OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-173

TITLE MILTON R. WASMAN, Petitioner v. UNITED STATES

PLACE Washington, D. C.

DATE March 20, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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MILTON R. WASMAN, :

Petitioner, :

v. : No. 83-173

UNITED STATES :

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Washington, D.C.

Tuesday, March 20, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:26 o'clock p.m.

APPEARANCES:

JAY R. MOSCOWITZ, ESQ., Miami, Fla.; on behalf of petitioner.

ALAN I. HOROWITZ, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Moskowitz, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JAY R. MOSKOWITZ, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MOSKOWITZ: Thank you, Your Honor.

Mr. Chief Justice, and may it please the Court:

We are here today in another in a line of cases following this Court's decision in North Carolina v. Pearce in 1969 dealing with under what circumstances may a trial judge impose a harsher sentence following retrial and reconviction after a first conviction has been reversed on appeal.

In Pearce this Court announced that double jeopardy does not absolutely bar an enhancement of sentence, but the Court also announced in Pearce that due process requires that when a judge chooses to enhance following a second conviction that vindictiveness on his part must play no part in that enhancement, and further that because a defendant may be fearful when decided whether to take an appeal or not that if he does and gets a new trial the sentence may be enhanced because the judge is vindictive against him, that the apprehension on the part of the defendant

should be taken away.

In order to effectuate those two goals set out in Pearce, this Court set out a prophylactic rule that: one, on resentencing the District judge, the trial judge, must announce on the record his reasons for enhancing the sentence; and, two, that those reasons must be based on objective information of identifiable conduct on the part of the defendant, that conduct occurring subsequent to the first sentencing procedure.

In the case at hand on these facts the defendant's sentence following his second trial and conviction was enhanced not on any conduct that he did, but on an intervening act, that is, a conviction on preexisting conduct that occurred between the first and second sentencing hearings.

I think that in order to best understand the issue I should set out now on a fairly detailed analysis of the procedural process of the two convictions. In 1978, Milton Wasman was indicted in two separate indictments, one dealing with the obtaining of a passport using a false name, and the second indictment charging him with several counts of mail fraud.

In September of 1979 the passport case came up for trial and he was found guilty. At the sentencing hearing after that first trial, the judge, Judge

Roettger, said that he was -- he knew about the other indictment but he was not going to consider the pending indictment in passing sentence upon Wasman, and passed sentence, sentencing him to six months in jail.

QUESTION: Did your client request that kind of consideration from Judge Roettger?

MR. MOSKOWITZ: In the colloquy back and forth -- I didn't represent him in that proceeding, but in the colloquy back and forth, Justice Rehnquist, before Judge Roettger the government made some kind of statement about the pending case. His counsel at the time made a comment about the fact that he wasn't involved in the case. There was some procedural arguing back and forth, discussing back and forth.

Then Judge Roettger made the pronouncement that he was not going to be considering it because he doesn't consider pending indictments. He thinks it's unfair to the defendant. It -- certainly Judge Roettger's comment was in response to a colloquy back and forth. Whether or not there was a specific request don't consider it, it's unclear.

But he certainly did not consider it and the defendant certainly had no objection to him not considering it.

QUESTION: And in your view that was not

improper?

MR. MOSKOWITZ: Improper in what way?

QUESTION: For the judge not to consider it?

MR. MOSKOWITZ: Under Williams v. New York he certainly could have considered it. I think it was, as defense counsel I would ask a judge at a sentencing not to consider a pending indictment because the indictment could go any way.

QUESTION: But you concede that he could have considered it?

MR. MOSKOWITZ: He could have considered it if he had chosen to.

QUESTION: A pending charge or the facts behind the pending charge?

MR. MOSKOWITZ: Well, he could have, yes.

QUESTION: And if he had would this case be a different case?

MR. MOSKOWITZ: This case probably, I am sure, would be a very different case because he certainly -- his basis -- I will get to that in a moment, but his basis for enhancing after the second trial was that I didn't consider it the first time around. Now it's a conviction, now I'm going to consider it.

If he had considered it the first time around, he certainly could not have made the statement at the

second sentencing that he made.

QUESTION: Do you see something illogical about that?

MR. MOSKOWITZ: That he didn't consider it?

QUESTION: That the first time, since it's only a charge, why the sentencing judge will not consider it. Now, after the second trial, it is nc longer just a charge; it is a conviction. Therefore, I will take it into account. Is that logical or illogical?

