HABEAS CORPUS: UNCONSTITUTIONAL INCREASE IN SENTENCE UPON RETRIAL AND DENIAL OF CREDIT FOR TIME SERVED: "JAWS OF THE SAME VICE"

PROSPECTIVE CRIMINAL appellants are frequently confronted with the risk of receiving harsher punishment after a subsequent retrial for the same offense, either through loss of credit for time spent in prison or by the imposition of a longer sentence upon reconviction.[1] While there has been little evidence of change to resolve the dilemma of those who desire to prosecute an appeal,[2] the inherent unfairness of these practices[3] and their effectiveness in discouraging meretorious as well as frivolous appeals[4] have recently prompted three types of constitutional challenge to their employment by state courts. First, it has been argued that to increase the sentence of a reconvicted defendant constitutes multiple punishment in violation of his immunity from double jeopardy.[5] Second, such practices have been alleged to involve placing unconstitutional conditions upon the right to a fair trial guaranteed by the due process clause of the fourteenth amendment.[6] Finally, it is possible to argue that penalizing a defendant simply because he sought and received a new trial

[1] See, *e.g.*, King v. United States, 98 F.2d 291 (D.C. Cir. 1938); McDowell v. State, 225 Ind. 495, 76 N.E.2d 249 (1947); State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964), *cert. denied*, 379 U.S. 1005 (1965). See Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws*, 35 MINN. L. REV. 239 (1951); Note, 1965 DUKE L.J. 395.

In addition to denial of credit for time served or imposition of a longer sentence, a defendant may be more harshly punished by denial of credit for "gain time" for purposes of parole eligibility. See note 13 *infra*.

[2] *But see* Hill v. Holman, 255 F. Supp. 924 (M.D. Ala. 1966); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677 (1963); State v. Wolf, 46 N.J. 301, 216 A.2d 586 (1966).

[3] See, *e.g.*, Hill v. Holman, *supra* note 2; Lewis v. Commonwealth, 329 Mass. 445, 447-48, 108 N.E.2d 922, 923 (1952); Stonebreaker v. Smyth, 187 Va. 250, 46 S.E.2d 406 (1948).

[4] See, *e.g.*, Patton v. North Carolina, 256 F. Supp. 225, 231-32 n.7 (W.D.N.C. 1966); Brief for Appellant, pp. 4-5, State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964), *cert. denied*, 379 U.S. 1005 (1965); Van Alstyne, *In Gideon's Wake: Harsher Sentencing and the Successful Criminal Appellant*, 74 YALE L.J. 606, 619, 620 (1965).

[5] People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677 (1963); Van Alstyne, *supra* note 4, at 623-36. *But see* State v. Wolf, 46 N.J. 301, 216 A.2d 586 (1966).

[6] United States *ex rel.* Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965); People v. Henderson, *supra* note 5; Van Alstyne, *supra* note 4, at 613-23.

The United States Supreme Court has indirectly condemned the placing of *unreasonable* conditions on appeal procedures. See Fay v. Noia, 372 U.S. 391, 439-40 (1963).

subjects him to arbitrary and unreasonable treatment in violation of the due process and equal protection clauses of the fourteenth amendment.[7] Against this background, the United States District Court for the Western District of North Carolina in *Patton v. North Carolina*[8] employed a novel variation on a constitutional theme to strike down on federal constitutional grounds the practices of denying credit and increasing the sentences of retried and reconvicted appellants.[9]

Eddie Patton had served nearly five years of a twenty-year sentence for armed robbery[10] when he won a new trial in the aftermath of *Gideon v. Wainwright*.[11] Reconvicted after a second trial, Patton received a twenty-five year sentence which was reduced to twenty years in deference to the time he had already served in prison.[12] Thereupon, he petitioned the federal district court for a writ of habeas corpus; a writ was granted in order to review the constitutional challenge to the form of Patton's sentence which had effectively denied him credit for time served as well as the parole credits earned during his initial imprisonment.[13] Although the

[7] Van Alstyne, *supra* note 4, at 612; Whalen, *supra* note 1, at 249-52.

