IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRENCE BOWSER, Appellant, vs. THE STATE OF NEVADA, Respondent.	Supreme Court Case No. 71516 District Court Case No. C211162-2

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APPELLANT'S SUPPLEMENTAL BRIEF PURSUANT TO ORDER DATED MARCH 21, 2018

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Appeal from Judgment of Conviction
Eighth Judicial District Court, Clark County

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ATTORNEY FOR APPELLANT

RESCH LAW, PLLC d/b/a
Conviction Solutions
Jamie J. Resch
Nevada Bar Number 7154
2620 Regatta Dr., Suite 102
Las Vegas, Nevada, 89128
(702) 483-7360

ATTORNEYS FOR RESPONDENT

CLARK COUNTY DISTRICT ATTY.
Steven B. Wolfson
200 Lewis Ave., 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

NEVADA ATTORNEY GENERAL
Adam Paul Laxalt
100 N. Carson St.
Carson City, Nevada 89701
(775) 684-1265

RULE 26.1 DISCLOSURE

Pursuant to Rule 26.1, Nevada Rules of Appellate Procedure, the undersigned hereby certifies to the Court as follows:

1. Appellant Terrence Bowser is the Appellant in Bowser v. State, Nevada Supreme Court Docket #71516.

2. The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. Appellant is represented in this matter by the undersigned and the law firm of which counsel is the owner, Resch Law, PLLC, d/b/a Conviction Solutions. Appellant was represented in the proceedings below by the Clark County Public Defender's Office, Norm Reed, Esq. and Nadia Hojjat, Esq.

RESCH LAW, PLLC d/b/a Conviction Solutions

By: 

JAMIE J. RESCH
Attorney for Appellant

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I. JURISDICTION

This is an appeal from a judgment of conviction following a jury trial in State v. Bowser, Case No. C211162-2. The written judgment of conviction was filed on August 31, 2015. 6 AA 1259. A notice of appeal was never timely filed, however; the District Court granted a Petition for Writ of Habeas Corpus which directed the Clerk of Court to file an untimely notice of appeal on Bowser's behalf pursuant to NRAP 4(c). 6 AA 1268. The Clerk of Court filed a notice of appeal on Bowser's behalf on October 13, 2016. 6 AA 1276.

On December 15, 2107, the Court of Appeals issued a decision which resulted in three separate opinions as to the issue of whether Bower's increased sentenced violated Due Process. Bowser filed a timely petition for review, which this Court granted on March 21, 2018. This brief is pursuant to the Court's order of that date.

II. SUPPLEMENTAL ISSUES PRESENTED FOR REVIEW

A. Whether the sentences imposed by the District Court for Counts Four and Six after Bowser's retrial violated the Due Process and/or Double Jeopardy Clause of the Nevada and/or United States Constitution.

III. STATEMENT OF THE CASE

This matter is before the Court on a petition for review from a three-way split decision by the Court of Appeals, which denied Bowser relief on a claim that the increased sentence imposed upon him following a retrial violated his right to Due Process.

IV. STATEMENT OF FACTS

The facts relevant to the issue currently before this Court are as follows: Bowser was tried twice in the instant case. The first trial ended in a conviction for First Degree Murder with Use of a Deadly Weapon and other serious offenses. 1 AA 109. Specific to this issue, Bowser was convicted after the first trial of Count Four, Discharging Firearm Out of a Motor Vehicle, and Count Six, Discharging Firearm at or into Structure, Vehicle, Aircraft, or Watercraft. 1 AA 110. On Count Four, Bowser received a sentence of 24 to 60 months in State prison to run concurrent to convictions on Counts one and two (Conspiracy to Commit Murder and First Degree Murder with Use of a Deadly Weapon). 1 AA 113. On Count Six, Bowser was sentenced to 12 to 60 months in State prison, and said

sentence was again concurrent with any previously imposed counts. 1 AA 114.

