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State v. Higgenbottom: Must a Criminal Defendant Endure the Wrath of a Vindictive Judge

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STATE V. HIGGENBOTTOM: MUST A CRIMINAL DEFENDANT ENDURE THE WRATH OF A VINDICTIVE JUDGE?

I. INTRODUCTION

Imagine your client is serving time in state prison system for a burglary conviction. Your client requests that you appeal the alleged violation of his constitutional rights that occurred during the initial trial. What should you do? In light of a recent South Carolina Court of Appeals decision, one risk of an appeal is the possibility of a greater sentence if the appeal results in resentencing.[1]

In *State v. Higgenbottom*, the South Carolina Court of Appeals reviewed an appeal by a criminal defendant asserting that his constitutional rights were violated when he received a higher sentence in response to a motion for reconsideration of the sentence.[2] The court of appeals affirmed the extended sentence.[3] Judge Anderson first held that the "rule of futility" excused Higgenbottom's failure to preserve the issue for appeal.[4] On the issue of vindictiveness, Judge Anderson held that there is no reasonable likelihood of vindictiveness when a trial judge is reconsidering a defendant's sentence at the defendant's request, thus the presumption of vindictiveness from the United States Supreme Court's opinion in *North Carolina v. Pearce*[5] does not apply.[6] Judge Anderson then concluded that the trial judge's extension of Higgenbottom's sentence was based on a review of the facts of the case; therefore, there was no actual vindictiveness on the part of the trial judge.[7]

Many jurisdictions have considered whether a higher sentence imposed upon a defendant who exercises constitutional or statutory rights to appeal or makes post-trial motions constitutes vindictiveness. The conduct of judges, as well as prosecutors, has been examined in many jurisdictions using the *Pearce* presumption of vindictiveness. The result in *Higgenbottom* indicates that it is

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1. The author acknowledges there is always a risk involved in appealing a criminal conviction. However, there is a distinction between risks that are constitutionally permissible and those that are not. *See infra* Part III.C., III.D.

2. State v. Higgenbottom, 337 S.C. 637, 525 S.E.2d 250 (Ct. App. 1999), *reh'g denied.* Although Higgenbottom's extended sentence was upheld, the decision was written by only one judge, Judge Anderson. Judge Goolsby concurred in the result only, and Judge Connor dissented.

3. *Id.* at 650, 525 S.E.2d at 256.

4. *Id.* at 640, 525 S.E.2d at 251.

5. 395 U.S. 711 (1969); *see infra* Part III.B.-D.

6. *Higgenbottom,* 337 S.C. at 650, 525 S.E.2d at 256.

7. *Id.*

becoming increasingly difficult for a defendant in South Carolina to convince a court that the presumption of vindictiveness should apply or, in the event that the presumption does not apply, to prove actual vindictiveness.

This Note examines the constitutionality of allowing a higher sentence on resentencing in circumstances where no basis for increasing the sentence arises. Part II discusses the facts and circumstances of the *Higgenbottom* case, including the following issues that were raised: (1) did Higgenbottom's failure to object to the harsher sentence in the trial court bar him from raising this issue on appeal; (2) should the presumption of vindictiveness apply; and (3) was there actual vindictiveness leading to the higher sentence? Part III examines the case law of various jurisdictions involving the constitutionality of increased sentences after a defendant's appeal or collateral attack on the conviction, and Part IV compares the holding in *Higgenbottom* to these cases. This Note concludes that the South Carolina Court of Appeals' decision in *Higgenbottom* is an unwise erosion of the *Pearce* presumption.