[8] 256 F. Supp. 225 (W.D.N.C. 1966).

[9] Federal constitutional grounds were invoked in Hill v. Holman, 255 F. Supp. 924 (M.D. Ala. 1966), to prohibit denial of credit for time served under an invalid conviction and in United States v. Walker, 346 F.2d 428 (4th Cir. 1965), to vacate a harsher sentence in a federal proceeding. The *Patton* court was the first, however, to utilize constitutional limitations to proscribe the imposition of increased sentences after a second trial in a state criminal proceeding.

[10] Patton's conviction was pursuant to N.C. GEN. STAT. § 14-87 (1953).

[11] 372 U.S. 335 (1963). Patton utilized North Carolina's Post-Conviction Hearing Act, N.C. GEN. STAT. §§ 15-217 to -222 (1965), a procedure in lieu of state habeas corpus proceedings, to procure a new trial.

[12] The transcript of the sentencing proceedings at the conclusion of the second trial reads as follows:

"'COURT: Before I announce punishment, I will take into account the fact that he has served four years, or nearly five years.

"'COURT: I am going to give you—I would give you five more years than what I am giving you, but I am allowing you credit for the time that you have served. Judgment of the court is that the defendant be imprisoned in the State's prison for a term of 20 years . . . .'" 256 F. Supp. at 227.

[13] N.C. GEN. STAT. § 148-58 (1964) provides that a prisoner is automatically *eligible* for parole after serving one-fourth of his sentence. Having begun serving his original sentence in October 1960, Patton would have been eligible for parole in October 1965. However, he was released from the burden of that sentence in November 1964 when a new trial was ordered. Under the second sentence, which began anew in February 1965, Patton would have become eligible for parole in February 1970. Thus, while the court purported to give him credit for time served, the failure of the second sentence to relate back to the time Patton began serving the first denied him any meaningful credit for that time served. Furthermore, the court's crediting Patton's time against an *increased* sentence made the credit all the more illusory.

petitioner proffered double jeopardy[14] and unconstitutional conditions[15] arguments for the invalidation of the second sentence, the court held that imposition of a harsher penalty upon a successful appellant in the absence of a "rational predicate" in the record of the second trial justifying such action presumptively subjects him to arbitrary and unreasonable conduct in violation of the due process and equal protection clauses of the fourteenth amendment.[16]

In most jurisdictions, the state's opportunity to alter a sentence expires when the defendant is committed to incarceration under the sentence originally imposed.[17] Thereafter, the results of the first trial can be modified only if the defendant obtains a new trial.[18] When a new trial is awarded, a majority of courts justify an increased sentence or denial of credit by employment of a "waiver"[19]

The failure of Patton's second sentence to relate back to the date of the imposition of his first sentence also served to defer his ultimate release date. Under his first sentence, Patton would have been free in November 1980. Under his second sentence, his release date would have been February 1985. It is important to note that if only Patton's ultimate release date had been affected by the operation of his second sentence, the District Court could not have assumed habeas jurisdiction since he would not have been illegally detained until the release date under his original sentence has passed. *Cf.* Palumbo v. New Jersey, 334 F.2d 524 (3d Cir. 1964); Gailes v. Yeager, 324 F.2d 630 (3d Cir. 1963). The Fourth Circuit has recently held, however, that deferral of parole eligibility satisfies the jurisdictional requirement of illegal custody for federal habeas corpus proceedings. Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965), 1966 DUKE L.J. 588.

[14] Memorandum for Petitioner, pp. 21-26.

[15] *Id.* at pp. 5-21.