Following the retrial, Bowser was not convicted of Conspiracy to Commit Murder, but instead was convicted of Voluntary Manslaughter with Use of a Deadly Weapon, instead of murder. 6 AA 1237. However, as to Count Four, Bowser was again convicted, and this time sentenced to 48 to 120 months in State prison, with that sentence to run consecutive to Count Two. 6 AA 1237-38. On Count Six, Bowser was sentenced to 28 to 72 months in State prison to run "concurrent with Count Four," meaning it too would effectively run consecutively to the conviction for manslaughter in Count Two. 6 AA 1238.

The trial court's "reasons" for ultimately imposing consecutive sentences simply do not appear in the record. The entirety of the court's analysis is the conclusory statement "And I do consider, because it's 10 years down the road, the information we do have about what has happened in the time since." 6 AA 1234. But Bowser was incarcerated in prison in the "time since" his first trial, and the record affirmatively shows

that there was no new evidence presented to justify an increased sentence. 6 AA 1218. The record expressly reflects the lack of any disciplinary infractions or other rule violations within the Department of Corrections in the almost ten years between the trials. 6 AA 1225. The only justification presented for an increased sentence was the State's argument that the trial court should rebalance the newly imposed sentence to most closely mirror the result from the first trial. 6 AA 1215-1216.

In its decision, the Court of Appeals noted the "reasons" for the increased sentence do not affirmatively appear in the record and the State has never suggested this factual finding to be error. Bowser v. State, 2017 WL 6547443 (Nev. Ct. of App., Dec. 15, 2017), (Silver, C.J, dissenting). The Court of Appeals decision instead rested on grounds that Bowser was required to prove a negative – that it was Bowser's responsibility to show that the increased sentences were the result of vindictiveness and that he failed to do so. Judge Tao, concurring, went on to explain that even if a further record were so provided, there would not appear to be anything

about the case which would suggest the increased sentence was the product of actual vindictiveness. Id., p. 14.

Bowser believes and will argue herein that the Due Process Clauses of the United States and Nevada Constitutions do require that a presumption of vindictiveness attach when a sentence is increased following a retrial, and that if the trial court wished to increase those sentences, the trial court was the entity required by law to justify the increased sentence.

V. SUMMARY OF ARGUMENT

The denial of this issue below resulted in three separate opinions, including two very different concurring opinions and one dissent. Perhaps this is unsurprising: As recently as 2015, two justices of the United States Supreme Court stated that "confusion reigns" with respect to lower courts applying the Supreme Court's Double Jeopardy precedents to increased sentences on resentencing. Plumley v. Austin, 135 S.Ct. 828 (2015) (Thomas, J., and Scalia, J., dissenting from denial of certiorari). The irreconcilable positions taken by Judges Tao and Silver below indicate the need for clarification of the issue in this State as well.

The complexity of Double Jeopardy law having been acknowledged, there are several reasons why relief should be granted in Bowser's favor. First, despite Judge Tao and/or the State's attempts to suggest otherwise, the Supreme Court's decision in North Carolina v. Pearce, 395 U.S. 711 (1969) and this Court's decision in Holbrook v. State, 90 Nev. 95, 98, 518 P.2d 1242 (1974) both remain good law. Bowser would acknowledge, as has the Supreme Court, that subsequent decisions have "chip[ed] away" at the presumption of vindictiveness. Plumley, 135 S.Ct. at 831. However, the decisions relied on by Judge Tao and/or the State are distinguishable, and Pearce remains the most analogous Supreme Court decision to the issue at hand.

Second, the decisions of the federal circuit courts confirm that the Pearce presumption remains valid and applicable where a defendant is resentenced by a different judge following a retrial which resulted from a reversal of the original judgment by a higher court. These circuit decisions are further evidence that federal law required the trial court to state its reasons for the increased sentence.

Finally, this Court should call upon Nevada's Double Jeopardy jurisprudence to conclude that the state's historically "strong" protections required the trial court to identify its reasons for the increased sentence. The trial court's failure to state the reasons for the increased sentence did not shift the burden of production or justification to Bowser. Rather, that failure violated state and federal guarantees of due process.

The remedy here is that the conviction and sentence on Counts Four and Six should be reversed and modified to mirror the originally imposed concurrent sentence – the exact remedy granted in Holbrook. Alternatively, the Court could follow the rationale of the dissent below and remand the matter for a new sentencing at which Pearce would need to be complied with if the original sentence was not reinstated. In either event the current, increased sentence violates state and federal due process and should be vacated.