MR. MOSKOWITZ: It's -- based on the rationale behind Pearce, it's not illogical. Pearce --

QUESTION: It's not?

MR. MOSKOWITZ: It's not illogical. I think that, and I've been asked this question many times in the Eleventh Circuit and other places, the difficulty there is, and what the Eleventh Circuit addressed was, that the defendant is somehow trying to, if you will, according to the Eleventh Circuit language, have his cake and eat it too.

He asks back then, hey, don't consider this pending charge, and now he says you can't consider it. The conduct predated my first sentencing, and if you wanted to consider it you should have done it back then. That's the argument that I've been faced a number

of times.

I think that the problem with that argument, and I'm taking it a little bit out of order now, but I'll address it now, the problem with that argument is that the argument forgets there is another judge waiting in the wings fully able to take that into account, in this case, and that if you will allow me to just develop the facts a little further I'll show you that Judge Davis, the judge in the, what was the mail fraud case and what ended up being a misdemeanor case, did have the opportunity to sentence Wasman on those facts, and in fact Judge Davis announced at the time of sentencing, considered the other case, the Judge Roettger case.

QUESTION: Well, you're saying in effect that the judge only gets one bite at the apple. If the judge who is sentencing the person for the substantive conviction takes the substantive conviction into account, then another judge before whom he is found guilty of another charge can't take into account the alternate substantive conviction because he's already been sentenced on that.

MR. MOSKOWITZ: No. It depends upon the facts. In this particular case --

QUESTION: Well, what, then, is the inference that you want us to draw from saying that Judge Davis

had already taken the mail fraud into consideration. He'd taken it into consideration in sentencing him for the mail fraud, hadn't he?

MR. MOSKOWITZ: That's right. But -- it wasn't a mail fraud. It was a misdemeanor case that was the result of the mail fraud. But Judge Davis considered that. As I said, I was jumping ahead a bit, but --

QUESTION: But that would be true of every single conviction that there ever was, I would think, for which a person was sentenced to anything, that the judge would have taken into consideration the nature of the charges upon which the jury returned a guilty verdict.

MR. MOSKOWITZ: Yes.

QUESTION: And you're saying that that having happened another judge trying him for an independent offense cannot take into consideration the fact that he was convicted of a wholly independent charge in setting the sentence.

MR. MOSKOWITZ: Not at all. Not at all. The difference here is that Pearce sets out that in a situation like this at a second sentencing, when a judge wants to enhance a sentence over that he previously had given, he can't consider conduct that predated the first

sentence.

QUESTION: Well, the Pearce rule may be one thing. But I thought you were arguing that it really -- that the "have your cake and eat it, too" argument didn't make any sense here because Judge Davis had taken into consideration the mail fraud conviction.

MR. MOSKOWITZ: Not at all. I'm sorry if I gave that impression. You know, when I was answering Chief Justice Burger's question, was that if Judge Roettger cannot take it into account the second time and the first time. I'm just saying Judge Davis did take into consideration the conviction.

QUESTION: But that doesn't answer the argument, I think, of whether in the passport violation charge at some point the -- either the pending charge or the conviction for the mail fraud misdemeanor should be considered by the judge sentencing for the passport fraud. To say that the judge sentencing for the misdemeanor took into consideration the misdemeanor is no answer to the other charge.

MR. MOSKOWITZ: No, no. Maybe I'm not making myself clear. What I am suggesting is that when Judge Davis considered it, it answers the question that the defendant is trying to skate through without the mail fraud case ever being considered.

QUESTION: No, I don't read Judge Markey's language in the Court of Appeals as suggesting that the defendant was complaining or that the state was complaining that the mail fraud would never be considered on the substance, but that so far as augmenting is concerned, first it was too early and then it was too late.

And I don't think the fact that Judge Davis considered the charge in sentencing him really is an answer to that.

MR. MOSKOWITZ: Except for the fact --

QUESTION: You're entitled to differ, obviously.

MR. MOSKOWITZ: Except for the fact that under Pearce at the first go-around for Judge Roettger he chose not to consider it, and again I readily concede I think that he was right in choosing not to consider it at that time.

QUESTION: Because it was not --

MR. MOSKOWITZ: Because it had not -- because it had not ripened into a conviction. It was a pending charge.

