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Due Process and the Harsher Penalty After Appeal: An Unwarranted Extension of *Pearce*—*Wood v. Ross*

At common law there was no "right" to an appeal.[1] Such a "right" could only be established by legislative enactment.[2] The statutes creating a right to an appeal brought with them the problems of determining the constitutional protections that must be afforded this right. Much controversy has centered around one such problem, that of the constitutionality of imposing a more stringent sentence on a defendant after he has successfully appealed and attained a new trial.[3]

In the companion cases of *Wood v. Ross* and *Rice v. North Carolina*,[4] the United States Court of Appeals for the Fourth Circuit was faced with resolving this question. In these cases, both individuals were convicted in courts not of record and each exercised his statutory right to appeal, which provided for a trial de novo in a superior court. Both were given harsher sentences on appeal.[5] These defendants contended that the Due Process Clause of the Fourteenth Amendment prevented the augmenting of punishment on appeal beyond the penalty imposed at the first trial. The Fourth Circuit relied on the reasoning of the *North Carolina v. Pearce*[6] decision and found that these defendants were denied due process of law.[7]

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[1] *See* McKane v. Durston, 153 U.S. 684 (1894) (dictum). *See generally* North Carolina v. Pearce, 395 U.S. 711 (1969); Douglas v. California, 372 U.S. 353 (1963) (dictum, dissenting opinion); Griffin v. Illinois, 351 U.S. 12 (1956) (dictum).

[2] *See* McKane v. Durston, 153 U.S. 684 (1894) (dictum).

[3] *See, e.g.*, Annot., 12 A.L.R.3d 978 (1967); Honigsberg, *Limitations Upon Increasing a Defendants Sentence Following a Successful Appeal and Reconviction*, 4 Crim. L. Bull. 329 (1968); Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L.J. 606 (1965); Note, *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev. 808 (1969); Note, *Constitutional Law: Increased Sentence and Denial of Credit on Retrial Sustained under Traditional Waiver Theory*, 1965 Duke L.J. 395 (1965); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960); Note, *Retrial of the Successful Criminal Appellant: Harsher Punishment and Denial of Credit for Time Served*, 28 Md. L. Rev. 64 (1968); Comment, *Criminal Procedure–Constitutional Limitations on Imposition of More Severe Sentence after Conviction upon Retrial*, 58 Ky. L.J. 380 (1970); Comment, *Another Look at Unconstitutional Conditions*, 117 U. Pa. L. Rev. 144 (1968); Comment, *Increased Sentence Upon Retrial*, 25 Wash. & Lee L. Rev. 60 (1968); 80 Harv. L. Rev. 891 (1967).

[4] — F.2d — (4th Cir. 1970).

[5] Wood received a 2 year sentence in the initial proceeding, and a 10 year sentence on appeal, which was later commuted by the Governor of North Carolina to a 5 year term. Rice received a 9 month sentence in the initial trial, and a 2 year sentence on appeal.

[6] 395 U.S. 711 (1969).

[7] *Id.* at 726.

The majority of courts that have been faced with the problem of increased sentences after retrial have held or indicated that it is constitutionally permissible to impose such a sentence.[8] The reasons[9] often cited in support of this view are: (1) the defendant assumes the risk by seeking a new trial;[10] (2) a new trial completely nullifies the first trial and, in effect, wipes the slate clean;[11] and (3) harsher sentences could act as deterrents to frivolous appeals.[12]

Other courts have prohibited increased punishment subsequent to a new trial brought about through an appeal.[13] The reasons cited in support of this view include the constitutional objections that the defendant would be

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[8] *See* Stroud v. United States, 251 U.S. 15 (1919); Murphy v. Massachusetts, 177 U.S. 155 (1900); Lemieux v. Robbins, 414 F.2d 353 (1st Cir. 1969), *cert. denied*, 397 U.S. 1017 (1970); United States v. White, 382 F.2d 445 (7th Cir. 1967), *cert. denied*, 389 U.S. 1052 (1968); United States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir.), *cert. denied*, 389 U.S. 889 (1967); King v. United States, 98 F.2d 291 (D.C. Cir. 1938) (dictum). *See generally* Annot., 12 A.L.R.3d 978 (1967); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

[9] *See generally* Comment, *Criminal Procedure–Constitutional Limitations on Imposition of More Severe Sentence after Conviction upon Retrial*, 58 KY. L.J. 380 (1970) for a more thorough discussion of the different views and justifications surrounding this increased sentence problem.