[16] 256 F. Supp. at 234-36. The court adopted, in the alternative, a modified version of petitioner's argument that the "imposition of a harsher penalty (whether by denial of credit for time served or by increased sentence) *without there being contained in the record any facts tending to rationally support the imposition of such a penalty* inhibits the right to petition for a new trial and unconstitutionally conditions that right." *Id.* at 236. (Emphasis added to indicate a manifestation of the court's novel "rational predicate" notion discussed at notes 41, 45-46 *infra*.)

It is interesting to note in passing that the court amended its original order, that Patton's sentence be deemed to have begun on the date of his original incarceration, to accord with the traditional procedure of providing for the release of the successful petitioner. 256 F. Supp. at 237 & n.15.

[17] See, *e.g.*, Hickman v. Fenton, 120 Neb. 66, 231 N.W. 510 (1930); see cases collected in Annot., 168 A.L.R. 706 (1947).

In North Carolina it is clear that the sentencing court does not have the power to alter a sentence once the term of court has expired. See State v. Godwin, 210 N.C. 447, 187 S.E. 560 (1937). It is not certain, however, whether the sentence may be altered *within* the term of court after the defendant has been committed to incarceration pursuant to his original sentence. See State v. Lewis, 226 N.C. 249, 37 S.E.2d 691 (1946); State v. Godwin, *supra*.

[18] *E.g.*, D'Alessandro v. Tippins, 98 Fla. 853, 124 So. 455 (1929); State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964), *cert. denied*, 379 U.S. 1005 (1965); State *ex rel.* Conway v. Hughes, 62 S.D. 579, 255 N.W. 800 (1934).

[19] According to the "waiver" theory, a defendant's request for a new trial is

or "nullity"[20] rationale. However, the *Patton* court dismissed North Carolina's "waiver" theory as a mere fictive device to justify a questionable practice.[21] A few courts proscribe the imposition of a greater second sentence on the theory that the first sentence must be presumed to be proper,[22] while others require that credit for time served be given in order to avoid intolerable injustice.[23]

Sentencing a criminal defendant after a second trial for the same offense involves the accommodation of various interests. On the one hand, the state has an interest in insuring that the defendant receives a sentence which will promote such goals as the deterrence of criminal acts and the rehabilitation of those convicted.[24] The defendant, on the other hand, has the right to demand a fair trial and a sentence based on rational, as opposed to arbitrary or unreasonable, grounds.[25] These interests may conflict when the state seeks to increase[26] what may be thought to have been an unduly

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deemed a consent to the expunging of the record and effects of the first trial and the acceptance of the hazards of harsher punishment along with the benefits of the new trial. Trono v. United States, 199 U.S. 521, 533-34 (1905); State v. Terreso, 56 Kan. 126, 42 Pac. 354 (1895); see Note, 1965 DUKE L.J. 395, 396. North Carolina's waiver theory was recently affirmed in State v. White, *supra* note 18: "[I]n seeking and obtaining a new trial [the appellant] must be deemed to have consented to a wiping out of all the consequences of the first trial." 262 N.C. at 56, 136 S.E.2d at 208.

The effect of a trial de novo in North Carolina is apparently to preclude the possibility of a *nunc pro tunc* operation of the sentence levied upon reconviction of the defendant. Support for this proposition is found in the *Patton* court's assumption of jurisdiction, see note 13 *supra*, and in the form of the original order, 256 F. Supp. at 237. See Short v. United States, 344 F.2d 550, 554 (D.C. Cir. 1965).

[20] The "nullity" theory posits that the first trial, because it is void of legal effect after reversal of the conviction, can impose no limitation upon the action taken by a court in a second trial for the same offense. Minto v. State, 9 Ala. App. 95, 64 So. 369 (1913); Hobbs v. State, 231 Md. 533, 191 A.2d 238, *cert. denied*, 375 U.S. 914 (1963). See generally Whalen, *supra* note 1, at 240-44.

[21] 256 F. Supp. at 232, 236; *accord*, United States v. Walker, 346 F.2d 428, 431 (4th Cir. 1966).