VI. ARGUMENT

A. The sentences imposed by the District Court for Counts 4 and 6 after Bowser's retrial violated the Due Process and/or Double Jeopardy Clause of the Nevada and/or United States Constitution.

The Double Jeopardy Clause of the Fifth Amendment states that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Nevada Constitution is similarly worded in that "[n]o person shall be subject to be twice put in jeopardy for the same offense." Nev. Const. art. 1 § 8, cl. 1 (Double Jeopardy Clause). These clauses have been interpreted to mean, at both the federal and state level, that increasing a criminal defendant's sentence after retrial is a violation of Due Process and/or the Double Jeopardy Clause.

1. At the federal level, Pearce remains controlling because subsequent Supreme Court decisions have involved dissimilar facts and have never directly overruled the presumption of vindictiveness that arises after retrial.

The Supreme Court's decision in Pearce actually involved two consolidated cases, and both of those featured criminal defendants who were granted appellate relief, new trials, and harsher sentences after

reversal than were originally imposed. Pearce, 395 U.S. at 714-715. The Court found that "neither the double jeopardy clause nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction." Id. at 723. This prohibition was not free from exclusions. Instead, the Court held:

> A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." Williams v. New York, 337 U.S. 241, 245 [(1949)].

Id. at 723.

Further, the Court considered the question in light of the Due Process Clause, and noted it would of course be improper for states to impose heavier sentences upon reconvicted defendants just because they appealed and succeeded. Id. The Court noted the "very threat" of such a policy would "chill the exercise of basic constitutional rights." Id. at 724, citing United States v. Jackson, 390 U.S. 570, 581 (1968). The Court ultimately held that:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 725-726.

Of particular relevance to the case at hand, the Supreme Court concluded in Pearce by noting that the State, in both of the cases underlying the Pearce decision, failed to even attempt to explain or justify the increased sentences. Id. at 726. In other words, nowhere in Pearce did the Supreme Court place the burden of disproving vindictiveness on the defendant.

To be sure, Pearce has been chipped away at ever since it was decided. But, the commentary by Justices of the Supreme Court as recently as 2015 confirms, it has not been overruled. Plumley, 135 S.Ct. 828. In fact, the denial of certiorari in that matter effectively let stand a Fourth Circuit Court of Appeals' decision that *granted* relief on a claim arising under Pearce – in a case governed by the hearty restrictions imposed by 28 U.S.C. §2254 no less. Austin v. Plumley, 565 Fed.Appx. 175, 190 (4th Cir. 2014). This, by definition, could not have occurred if Pearce were anything other than clearly established federal authority as determined by the United States Supreme Court. See 28 U.S.C. §2254(d)(1).

The Fourth Circuit's decision in Austin notes at least six known United States Supreme Court decisions involving the presumption of vindictiveness. Austin, 565 Fed.Appx. at 185. Some of these decisions reaffirmed Pearce while placing limits on its expansion. Colten v. Kentucky, 407 U.S. 104 (1972) (Pearce does apply to a new trial after an appellate reversal, and does not apply to a pure trial de novo); Chaffin v. Stynchombe,

412 U.S. 17 (1973) (Resentencing by a jury that is unaware of the originally imposed sentence does not violate Due Process).

In Blackledge v. Perry, 417 U.S. 21, 26 (1974), the Supreme Court reaffirmed its holding in Pearce and unambiguously explained that therein it had held "an increased sentence could not be imposed upon retrial unless the **sentencing judge** placed certain specified findings on the record." (Emphasis added). Ultimately, the issue in Blackledge turned on a finding that increasing the severity of charges on retrial violated the defendant's right to Due Process. Id. at 30.

In the 1980s, the Supreme Court issued three decisions regarding vindictiveness. It is those decisions which could be said to have chipped away at Pearce, and they are the decisions relied upon by the Court of Appeals and State in this matter. The first of the three cases affirmed yet again that Pearce forbid greater sentences following a retrial – but found the presumption rebutted where the trial judge did specifically explain the reasons for the increased sentence. Wassman v. United States, 468 U.S.