II. FACTUAL AND PROCEDURAL BACKGROUND OF *STATE V. HIGGENBOTTOM*

Higgenbottom was arrested for disorderly conduct.[8] While being booked, Higgenbottom pulled a spoon out of his pocket and stated that he "'might as well get one last piece of it.'"[9] The residue on the spoon tested positive for cocaine.[10] Higgenbottom claimed the spoon was not his.[11] He insisted that he found it while cleaning the parking lot at his tire store and placed it in his pocket when a customer pulled into the parking lot.[12] At his trial "Higgenbottom entered an *Alford* plea[13] to one count of possession of cocaine, first offense."[14] He was sentenced to "two years imprisonment and a $5,000 fine, suspended upon the service of thirty days or payment of $750, and eighteen months probation."[15] Before the court sentenced Higgenbottom, his attorney asked the court to use its discretion and give Higgenbottom a lenient sentence due to his medical disabilities.[16] The day after Higgenbottom was sentenced, his counsel made a motion to reconsider the probation portion of his sentence.[17] The following exchange took place between defense counsel and the trial judge:

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8. *Id.* at 639, 525 S.E.2d at 250.
9. *Id.*
10. *Id.*
11. *Id.* at 639, 525 S.E.2d at 250-51.
12. *Id.*
13. When a criminal defendant enters a guilty plea, but at the same time maintains that he is not guilty, this is called an *Alford* plea, after the case which recognized its validity. North Carolina v. Alford, 400 U.S. 25 (1970).
14. *Higgenbottom*, 337 S.C. at 639, 525 S.E.2d at 250.
15. *Id.*
16. *Id.* at 649, 525 S.E.2d at 256.
17. *Id.* at 639-40, 525 S.E.2d at 251.

> [Counsel]: Your honor, I have one brief matter; It's a motion to reconsider on Jeffrey Higgenbottom . . . . At his request I am waiving his presence and asking for the court to . . . reconsider the probationary sentence specifically and reduce that to twelve months.
> Court: [Counsel], Mr. Higgenbottom is lucky. Maybe I ought to reconsider his sentence completely.
> [Counsel]: I discussed that with him before I came.
> Court: It takes a lot of courage for a lawyer to come back to ask for a reconsideration like that. Since this term of court has not expired and since he is asking for a reconsideration maybe I ought to just reconsider it on my own and extend his sentence . . . have hi[m] picked up to do jail time.
> [Counsel]: I understand that, your Honor. I discussed it with him before he asked for this.
> Court: He just about talked himself into jail as it was. No, sir; I'm going to give him twenty-four months probation. We're going to see if he can do probation. Maybe he'll be cleaning up his lot again. Since you made the motion to reconsider, I'm denying that motion and I'm reconsidering my sentence and extending his probation to twenty-four months.[18]

On appeal Higgenbottom asserted that the trial court had violated his due process rights by imposing a longer sentence only because he chose to exercise his right to bring a post-trial motion.[19] Before turning its attention to the merit of Higgenbottom's claim, Judge Anderson addressed the State's argument that Higgenbottom failed to preserve the issue for appeal because he did not object to the extended sentence at the time it was imposed.[20] It is well-established in South Carolina that an objection to sentencing must be raised at trial or the issue will not be preserved for appellate review.[21] Judge Anderson explained that the court extended Higgenbottom's sentence on a motion to reconsider and if he had objected at that point, "surely he would [have] place[d] himself in a perilous posture."[22] Therefore, Judge Anderson concluded, under "the rule of futility," that Higgenbottom's failure to object below did not prevent him from raising the issue on appeal.[23]

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18. *Id.* at 651, 525 S.E.2d at 257 (Goolsby, J., concurring).

19. *Id.* at 639, 525 S.E.2d at 251.

20. *Id.* at 640, 525 S.E.2d at 251.

21. *See* State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999); State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991); State v. Shumate, 276 S.C. 46, 47, 275 S.E.2d 288, 288 (1981); State v. Winestock, 271 S.C. 473, 475, 248 S.E.2d 307, 308 (1978).

22. *Higgenbottom*, 337 S.C. at 640, 525 S.E.2d at 251.