[10] *See* Stroud v. United States, 251 U.S. 15 (1919); Mann v. State, 23 Fla. 610, 3 So. 207 (1887) (dictum); Hobbs v. State, 231 Md. 533, 191 A.2d 238, *cert. denied*, 375 U.S. 914 (1963); Hicks v. Commonwealth, 345 Mass. 89, 185 N.E.2d 739 (1962), *cert. denied*, 374 U.S. 839 (1963) (dictum); Sanders v. State, 239 Miss. 874, 125 So. 2d 923 (1961); State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964), *cert. denied*, 379 U.S. 1005 (1965); Commonwealth v. Alessio, 313 Pa. 537, 169 A. 764 (1934); Annot., 12 A.L.R.3d 978 (1967).

[11] *See* Green v. United States, 355 U.S. 184 (1957) (dissenting opinion); Stroud v. United States, 251 U.S. 15 (1919); United States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir.), *cert. denied*, 389 U.S. 889 (1967); United States v. Walker, 346 F.2d 428 (4th Cir. 1965); King v. United States, 98 F.2d 291 (D.C. Cir. 1938); Note, *Constitutional Law: Increased Sentence and Denial of Credit on Retrial Sustained under Traditional Waiver Theory*, 1965 DUKE L.J. 395 (1965).

[12] *See* Fay v. Noia, 372 U.S. 391 (1963) (dissenting opinion); Royals v. City of Hampton, 201 Va. 552, 111 S.E.2d 795 (1960). *See generally* Whalen, *Resentence without Credit for Time Served: Unequal Protection of the Laws*, 35 MINN. L. REV. 239 (1951); Comment, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453 (1960).

[13] *See* Rush v. State, 239 Ark. 878, 395 S.W.2d 3 (1965) (dictum); Sneed v. State, 159 Ark. 65, 255 S.W. 895 (1923); People v. Ali, 66 Cal. 2d 277, 424 P.2d 932, 57 Cal. Rptr. 348 (1967); Application of Ferguson, 233 Cal. App. 2d 79, 43 Cal. Rptr. 325 (1965); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963); State v. Wolf, 46 N.J. 301, 216 A.2d 586 (1966). *See also* State v. Turner, 247 Ore. 301, 429 P.2d 565 (1967); Van Alstyne, *supra* note 3; Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

denied equal protection of the law,[14] would be subjected to double jeopardy,[15] or would be deprived due process of law.[16] Another argument, closely related to that of due process, involves the doctrine of unconstitutional conditions.[17]

A few courts have reached a middle ground in this controversy, holding that an increased sentence upon a new trial is permissible and constitutional if certain safeguards are present.[18] Such a holding was rendered by the United States Supreme Court in the case of *North Carolina v. Pearce*.[19] Pearce was convicted in a superior court of assault with intent to rape.[20] He was retried and again convicted.[21] The second sentencing resulted in a harsher overall punishment.[22] Pearce obtained a writ of habeas corpus, and the District Court held that the greater sentence was unconstitutional.[23]

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[14] *See* Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967), *cert. denied*, 390 U.S. 905 (1968); Whaley v. North Carolina, 379 F.2d 221 (4th Cir. 1967). *But see* North Carolina v. Pearce, 395 U.S. 711 (1969).

[15] *See* Rush v. State, 239 Ark. 878, 395 S.W.2d 3 (1965); Sneed v. State, 159 Ark. 65, 255 S.W. 895 (1923); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963); Annot., 12 A.L.R.3d 978 (1967). *But see* North Carolina v. Pearce, 395 U.S. 711 (1969).

[16] *See* Fay v. Noia, 372 U.S. 391 (1963); Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967), *cert. denied*, 390 U.S. 905 (1968); Whaley v. North Carolina, 379 F.2d 221 (4th Cir. 1967); Honigsberg, *supra* note 3, at 335, 341; Van Alstyne, *supra* note 3, at 623. *But see* North Carolina v. Pearce, 395 U.S. 711 (1969), which stated that the threat of increased punishment on appeal would not be a denial of due process if certain safeguards were present.

[17] *See* Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967), *cert. denied*, 390 U.S. 905 (1968); United States v. Walker, 346 F.2d 428 (4th Cir. 1965). *See generally* Van Alstyne, *supra* note 3, at 614; Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

[18] *See* North Carolina v. Pearce, 395 U.S. 711 (1969); United States v. Coke, 404 F.2d 836 (2d Cir. 1968); United States v. White, 382 F.2d 445 (7th Cir. 1967), *cert. denied*, 389 U.S. 1052 (1968); United States *ex rel.* Starner v. Russell, 378 F.2d 808 (3d Cir.), *cert. denied*, 389 U.S. 889 (1967); Marano v. United States, 374 F.2d 583 (1st Cir. 1967).