559, 570 (1984) (Increased sentence expressly due to additional criminal convictions that did not exist at time of first sentencing).

That just leaves the primary cases relied upon by the Court of Appeals and State: Texas v. McCullough, 475 U.S. 134 (1984) and Alabama v. Smith, 490 U.S. 794 (1989). But these decisions were not explored in any depth by the Court of Appeals or State and are easily distinguishable from the case at hand.

The decision in McCullough has almost no parallel to the instant case. There, misconduct during trial compelled the trial judge to grant a new trial. Thus, as an initial matter, the case lacked the important element of a reversal by a higher tribunal. Second, even if the Pearce presumption did apply notwithstanding the lack of a higher court's involvement, here again the judge expressly stated the reasons for the increased sentence following retrial. McCullough, 475 U.S. at 140. The trial judge's "careful explanation" for the increased sentence satisfied the Court's prior holdings. Id. at 143. The case at hand hews much closer to the basic facts of Pearce: Bowser faced a retrial that resulted from a higher court reversal, and the sentencing

judge provided no explanation, much less a careful one, for the increased sentence following retrial.

Finally, in Alabama v. Smith, 490 U.S. 794 (1989), the Supreme Court considered whether the Pearce presumption applies when a guilty plea is overturned and the defendant receives a harsher sentence following retrial. The Court ultimately held the presumption does not apply in such a case, because following a withdrawal of a guilty plea, any further sentence "is not more likely than not attributable to the vindictiveness on the part of the sentencing judge." Id. at 801. Put another way, a withdrawal of a guilty plea fell closer on the spectrum to the decision in Colten involving a trial de novo, than it did Pearce which involved assertion of constitutionally protected appellate rights.

There is more, and the Court of Appeals below erred by not making mention of the important rationale provided at the end of Smith:

> The failure in Simpson v. Rice to note the distinction just described stems in part from that case's having been decided before some important developments in the constitutional law of guilty pleas. A guilty plea may justify leniency, Brady v. United States, supra, a prosecutor may offer a "recommendation of a lenient sentence or a reduction of

> charges" as part of the plea bargaining process, Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978), and we have upheld the prosecutorial practice of threatening a defendant with increased charges if he does not plead guilty, and following through on that threat if the defendant insists on his right to stand trial, ibid.; we have recognized that the same mutual interests that support the practice of plea bargaining to avoid trial may also be pursued directly by providing for a more lenient sentence if the defendant pleads guilty, Corbitt v. New Jersey, 439 U.S. 212, 221-223 (1978).

Id. at 802-803.

It was exclusively on the basis of the many differences between guilty pleas and trials that the Supreme Court overruled a portion of Pearce that dealt with a guilty plea (the "Rice" decision). Nothing about this affects the "Pearce" portion of the decision and the Court of Appeals erred by reading Smith to apply to the entirety of the decision in Pearce. The Supreme Court explained in Smith there are multiple (and presently well-understood) reasons for treating a guilty plea differently than a verdict after trial. In any event, Bowser's case does not involve guilty pleas at all, and Smith is therefore of limited or no relevance to the situation at hand at all.

Instead, Bowser would contend that upon review of Supreme Court decisions following Pearce, it should be clear the presumption of

vindictiveness is alive and well when, as here, a conviction after trial is reversed by a higher court and a harsher sentence is subsequently imposed after retrial. Because that is so, Bowser's convictions and sentences for Counts Four and Six violate federal due process and should be reversed.

2. Federal circuit decisions confirm that Pearce remains applicable when a conviction is reversed and the defendant's sentence is increased following retrial.

Much of the concurring opinion below attempted to differentiate Bowser's case from the Supreme Court decisions regarding vindictiveness. The Court of Appeals pointed out: the aggregate sentences after retrial were shorter, the judge and prosecutors were different individuals than at the first trial, and "at least" one defense attorney changed as well. Bowser, 2017 WL 6547443 at p. 16. However, not a single one of these factors were ever mentioned by the Supreme Court as affecting the rule stated in Pearce, and the Court of Appeals cites to no authority to support its suggestion that these distinctions matter. To the contrary, the "aggregation" defense has never been applied by the Supreme Court, was already expressly rejected by this Court, and is at odds with various circuit decisions which

confirm that changes in the personnel involved do nothing to vitiate the presumption of vindictiveness that must apply here.