QUESTION: In other words, he was giving the man the full benefit of the presumption of innocence, wasn't he?

MR. MOSKOWITZ: That's correct. That's correct.

QUESTION: But you then say later on he cannot take the conviction into account when the presumption of innocence has been merged and washed out by the conviction.

MR. MOSKOWITZ: Well, we are talking about in this particular case the language in Pearce and when that conduct occurred. The conduct occurred five or six years earlier. I read Pearce to say that due process requires that a defendant when he decides whether to take an appeal or not should be free of the apprehension that a judge is going to be vindictive against him, and those Court chose to put forth a rule to carry out that belief by saying --

QUESTION: What vindictiveness do you spell out here? Pearce indeed was a state of mind holding, wasn't it -- a state of mind of vindictiveness on the part of the judge?

MR. MOSKOWITZ: Pearce had a two-pronged holding, or two-pronged reason for its test: one, that we want to keep judges from being vindictive; and, two, we want defendants who when choosing to take an appeal should not be fearful of a judge coming back and being vindictive against him.

QUESTION: Where do you see the vindictiveness here?

MR. MOSKOWITZ: I don't think I necessarily have to see the vindictiveness. I think this Court's pointed out in Blackledge v. Perry and other cases that, number one, it's nigh on to impossible for a defendant to ever show in the record that a judge was vindictive against him. I don't think we're ever going to see a case where a judge says I'm going to enhance your sentence because you took it up on appeal and beat me.

QUESTION: So you think that the prophylactic nature of the Pearce rule is such that if at the initial trial the trial judge takes into effect those prior convictions shown on the rap sheet, he's got two, say, he's got two and he takes those into account.

But the judgment is reversed. There is a retrial and he comes to the sentencing phase again and it turns out that he's now got a rap sheet that the first one was just wrong. He's been convicted five times, six times. Must he ignore those other three or four convictions in sentencing the second time?

I would think you would say he has to.

MR. MOSKOWITZ: It depends on --

QUESTION: Well, what could it depend on?

MR. MOSKOWITZ: When the conduct that gave

rise --

QUESTION: Well, the conduct has all happened before -- all those convictions happened before his first conviction?

MR. MOSKOWITZ: Under the prophylactic rule in Pearce, yes.

QUESTION: So he may never, ever then have a sentence at the second trial that takes into account all of what would have been valid considerations at the first; is that --

MR. MOSKOWITZ: That's true, except for the fact that it misses the point that the defendant is not escaping punishment. Other judges who have --

QUESTION: Well, he's escaping the punishment that could have validly been imposed on him at the first trial, except for some other trial error.

MR. MOSKOWITZ: Okay. You're assuming that the rap sheet was incorrect.

QUESTION: Yes. Well, I take it you think the prophylactic --

MR. MOSKOWITZ: The prophylactic -- well --

QUESTION: Forbids at the second trial taking into account things that could have been taken into at the first trial but were erroneously excluded.

MR. MOSKOWITZ: I read Pearce --

QUESTION: Mr. Moskowitz, what is some event occurs after the first trial that's favorable to the defendant, for instance a prior conviction is reversed and set aside by an appellate court and so by the time of the retrial in your situation the sentencing judge after the retrial, can he consider the fact that now there is one less prior conviction?

MR. MOSKOWITZ: I certainly think he could.

QUESTION: It helps the defendant, doesn't it?

MR. MOSKOWITZ: Certainly, certainly.

QUESTION: Well, then why isn't the reverse true, too? Why shouldn't the judge be able to consider it either way?

MR. MOSKOWITZ: Getting back to the reason behind the rule set out in Pearce, the reason, as this Court enunciated in Pearce and in prior -- in subsequent opinions from Pearce was to take fear of vindictivenss out of the defendant's mind when he chooses whether he should take an appeal or not.

QUESTION: Well, he ought to be able to be at peace with the knowledge that whatever happens afterwards the court can consider it, whether it helps him or hurts him -- any event.

MR. MOSKOWITZ: Whatever happens, whatever he does.

QUESTION: In any event.

MR. MOSKOWITZ: The way I read Pearce is essentially it puts the ball, so to speak, in the defendant's lap. The defendant is able after the first conviction to know that if he commits no more bad acts he knows what's going to happen. If he commits some future bad act, he knows what's going to happen, too, and it's going to be just the opposite of what he wants. It puts the ball in his court, so to speak.

