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Fitzgerald v. United States: Sentence Enhancement Statutes Redefine Double Jeopardy Analysis

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FITZGERALD v. UNITED STATES: SENTENCE ENHANCEMENT STATUTES REDEFINE DOUBLE JEOPARDY ANALYSIS

The fifth amendment to the United States Constitution provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb."[1] This provision, commonly called the double jeopardy clause,[2] protects defendants from multiple prosecutions and sentences for the same offense.[3] The double jeopardy clause, however, does not provide all-encompassing protection to a defendant being retried for the same offense.[4] As an example, United States Supreme Court rulings have established that the double jeopardy clause does not normally preclude retrial of a criminal defendant whose conviction is set aside because of trial error.[5]

The Supreme Court's double jeopardy standard states that, absent

1. U.S. CONST. amend. V.

2. The concept of double jeopardy is that a defendant should not be tried or punished twice for the same offense. Although it is difficult to trace the double jeopardy doctrine to a specific origin, legal historians have found that the Greeks and Romans recognized such a precept. *See* Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283 (1963); *See generally* Batchelder, *Former Jeopardy*, 17 AM. L. REV. 735 (1883).

Early canon law, which developed at the end of the Roman Empire, also opposed retrying a person for the same act by adhering to the principle that God does not punish twice. *See* 1 F. POLLOCK & F. MAITLAND, A HISTORY OF ENGLISH LAW 448-49 (2d ed. 1899); *see also* Bartkus v. Illinois, 359 U.S. 121, 152 n.4 (1959) (Black, J., dissenting).

3. *See, e.g.*, United States v. Jamison, 505 F.2d 407, 412 (D.C. Cir. 1974). In Green v. United States, 355 U.S. 184, 187-88 (1957), the Supreme Court described the purpose underlying the double jeopardy clause thus: "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense. . . ." *Id.* at 187. The original purpose of the double jeopardy clause was to protect the integrity of a final judgment, but there has developed a body of law allowing the protection of the double jeopardy clause in two instances when there is no final judgment. *See, e.g.*, United States v. Scott, 437 U.S. 82, 92 (1978). One instance when there is no final judgment is when a mistrial is declared and the other is when the trial judge terminates the proceedings favorably to the defendant without a consideration of guilt or innocence, for example, when an indictment is found defective. *Id.* at 92.

4. The landmark case of United States v. Ball, 163 U.S. 662 (1896), established that defendants who are successful in having their convictions reversed are precluded from pleading double jeopardy. *See also* Forman v. United States, 361 U.S. 416 (1960).

5. *See Scott*, 437 U.S. at 91, where the Supreme Court reaffirmed its position in *Tateo* by stating that to require a criminal defendant to be retried "after he has successfully invoked a statutory right of appeal is not an act of governmental oppression of the sort against which the double jeopardy clause was intended to protect." *Id. See generally* United States v. Tateo, 377 U.S. 463 (1964).

"prosecutorial harassment or overreaching,"[6] the double jeopardy clause does not insulate a defendant from being retried after he has successfully appealed his first conviction unless there is insufficient evidence to support the original verdict.[7] Previous decisions of the Supreme Court and the federal circuit courts of appeals have also held that a defendant who has not fully satisfied his sentence may be retried without violating the double jeopardy clause.

In a recent case of first impression, *Fitzgerald v. United States*,[8] the District of Columbia Court of Appeals expanded upon that sentencing principle in a case where the defendant had already served the sentence imposed at his first trial and, prior to retrial, had been unconditionally released from parole.[9] Defendant Fitzgerald argued that, having been once punished for an offense, further punishment would amount to double jeopardy.[10] The defendant was indicted for assault with intent to commit rape,[11] taking indecent liberties with a minor child,[12] and enticing a minor child.[13] At trial, evidence was introduced that Fitzgerald took a neighbor's twelve year old female house-guest with him on a drive to a nearby liquor store.[14] On the way back, the defendant parked in an alley, forced her to submit to cunnilingus and attempted to have vaginal intercourse.[15] A jury found the defendant guilty of assault with intent to commit rape.[16] The trial judge subsequently sentenced him to a prison term of fifteen to forty-five months.[17]

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6. United States v. Scott, 437 U.S. 82 (1978).