It should go without saying here: Bowser was found guilty of First Degree Murder at his first trial and was sentenced to life in prison on that count. 1 AA 113. Bowser was not convicted of murder following his retrial, and thus, "life" was not even a sentencing option following the retrial. It is patently unfair to set "life" as the benchmark by which the sentences following retrial would be measured because there was no equivalent sentencing option available after Bowser's retrial.

The Court of Appeals' belief that Pearce was not violated because Bowser's aggregate sentence was less than after the first trial is, as an initial point, flatly at odds with this Court's decision in Wilson v. State, 123 Nev. 587, 170 P.3d 975 (2007). However, it also runs afoul of decisions of the federal Courts of Appeals that have attempted to apply Pearce in such situations.

In United States v. Henry, 709 F.2d 298, 301 (5th Cir. 1983), the Fifth Circuit was confronted with an aggregate decrease in a defendant's

sentence following retrial, but a situation where various counts which were initially run concurrently were modified to run consecutively following the retrial. The Court ultimately concluded that this meant, for purposes of Pearce, that the defendant's sentence was increased. Id. at 315. Specifically, the Court held:

> The due process prohibition against sentence increases under certain circumstances plainly applies to *all* kinds of increases, and most particularly to modifications that make consecutive sentences that had formerly been concurrent. See Barnes v. United States, 419 F.2d 753 (D.C. Cir. 1969) ("the change of th[is] sentence…from concurrent to consecutive was error in violation of the due process clause").

Id.

Bowser's sentence structure was similarly changed, and in fact his primary complaint is the change in Counts Four and Six from concurrent following the original sentencing to consecutive following his resentencing. This change alone violated his right to Due Process and the Court of Appeals erred in applying an overall approach – particularly where this Court had already rejected use of an overall approach under state law. Wilson, 123 Nev. at 591 (unequivocally rejecting use of aggregate

sentencing as the measure of whether a sentence was "increased" under Pearce).

The other factors relied upon by the Court of Appeals are not supported by any discernable rule or citation. As previously noted, circuit courts continue to apply Pearce. Austin v. Plumley, 565 Fed.Appx. 175, 190 (4th Cir. 2014). In addition, at least one other circuit has rejected the concept that changes in personnel have any effect on the presumption of vindictiveness, or upon the party responsible for rebutting it.

In United States v. Tucker, 581 F.2d 602 (7th Cir. 1978), the Seventh Circuit Court of Appeals was called upon to apply Pearce in a case that involved a sentence imposed following a second jury trial, with the second sentencing presided over by a different judge.

The Court readily concluded that Pearce and its progeny required "that the factual record must be made by the sentencing judge." Id. at 605. The Court rejected the government's position that the reviewing court should scour the record to locate justifications for the increased sentence. Instead, it held: "[T]o eliminate that apprehension, it is necessary that the

second sentencing judge articulate the reasons for his conclusion that a harsher sentence is necessary." Id. at 606.

In fact, Tucker took great pains to address and dismiss the state's argument that anyone other than the sentencing judge was required to provide the necessary record:

> If any doubt remained that the sentencing judge must himself articulate the basis for the harsher sentence, such doubt was dispelled by the Court's interpretation of Pearce in Blackledge v. Perry, 417 U.S. 21, 25-26, 94 S.Ct. 2098, 2101, 40 L. Ed. 2d 628 (1974): "Because 'vindictiveness against a defendant for having successfully attacked his first conviction must play no party in the sentence he receives after a new trial,' (North Carolina v. Pearce, 395 U.S. at 725, 89 S.Ct. at 2080), we held that an increased sentence could not be imposed upon retrial unless the sentencing judge placed certain specified findings on the record." (Emphasis Added.) The conclusion follows that the Government's reliance upon the additional testimony at the second trial, not referred to by the sentencing judge, is misplaced.

Id. at 606.