QUESTION: Well, of course, literally read in this case what was taken into account was something that happened after his first conviction. Literally read, he pled guilty or nolo to a charge, and that certainly is -- that is not a non-event, is it?

MR. MOSKOWITZ: It certainly is an event. The question is is it conduct on his part.

QUESTION: It is conduct on his part.

MR. MOSKOWITZ: Well, we come right down to the meaning of --

QUESTION: Isn't it? Isn't it?

MR. MOSKOWITZ: We come right down to the meaning of the word "conduct" in Pearce.

QUESTION: But if you read Pearce as trying to set up barriers to vindictiveness, how can you spell out any vindictiveness on the part of the judge here,

possible vindictiveness?

MR. MOSKOWITZ: Well, if you'll -- in the case, in the recent case in this Court of United States v. Goodwin, the Court pointed out how difficult it is to prove vindictiveness. There's all kinds of subconscious motivations on the part of judges, lawyers in going back and doing something again and trying a case again, and it is virtually -- it would be virtually impossible.

I think this Court in Blackledge recognized it is virtually impossible for a defendant to be able to prove actual vindictiveness on the part of a trial judge. I don't think any trial judge is going to say, like I said before, on the record I'm enhancing your sentence because I didn't like you taking the appeal the first time around.

QUESTION: I take it you then would also say Pearce would prevent the trial judge taking into account another conviction that occurred while the case was on appeal, based on conduct that was never known at all until after his first conviction?

MR. MOSKOWITZ: Well --

QUESTION: Based on conduct that occurred prior to his first conviction but nobody'd ever heard of it when he was first convicted. It turns out that he made some statements that led to other indictments.

MR. MOSKOWITZ: Yes, with a qualification to your question. The qualification is that the judge who sentenced him on that other conviction for facts that were unknown has sentenced him and is very able to consider the pending conviction in sentencing and to allow the, in this case for simplicity, to allow Judge Roettger at the second sentencing to consider it again is in essence pyramiding the sentences because the Judge X in the middle has said I am sentencing you on this conduct and also, by the way, you are convicted of obtaining a passport using a false name and I'm considering that in arriving at an appropriate sentence for you.

And then to allow Judge Roettger down the road a piece to say I'm going to enhance your sentence over that which I gave before --

QUESTION: That may be barred by some principle, but not by Pearce.

MR. MOSKOWITZ: Well, I think it's an improper pyramiding.

QUESTION: You're saying in effect that if your client, Mr. Wasman, is convicted of robbery in one court and a false impersonation in another court and the two cases go on pari passu and the jury returns a verdict of conviction on each count on the same day --

let's assume that he was able to go to one court in the morning and one court in the afternoon and the court could schedule it that way -- then neither judge or at least both judges could not take into consideration both the fact of the conviction returned in their court and augment it by taking into consideration the fact that another conviction against the man was returned in another court.

MR. MOSKOWITZ: Either one of them could.

QUESTION: Well, that isn't Pearce, though, is it?

QUESTION: You say they could or they couldn't?

MR. MOSKOWITZ: They could. They certainly could.

QUESTION: Well, then what's your objection? It seems to me your objection here that Judge Davis had already taken into account something doesn't wash.

MR. MOSKOWITZ: Well, when I raised that before, Justice Rehnquist, was in response to the question about his having his cake and eating it, too. I think that in your fact situation that you just posed either or both judge could take into account the other conviction.

In our situation, the argument is well,

Wasman, back the first time before Judge Roettger you say he can't consider, don't consider the pending indictment, and then the second time around you can't consider it because it's subsequent, it's predating the first indictment, and the result of that being, the argument being what the Eleventh Circuit opinion is saying, that Wasman's trying to have his cake and eat it, too. That's not true.

He was before Judge Davis. Judge Davis was able and did consider both convictions.

QUESTION: But the have your cake and eat it, too, argument is that in respect to this particular passport conviction that it shouldn't be allowed a defendant to say first it's too early to consider this charge because it hasn't ripened into a conviction, and then it comes around again now it's too late to consider it because you could have considered it before.