7. The proposition that there must be sufficient evidence to support the verdict before retrial can be accomplished is found in Burks v. United States, 437 U.S. 1 (1978).

8. 472 A.2d 52 (D.C. 1984).

9. *Id.* at 53.

10. *Id. Cf.* United States v. Ewell, 383 U.S. 116, 121 (1966), (where the Court relied on *Ball*, 163 U.S. at 671-72, and *Tateo* 377 U.S. at 465, 473-74, to support its position that when a defendant obtains reversal of a prior, unsatisfied conviction, he is not protected by the double jeopardy clause). The defendant in *Ewell* had already served a substantial amount of his prison sentence when he was retried for the same offense. *Id.* Despite that fact, the Supreme Court found he could still be retried consistent with the double jeopardy clause, but that time already served must be credited against the sentences that might be imposed on reconviction. *Id.* at 123. *Compare Fitzgerald*, 472 A.2d 52 (D.C. 1984), *with Scott*, 437 U.S. at 82; United States v. DiFrancesco, 449 U.S. 117 (1980); *and In re* Evans, 450 A.2d 443 (D.C. 1982) (in each of these cases, the defendant had not satisfied his conviction and was denied double jeopardy clause protection).

11. D.C. CODE ANN. § 22-501 (1981 & Supp. 1985).

12. *Id.* § 22-3501 (a).

13. *Id.* § 22-3501 (b).

14. *Fitzgerald*, 472 A.2d at 53.

15. *Id.*

16. *Id.* The jury found the defendant guilty only of the one offense, even though he was charged with two others. *See supra* notes 12 and 13 and accompanying text.

17. *Fitzgerald*, 472 A.2d at 53. Under the D.C. Code § 22-501, the maximum sentence the defendant could have received was fifteen years.

While serving his prison sentence, the defendant appealed the conviction.[18] A panel of the District of Columbia Court of Appeals reversed, holding that while sufficient evidence had been presented to corroborate the victim's testimony, the trial judge had committed plain error by failing to instruct the jury that corroboration of a minor complainant's testimony is required in sexual abuse cases.[19] Following this reversal, the government petitioned the court for a rehearing en banc.

While the appeals process was running its course, Fitzgerald was serving his sentence, and after sixteen months was released on parole.[20] Two months after his unconditional release, the Court of Appeals en banc upheld the panel's decision and remanded the case for a new trial.[21] Prior to retrial, Fitzgerald's attorney moved to dismiss the indictment arguing the double punishment aspect of the double jeopardy clause.[22] The trial judge denied the motion, and an immediate appeal followed.[23] The District of Columbia Court of Appeals affirmed the trial court's denial of defendant's motion to dismiss reasoning that despite the completion of the defendant's sentence the government still had an important interest in prosecuting him[24] and, therefore, double jeopardy protections did not apply.[25] The court held that even where a defendant has been released from parole, there may still be legitimate governmental and societal interests in obtaining findings of guilt.[26]

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18. *Fitzgerald*, 472 A.2d at 53.

19. Fitzgerald v. United States, 412 A.2d 1, 8 (D.C. 1980). This was a panel decision which was subsequently vacated by the D.C. Court of Appeals sitting en banc. The court reasoned that had the instruction been given, the jury's verdict might have been different, especially since evidence of corroboration was slight.

20. *Fitzgerald*, 472 A.2d at 53.

21. Fitzgerald v. United States, 443 A.2d 1295, 1305 (D.C. 1982) (en banc).

22. *Fitzgerald*, 472 A.2d at 53. Fitzgerald's attorney argued that double jeopardy protection was applicable to the defendant inasmuch as he would face double punishment if he were reconvicted at another trial. *Id.* The defendant had already fully served the sentence imposed at the first trial.

23. *Id.* at 53. Such an appeal is allowed because "a motion to dismiss an indictment on double jeopardy grounds is a final order and thus immediately appealable." *Id.* at 53 n.1. *See* Abney v. United States, 431 U.S. 651 (1977); Coleman v. United States, 414 A.2d 528 (D.C. 1980).