23. *Id.* Judge Goolsby took the opposite position, affirming the greater sentence because Higgenbottom did not raise the issue in the court below. *Id.* at 650-51, 525 S.E.2d at 256-57 (Goolsby, J., concurring). Judge Goolsby expressly rejected the rule of futility because

On the issue of vindictiveness, Judge Anderson held that without reasonable likelihood of vindictiveness, no presumption of vindictiveness exists when a defendant makes a motion to reconsider the sentence imposed and, in response to the motion, the trial judge increases the sentence.[24] Thus, when reasonable likelihood does not exist, the defendant must prove that actual vindictiveness on the part of the judge led to the increased sentence.[25] Judge Anderson found that such "fact-based reconsideration does not rise to the level of 'actual vindictiveness' on the part of the sentencing judge."[26]

A notable aspect of the three opinions in *Higgenbottom* is the absence of any reference to the South Carolina Constitution. Article I, section 3 establishes that no person shall "be deprived of life, liberty, or property without due process of law."[27] Judge Anderson's opinion implicitly refers to the Due Process Clause of the Fourteenth Amendment contained in the United States Constitution[28] by referring to prior resentencing cases that were decided on that basis.[29] Judge Goolsby's concurring opinion[30] and Judge Connor's dissenting opinion[31] both mention due process in passing. The failure to decide *Higgenbottom* based on a specific constitutional provision leaves the door open for the South Carolina Supreme Court to resolve this ambiguity.

III. HISTORY

A. Modern Philosophy of Sentencing Criminal Defendants

Despite ample guidance from other courts that have considered the issue of vindictiveness, the decision in *Higgenbottom* fails to adhere to the reasoning of prior decisions. According to the modern philosophy governing the sentencing of criminals, the punishment should fit the offender and not merely the crime.[32] As a result, the trial judge has broad discretion in imposing a sentence.[33] Many states have statutes that allow more severe sentences for subsequent crimes based on past crimes,[34] and many states have statutes that

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"nothing . . . about the tone and tenor of the trial court's remarks during those proceedings suggests it would have been futile for counsel to have raised the issue now argued to us." *Id.* at 651, 525 S.E.2d at 257 (Goolsby, J., concurring).

24. *Id.* at 650, 525 S.E.2d at 256.

25. *Id.*

26. *Id.*

27. S.C. CONST. art. I, § 3.

28. U.S. CONST. amend. XIV, § 1.

29. *Higgenbottom*, 337 S.C. at 641-49, 525 S.E.2d at 252-56.

30. *Id.* at 650, 525 S.E.2d at 256 (Goolsby, J., concurring).

31. *Id.* at 652 n.1, 656-57, 525 S.E.2d at 257 n.1, 260 (Connor, J., dissenting).

32. *See* Williams v. New York, 337 U.S. 241, 247 (1949); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.5(c), at 28 (2d ed. 1986).

33. Wasman v. United States, 468 U.S. 559, 563 (1984).

34. 3 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 23:43 (2d ed.); *see e.g.* S.C. CODE ANN. § 16-1-120 (Law. Co-op. 1976) (mandating increased sentence for repeat offenders).

allow more severe sentences when aggravating circumstances are involved.[35] The courts have upheld statutes of this type when challenged as a violation of due process.[36]

In setting the sentence, the trial judge may consider a number of factors such as the defendant's "past life, health, habits, conduct, and mental and moral propensities."[37] The importance the Court places on the availability of information that the sentencing authority may rely upon is summed up as follows: "Highly relevant–if not essential–to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."[38] The trial judge may even consider evidence that was not admitted during the trial.[39]

Although the discretion of the trial judge determines the sentence in most cases, there are limits to the trial judge's authority. The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit punishing a criminal defendant for choosing to exercise constitutional or statutory rights to post-conviction relief.[40] It is well-established that a more severe sentence imposed solely to punish a defendant for exercising the right to appeal, to withdraw a guilty plea, or to seek other post-conviction relief is the result of vindictiveness and is unconstitutional.[41] The problem lies in distinguishing between "governmental action that is . . . a legitimate response to perceived criminal conduct [and] governmental action that is an impermissible response to noncriminal, [constitutionally] protected activity."[42]

B. The Presumption of Vindictiveness: North Carolina v. Pearce

The Supreme Court's first attempt to resolve the constitutionality of a higher sentence at retrial was *North Carolina v. Pearce,*[43] which resulted in the often cited *Pearce* presumption of vindictiveness. In *Pearce,* several years after being convicted, the defendant initiated state post-conviction proceedings,

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35. COOK, *supra* note 34, § 23:43; *see e.g.* S.C. CODE ANN. § 16-3-20(c) (Law. Co-op. 1976 & Supp. 1999) (setting forth aggravating and mitigating circumstances that shall influence the punishment for murder); S.C. CODE ANN. § 16-25-65 (West Supp. 1999) (creating a statutory offense of criminal domestic violence of a high and aggravated nature).