MR. MOSKOWITZ: No, I think that certainly Judge Roettger had a right to consider it the first time around. The second time I'm saying that the -- and, of course, that's basically what we're here for, because I think that there is a split in the circuits as to how to interpret the language "subsequent conduct" as written in Pearce, because the Second and Ninth Circuit interprets the language that if the conduct -- if the,

let's not use the word "conduct" -- if the action of the defendant, if he does something and what he does predates the first sentencing, then, and the judge doesn't consider it, then it's out for all times.

That's what the language of the -- that's the interpretation given to the subsequent conduct language in Pearce, given by the Second Circuit in the Markus case, and the Ninth Circuit in the Williams case. The Eleventh Circuit in Wasman chose to read Pearce and conduct differently, and I would venture to say I believe that's why we're in this courtroom today.

I read Pearce in a line along with the Second and Ninth Circuits, for the reason that I think that the Pearce test was formulated to take this fear of vindictivnees sout of the mind of the defendant and to allow the defendant when he chooses to appeal or not to know that the ball is in his lap.

In this case, taking a look at the facts in this case, all that Wasman essentially did between the time of the first and second sentencing hearings was go home, fold his hands and sit there for a year and a half or two years, except one day go to court and have the mail fraud case reduced to a misdemeanor and have him enter a plea of nolo contendere for that charge, and be sentenced.

That's all he did in the total time period.

QUESTION: But up to that time, the very instant of the nolo plea, he was clothed with the presumption of innocence, wasn't he?

MR. MOSKOWITZ: In the, what was originally the mail fraud case, yes, he was.

QUESTION: And that disappeared somewhat by the nolo plea.

MR. MOSKOWITZ: That's correct. And at the nolo plea Judge Davis asked the government if the facts of the two cases are somewhat -- are intertwined at all, and the government acknowledged that they were intertwined. It's a very intricate fact situation that is, as Judge Roettger once observed, is better than an Ian Fleming novel.

But at the time of the Davis sentence, Davis announced that I am going to -- I understand the facts are interrelated and I know you have Judge Roettger's sentence ahead of you, and then passed sentence upon him.

You asked, Chief Justice Burger, earlier where the vindictiveness may lie, and I answered that question by saying that I don't think you can ever point to vindictiveness, and I didn't --

QUESTION: On the contrary, his position, the

judge's position, that he would not take it into account when it was only a charge, an indictment as distinguished from a conviction, suggests that he wasn't a judge that harbored vindictiveness, does it not?

MR. MOSKOWITZ: At the time, no. His case hadn't gone on appeal yet. I -- reading the -- and it's included in my cert petition, the transcript of the hearing before Judge Roettger when he enhanced the sentence, and reading that, as -- I never in my briefs said I can demonstrate Judge Roettger is vindictive.

I certainly think that what appears to be in the record here is that Judge Roettger was dissatisfied with the sentence imposed by Judge Davis. Judge Davis gave him probation on the misdemeanor case, and enhanced the sentence.

I think there is some kind of a vindictiveness or subconscious vindictiveness running through here. I don't think I -- I cannot. I cannot go to any page in the record and point to a place where Judge Roettger is being vindictive or saying he's being vindictive.

QUESTION: Let me ask this one question. Is your position at all -- would your position be any different if it were a guilty plea rather than a nolo plea in the other case?

MR. MOSKOWITZ: No.

QUESTION: You don't attach any significance to the fact that it was just a nolo plea? I don't think you've argued it so far.

MR. MOSKOWITZ: I don't think it makes that much -- this is more than just a nolo plea. If you read the record, it was a nolo plea also announcing to Judge Davis that it's given under the case of North Carolina v. Alford, saying that's it. I have had enough, said Wasman, it's over.

I don't think -- I think my case is stronger because it's a nolo plea. I don't think a guilty plea would change my argument.

QUESTION: You'd make the same argument for a guilty plea?

MR. MOSKOWITZ: I think the case is --

QUESTION: I asked you a while ago, and you did make the same argument based on a guilty plea.

MR. MOSKOWITZ: Yes. I think my case -- the fact that it was a nolo plea makes it stronger, but I don't think that it would change my ultimate argument.

QUESTION: Or a conviction?

MR. MOSKOWITZ: Or a jury? No, same thing.

I see the white light. I'll reserve a few moments for rebuttal.

QUESTION: Very well. Mr. Horowitz.

ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.

ON BEHALF OF RESPONDENT

MR. HOROWITZ: Thank you, Mr. Chief Justice, and may it please the Court:

I don't want to belabor this discussion that has gone on quite a bit already about the nature of taking into account the intervening conviction here, but I would like to say two things about it.