[22] *E.g.*, United States v. Castner, 3 U.S.C.M.A. 466, 13 C.M.R. 22 (1953).

[23] State v. Nelson, 160 Fla. 744, 36 So. 2d 427 (1948); Lewis v. Commonwealth, 329 Mass. 445, 447-48, 108 N.E.2d 922, 923 (1952); *Ex parte* Williams, 63 Okla. Crim. 395, 75 P.2d 904 (1938); Stonebreaker v. Smyth, 187 Va. 250, 46 S.E.2d 406 (1948); see cases collected in Annot., 35 A.L.R.2d 1283 (1954).

The North Carolina Supreme Court has required that credit be given where the second sentence, when added to time served, exceeded the statutory maximum sentence for the offense. State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965).

[24] See, *e.g.*, Williams v. New York, 337 U.S. 241, *rehearing denied*, 337 U.S. 961, *rehearing denied*, 338 U.S. 841 (1949); Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465 (1946); State *ex rel.* Schock v. Barnett, 42 Wash. 2d 929, 259 P.2d 404 (1953); RUBIN, THE LAW OF CRIMINAL CORRECTION 646-72 (1963).

[25] See, *e.g.*, State v. Mitchell, 77 Idaho 115, 289 P.2d 315 (1955); People v. Guiden, 5 App. Div. 2d 975, 172 N.Y.S.2d 640 (1958); *cf.* United States v. Boyce, 352 F.2d 786 (4th Cir. 1965); United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

[26] As Patton's situation illustrates, this "increase" may take either of two, or

lenient sentence and the defendant protests that his punishment is being aggravated solely as a penalty for having sought to overturn his original conviction.[27] Any procedure which allows the alteration of sentence after a second trial must confront the problem of achieving a workable balance between the interests of the state and the defendant.

While it is clear that punishing a defendant simply for prosecuting an appeal or seeking a new trial is violative of due process and equal protection of the laws,[28] attempts to establish that a defendant has been so punished have proved singularly ineffective in light of the extreme difficulty of proving improper motivation on the part of the trial judge.[29] Aware, however, of the probability that the petitioner in the instant case had indeed been more harshly penalized because he had sought a new trial[30] and recognizing the illusory nature of any relief necessitating a demonstration of the trial judge's prejudicial attitude,[31] the *Patton* court surmounted the evidentiary problem by introducing a presumption that the first sentence was proper.[32] By isolating and emphasizing the propriety of the *first* sentence and that sentence alone, any deviation from the standard set by this initial sentence becomes immediately suspect. If, therefore, the punishment imposed after retrial is greater than that which was handed down after the first trial, the second trial judge is *presumed* to have acted arbitrarily in deviating from *the* proper standard unless factors (that is, "rational predicates") appear in the

both, forms: denial of credit and/or a longer second sentence. The effect of either is to increase the punishment levied on the defendant. See note 13 *supra*.

[27] See 256 F. Supp. at 231 n.7; State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964), *cert. denied*, 379 U.S. 1005 (1965).

[28] *E.g.*, State v. Patton, 221 N.C. 117, 19 S.E.2d 142 (1942); *cf.* United States v. Boyce, 352 F.2d 786 (4th Cir. 1965); United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

[29] In State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964), *cert. denied*, 379 U.S. 1005 (1965), for example, the North Carolina Supreme Court observed that if nothing in the record of the defendant's trial indicates that a harsher sentence was given as a penalty for seeking a new trial, a case of judicial arbitrariness is not made out. Thus, it is clear that where the record is silent, the defendant must produce evidence proving that he has been unfairly treated. *Cf.* United States *ex rel.* Russell v. Commonwealth, 99 F. Supp. 218 (W.D. Pa. 1951) (lighter sentence to co-defendant); State v. Douglas, 87 Ariz. 182, 349 P.2d 622 (1960) (denial of probation). See generally Comment, *The Right to Non-Discriminatory Application of the Criminal Law*, 61 COLUM. L. REV. 1103 (1961).