[19] 395 U.S. 711 (1969).

[20] Pearce was convicted in the Superior Court of Duraham County, North Carolina, and sentenced to a term of 12 to 15 years.

[21] After serving several years of this term, Pearce initiated post conviction proceedings on the ground that an involuntary confession had been admitted into evidence against him. A new trial was awarded. State v. Pearce, 266 N.C. 234, 145 S.E.2d 918 (1966).

[22] The second trial judge imposed a sentence of 8 years, which, when added to the time already served, amounted to a longer sentence than the 12 year minimum originally imposed. The conviction and sentence were affirmed on appeal. State v. Pearce, 268 N.C. 707, 151 S.E.2d 571 (1966).

[23] The court relied on the then recent Fourth Circuit decision, Patton v. North

The Fourth Circuit Court of Appeals affirmed,[24] as did the United States Supreme Court.[25] The Court, after discounting the equal protection[26] and the double jeopardy arguments,[27] relied heavily upon the due process guarantees.[28] The Court stated that certain requirements must be met before a defendant could be subjected to a harsher sentence.[29] Such a sentence could only be imposed if the reasons for the increased punishment were based on the conduct of the defendant occurring after the time of the first trial, and only if these reasons were recited by the judge in the record.

The *Wood* court relied on *Pearce* and stated that since there was a "lack of proof of intervening deportment"[30] on the part of the defendants, and no factual data in the record to justify an increased sentence, the defendants were denied due process of law when they received a harsher sentence on appeal. Such would be the logical conclusion if the *Pearce* rule were applicable to the instant case. However, it is distinguishable on several major fronts. In *Pearce,* the superior court had original jurisdiction, while in *Wood,* the superior court's jurisdiction was derivative.[31] In *Pearce,* the second trial was a retrial in the same court but in *Wood* the second trial was a trial de novo in a higher court.[32] The most notable distinction be-

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Carolina, 381 F.2d 636 (4th Cir. 1967), *cert. denied*, 390 U.S. 905 (1968), and held the increased sentence unconstitutional.

[24] 397 F.2d 253 (4th Cir. 1968).

[25] Certiorari was granted, 393 U.S. 922 (1968), and in 395 U.S. 711 (1969), the Court affirmed the District Court decision. However, the Court modified the *Patton* decision, and allowed increased sentences on appeal if certain safeguards or conditions were present.

[26] 395 U.S. at 722-23.

[27] *Id.* at 719-21.

[28] *Id.* at 723-26.

[29] *Id.* at 726.

[30] — F.2d —, — (4th Cir. 1970).

[31] Pearce was charged with a type and degree of crime in which the superior court had original jurisdiction. However, the superior court in *Wood* could only derive its jurisdiction from a statute. Original jurisdiction in *Wood* was vested in a non-record court.

[32] The court in State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), which involved a legal issue identical to the issue in *Wood*, distinguished *Pearce* and discussed the differences between a retrial in the same court and a trial de novo in a higher court. These differences were emphasized through a comparison of the composition and operation of the non-record courts and the superior courts. The court stated:

> A district court makes no transcript of the evidence in the trial of a criminal case. It is therefore impossible for a Superior Court judge, upon appeal from a district court, to know what evidence and what facts affected the imposition of sentence in the court below. Furthermore, in a criminal trial before a jury in Superior Court more evidence is ordinarily presented and a more extensive

tween the two decisions involved the type of appeal upon which each case was based. The *Pearce* appeal was based on the fact that there was a constitutional error[33] in the first trial which thereby effectively denied Pearce a "fair trial."[34] The *Pearce* case held that this constitutional right to due process[35] could not be unreasonably hampered.[36] The Court limited the rule delineated in *Pearce* to new trials resulting from appeals based on constitutional and non-constitutional *errors* committed in the prior trial.[37] The Court indicated that due process would require that the defendant in these cases had a constitutional right to an errorless fair trial, and this right, exercised through an appeal and retrial, could not be unreasonably chilled.[38] The threat of an increased sentence on appeal would unreasonably deter a defendant from seeking his right to such an appeal, and therefore, would be a denial of due process.[39]

The *Wood* decision is clearly distinguishable from *Pearce* in that Wood's appeal was not structured on any type of error, but was based on an absolute and unconditional statutory right to a trial de novo irrespective of error.[40] In *Wood*, the defendants merely appealed from an inferior court to a superior court, not to achieve their right to an errorless fair

cross-examination is conducted. Thus the facts are more fully developed. The Superior Court judge is generally a lawyer with extensive trial experience and with a deep understanding with respect to proper punishment. *Id.* at 903.