24. *Fitzgerald*, 472 A.2d at 54. The court supported its position, in part, by citing two Supreme Court cases. First, in United States v. Scott, 437 U.S. 82 (1978), the Court stated that there is a public interest in allowing a defendant a just judgment on the merits of the case. In the second case, Wade v. Hunter, 336 U.S. 684 (1949), the Court reasoned that courts must have the power to retry defendants since the purpose of law is to protect society from people who are guilty of crimes. *See* United States v. Tateo, 377 U.S. at 466 (the practice of retrial serves the defendant's rights as well as society's interests).

25. *Fitzgerald*, 472 A.2d at 54.

26. *Fitzgerald*, 472 A.2d at 53-54. *See infra* note 52 for the D.C. Code provisions that take a previous conviction into consideration.

This Note will point out that public policy considerations guided the District of Columbia Court of Appeals to ignore double punishment in its decision to permit retrial in the unique situation in which a defendant had fully served his sentence and was unconditionally released from parole. The court found that a defendant can be retried even though he had fully satisfied his sentence because of the potential significant collateral consequences that may attach to a finding of guilt in criminal cases. Specifically, the promulgation of sentencing enhancement statutes has altered considerably the previously held notion that present punishment is the primary goal in a criminal conviction. The Note concludes that *Fitzgerald* may be the precursor of a trend in which sentencing enhancement statutes increasingly require the courts to shift their focus from considering only double punishment to weighing the public policy considerations of the effect of recorded convictions on possible future punishment.

I. THE DOUBLE JEOPARDY CLAUSE: BALANCING THE RIGHTS OF AN INDIVIDUAL DEFENDANT AGAINST THE RIGHTS OF SOCIETY

A. The Supreme Court View of Double Jeopardy: A Tool Against Government Oppression That Does Not Provide Blanket Protection for Defendants

The Supreme Court first addressed the double jeopardy issue in *United States v. Ball*.[27] In *Ball*, three defendants had been tried together for murder; two were found guilty by the jury, while the third was acquitted.[28] The Supreme Court reversed the two convictions, concluding that the indictment was defective.[29] Thereafter, the three original defendants were reindicted. At a second trial, all three defendants were convicted of murder and sentenced to death.[30] On appeal, the Supreme Court established the following basic double jeopardy tenets: first, that the double jeopardy clause precludes a defendant from being retried who has been acquitted at the original trial,[31] and second, that the double jeopardy clause does not necessarily prevent the

27. 163 U.S. 662 (1896).

28. *Id.* at 662-64.

29. *Id.*

30. *Id.* Even the defendant who had initially been acquitted was retried.

31. *See, e.g.*, Fong Foo v. United States, 369 U.S. 141 (1962). In *Fong Foo*, a mandamus order had been issued by the court of appeals, directing the district court to vacate certain acquittals. Despite the fact that the Supreme Court acknowledged that the acquittals had been entered erroneously, it held that retrial was barred by the double jeopardy clause. *Id.* at 143. *Accord* United States v. Martin Linen Supply Co., 430 U.S. 564, 575-76 (1977) (appellate review and retrial are barred by the double jeopardy clause after a judgment of acquittal has been entered under FED. R. CRIM. P. 29 (c)).

retrial of defendants who have been convicted at an earlier trial.[32] The *Ball* principles have consistently been followed by the Supreme Court in a variety of circumstances.[33]

B. The Double Punishment Bar of the Double Jeopardy Clause

With respect to double punishment,[34] the United States Supreme Court, in *North Carolina v. Pearce*,[35] stated that under double jeopardy principles a harsher sentence may not be imposed at a second criminal trial unless it is justified based on the defendant's conduct since the time of the original sentencing proceeding.[36] Habeas corpus relief was granted by the trial court based on a finding that a longer sentence on retrial was unconstitutional without the requisite justification.[37] Both the court of appeals and the Supreme Court affirmed the decision of the trial court.

While application of the *Pearce* rule would allow a harsher sentence on retrial if the proper justification were present, it is limited by the well-established proposition found in *Ex parte Lange*[38] that a defendant who has suf-

32. *Id.* See *Scott*, 437 U.S. at 88-101, for a review of the history of the double jeopardy clause in the Anglo-American system of jurisprudence.