[30] 256 F. Supp. at 232, 234.

[31] "To put upon the prisoner the burden of proving improper trial judge motivation is like granting him the opportunity to move Parnassus with a spoon." *Id.* at 235.

[32] *Ibid.*

record of the second trial upon which it might be rationally inferred that a harsher punishment could have been based.[33]

In addition to a rebuttable presumption that the second trial judge's imposition of a harsher sentence was an arbitrary act, there is language in the *Patton* opinion which indicates a strong suspicion of improper motivation on the part of trial judges.[34] That is to say, there is a virtual assumption that a second trial judge who gives a harsher punishment does so as a penalty for the defendant's having sought a new trial. Both of these assumptions—that the second trial judge acted arbitrarily or that he was impelled by improper motives —involve a curious inversion of the normal presumption that trial judges are properly motivated.[35] Nevertheless, the emphasis upon the trial judge's motivation is indicated by two cases cited by the *Patton* court for its holding. In one, *United States v. Wiley*,[36] involving the imposition of a longer sentence on an accessory who had pleaded not guilty than was imposed upon the principal who had pleaded guilty, the Seventh Circuit stated that it was impermissible to impose a harsher punishment on a defendant merely because he had requested a trial.[37] Likewise, in *United States v. Boyce*,[38] where a defendant received a greater sentence on retrial, the Fourth Circuit found the longer sentence to be the result of the consolidation of several charges against the defendant but was care-

[33] "Arbitrariness" in the present context refers to an increase in sentence which is imposed without an *apparent* rational basis for doing so. The key to the argument is the disparity in weight accorded to the first as opposed to the succeeding sentences.

The presumption that the first sentence was proper rests upon the notion that the first judge was equally well acquainted with the facts relevant to the sentencing of the defendant and diligently exercised his discretion on the basis of those facts. This presumption has been reversed by the *Patton* court in the case of the second trial judge, however, for unless *the state* demonstrates a rational basis in the record for an increased sentence, the second sentence will be held to be improper and to have been arbitrarily imposed. If, however, the sanctity of the first sentence is based upon the traditional discretion of the sentencing judge (see, *e.g.*, George, *Sentencing Mcthods and Techniques in the United States*, Fed. Prob., June 1962, p. 33; Kaufman, *Sentencing: The Judge's Problem*, Fed. Prob., March 1960, p. 3), then it is unclear why the same theory does not also underlie the authority of the second trial judge.

[34] 256 F. Supp. at 234-35. The court stated that the "corollary of that proposition [that nothing in the record of the second trial suggests improper motivation] is that . . . there is nothing in the record to suggest any other reason for the imposition of heavier punishment." *Id.* at 235.

[35] See, *e.g.*, Nichols v. United States, 106 Fed. 672 (8th Cir. 1901); Note, *Appellate Review of Sentencing Procedure*, 74 YALE L.J. 379 (1964).

[36] 278 F.2d 500 (7th Cir. 1960).

[37] *Id.* at 504.

[38] 352 F.2d 786 (4th Cir. 1965).

ful to admonish that "if it had been the intent of the trial judge to dissuade the exercise of the right of appeal we would be quick to condemn the practice . . . ."[39] While neither court expressly articulated constitutional bases for its decision, it is nevertheless clear that the operative factors involved were judicial *intent* to penalize the defendants *for having sought trials of their cases.* Cited in the *Patton* opinion, these cases indicate the preoccupation of the court with the possibility that the petitioner had been subjected to the operation of improper motives.[40]

In placing the burden to prove lack of arbitrariness on the state, the court both improved the lot of prisoners pursuing new trials and accommodated the state's interest in justifiably increasing sentences. Of considerable significance, however, is the fact that the state must set forth specific justificatory reasons for an increased sentence. That is to say, the state may not rebut the presumption of arbitrariness with proof that the judge was *not* arbitrarily motivated but must assume the burden of proving affirmatively that the increase was based on rational grounds relevant to the imposition of sentence.[41] Nevertheless, the eminent reasonableness of placing such a burden on that party having the best access to the relevant evidence is ample justification for this procedure.[42] Placing the burden of proof on the state is also supported by the consideration that the second sentence superseded a sentence rendered in a trial

[39] *Id.* at 787.