36. COOK, *supra* note 34, § 23:43.

37. Williams v. New York, 337 U.S. 241, 245 (1949).

38. *Id.* at 247 (citations omitted).

39. *See id.* at 242, 244-45 (allowing sentencing judge to base determination of sentence on information obtained through pre-sentence investigation and probation records in addition to evidence produced at trial).

40. North Carolina v. Pearce, 395 U.S. 711, 725 (1969). The Constitution does not require states to provide appellate review. Griffin v. Illinois, 351 U.S. 12, 18 (1956). However, when a state creates a statutory right to appeal, the state cannot restrict access to appellate review. *Pearce,* 395 U.S. at 724 (citations omitted).

41. *See* Alabama v. Smith, 490 U.S. 794, 798 (1989); *Pearce,* 395 U.S. at 725.

42. United States v. Goodwin, 457 U.S. 368, 373 (1982)

43. 395 U.S. 711 (1969).

and his conviction was reversed on constitutional grounds.[44] The defendant was then retried, convicted, and sentenced to eight years which, when added to the time he had already served, amounted to a sentence longer than the initial one.[45] The Court held that when a more severe sentence is imposed upon a defendant on retrial, there is a presumption of vindictiveness.[46] To overcome the presumption, the reasons for the more severe sentence must be based on objective information about the defendant's conduct that occurred after the original sentence, and such facts must be stated in the record.[47]

The *Pearce* Court used the word 'vindictiveness' to describe the improper motivation for increased sentences.[48] The words 'retaliation' and 'retaliatory' are also used to describe the conduct the Court was attempting to prevent.[49] The Court devised the *Pearce* presumption in an effort to assure that retaliation was not a factor in sentencing a criminal defendant.[50] This presumption, however, does not preclude the trial judge from subsequently imposing a harsher sentence.[51] To overcome the presumption the trial judge merely must set forth in the record the facts which justify the higher sentence.[52]

C. *Circumstances in Which the* Pearce *Presumption Does Not Apply*

In theory, *Pearce* is a broad, sweeping rule. However, subsequent decisions have narrowed *Pearce* by limiting and defining the circumstances in which the presumption applies.[53] The presumption of vindictiveness does not arise where the initial sentence and the second sentence are imposed by two different judges,[54] where one sentence is imposed by a jury and the subsequent sentence is imposed by a judge,[55] or where there is a trial de novo.[56] The

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44. *Id.* at 713.
45. *Id.*
46. *Id.* at 726.
47. *Id.*
48. *Id.* at 725.
49. State v. Higgenbottom, 337 S.C. 652 n.1, 525 S.E.2d at 257 n.1 (Ct. App. 1999) (Connor, J., dissenting) (indicating that "retaliation" is more accurate).
50. *Pearce*, 395 U.S. at 726.
51. *See id.*
52. *Id.* The Court has referred to this requirement as a prophylactic measure. Texas v. McCullough, 475 U.S. 134, 142 (1986) (citing Michigan v. Payne, 412 U.S. 47, 52-53 (1973)).
53. Alabama v. Smith, 490 U.S. 794, 799 (1989) (stating that the *Pearce* presumption has been limited because it may arise where there is in fact no improper motive thereby blocking "'a legitimate response to criminal conduct'"(quoting United States v. Goodwin, 457 U.S. 368, 373 (1982))).
54. *See* Colten v. Kentucky, 407 U.S. 104, 117 (1972) ("It may often be that the superior court will impose a punishment more severe than that received from the inferior court. But it no more follows that such a sentence is a vindictive penalty for seeking a superior court trial than that the inferior court imposed a lenient penalty."); State v. Hilton, 291 S.C. 276, 278-79, 353 S.E.2d 282, 284 (1987).
55. Texas v. McCullough, 475 U.S. 134, 140 (1986).
56. *Colten*, 407 U.S. at 119.