33. *See, e.g.*, United States v. Scott, 437 U.S. 84 (1978) (where the defendant obtains termination of the proceedings, retrial does not violate the double jeopardy clause); Stroud v. United States, 251 U.S. 15 (1919) (retrial allowed after conviction reversed because of error). The District of Columbia Court of Appeals has also applied the *Ball* principle to a double jeopardy clause issue of retrial where a judgment has been reversed. *See In re* Paul G. Evans, 450 A.2d 443 (D.C. 1982). In *Evans*, the defendant did not suggest that he would face double punishment if retried, rather, he argued that his contempt conviction was barred by the double jeopardy clause because his conviction was reversed on grounds of judicial bias. *Id.* at 444. The court of appeals rejected that argument by invoking the long-standing Supreme Court rule that absent very unusual circumstances the double jeopardy clause does not protect a defendant from retrial following reversal of a conviction. *Id.* at 442. *Accord* United States v. Hall, 559 F.2d 1160 (9th Cir. 1977) (holding that a defendant who had served his probationary period could be retried). *Cf.* Williams v. Wolfe, 497 F. Supp. 122 (D. Nev. 1980), *aff'd mem.*, 679 F.2d 904 (9th Cir. 1982) (dicta suggesting that a defendant who has satisfied his sentence may be retried).

34. *See generally* Note, *A Definition of Punishment for Implementing the Double-Jeopardy Clause's Multiple-Punishment Prohibition*, 90 YALE L.J. 632 (1981).

35. 395 U.S. 711 (1969).

36. *Id.* In *Pearce*, the Court held that a trial judge is not constitutionally precluded from imposing a harsher sentence and may look at the defendant's "life, health, habits, conduct, and mental and moral propensities." *Id.* at 723. *See* Barnes v. United States, 419 F.2d 753, 754 (D.C. Cir. 1969) (relying on the *Pearce* rule).

37. *Pearce*, 395 U.S. at 713-15.

38. 85 U.S. (18 Wall.) 163 (1874). The *Lange* doctrine is still followed. *See, e.g.*, United States v. DiFrancesco, 449 U.S. 117 (1980). *Lange* was invoked in *DiFrancesco* for the proposition that a defendant may not be sentenced to a greater length of time than the legislature has authorized. *Id.* at 139. The Court avoided the *Lange* limitation by reasoning that the major offender statutes under which the defendant had been sentenced were authorized by Congress.

fered the maximum penalty cannot be punished further.[39] In *Lange*, the defendant had been both fined and imprisoned when the statute allowed for either fine or imprisonment.[40] The Court held that the government was barred from seeking double punishment because the defendant, by paying the fine, had already suffered the maximum punishment under the statute.[41]

C. Societal Interests as a Factor in Retrial of Defendants

The Supreme Court has posited that there are certain legitimate societal interests implicated in the retrial of a defendant. *Wade v. Hunter*[42] caused the Supreme Court to focus on whether the double jeopardy clause precluded retrial when a trial failed to end in a final judgment.[43] The Court recognized that there may be circumstances in which a trial already begun could not be completed, but held that absent compelling circumstances such an event should not deny courts the power to retry defendants.[44] It reasoned that the primary purpose of the legal system is to protect society from those found guilty of crimes and, therefore, the courts should be allowed to achieve that purpose notwithstanding the defendant's rights under the double jeopardy clause.[45] Addressing again the importance of balancing societal interests in double jeopardy cases, the Court in *United States v. Tateo*[46] indicated that abstract legal principles must not interfere with the sound

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Id. See also North Carolina v. Pearce, 395 U.S. 710 (1969), *supra* note 36 and accompanying text.

39. *Lange*, 85 U.S. at 175.

40. *Id.*

41. *Id.* In *Fitzgerald*, the court distinguished *Lange* by pointing out that Lange had been sentenced to the maximum penalty whereas Fitzgerald had received a sentence of 15-45 months under a statute that allowed for 15 years. The court refused to interpret *Lange* as an absolute bar to adding a sentence upon reconviction. *Fitzgerald*, 472 A.2d at 54.

42. 336 U.S. 684 (1949). *Wade* involved the court-martial of an American soldier in Germany in 1945. The first court-martial proceeding was discontinued because the prosecution did not have available necessary witnesses. The case was then transferred to another location and a second proceeding was held at which time the defendant argued that double jeopardy had attached. His double jeopardy plea was rejected and he was found guilty and dishonorably discharged. The Supreme Court subsequently decided that the double jeopardy clause did not bar the defendant's second court-martial. *Id.* at 688-89.