33 An involuntary confession had unconstitutionally been admitted against Pearce. North Carolina v. Pearce, 395 U.S. 711, 713 (1969).

34 The right to a fair trial is a constitutional right based on and guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments. It is often the case that a defendant must appeal and be retried in order to receive a fair trial (one free from constitutional error). *See* Van Alstyne, *supra* note 3, at 615.

35 The right to due process includes the right to an errorless fair trial through the use of an appeal, if necessary.

36 *See* North Carolina v. Pearce, 395 U.S. 711, 724 (1969).

37 *Id.* (emphasis added).

38 The *Pearce* Court cited with approval language from its earlier holding in Rinaldi v. Yeager, 384 U.S. 305, 310 (1966):

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of *unreasoned distinctions* that can only impede open and equal access to the courts. *Id.* at 724 (emphasis added).

Therefore, if *Pearce* is to be applied to the *Wood* case, then the question presents itself—was the threat of an increased sentence an *unreasoned distinction* for this type of right to appeal?

39 *See* North Carolina v. Pearce, 395 U.S. 711, 724-25 (1969).

40 Wood, unlike Pearce, did not have to prove error in his first trial in order to attain an appeal. Wood was awarded an automatic appeal as a matter of right under G.S. §§ 7-230 and 15-177.1 of the North Carolina Code.

trial,[41] but rather to effectuate their right to a trial by jury.[42] This type of right to appeal is distinguishable in that here the defendant is automatically awarded a trial de novo, and is not obligated to prove error in his first trial. It is a different type of right,[43] suited for a different degree of crime,[44] and subject to different requirements before it can be attained.[45] It logically follows that the measure of reasonable or unreasonable chill to this right would also be different. When an appeal founded on this type of right is taken to the superior court it is as if the case had been

[41] The defendants may have already been afforded due process of law if their initial trials were errorless fair trials. This information, however, is not readily ascertainable because, as their name indicates, non-record courts do not keep records.

[42] *See* N.C. CODE G.S. §§ 7-230, 15-177.1.

[43] The court in the *Wood* decision considered the "right" to appeal in the cases of Pearce and Wood, and found no distinction. — F.2d at —. A closer inspection reveals that the "right" to appeal in the case of *Pearce* was based on the concept of right to a fair trial guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments, while the "right" to appeal in the *Wood* case was based on the right to a trial by jury guaranteed by the Sixth and Seventh Amendments of the Constitution of the United States. These different types of rights have different functions and different weights. The right to trial by jury seems weaker than the right to due process in that this right, as it exists in state courts, is not a fundamental right guaranteed by the Federal Constitution. Campbell v. St. Louis Union Trust Co., 346 Mo. 200, 139 S.W.2d 935 (1940); Caudle v. Swanson, 248 N.C. 249, 103 S.E.2d 357 (1958); White v. White, 108 Tex. 570, 196 S.W. 508 (1917). *See* Annot., 129 A.L.R. 324 (1940). There is substantial authority that the provisions of the Federal Constitution which guarantee the right to jury trial do no limit the power of the states to abolish, modify, or alter the right of trial by jury. *See, e.g.*, Dimick v. Schiedt, 293 U.S. 474 (1935); Southern R.R. v. City of Durham, 266 U.S. 178 (1924); Chesapeake & O.R.R. v. Gainey, 241 U.S. 494 (1916). *See generally* 47 AM. JUR. 2d JURY § 9 (1969). There are also numerous cases holding that a requirement of due process in a constitutional provision does not require a trial by jury, and that such a due process clause does not imply that all trials in state courts, affecting personal or property rights, must be by jury. It has even been indicated that this is true of the Due Process Clause of the Fourteenth Amendment, which does not require a jury trial in a judicial proceeding in a state court. 47 AM. JUR. 2d JURY § 11 (1969). It is conceded that the Due Process Clause of the Fourteenth Amendment imposes on states the requirement that jury trials be available to *criminal* defendants, but the fact remains that the right to trial by jury is distinguishable from the right to due process both in function and in weight.