[40] The actual basis of the court's holding, as opposed to its preoccupation, is not entirely clear. There is, of course, no alternative to the conclusion that the *Patton* court found the petitioner to have been treated arbitrarily in an unconstitutional sense, for otherwise the district court would have been powerless to issue his writ. See 28 U.S.C. § 2241 (c) (3) (1964). However, it is unnecessary to a finding of arbitrary treatment that the court actually impute base motives to the second trial judge. Compare notes 28-35 *supra* and accompanying text. In fact, the court expressly disavowed such an intention, 256 F. Supp. at 236, although the disclaimer appeared in the section of the opinion dealing with unconstitutional conditions.

[41] In the typical case involving discriminatory utilization of an otherwise valid procedure, the challenger's proof of discrimination could be rebutted by evidence showing the absence of improper motivation. See, *e.g.,* Patton v. Mississippi, 332 U.S. 463, 466 (1947). The requirement suggested by the court in the instant case is that the presumption against the second sentence can be rebutted only by proving an independent, affirmative fact, namely, that the second sentence was rationally imposed. The effect, then, of the court's holding is to place the complete burden of *proof* on the state, rather than simply the burden of going forward with the evidence.

[42] 256 F. Supp. at 235; *accord,* Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189 (4th Cir. 1966).

which afforded the state a more than adequate opportunity to pursue its interest.[43]

Perhaps the most troublesome legacy arising from the *Patton* decision concerns the application and interpretation of the "rational predicate" notion. In the first instance this concept represents a half-way measure designed to accommodate the interests of both the states and criminal appellants by taking a position between the well-defined extremes of no federal regulation of harsher punishment and the position of some commentators[44] that an absolute prohibition against such punishment be enforced. As such, however, the "rational predicate" is not capable of easy identification. Indeed, the *Patton* court did not set forth any guidelines in this area, although it did offer two examples of "rational predicates," namely, misrepresentation by the defendant to the first court as to his past criminal record and demonstration during service of the defendant's first sentence that he cannot be rehabilitated within the term of his original sentence.[45]

A further difficulty with the *Patton* decision lies in its failure fully to reach the problem which confronted the court. Although the necessity of the existence of "rational predicates" in the record of the second trial to support an increased sentence insures that a defendant will not be penalized for seeking a new trial[46] and although the court's examples[47] allow a prospective appellant to pre-

[43] At his first trial, as an illiterate, indigent defendant without counsel, see note 11 *supra* and accompanying text, the petitioner was virtually defenseless.

[44] See, *e.g.*, Van Alstyne, *supra* note 3, at 611.

[45] As a practical matter, misrepresentation to the court may rarely occur since the presentencing conversation between judge and defendant is often not included in the trial record. Thus, it will often be impossible to determine whether or not the defendant misled the first judge.

Furthermore, it is arguable that capacity for rehabilitation is more properly a consideration for the parole agency than for the court, see MODEL PENAL CODE § 305.13, comment (Tent. Draft No. 5, 1956).

[46] The rational predicate concept does not reach the problem of the trial judge whose motives consist at least in part of a desire to penalize a particular defendant who has received a new trial or to discourage other prisoners from requesting reconsideration of their cases. However, the necessity that a rational predicate be found in the record does serve to insure that an increased sentence is imposed on a reasonable basis. Furthermore, the possibility of misapplication or evasion of the standards laid down in *Patton* is eliminated by the requirement of an evidentiary hearing in the course of habeas corpus proceedings as imposed under Townsend v. Sain, 372 U.S. 293 (1963). See 256 F. Supp. at 234.