presumption also does not apply when a defendant withdraws a guilty plea and receives a harsher sentence after being convicted at a full trial.[57]

1. *No Presumption of Vindictiveness if Vindictiveness Clearly Not Present*

Obviously the presumption does not apply when the record clearly reflects a lack of vindictiveness. In *Texas v. McCullough* the Supreme Court revisited the issue of whether a higher sentence at retrial violates due process.[58] In his first trial, the defendant was convicted of murder and was sentenced to twenty years by the jury.[59] The trial judge granted the defendant's motion for a new trial based on prosecutorial misconduct.[60] At the new trial, the prosecution presented new testimony identifying McCullough instead of his accomplice as having slashed the victim's throat.[61] The same judge presided, and the defendant requested that the judge impose his sentence.[62] The judge sentenced the defendant to fifty years imprisonment.[63]

The Supreme Court held that the presumption of vindictiveness was inapplicable.[64] In support of that holding, the Court emphasized that the trial judge granted the new trial because she herself thought that the defendant's claims had merit.[65] Furthermore, the *defendant chose the judge*, rather than the jury, to impose his sentence.[66] The Court found that these factors proved that the circumstances did not create any apprehension on the part of the defendant that the judge would be vindictive.[67] The Court further held that the presumption of vindictiveness did not apply because different sentencing authorities imposed the two sentences McCullough received.[68] The Court indicated that "[i]n such circumstances, a sentence 'increase' cannot truly be said to have taken place."[69]

2. *No Presumption of Vindictiveness When Different Sentencing Authorities Impose the Sentences*

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57. *Smith*, 490 U.S. at 801.
58. 475 U.S. at 135 (1986).
59. *Id.* at 135-36.
60. *Id.* at 136.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 138.
65. *Id.* at 138-39.
66. *Id.*
67. *Id.* Interestingly, the majority opinion in *McCullough* did not mention that the prosecutor agreed to the defense motion for a retrial. The press reported that "one of the biggest factors influencing [the prosecutor's] decision to join the defense motion was the possibility of . . . getting a harsher sentence in a new trial." *Id.* at 146-47 (Marshall, J., dissenting).
68. *Id.* at 140.
69. *Id.*

Following the Supreme Court's reasoning in *McCullough*, the South Carolina Supreme Court in *State v. Hilton*[70] held that the *Pearce* presumption of vindictiveness is not applicable when the second sentencing judge is someone other than the original trial judge who imposed the initial sentence.[71] In *Hilton*, the defendant was sentenced to fifteen years in prison.[72] His conviction was overturned, and, at the second trial, the defendant was again convicted and sentenced by a different judge to twenty years in prison.[73] The court reasoned that "[w]hen the second sentencing authority has no prior connection with the case, there can be no potential for self-vindication."[74]

3. *No Presumption of Vindictiveness When the Extended Sentence is Based on Additional Information Not Revealed Prior to the Initial Sentence*

The Supreme Court held in *Alabama v. Smith*[75] that the *Pearce* presumption does not apply when a higher sentence is imposed after trial than was imposed after a guilty plea.[76] In *Smith,* after initially pleading guilty, the defendant later had his guilty plea vacated and stood trial for burglary, rape, and sodomy.[77] Eventually, he received a longer sentence for the burglary charge than he had received after pleading guilty.[78] The Court reasoned that "in the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged," and the trial judge may also consider the defendant's conduct during the trial when imposing a sentence.[79] In particular, "[t]he defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation."[80]

4. *Other Applications of the* Pearce *Presumption*

The Supreme Court also has applied the *Pearce* presumption of vindictiveness to address prosecutors' conduct. Although prosecutorial conduct was not an issue in *Higgenbottom*, these cases are important in understanding how the *Pearce* presumption has developed over time.