Having concluded that Due Process required the sentencing judge to state the reasons for the increased sentence, the court then concluded that the judge below had failed to do so. The court rejected a broad reference by the trial judge to the evidence in general as sufficient to satisfy the Due

Process Clause. Id. at 607 (Pearce requires that the "second sentencing judge should attempt to state with particularity the factors upon which he bases a harsher sentence, rather than leaving in doubt what he was in fact relying upon").

The Pearce presumption applies to resentencing after a retrial that resulted from a reversal by a higher court. The Court of Appeals erred in attempting to shift that burden to Bowser. It should be amply clear based on the extensive Supreme Court and circuit authority in which Pearce has repeatedly been considered over the last forty-plus years that the burden for rebutting the presumption, which unquestionably applied in the instant case, rested solely with the sentencing judge.

3. State law provides "strong" double jeopardy protections which already include a rejection of the overall sentence structure adopted by the Court of Appeals below.

This Court has already held that "When a court is forced to vacate an unlawful sentence on one count, the court may not increase a lawful sentence on a separate count." Wilson v. State, 123 Nev. 587, 594, 170 P.3d 975 (2007).

In Wilson, this Court reversed several of the defendant's convictions and remanded the matter for resentencing. The defendant received harsher sentences on resentencing. On appeal, he claimed the Double Jeopardy Clause was violated when the trial court "increased the minimum sentences associated with the possession counts and ran them consecutively with his sentence on the one remaining production count." Id. at 591.

On appeal, this Court noted the "strong double jeopardy protections" enjoyed by Nevada citizens. Id. at 592, citing Dolby v. State, 106 Nev. 63, 787 P.2d 388 (1990). In part, those strong protections were given life when this Court rejected the concept that altering sentences on resentencing would not violate double jeopardy so long as the aggregate sentence was less than that which was previously imposed. Id. at 591. That is, it was error for the trial court to increase the individual sentences imposed on resentencing, even though the aggregate term imposed was not harsher than the original sentence structure. Id. at 596-597.

The decision in Wilson reaffirmed this Court's earlier decision in Dolby. There, following a successful motion to correct illegal sentence, a defendant was resentenced and received a harsher punishment. This Court found, however, that "[o]nce a defendant begins to serve a lawful sentence, he may not be sentenced to an increased term; to do so violates the constitutional proscription against double jeopardy." Dolby, 106 Nev. at 65. As such, "[w]hen a court is forced to vacate an unlawful sentence on one count, the court may not increase a lawful sentence on a separate count." Id., citing Chandler v. United States, 468 F.2d 834 (5th Cir. 1972).

It is noted that Dolby and Wilson dealt with resentencing proceedings and not sentencing following a retrial. However, there is no good reason to erode the double jeopardy protections provided by those cases in circumstances following a retrial. The "strong" protections provided to Nevada citizens under Wilson are based on Pearce, which is still good law and must apply to Bowser's situation.

It is abundantly clear that the protections afforded by the United States Supreme Court are amplified when retrials are at issue versus when a

trial de novo/resentencing is at issue. The enhanced protections afforded by Nevada law would make the most sense if applied to sentencings after reversal and retrial, as those are the proceedings protected by the holding in Pearce.

Moreover, this Court has also already addressed how double jeopardy may impact a sentencing after retrial:

> The appellant contends that the sentence he is presently serving in unconstitutional since it is harsher than the sentence originally imposed and later set aside. The controlling authority on this subject is North Carolina v. Pearce, 395 U.S. 711 (1969). The court noted that due process of law requires that vindictiveness against a defendant must play no part in the sentence he receives after a new trial, since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction. Accordingly, whenever a more severe sentence is imposed after a new trial the reasons for doing so must affirmatively appear. "Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made a part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." Id. at 726.

Holbrook v. State, 90 Nev. 95, 98, 518 P.2d 1242 (1974).

Here, Holbrook was not complied with because the reasons for increasing Bowser's sentence on retrial do not affirmatively appear in the record. In fact, the State's argument repeatedly urged the trial court (in **direct** violation of Wilson) to restructure the sentence after retrial to be as long as possible: "In this case unfortunately he's going to have to be released at some point, quite soon actually, too soon." 6 AA 1215; "The facts that came out at trial demonstrate that this was nothing less than a first degree murder." 6 AA 1213. The State specifically requested longer, consecutive sentences on Counts 4 and 6, because it was the "only way" to "protect the community for as long as possible." 6 AA 1216.