[44] Pearce did not have the same right to appeal that Wood had because each "right" was contingent upon the degree of criminial activity in each case. The degree of criminal activity alleged in *Pearce* was serious enough to afford a trial by jury in the initial proceeding. In *Wood*, the degree of crime was less serious and the trial was held without a jury, however, a statute provided an automatic right to appeal to protect this right of trial by jury.

[45] Pearce had to attack the initial proceeding and prove error before he could be granted an appeal. Wood had only to request an appeal and he would be automatically awarded a trial de novo.

brought there originally and there had been no previous trial.[46] The judgment appealed from is completely annulled and is not available thereafter for any purpose.[47] Consequently, the defendant may be acquitted or he may receive a weaker or harsher sentence than he received at his first trial.[48]

The First Circuit was recently faced with the identical problem that was raised in the *Wood* case.[49] After considering and distinguishing *Pearce*,[50] the court held that an increased sentence on this type of appeal was not a denial of due process. The court considered the unreasonable chill argument and noted the differences in the types of appeal and the rights upon which each type of appeal was based.[51] *Pearce* was held not applicable to de novo trials resulting from appeals of convictions entered in non-record courts.[52]

The majority of cases that have relied on and followed the *Pearce* rule

[46] *See* Lemieux v. Robbins, 414 F.2d 353 (1st Cir. 1969), *cert. denied*, 397 U.S. 1017 (1970); People v. Olary, 382 Mich. 559, 170 N.W.2d 842 (1969); State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); Gaskill v. Commonwealth, 206 Va. 486, 144 S.E.2d 293 (1965).

[47] *See* Lemieux v. Robbins, 414 F.2d 353 (1st Cir. 1969), *cert. denied*, 397 U.S. 1017 (1970); Doss v. North Carolina, 252 F. Supp. 298 (M.D.N.C. 1966); Spriggs v. North Carolina, 243 F. Supp. 57 (M.D.N.C. 1965); People v. Olary, 382 Mich. 559, 170 N.W.2d 842 (1969); State v. Anderson, 5 N.C. App. 614, 169 S.E.2d 38 (1969); State v. Meadows, 234 N.C. 657, 68 S.E.2d 406 (1951); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934).

This type of appeal so completely annuls the first judgment that it is reversible error if such judgment is introduced into evidence at the trial de novo. *See* Harbaugh v. Commonwealth, 209 Va. 695, 167 S.E.2d 329 (1969); Gaskill v. Commonwealth, 206 Va. 486, 144 S.E.2d 293 (1965).

[48] *See* note 46 *supra*.

[49] The problem in *Wood* and in this First Circuit case involved the constitutionality of an increased sentence after an appeal from a non-record court through a statute that afforded an automatic right to a trial de novo. *See* Lemieux v. Robbins, 414 F.2d 353 (1st Cir. 1969), *cert. denied*, 397 U.S. 1017 (1970).

[50] 414 F.2d 353, 355 (1st Cir. 1969).

[51] The First Circuit distinguished the different types of rights to appeal in the *Pearce* case and in the instant case and concluded that although the defendant's right to appeal in the case at bar was being chilled, it was not being *unreasonably* chilled because there were legitimate state objectives involved which would justify the threat of increased sentence on appeal. *Id.* at 355-56. The court stated:

> Here we deal with a two-way street. Defendant has the benefit of two full opportunities for acquittal. If he fails to gain acquittal in the district court, his mere exercise of his right to "appeal" not only gives him a new trial but vacates the judgment and removes the entire case to the Superior Court. The state is willing to accept this in the long run interest of reducing the load on the Superior Court. The defendant need not accept it at all. If he does accept it, both he and the state start at parity. *Id.* at 355.

[52] *See Id.* at 355, 356.

have been cases similar to *Pearce* in that they all involved some type of error in the first trial.[53] Noticeably, the majority of cases that involved appeals not brought on error but rather on a statutory right to a trial de novo, have not followed or relied on *Pearce*.[54] Many of these cases have actually stated that *Pearce* was not applicable to cases involving this type of appeal.[55] Even the *Pearce* decision indicates that it is only applicable to cases involving appeals brought about because of an error in the first trial.[56] The *Wood* case represents the small minority that holds the *Pearce* rule applicable to cases involving de novo trials from non-record courts.[57] *Wood* represents an erroneous, unwarranted, and dangerous extension of the *Pearce* doctrine.[58] Such an extension of *Pearce* not only completely defeats the purpose of the lower court system, but it makes these courts an impediment to the administration of justice.[59]

The court in *Wood* relied entirely on the due process argument of *Pearce*.[60] They did not concern themselves with the unreasonable chill

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[53] *See* Barnes v. United States, 419 F.2d 753 (D.C. Cir. 1969); United States v. Gross, 416 F.2d 1205 (8th Cir. 1969); United States v. King, 415 F.2d 737 (6th Cir. 1969); United States v. Kienlen, 415 F.2d 557 (10th Cir. 1969); United States v. Wood, 413 F.2d 437 (5th Cir. 1969); Pinkard v. Neil, 311 F. Supp. 711 (M.D. Tenn. 1970); Sefcheck v. Brewer, 301 F. Supp. 793 (S.D. Iowa 1969).

