, "North Carolina deprives the accused of the constitutional right of a fair trial, then dares him to assert his right by threatening him with the risk of a longer sentence." Patton v. North Carolina, 381 F.2d 636, 640 (4th Cir. 1967).
14 Id. at 861.
equally naive to suppose that a prisoner's fears are confined to the possible retributive motives of a sentencing judge. More particularly, the prisoner must consider the possibility of receiving a harsher penalty not only because a particular judge could act with improper motives, but also the very fact that a second conviction may produce a longer sentence than the one he is presently serving. The Shear court recognizes that, "The threat of harsher sentences on successful habeas corpus applicants certainly can become a tool by which to prevent state or federal prisoners from seeking redress of Constitutional deprivations previously suffered." But, the Shear decision does not preclude relief for an individual ostensibly aggrieved by a harsher punishment after the second trial. That is, the particular defendant may still have judicial review of his case in order to determine the propriety of the sentencing judge's actions.

Since the circuit courts of appeals are evenly split over the constitutionally of imposing a harsher penalty on a successful habeas corpus applicant, the United States Supreme Court may move to resolve the issue. Until that decision is rendered, Shear v. Boles stands as an attempt to reconcile the exigencies of federalism with the demands for individual rights.

Thomas Ryan Goodwin

Wills—Ademption of Specific Legacies

T executed a will devising a lot and store building to an orphanage. Subsequently T became incompetent and a trustee under court order sold the specific realty to acquire funds for the maintenance of T. A portion of the funds were still held by the trustee at T's death. The executor of T's estate petitioned the court for construction of T's will and instructions in the administration of T's estate. The trial court held that the sale of the lot and store

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15 Id. at 864.
16 United States v. White, 36 U.S.L.W. 2082 (U.S. 1967); Starner v. Russell, 378 F.2d 808 (3rd Cir. 1967), both uphold the imposition of a harsher penalty. Contra, Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967); Marano v. United States, 374 F.2d 583 (1st Cir. 1967). It is to be noted that the court in Marano v. United States, supra, would allow the exceptional step of increasing the sentence of the successful habeas corpus applicant if there were sufficient grounds contained in a new pre-sentence report and these grounds had been affirmatively revealed.