The main thing, I think, is that this is all quite beside the point. Petitioner has made a lot of whether Judge Roettger really gave an appropriate sentence here because Judge Davis had already taken things into account, the matter was already before Judge Davis, Mr. Wasman is an old man.

The question for the Court is not to review the appropriateness of Judge Roettger's sentence. This is a constitutional case, and the only question is whether the due process clause was violated by the increase of the sentence after retrial.

I'd like to begin by talking a little bit about the factual background here because I think the statements that were made in the record at the two sentencing proceedings pretty clearly indicate that there was no conceivable process violation.

At the first sentencing hearing the government

called the court's attention to this pending indictment on the mail fraud charges. I think it's quite clear there that the defense counsel asked the court not to take that into account. This is on page 26 of the Joint Appendix.

He explained that Mr. Wasman had never had an opportunity to tell his story and connects him with the mail fraud charges, and then he said, I quote, "I respectfully suggest it's not appropriate for the government to be arguing that Mr. Wasman's entitled to some sort of enhanced punishment in this passport case by virtue of the mail fraud indictment."

Judge Was -- excuse me, Judge Roettger agreed with that and said it was his general policy not to take pending charges into account. He also said, and again I quote from the same page: "My theory of sentencing is simply that one can consider prior convictions and judges not only may but should consider prior convictions."

At that point he sentenced petitioner under the split sentence provision of 18 USC 3561 to two years imprisonment, with all but six months of that sentence suspended in favor of three years' probation.

After petitioner succeeded in getting his conviction reversed on appeal, he came back for

resentencing after his second conviction before Judge Roettger. And at that time, of course, a conviction had been entered on the misdemeanor that arose out of the mail fraud charges.

At that hearing Judge Roettger focused on this intervening conviction and made it clear that that was his reason for changing the sentence. He said -- this is at page A42 of the appendix to the petition: "At that time he came before me with two convictions. The last time he came before me with one conviction."

And the court explained that it considered the conviction to which Mr. Wasman had pled during the intervening time to be a more serious offense and that it warranted a higher sentence. At this time he sentenced him to two years imprisonment.

And as we pointed out in our brief, because of the provisions of 18 USC 3651 he could not have simply sentenced him to eight months imprisonment, impose the same split sentence that he had before, just increasing the imprisonment time a little bit, because 3651 has a six-month maximum on the amount of imprisonment time that may be imposed where there's a split sentence.

We suggest that nothing in this history suggests anything more than the normal sentencing decisions by a judge. On its face there's no hint of a

violation of the due process clause.

Petitioner's claim that there is a due process violation rests entirely on North Carolina v. Pearce. Pearce did recognize a due process limitation on resentencing after appeal, but it certainly did not impose an absolute ban on a higher sentence.

Quite the contrary, the Court explicitly stated there at page 723 that a trial judge is not constitutionally precluded from imposing a higher sentence after a retrial in light of events subsequent to the first trial which shed new light on the sentencing decision.

QUESTION: The term was "events".

MR. HOROWITZ: Well, I was going to get to that a little bit later, but there are two separate statements in Pearce. Once the Court uses the term "events" subsequent to the first trial, and at a later point it refers to conduct on behalf of the defendant. So there is certainly some ambiguity as to exactly what the Court meant.

What Pearce did hold is that it violates due process to impose a greater sentence in retaliation for the defendant's exercise of his right to appeal. To protect against the realistic possibilit of such a vindictive motivation, whether conscious or, more

likely, a subconscious motivation, and to avoid unfairly chilling the right to appeal by assuring defendants that such vindictive resentencing will not be allowed, the Court in Pearce set for a prophylactic rule prohibiting such a sentence increase unless justified by specific reasons placed on the record by the sentencing judge.

Now it's clear beyond doubt from Pearce and from the other due process cases that have followed it that the concern there is with preventing actual vindictiveness, in this context an increased sentence that is imposed actually in retaliation for the taking of an appeal.

This danger arises because of the human element that is involved in resentencing. It is possible and difficult to determine from the record that a judge will in fact harbor some vindictive motivation, perhaps subconsciously. If sentences were imposed by machines under some formula, there would be no need for the North Carolina v. Pearce rule.