The rational predicate approach may not fully meet the unconstitutional conditions challenge to harsher punishment. See notes 48-51 *infra* and accompanying text.

[47] See text accompanying note 45 *supra*.

dict the possibility of his receiving a greater sentence if reconvicted, the fact remains that in many jurisdictions the state's opportunity to modify sentences occurs only in the context of a new trial for the same offense. Thus, even though a prisoner may be said to deserve a greater sentence, the exercise of his constitutional right to a fair trial is conditioned and inhibited by the possibility of an increased sentence. Since reasonable restrictions may be placed on the exercise of constitutional rights,[48] the crucial question is whether, in a case such as Patton's, it is reasonable to allow the state to hold out the possibility of harsher punishment upon reconviction. Because alternative means of correcting sentences are available to the state,[49] it has been urged that harsher punishment upon reconviction constitutes an unreasonable method of sentence revision.[50] One court has indicated that the complete vindication of governmental interests should be foreclosed in resentencing when that vindication infringes upon the defendant's constitutional rights.[51]

Moreover, it is arguable that the "rational predicate" concept leaves harsher sentencing vulnerable to an equal protection challenge. If it be assumed that the state's purpose in imposing increased sentences is pursuant to a valid interest in correcting unduly lenient

[48] See, *e.g.*, Adler v. Board of Educ., 342 U.S. 485, 492-93 (1952); Garner v. Board of Pub. Works, 341 U.S. 716, 720-21 (1951).

[49] See Note, 69 YALE L.J. 1453 (1960); CONNECTICUT GOVERNOR'S PRISON STUDY COMM., FIRST INTERIM REPORT (1956).

[50] See Van Alstyne, *supra* note 4, at 621.

[51] United States v. Walker, 346 F.2d 428 (4th Cir. 1965). In *Walker*, the defendant received a tentative sentence of five years under 18 U.S.C. § 4208(b) (1964). After receiving a Bureau of Prisons report, the district court reduced the sentence to three years. Upon the ground that his absence from the imposition of the three-year sentence had rendered that sentence improper, Walker won a hearing for resentencing, at which the imposition of any sentence was suspended and Walker was placed on probation for five years. Walker thereafter violated probation and was sentenced to five years. Walker then appealed this five-year sentence.

In vacating the sentence, the court of appeals noted that "the import of the [district] court's ruling was to condition his [Walker's] constitutional right to seek correction upon the risk of another sentence, then unforeseeable in nature and extent. Thus, though not so intending, the [district] court potentially penalized him [Walker] for asserting that right." 346 F.2d at 430. The holding is particularly significant in its proscription of a harsher sentence notwithstanding the existence of a "rational predicate" in the defendant's violation of probation. See also Van Alstyne, *supra* note 4, at 611-12. *But see* James v. United States, 348 F.2d 430 (10th Cir. 1965), 1966 UTAH L. REV. 280.

Of course, the unconstitutional conditions doctrine would extend only to petitioners who seek to overturn a constitutionally defective conviction. However, the *Patton* court's application of the equal protection clause would seem to broaden the class of defendants afforded protection to include those seeking to challenge their convictions on nonconstitutional grounds as well.

sentences, the effectuation of that purpose in the context of a second trial is to deny equal protection of the laws to successful appellants. There is no evidence that appellants as a class are likely to have received lenient sentences; yet, under the procedure set forth by the *Patton* court, review and modification of sentences extends only to successful criminal appellants.[52] The proper remedy, therefore, for the situation confronted by the *Patton* court lies in the direction of absolutely proscribing the practice of imposing harsher punishment on reconvicted criminal appellants. As an intermediate solution, however, the *Patton* criteria are workable and valuable to the extent that they may serve to stir further judicial and legislative action.

[52] See Van Alstyne, *supra* note 4, at 636. See generally Kellet, *The Expansion of Equality*, 37 So. CAL. L. REV. 400 (1964); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).