43. *Id.* at 685-89. The first trial was not completed because the witnesses were not accessible.

44. *Id. Accord* United States v. Scott, 437 U.S. at 98-100 (where the defendant seeks to terminate the trial, an appeal by the government is not barred by the double jeopardy clause).

45. *Wade*, 336 U.S. at 689.

46. In *Tateo*, the defendant pled guilty to four counts of a five-count indictment. 377 U.S. at 464. As a result of this plea, he was sentenced to 22 1/2 years in prison. *Id.* Tateo's conviction was subsequently set aside by another judge. 214 F. Supp. 560 (S.D.N.Y. 1963). That judge determined Tateo did not possess the freedom to make a voluntary plea because of the cumulative impact of the trial testimony, the judge's expressed view that if Tateo was

administration of justice. The Court reasoned that the right of a defendant to be provided a fair trial must coexist with the right of society to punish those whose guilt is clear. In dicta, other Supreme Court cases[47] have reiterated that there is a societal interest in bringing to trial those accused of a crime.

Congress has also recognized the importance of obtaining and recording valid convictions through its promulgation of federal criminal statutes. For instance, the Dangerous Special Offender Statute was promulgated to enhance punishment for three types of defendants: (1) the habitual offender; (2) the professional criminal; and (3) upper echelon organized crime figures.[48] The statute permits prosecutors to request an enhanced penalty of up to a maximum of twenty-five years in prison.[49] Since passage of the statute, the Supreme Court has upheld its constitutionality by finding that its procedures do not violate the double jeopardy clause.[50] Moreover, Congress recently has provided for enhanced penalties in three areas of the Comprehensive Crime Control Act of 1984.[51] Certain provisions of the District of

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found guilty by the jury he would impose a life sentence, and the advice by counsel that he would probably be found guilty. *Id.*

For a contrasting result see Green v. United States, 355 U.S. 184 (1957), where the Court held that because the defendant had been convicted of a lesser offense included in the original indictment, he could only be retried for the offense for which he was found guilty. *Id.* at 189. For example, a defendant cannot be retried for first degree murder when he has been convicted of the lesser offense of second degree murder. *Id.*

47. *E.g., Scott*, 437 U.S. at 100; United States v. Ewell, 383 U.S. 116, 121 (1966).

48. 18 U.S.C. §§ 3575-3578 (1982). Section 3575 was repealed, effective November 1, 1985; however, enhanced penalty statutes have been added to the Comprehensive Crime Control Act of 1984. *See infra* note 51.

49. Pub. L. No. 91-452, § 1001(a), 84 Stat. 948 (1970) (codified at 18 U.S.C. § 3575(e) (1982 & Supp. 1 1983)).

50. *DiFrancesco*, 449 U.S. at 135. Writing for the majority, Justice Blackmun noted that the Dangerous Special Offender statute "represents a considered legislative attempt to attack a specific problem in our criminal justice system [which is] the tendency on the part of some trial judges 'to mete out light sentences in cases involving organized crime management personnel.'" *Id.* at 142 (quoting PRESIDENT'S COMM'N ON LAW ENF'T AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 203 (1967)).

51. Pub. L. No. 98-473, 98 Stat. 1837, 1976 (1984). Part D of chapter X amends 18 U.S.C. § 924(c), imposing a mandatory penalty without the possibility of parole or probation on anyone who uses or carries a firearm during, and in relation to, a federal crime of violence. On a first conviction, the amended section requires a five-year prison sentence, and with respect to a second or subsequent conviction, it mandates a 10-year prison sentence. 18 U.S.C.A. § 924(c) (West Supp. 1985). Thus, the importance of a conviction under § 924(c) is to determine whether the defendant falls into the 10-year mandatory sentence category upon a second conviction. *Id.*

Part E of chapter X amends ch. 44 of title 18 by adding § 929. That new section mandates an increased punishment of at least five years in prison for those who commit crimes of violence while carrying a handgun loaded with armor-piercing ammunition. The result of this section and § 924(c) is that a defendant may receive consecutive mandatory sentences totalling

