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Colten v. Kentucky: De Novo Review and the Price of a Fair Trial

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COLTEN v. KENTUCKY: DE NOVO REVIEW AND THE PRICE OF A FAIR TRIAL

Perhaps the peacock has begun to sport a few of its new feathers. Since Chief Justice Warren E. Burger's appointment to the highest court, one message has become exceedingly clear to the judiciary: steps must be taken to expedite the overburdened dockets of the nation's courts[1] and to increase the speed and efficiency of the administration of justice.[2] With this noteworthy ambition no argument is ventured; however, when expediency and efficiency are attained at the expense of fundamental fairness and justice, the price must be evaluated scrupulously and the bargain placed in its proper perspective. Noble goals attained by ignoble means are of dubious value.

Consideration of two qualities, justice and expediency, was recently aired before the United States Supreme Court in a challenge to the Kentucky trial *de novo* arrangement.[3] Unfortunately instead of striving for an improvement in the quality of justice, the Court settled in favor of expediency. In *Colten v. Kentucky*,[4] the Supreme Court refused to extend the holding of *North Carolina v. Pearce*[5] to appeals from Kentucky's inferior courts (which include justice of the peace, police, municipal, and county courts) to the superior or circuit courts through the trial *de novo*. In *Pearce* the Supreme Court disallowed the imposition of a harsher sentence upon a defendant after a new trial unless there appeared affirmatively in the trial record ample justification based upon objective information and factual data concerning identifiable conduct occurring in the time lapse between the original trial and the new trial.[6] Although the decision in *Colten* is limited to the *de novo* process as exercised in Kentucky, some twenty states[7] use a similar arrangement and can be assumed to be affected.

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[1] Interview with Chief Justice Warren E. Burger, U.S. NEWS & WORLD REPORT, December 14, 1970, at 35.

[2] *Id.* at 39-40.

[3] Colten v. Kentucky, 407 U.S. 104 (1972).

[4] *Id.*

[5] 395 U.S. 711 (1969).

[6] *Id.* at 726.

[7] *See* ARIZ. REV. STAT. ANN. §§ 22-371 *et seq.* (1956); ARK. STAT. ANN. §§ 44-501 *et seq.* (1964 Repl. Vol.); COLO. RULES CRIM. PROC. 37(f) (1963); FLA. STAT. ANN. §§ 932-52 *et seq.* (1973); IND. ANN. STAT. §§ 9-713 *et seq.* (1971); KAN. STAT. ANN. §§ 22-3610 *et seq.* (Cum. Supp. 1971); ME. REV. STAT. ANN. tit. 15, § 2112 (Cum. Supp. 1972); MD. ANN. CODE art. 5, § 43 (1968 Repl. Vol.); MICH. STATE ANN. §§ 28-1226 *et seq.* (Cum. Supp. 1972); MINN. STAT. §§ 488.20, 633.20 *et seq.* (1971); MISS. CODE ANN. §§ 1201, 1202 (Supp. 1971); MO. SUP. CT.

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Mr. Justice White, speaking for the majority, indicates that the inital reason for not applying *Pearce* to the trial *de novo* is that "the hazards of being penalized for seeking a new trial, which underlay the holding of *Pearce*" does not inhere in the trial *de novo*.[8] As commentators and judges have noted, the *Pearce* holding was necessary "to free all defendants from the fear, whether real or imagined, that they will be penalized for initiating postconviction proceedings."[9] In addition, it has been noted that due process requires the protection of the defendant who exercises his right and the elimination of the chilling and deterring effect such a possibility has on the unrestrained exercise of this right.[10] It is contended herein that the Court erred in not extending the *Pearce* holding to appeals from Kentucky's inferior courts by trial *de novo* for two principal reasons. First, precisely the same dangers to the defendant are inherent in the trial *de novo* as in the *Pearce* case; in both there is a possibility of increased penalty through vindictive sentencing and, simultaneously, a chilling effect on the exercise of a given right from the presence of that possibility. Second, there is no material distinction between a *Pearce*-type case and a trial *de novo;* both involve new trials granted after an appeal process by the state. Concurrently, it is contended herein that the Court's concern for expediency rather than for a better quality of justice promulgated the error.