[54] *See* Lemieux v. Robbins, 414 F.2d 353 (1st Cir. 1969), *cert. denied*, 397 U.S. 1017 (1970); People v. Olary, 382 Mich. 559, 170 N.W.2d 842 (1969); State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); Evans v. City of Richmond, 210 Va. 403, 171 S.E.2d 247 (1969).

[55] *See* note 54 *supra*.

[56] North Carolina v. Pearce, 395 U.S. 711, 724 (1969). Admittedly, there could be an error in the proceedings in the court not of record, but the *Wood* type of appeal is not granted because of any possible error, it is granted to afford the defendant the right to a jury trial, irrespective of error.

[57] *See* Love v. Winston, — F. Supp. — (E.D. Va. 1971); Bronstein v. Superior Court, 106 Ariz. 251, 475 P.2d 235 (1970); State v. Shak, — Hawaii —, 466 P.2d 420 (1970).

[58] This extension has been justified by holding it to be within the "spirit" of *Pearce*. Bronstein v. Superior Court, 106 Ariz. 251, 475 P.2d 235 (1970).

[59] The First Circuit in Lemieux v. Robbins, 414 F.2d 353 (1st Cir. 1969), *cert. denied*, 397 U.S. 1017 (1970), and the Supreme Court of North Carolina in State v. Sparrow, 276 N.C. 449, 173 S.E.2d 897 (1970), considered the ramifications of such an extension and concluded that such a rule would either encourage defendants to appeal in every case, thereby rendering trials in these courts a worthless exercise, or would encourage lower court judges to impose maximum sentences out of caution, in the interest of the state. Either alternative would encourage appeals in all cases. Defendants would have everything to gain and nothing to lose, and their appeals would flood the superior court creating a workload that would involve retrying every case that the lower courts had previously tried.

[60] The court did raise the double jeopardy argument in the *Wood* case, however,

argument,[61] and they gave only superficial recognition to the more appropriate argument of double jeopardy.[62] They relied solely on the due process argument even though they were cognizant of the blatant distinctions between *Pearce* and *Wood* concerning due process.[63] After giving recognition to the "logical and persuasive argument" espoused by the First Circuit, the *Wood* court disregarded this logic and persuasiveness with the profound statement, "[w]e simply disagree."[64] Hopefully, such an irrational result will not become pervasive.

D.C.E.

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it must be remembered that this case was considered along with the *Rice* case. There was no double jeopardy issue in *Rice,* therefore, to effectuate the holding the court reached, it was necessary to base it entirely on the due process argument of *Pearce.*

[61] The court did not discuss the unreasonable chill argument because the court found no distinction in the types of rights upon which the *Pearce* and the *Wood* appeals were based. The court assumed the "rights" were the same and concluded that the rule would be the same, therefore a discussion of what might be an unreasonable chill was unnecessary.

[62] The *Wood* and *Rice* cases should have been considered separately, and not as companion cases. Rice was simply retried for the same crime and given an increased punishment, but Wood was retried for a higher degree of crime on his appeal. The double jeopardy argument had merit and should have been more thoroughly pursued in the case of *Wood.* The double jeopardy clause precludes the conviction of a defendant for a higher degree of crime after he has secured a reversal of the conviction of the lower degree. *See* Green v. United States, 355 U.S. 184 (1957). *See also* Annot., 12 A.L.R.3d 978 (1967); Annot., 61 A.L.R.2d 1141 (1958).

[63] The court stated they were cognizant of the *Lemieux* and *Evans* decisions, therefore, they were aware of the distinctions in the types of appeals involved in those cases and the *Pearce* case. However, the court chose not to see the distinction in the "rights" to these appeals and failed to realize that the type of "right" to appeal dictates the amount of chill that would determine if due process had been afforded or denied.

[64] Wood v. Ross, — F.2d —, — (4th Cir. 1970).