Columbia Code also include sentence enhancement provisions.[52] Many of these statutes were formulated to achieve a greater degree of consistency in sentencing, especially in cases involving both repeat offenders and dangerous special offenders.[53]

II. *FITZGERALD V. UNITED STATES*: PUBLIC POLICY AS A JUSTIFICATION FOR GOVERNMENT RETRIAL OF DEFENDANTS WHO HAVE SATISFIED THEIR SENTENCES

In *Fitzgerald v. United States*,[54] the District of Columbia Court of Appeals was confronted with a novel factual situation. *Fitzgerald* is novel because Supreme Court cases[55] dealing with the double punishment issue had addressed only unsatisfied sentences, whereas this case involved a fully satisfied sentence. The specific issue in *Fitzgerald* was whether a defendant could be retried after he had completely served his sentence and had been unconditionally released from parole. In arguing that he could not be retried, the defendant relied primarily on double jeopardy clause dicta from two Supreme Court cases[56] and a U.S. District Court case.[57] The District of

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at least 10 years in addition to the sentence for the underlying offense. 18 U.S.C.A. § 929 (West Supp. 1985). These sections underline the importance of a conviction on a serious or repeat offender's record.

Chapter XVIII, known as the Armed Career Criminal Act of 1984, increases the penalty for the already existing offense under 18 U.S.C.A. app. § 1202, of a felon who possesses a weapon. If a defendant is convicted under § 1202, and has three prior convictions (state or federal) for robbery or burglary or both, the new statute allows a mandatory prison sentence of not less than 15 years and a discretionary fine of up to $25,000. 18 U.S.C.A. app. § 1202 (West Supp. 1985).

52. The following provisions of the congressionally legislated District of Columbia Code consider a conviction to be of importance in determining the treatment to be meted out by the criminal justice system: (1) D.C. CODE ANN. § 22-104(a) (1981 & Supp. 1985) (repeat offenders may receive a more severe punishment upon a second or third conviction); (2) D.C. CODE ANN. §§ 3202(a)(2), 24-203(b) (1981 & Supp. 1985) (minimum mandatory sentences required where defendant is convicted of serious crime after being convicted for a violent crime); (3) D.C. CODE ANN. § 22-3203(2) (1981 & Supp. 1985) (convicted felons are denied the right to possess certain firearms); (4) D.C. CODE ANN. §§ 23-1322(a)(1), (2), 23-1322(c)(3), (d) (1981 & Supp. 1985) (accused who has previously been convicted of a violent crime may be detained pretrial); (5) D.C. CODE ANN. § 14-305 (1981 & Supp. 1985) (a defendant may be impeached with a past felony conviction once he testifies at his trial).

53. *See, e.g.*, United States v. DiFrancesco, 449 U.S. 117, 118 (1980) (where a federal dangerous special offender statute allowed for an increased sentence upon the conviction of such a "dangerous" offender). It has been observed that sentencing is the one area of the criminal justice system most in need of reform. *See* M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

54. 472 A.2d 52 (D.C. 1984).

55. *See supra* note 10 and accompanying text.

56. United States v. Wilson, 420 U.S. 332 (1975); United States v. Ewell, 383 U.S. 116 (1966).

Columbia Court of Appeals found the defendant's argument unpersuasive after examining the long history of the double jeopardy clause[58] and considering the societal importance of convicting those found guilty of crimes.[59]

The *Fitzgerald* court found that the defendant could be retried because the government's interests in the case were not limited to punishment alone.[60] The court reached that conclusion after examining the policy considerations found in *Wade v. Hunter*.[61] The Court of Appeals reasoned that it was beneficial both from a governmental and a societal standpoint to insure that individuals guilty of crimes be identified.[62] Citing various District of Columbia Code provisions enacted by Congress that attach important collateral consequences to convictions, the court noted the expressed congressional concern with having valid convictions entered and made a permanent part of a defendant's criminal record.[63] Indeed, a prerequisite to the use of most sentence enhancement statutes is an undisputed record of at least one prior conviction. Thus, an argument against retrial based upon the double punishment protections of the double jeopardy clause is less persuasive now in the wake of increasingly popular sentence enhancement statutes.