Appellate review has never been required of the states; nonetheless, once provided, a state must not deny a constitutional guarantee as the price for its exercise:[11]

> The court was without right to . . . put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered. . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice.[12]

Kentucky provides a statutory right of appeal to the circuit court for

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(Footnote continued from preceding page)
RULE 22 (Cum. Supp. 1973); MONT. REV. CODES ANN. §§ 95-2001 *et seq.* (1967 Repl. Vol.); NEB. REV. STAT. §§ 29-601 *et seq.* (1971); NEV. REV. STAT. §§ 189.010 *et seq.* (1968); N.H. REV. STAT. ANN. §§ 502.18, 502A:11-12 *et seq.*, 20-138 (1965); N.D. CENT. CODE §§ 33-12-40 *et seq.* (1960); PA. CONST. SCHED. ART. 5, 16(r) (iii) TEX. CODE CRIM. PROC. arts. 44.17, 45.10 (1966); VA. CODE ANN. §§ 16.1-129 *et seq.* (1960 Repl. Vol.); WASH. REV. CODE ANN. §§ 3.50.380 *et seq.* (Supp. 1971); W. VA. CODE ANN. §§ 50-18-1 *et seq.* (1966).

[8] Colten v. Kentucky, 407 U.S. 104, 116 (1972).

[9] Comment, 24 ARK. L. REV. 117, 118 (1970).

[10] Comment, 44 ST. JOHN'S L. REV. 286, 292 (1969). *See also* Note, *Another Look at Unconstitutional Conditions,* 117 U. PA. L. REV. 144 (1968).

[11] Douglas v. California, 372 U.S. 353, 356 (1962); Griffin v. Illinois, 351 U.S. 12, 18 (1955).

[12] Worcester v. Comm'r, 370 F.2d 713, 718 (1st Cir. 1966).

persons convicted in the inferior courts.[13] By statutory requirement, that appeal must be through a trial *de novo* regardless of the type of error on which the defendant seeks review.[14] Within the jurisdiction of these lower, informal courts are crimes punishable by a maximum sentence of 12 months imprisonment and a maximum fine of $500 or both.[15] In practice, choice of forum in offenses falling within this category is often at the discretion of the arresting officer who assigns the forum at the time of the arrest.

A not atypical encounter with an inferior court involves a hearing before a judge who has little or no formal legal education, sitting without the presence of a jury (unless specifically requested by the defendant), with no record being made. Often the entire matter is completed within a matter of moments, which is frequently the same amount of time counsel, if requested, has had to prepare his case for the proceeding. It is no wonder that the defendant is often left frustrated, frightened, and indubitably questioning the integrity of the judicial process.[16] Ordinarily the defendant feels more like he has been trapped in a revolving door than in a court of justice.

The Kentucky Court of Appeals has recognized that the state's inferior courts are hardly equipped to insure a constitutionally fair trial:

> Under our system of justice the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of dispositions of minor offenses.[17]

In other words, Kentucky—frequently at the discretion of an arresting officer—forces a person to stand trial in a court admittedly a notch below constitutional standards[18] and then makes him sustain the risk of an augmented sentence for requesting his constitutional right to a fair trial. The defendant, perhaps less impressed with the fairness of his trial than its brevity, is given the "grisly choice"[19] of abandoning his constitutional right to a fair trial and serving his sentence (which, regardless of the severity, may mean a criminal record for the rest of his life) or exercising that right under the hazard, should he be recon-

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[13] KY. REV. STAT. § 23.032 (1971) [hereinafter cited as KRS].
[14] KY. R. CRIM. P. 12.02, 12.06 (1972).
[15] KRS §§ 25.010, 26.010 (1971).
[16] *See* Hasler, *De Novo Juries, Misdemeanor Counsel and other Problems: Changes Ahead for the Maine District Courts?*, 23 U. ME. L. REV. 63, 93 (1971).
[17] Colten v. Commonwealth, 467 S.W.2d 374, 379 (Ky. 1971).
[18] *Id.* at 379.
[19] Fay v. Noia, 372 U.S. 391, 440 (1963).