And in fact the Court held that in kind of an analogous situation in Chaffin v. Stynchcombe, where the sentence the second time around was to be imposed by a jury that did not know what the first sentence was. There the Court realized there was no possibility that the jury would have a vindictive motivation, not even

knowing what the first sentence was, and it held that the Pearce rule did not apply.

Now --

QUESTION: Even though the -- after that decision defendants might have a realistic fear of being sentenced to a longer sentence after appeal.

MR. HOROWITZ: That's right. So the so-called chilling effect that Pearce is concerned with is an unfair chilling effect that defendants may be worried that they're going to get an unfair higher sentence later, a vindictive higher sentence.

But there is nothing unfair about them taking the risk of getting a valid higher sentence later, and Pearce and the due process clause does not protect against that possibility.

I won't read it again here, but I think this is stated quite clearly by the Court in Chaffin at page 25 and the three printed pages 16 to 17 of our brief, the fact that in Pearce the possibility of a higher sentence was recognized and accepted as as legitimate concomitant of the retrial process. Thus, when a sentence is increased for valid, non-vindictive reasons, no Pearce problem is presented.

As the Court explained in Goodwin, the rule of Pearce simply imposes a presumption of vindictiveness.

This alleviates the practical difficulty of proving motivation for the defendant, but it is not an absolute rule. When the circumstances of a particular case clearly dispell the realistic possibility of vindictiveness by demonstrating a valid reason for the increase, there should be no bar to the imposition of a higher sentence on retrial.

Now petitioner's contention here is that the only reason that can validly be used to impose a higher sentence on retrial is one that is based on conduct on the part of the defendant that occurs subsequent to the first trial.

Now putting aside for one moment what the opinion in Pearce has to say about that, I would like to point out that there's been no explanation as to why the due process should require such a rule. I think as we fully explained our brief this sort of distinction simply makes no sense with respect to the policies that underlie Pearce and the overall thrust of the decision.

If this sort of distinction does apply, it would have quite undesirable consequences in the sentencing process without advancing the policies of the due process clause one iota. And I'd like to give a few examples of that.

One is the example that is given in this case,

where there is an intervening conviction -- excuse me -- after the first sentence was imposed by the judge. Now he has additional information before him that suggests that a defendant perhaps deserves a higher sentence. Under the rule suggested by petitioner, the judge is not allowed to take this into account.

This is highlighted in this case and perhaps more egregiously in the Williams case in the Ninth Circuit, if you look at the facts of that case, a case where the Court found the conduct language in Pearce to be controlling. The Court was unable on the resentencing to take into account what I believe was a murder, state murder conviction that occurred later.

Another example is the hypothetical suggested by Justice White, where in fact nothing happens after the first trial, but more information comes to light that wasn't available the first time around. Then we learn that the defendant has quite a long rap sheet and really is a much more serious offender than was thought before.

And finally I think an important situation to be taken into account and one that has come before this Court before in Michigan v. Payne -- the case where the defendant pleads guilty and is sentenced on the basis of a guilty plea. The Court has recognized many times that

judges usually impose leniency when a guilty plea is entered.

Now sometimes the defendant may collaterally attack the validity of his guilty plea and ultimately go to trial a second time if he succeeds in that attack. Now it just simply doesn't make any sense that the judge should be restricted to the sentence that he imposed the first time, the lenient sentence that he imposed on the basis of the guilty plea, when the defendant ends up going to trial.

Now to digress for a moment as to exactly what the opinion in Pearce says, I think there are three different basic kinds of situations here. One is where there's actual conduct, bad acts, by the defendant after the first trial. The petitioner himself agrees that a higher sentence on retrial would be permissible if based on such conduct.

The second class is where some event takes place after trial. That would be this case, I believe, where the conviction has been entered but in fact there was no bad act committed by the defendant during that time.

It's our position, as we explain in our brief, that the Court in Pearce contemplated that an event such as that, such as the one in this case, would equally be

permissible to be used by the judge as a basis for increasing the sentence at the second trial. Petitioner disagrees with that and focuses only on this one isolated statement at the end of the opinion.

But, as I say, our position is that everything in Pearce is fully consistent with affirming the Court of Appeals here.

Now there is a third class of cases, the hypothetical suggested by Justice White, where there's really no event after the first trial ends, but there is new information that comes to light that would seem to justify a higher sentence.