Guided by the holding in *North Carolina v. Pearce*,[64] the *Fitzgerald* court acknowledged that upon retrial the judge is restricted to the sentence originally imposed unless a harsher one is justified by the defendant's "identifiable conduct" between the first and the second sentencing.[65] The impact of *Fitzgerald* does not rest, however, with the court's view that a longer sentence may ultimately be imposed, for that is merely a restatement of settled double jeopardy clause principles. Rather, *Fitzgerald* is significant because the court's rationale permitting retrial is based solely on the "governmental and societal" interests involved. The interests articulated by the court are two-fold: 1) insuring that those guilty of crimes are punished,[66] and 2) in-

57. *Wolff*, 497 F. Supp. at 122.

58. *See supra* notes 27-47 and accompanying text.

59. *Fitzgerald*, 472 A.2d at 53-54.

60. *Id.* at 53.

61. 336 U.S. 684 (1949); *see* United States v. Ewell, 383 U.S. 116 (1966)

62. *Fitzgerald*, 472 A.2d at 53-54. Specifically, the court said the collateral consequences attending conviction for certain crimes "are intended to encourage those who have been convicted . . . to observe the precepts of the criminal code. As such, they inure to the public's benefit and justify the government's authority to retry [the defendant]." *Id.* at 54.

63. *See supra* note 52. For example, repeat offenders may be sentenced more severely after being convicted a second or third time. D.C. CODE ANN. §§ 22-104, -104(a). Additionally, in the annotation to § 22-104, the purpose of that section is stated as being to give new sentencing alternatives to judges to "protect society" as well as to rehabilitate the defendant. *See* Smith v. United States, 304 A.2d 28 (D.C.), *cert. denied*, 414 U.S. 1114 (1973).

64. 395 U.S. 711 (1969).

65. *Fitzgerald*, 472 A.2d at 54.

66. *Id.* at 54.

suring that those convictions are recorded for possible future use in conjunction with sentencing enhancement statutes.[67] Therefore, it is the court's unusual rationale, which focuses almost entirely on the governmental interests involved, that sets *Fitzgerald* apart from prior decisions. The court is primarily concerned with the collateral consequences that attach to criminal convictions in order to protect the viability and insure the utilization of sentence enhancement statutes. Focusing on the governmental interests, the court virtually brushes aside considerations normally applied in double jeopardy cases such as the heavy burden on a defendant who is twice placed in jeopardy or the unfairness of double punishment.[68]

In its opinion, the court attempts to deemphasize the importance of "punishing" those guilty of crimes when it reasons that the government's interests are not limited to punishment.[69] It is, however, essentially focusing on punishment when it permits retrial of a defendant who may face greater penalties under a sentencing enhancement statute upon a later conviction. In sum, the court decided that while a defendant may not necessarily be given a harsher sentence on retrial, he, nevertheless, may be retried because the conviction itself may prove to be important in future trials and other sentencing proceedings.[70] The legislative mandate that a repeat violent offender receive a greater sentence in the future because of past misdeeds must lead immutably to an expansion of the rights of society and a lessening of the traditionally-recognized rights of the defendant in the delicate double jeopardy balancing process. The *Fitzgerald* decision is apparently the first of many that will follow in the wake of such "get-tough" legislation.

In *Fitzgerald*, the court primarily focused on the collateral consequences attaching upon conviction for a *serious crime*.[71] Where a serious crime is not at issue, however, it is unclear how the court would treat the double punishment question, especially in circumstances in which a sentence has been fully satisfied.

III. CONCLUSION

In *Fitzgerald*, the court turned to public policy and legislative considerations in overruling the defendant's double jeopardy argument and in deciding that there are benefits to society when a person guilty of criminal activity is convicted and a permanent record is made of that conviction. This result is directly related to the existence of sentence enhancement statutes. Conse-

67. *See supra* notes 48-52 and accompanying text.
68. *See supra* note 3.
69. *Fitzgerald*, 472 A.2d at 54.
70. *Id.*
71. *Id.*

quently, the District of Columbia Court of Appeals in future double jeopardy cases will be focusing less on double punishment and more on the significance of a conviction. Because identifying career criminals is of increasing importance to society, the decision in *Fitzgerald* may be only the precursor of a trend in which the courts gradually shift their double jeopardy focus away from the traditional rights of the defendant toward society's right to be protected.

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