victed, of an increased sentence. The injustice inherent in such a system is readily apparent:

> [A]n accused is being required to relinquish his right to a fair trial in order to secure the privilege of the sentence first pronounced. To compel a defendant to waive this right is plainly inconsistent with the desired ends of our legal system. The right to a fair trial is fundamental. Without it our system expires. By permitting stiffer sentences at the second trial the state is clearly qualifying that right.[20]

Another area of danger involved in not applying *Pearce* to trials *de novo* is not as readily apparent. It has been said that the law is not tidy but is as unkempt as the life with which it deals.[21] The same is true of the analysis of legal problems; they do not come compartmentalized but instead are intertwined, gnarled, and knotty. Enmeshed with the possible due process problems of allowing harsher penalties after appeals by a trial *de novo* is the chilling effect such a possibility has on the right to appeal. Other prisoners, considering whether to appeal through the *de novo* process, will be dissuaded by harsher penalties, and *any* factor which inhibits free exercise of a constitutional right effectively limits that right. As Professor Van Alstyne has noted, the fact that exercising the right to appeal can and does mean increased penalties is a fact that will not be lost on other prisoners.[22] Clearly the price of exposure to a greater penalty may be more than a defendant is willing to pay in asserting his rights. The presence of such a risk restrains those who would otherwise attempt to vindicate alleged wrongs and suppressed rights.[23] Realizing the inherent dangers of augmented sentences after new trial and the general impairment such a possibility has on the judicial process, the American Bar Association has flatly opposed such a practice:

> [I]n light of the constitutional concerns and the probably deterrent effects if increased sentences are imposed . . . the original sentence should operate as a ceiling in cases where a new conviction is obtained.[24]

A second distinction the Court draws between a *Colten* situation, involving an increase in penalty after an appeal through a trial *de*

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[20] Honigsburg, *Limitations Upon Increasing a Defendant's Sentence Following a Successful Appeal and Reconviction*, 4 CRIM. L. BULL. 329, 333 (1968).

[21] F. FRANKFURTER, REMINISCES 21 (1960).

[22] Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606, 609 (1965).

[23] *See* Comment, *supra* note 10, at 292.

[24] *See* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO POST CONVICTION REMEDIES § 6.3, Comment C (Approved Draft 1968) [hereinafter cited as POST CONVICTION REMEDIES].

novo, and a *Pearce* case, involving an increase in penalty after an appeal and a subsequent trial, is that the *de novo* review "represents a completely fresh determination of guilt or innocence. It is not an appeal from the record."[25] Several problems arise with this rationale. First, it is virtually impossible to delineate the Court's rather feeble distinction between a *Pearce*-type case where a defendant's original conviction has been set aside—either by appeal or collateral proceeding—and a new trial ordered, and a case where the defendant has appealed his original conviction and received a trial *de novo.* In both cases a new trial and a redetermination of guilt are involved; moreover, in both cases the misconduct to be punished is the same.[26] The differentiation, rather than rational, appears to be a mirage of words which could best be cured by application of the concurring opinion of Justices Douglas and Marshall in *Pearce*: "[I]f for any reason a new trial is granted and there is a conviction a second time, the second penalty imposed cannot exceed the first penalty . . . ."[27]

Infatuated with the concept of a fresh determination, the Court indulges itself in a second fallacy: the trial *de novo* is a fresh determination; therefore, the defendant "consents" to a whole new trial including a possible harsher penalty. As in *Pearce,* however, it is a redetermination of guilt and the guarantee of a fair trial which are at issue here, and, as has been noted, for a court to declare that a defendant who predicates a "constitutional right to petition for a fair trial on the fiction that he has consented to a possible harsher punishment offends the due process clause of the Fourteenth Amendment."[28]

Since there is no material distinction between the *Pearce* and *de novo* situations and since in either case to allow harsher penalties is to expose the defendant to unnecessary hazards for exercising an appeal, *Pearce* should apply. If it is not applied, under the *de novo* arrangement the state deprives the accused of his constitutional right to a fair trial by trying him in a court which the state admits is below constitutional standards and then dares him to assert his right by threatening him with the risk of augmented punishment.[29]