Now in our view such information should also be grounds for imposing a higher sentence if it in fact justifies the higher sentence. I think a reading of the opinion in Pearce suggests that in fact the Court did not contemplate that such information would be available and we suggested in our brief that that is dictum and that the Court ought to reconsider it here.

We're not really asking the Court to come up with a rule one way or the other, but more or less to back away from what it said before and leave these kind of questions to be decided by the lower courts.

QUESTION: Well, logically it's events and information not previously available that must have been

in the minds of the Court in Pearce.

MR. HOROWITZ: Well, I --

QUESTION: It wasn't intended to be a mechanical rule where you just touch a computer. If the court didn't have the information at one point but had information, adverse information, that was relevant to a sentence, Pearce -- I do not read Pearce as precluding the use of that.

MR. HOROWITZ: Well, I hope you're right, Mr. Chief Justice. All I was saying is that there is certainly some of the language in the opinion of Pearce suggests that if no event occurs --

QUESTION: Some each way. There's some language each way in that respect.

MR. HOROWITZ: Well, there's language each way as far as the conduct of the defendant. But as far as the requirement that something occur after the first trial, there is nothing in the opinion in Pearce that would authorize a higher sentence at that point.

We think that in all these situations --

QUESTION: This third situation you're really asking just for an advisory opinion, I take it.

MR. HOROWITZ: We're not really asking for an advisory opinion. What we're asking for is for the Court to back away from its previous advisory opinion

and to say that this is --

QUESTION: You're saying that our prior advice was unreliable?

MR. HOROWITZ: Unreliable, not necessarily wrong. I'm not saying it's wrong, just that it's an open question at this point.

QUESTION: What you really want us to do is construe Pearce and the cases that have come since then as not providing for any relief for the petitioner here; isn't that the net of it?

MR. HOROWITZ: Well, certainly in this case I think under any reading of Pearce the petitioner is not entitled to relief here. It's just inconceivable that on the facts here there was any vindictiveness. You could hardly have a stronger case for dispelling the vindictiveness in this case.

Unless there are any further questions --

QUESTION: Do you have anything further, Mr. Moskowitz?

ORAL ARGUMENT OF JAY R. MOSKOWITZ, ESQ.

ON BEHALF OF PETITIONER - REBUTTAL

MR. MOSKOWITZ: A couple of comments, Your Honor.

Not to belabor the point, but I think that Pearce talks not just of actual vindictiveness. It also

talks about a defendant's state of mind following his first conviction, a state of mind at the time when he has to make a determination as to whether he should take an appeal or not.

Pearce says, Pearce states and in Blackledge v. Perry it's expounded upon, that fear of vindictiveness is as important as removing vindictiveness itself, and that it is not always possible and not always required that a defendant actually prove vindictiveness in order to succeed.

One of the things -- Mr. Horowitz laid out certain hypotheticals and one I just want to let the Court know that I'm in complete agreement with, and that is his guilty plea situation, that a man enters a guilty plea, withdraws it, then goes to trial and is convicted.

In-between the time of his first sentencing on the guilty plea and the second sentencing on the conviction, something else happens. I find the guilty plea situation withdrawn or overturned on some kind of an appeal to be nothing more than the withdrawal of a plea bargain, and certainly a judge who may have been lenient the first time around can give whatever sentence the judge thinks appropriate the second time around.

That really, I don't think, falls within the

line that I've been arguing.

Mr. Horowitz also commented about on the Ninth Circuit case the Williams case about the man convict -- the man who was -- the intervening act was a murder. I am not here standing here saying that my client or that Williams or that Markus or anybody else should escape punishment on the murder, on the misdemeanor false certificates case or any other case.

I'm just saying that under the guidance and guidelines of Pearce the punishment should not be enhanced based on previous conduct.

It seems that we're really talking here about a fortuitous event in the Wasman situation, the fortuitous event being that Wasman resolved the mail fraud case prior to the second trial and second conviction in the passport case. Had the mail fraud case, which was resolved in a negotiated settlement, have occurred subsequent to the retrial and reconviction in the passport case, we obviously would not be standing here today, because Judge Roettger obviously could not have and would not have taken it into account the second time around.

And I think that that fortuitous events should not dictate how we rule, and I ask the Court to not send the case back but just send the case back for

resentencing in this case.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 3:10 o'clock p.m., the case was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#83-173 - MILTON R. WASMAN, Petitioner v. UNITED STATES

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