The defense argument was essentially the holding from Holbrook:

> We're just asking that all three counts run concurrent in this case. The counts, all six counts previously ran concurrent in this case. There was a first trial. All of the evidence was presented. All the mitigation was present. The counts ran concurrent. Nothing has changed, Your Honor. Absolutely nothing has changed from the first trial to the second trial. There is a not a single piece of new evidence."

6 AA 1218.

The trial court noted that the verdict had changed. 6 AA 1218. However, defense counsel explained that was because the limited new information which came out in the second trial was in the form of mitigating evidence. 6 AA 1218.

Defense counsel also argued that it was error to reconfigure the sentence in a manner which approached the result from the first trial:

> The idea that because they come back less let's just compound everything. Let's run it all consecutive and get it as close to the first sentence as we can get, that's not the purpose of sentencing ranges. That's not what these statutes were designed for.

6 AA 1220.

Trial counsel went on to argue that it was "actually double jeopardy" to impose consecutive sentences where "[n]othing aggravating has been presented on top of the prior facts that warrants now going consecutive." 6 AA 1220.

The Court of Appeals distinguished Holbrook by suggesting it was overruled by Alabama v. Smith. See Bowser, 2017 WL 6547443 at p. 18. On this narrow issue, the Court of Appeals *might* have a point: As Holbrook

dealt with a withdrawal of a guilty plea and a later, harsher sentence after retrial, it is indeed at odds with, but certainly not *required to be overruled by*, the Supreme Court's decision in Smith. Moreover, this Court's recognition of Pearce as controlling authority in Holbrook remains a correct statement of law as applied to the instant case, which does not involve a withdrawal of any guilty plea. Any issue of whether or how Holbrook continues to apply in cases involving guilty pleas is a question for another day. As a pure application of Pearce, this Court's decision in Holbrook correctly stated and applied federal law and continues to require that Bowser's convictions and sentences be reversed.

Bowser requests this Court simply modify his sentences on Counts four and six back to their original smaller and concurrent form. NRS 177.265. However, and only as an alternative should the Court have any hesitation about modifying the sentence, the dissent below seemed to suggest that Bowser should be resentenced "in conformance with established Nevada jurisprudence regarding the law of double jeopardy. Bowser, p. 21.

This could be read to suggest the trial court could yet again re-determine the appropriate sentence and even impose the same increased sentence if the reasons for doing so were stated by the court. As an alternative approach this may initially appear attractive, but this Court has simply modified sentences to the "term originally imposed" before and it would be consistent with this Court's precedent and practice to do so here. Holbrook, 90 Nev. at 99. Bowser has also expired his underlying manslaughter conviction so it is believed any modification of Counts Four and Six to run concurrent to that expired sentence would result in the immediate expiration of Counts Four and Six and Bowser's immediate release from custody. This Court should give heavy consideration to simply modifying the sentences at issue, because if those sentences were in fact imposed in violation of law, they are the only reason he remains incarcerated.

VII. CONCLUSION

Based on the foregoing, as was the result in Holbrook, this court should modify the sentence imposed for Counts Four and Six to the term originally imposed: a 24 to 60 month sentence on Count Four, and a 12 to 60 month sentence on Count Six, both concurrent to one another and to all other counts. Alternatively, the matter should be remanded for resentencing consistent with Pearce.

DATED this 19th day of April 2018.

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____

JAMIE J. RESCH
Attorney for Appellant
2620 Regatta Dr. #102
Las Vegas, Nevada 89128
(702) 483-7360

RULE 28.2 ATTORNEY CERTIFICATE

1. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied upon is found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of the Ebrima style.

3. I further certify this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 5,472 words.

DATED this 19th day of April 2018.

RESCH LAW, PLLC d/b/a Conviction Solutions

By: 

JAMIE J. RESCH
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 19, 2018. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

STEVEN WOLFSON
Clark County District Attorney
Counsel for Respondent

ADAM P. LAXALT
Nevada Attorney General

An Employee of RESCH LAW, PLLC, d/b/a Conviction Solutions