A third and rather fragile distinction which the Court proffers for not applying *Pearce* to trials *de novo* centers on the fact that the second trial occurs in a new court. The same court is not being "asked

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[25] Colten v. Kentucky, 407 U.S. 104, 117 (1972).
[26] Torrance v. Henry, 304 F. Supp. 725, 726 (E.D.N.C. 1969).
[27] North Carolina v. Pearce, 395 U.S. 711, 726-27 (1969).
[28] Patton v. North Carolina, 381 F.2d 636, 639 (4th Cir. 1967).
[29] *Id.* at 640.

to do what it thought it had done correctly."[30] What difference it makes whether the same or a new court imposes the harsher sentence remains obscure. If the Court believes that vindictiveness is left behind as the appellant moves to a higher court for the trial *de novo,* then it should be reminded that vindictiveness is not confined to one courtroom or one judge. Merely because the trial *de novo* occurs in a new court does not end the danger the Court was attempting to quell in *Pearce.* The danger is not in which court has the possibility of inflicting the harsher punishment; the danger lies in the deterrent effect such a possibility has on the appeal process.[31] If *Pearce* was aimed at liberating the defendant from judicial vindictiveness and the fear thereof, it clearly needs application to the trial *de novo.*

A final distinction between *Colten* and *Pearce* tendered by the Court is "[t]he possibility of vindictiveness, found to exist in *Pearce* is not inherent in the Kentucky two-tier system."[32] Presumably since a different court from the inferior court imposes the second sentence, the probability that an augmented penalty has resulted from vindictiveness is eliminated.[33] It must be remembered, however, that improper motivation for inflicting harsher penalties is a "force of low visibility"[34] and is, therefore, difficult to detect and eliminate. In *Pearce* the Court concluded that the only way to avoid vindictive sentencing was to require:

> that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.[35]

Since new trials granted after an appeal process provided by the state are involved in both *Pearce* and *Colten,* the safeguards required for one should be equally applicable to the other.

If the belief in a lower probability of vindictiveness derives from the notion that the new court will not be aware of the proceedings in the lower court, it fails to take into account the vicissitudes of Ken-

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[30] Colten v. Kentucky, 407 U.S. 104, 117 (1972).
[31] Wood v. Ross, 434 F.2d 297, 299 (4th Cir. 1970). *See also* Alpine, *Sentence Increases on Retrial After North Carolina v. Pearce,* 39 U. CIN. L. REV. 427, 436 (1970).
[32] Colten v. Kentucky, 407 U.S. 104, 116 (1972).
[33] *See* Alpine, *supra* note 31, at 456.
[34] Patton v. North Carolina, 381 F.2d 636, 641 (4th Cir. 1967).
[35] North Carolina v. Pearce, 395 U.S. 711, 726 (1969).

tucky court life in which, more often than not, the lower court judge and the circuit court judge share the same building, the same staircases and elevators, and often even the same coffee machine. Likewise no definable reason explains why "Circuit Court judges cannot be as vindictive towards defendants who encumber their courts with trials for *de novo* review as they can be toward those who encumber their courts with retrials resulting from reversals or remand orders."[36] Additionally it should be noted that judges, who are elected officials, are not immune in their austerity from feeling political pressures. To extend Professor Wechsler's observation that heavy sanctions for certain crimes are often the result of political notation of sudden public interest rather than logical analysis,[37] it would not seem unreasonable to believe it possible that a sudden and dramatic increase in a defendant's penalty before an elected judge might be the result of an attempt to communicate a stand on law and order to an interested electorate.

To prevent such an appearance or possibility, whether involving a trial *de novo* or an appeal from the record, "the fixed policy must necessarily be that the new sentence shall not exceed the old."[38] Such an action has been found to be the sole guarantee against allegations of improper conduct[39] and against even the appearance of improper motivation which, working alone, can cast a shadow of mistrust over the administration of justice.[40] Such a rule is not a nonentity or even a rarity; it has been adopted in the *Uniform Code of Military Justice*,[41] has been proposed by the American Bar Association,[42] and is used in at least one foreign court.[43] Two additional reasons beyond the *Pearce* distinctions already noted permeate the rationale for not limiting sentences on *de novo* review: one is the expediency of the *de novo* courts, and the other is the fear that restraining circuit courts from increasing penalties would, in effect, cause the inferior courts to invoke more severe sentences. The latter smacks of the lowest opinion of an inferior court judge, regarding him as an ogre who disseminates sentences without regard to purpose or justification. It is to be hoped

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[36] Brief for Appellant at 42, Colten v. Kentucky, 407 U.S. 104 (1972).

[37] Wechsler, *Sentencing Corrections and the Model Penal Code*, 109 U. PA. L. REV. 465, 472-73 (1961).

[38] Patton v. North Carolina, 381 F.2d 636, 641 (4th Cir. 1967).

[39] *See* Comment, *supra* note 10, at 295. *See generally* Brief for Respondent at 29-31, North Carolina v. Pearce, 395 U.S. 711 (1969).

[40] Patton v. North Carolina, 381 F.2d 636, 641 (4th Cir. 1967).

[41] 10 U.S.C. § 863b (1970).

[42] *See* POST CONVICTION REMEDIES, *supra* note 24, and ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: SENTENCING ALTERNATIVES AND PROCEDURES § 3.8 (Tentative Draft 1967).

[43] Strafprozessordnung (GERMAN CODE OF CRIMINAL PROCEDURE) §§ 331(1), 358(2) (1965).

that such is not the case now nor would it be should *Pearce* be applied universally to new trials. If such a practice should occur, legislative action could remedy the problem. It must be realized also that invoking unjust penalties would have an adverse effect on the state's interest in maintaining the inferior courts as courts of convenience. Instead of deterring appeals, relieving the crowded superior court docket, and cutting rising judicial costs, it would cause an increase in the number of appeals, a more crowded docket, and consequently greater expense.

Recognition by the Court that the informal inferior court trial is an expedient and economical means of administering justice is commendable. The Court's willingness, however, to permit this expediency and consciousness of economy to dampen the right to appeal without the risk of an increase in penalty is unfortunate. It is conceded, with some reluctance, that the right to appeal is not an absolute right and that legitimate state procedures which merely chill the right must be tolerated;[44] nevertheless the threat of a harsher penalty which deters not only a statutory right to appeal but also the constitutional right to a fair trial is wholly inconsistent with legitimate interests. Even in economic terms it certainly is not persuasive for a state to maintain that the monetary costs or the costs in time and personnel of entertaining postconviction proceedings justifies such an unfair and eccentric means of cutting costs and relieving court congestion,[45] especially since there is no evidence that costs have risen noticeably in those jurisdictions which currently forbid harsher sentencing.[46] Similarly, if underlying the allowance of the deterrent effect of more severe sentences is the pervasive fear that otherwise the already overburdened superior courts would be engulfed in frivolous appeals, the Court merely looked too long and too fondly at expediency and failed to take notice of the evidence. Contrary to the landslide theory, those court systems, states and countries which have forbidden increased penalties have noted no significant evidence of undue burdens on the courts because of the practice.[47]

As a final note, it must be realized that a deterrent effect is indiscriminate, affecting meritorious as well as frivolous appeals. In that the danger lies. Surely the expediency of a possible unfair trial does

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[44] U.S. v. Coke, 404 F.2d 836, 843 (2d Cir. 1968). *See also* Comment, 83 HARV. L. REV. 187, 192 (1969).

[45] *See* Van Alstyne, *supra* note 22, at 618. *See also* Comment, 1965 DUKE L.J. 395, 401.

[46] *See* Van Alstyne, *supra* note 22, at 618 n.33.

[47] *Id.*

not outweigh the deleterious effect such a system has on an individual seeking a fair and just adjudication of his case. To have extended *Pearce* to trials *de novo* might have curtailed the expediency of the system to some extent, but not to have extended *Pearce* placed expediency before fairness and justice on the value scale—an unfortunate price.

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