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70. 291 S.C. 276, 353 S.E.2d 282 (1987).
71. *Id.* at 278-79, 353 S.E.2d at 284.
72. *Id.* at 277, 353 S.E.2d at 283.
73. *Id.*
74. *Id.* at 278-79, 353 S.E.2d at 284 (citing Williams v. State, 494 N.E.2d 1001, 1005 (Ind. Ct. App. 1986)).
75. 490 U.S. 794 (1989).
76. *Id.* at 801.
77. *Id.* at 795.
78. *Id.*
79. *Id.* at 801.
80. *Id.*

In *United States v. Goodwin,*[81] a police officer filed misdemeanor and petty offense charges against the defendant.[82] The case was assigned to an attorney from the Department of Justice who had authority to try only petty crime and misdemeanor cases.[83] The defendant entered into plea negotiations with the prosecutor but decided not to plead guilty and requested a jury trial.[84] The case was then transferred to the District Court and reassigned to a different prosecutor.[85] After reviewing the case, the prosecutor decided to charge the defendant with a felony rather than simply charging him with petty crime and misdemeanor violations.[86] The defendant appealed, alleging that, due to prosecutorial vindictiveness, he was charged with a more serious crime after he had declined to plead guilty and had requested a jury trial.[87]

The Court of Appeals found that the prosecutor did not act with actual vindictiveness but reversed because the circumstances warranted a presumption of vindictiveness.[88] The Supreme Court disagreed with the Court of Appeals' application of the presumption.[89] The Supreme Court stated that "[t]he possibility that a prosecutor would respond to a . . . demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness certainly is not warranted."[90]

Almost ten years later, the Fourth Circuit concluded that when a prosecutor simply follows procedures that are incidental to his duties, there is no presumption that the prosecutor's actions are vindictive. In *United States v. Mabry,*[91] the defendant exercised her right to challenge the presentencing report.[92] After the government offered evidence of even greater cocaine possession than was introduced at the trial, the defendant claimed that it was because she exercised this right.[93] The court held that the *Pearce* presumption of vindictiveness did not apply in this situation because there was no reasonable likelihood of vindictiveness where the government was "merely following the procedures set out in the Sentencing Guidelines."[94]

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81. 457 U.S. 368 (1982).
82. *Id.* at 370.
83. *Id.* at 370-71.
84. *Id.* at 371.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 372.
89. *Id.* at 384.
90. *Id.*
91. 953 F.2d 127 (4th Cir. 1992).
92. *Id.* at 132.
93. *Id.*
94. *Id.* at 133 (citing the limitations imposed on *Pearce* by Alabama v. Smith, 490 U.S. 794 (1989)).

Five years later, the South Carolina Court of Appeals addressed prosecutorial vindictiveness in *State v. Fletcher*.[95] Fletcher was convicted of assault and battery and discharging a firearm, both of which were municipal court offenses.[96] After the reversal of her conviction on the municipal court charges and prior to her new trial, Fletcher requested that the charge for pointing a firearm, a general sessions charge, be dismissed because of prosecutorial vindictiveness.[97] The court refused to dismiss the charge, and Fletcher was convicted.[98] Because the solicitor charged Fletcher with the general sessions charge at the same time that he charged her with the municipal charges, the court held that the presumption of vindictiveness was not warranted.[99] The general sessions charge was not brought against Fletcher after she exercised a right to appeal; the solicitor was merely continuing to prosecute an existing charge.[100] The court noted that there was no incentive for the prosecutor to discourage an appeal because the initiation of an appeal did not increase the prosecutor's work load since "[he was] already faced with the duty of prosecuting [a] separate charge" resulting from the same incident.[101]

D. Circumstances in Which Courts Have Applied the Presumption

Despite the subsequent limitations to the *Pearce* presumption of vindictiveness, the presumption still has valid applications. In *Wasman v. United States,*[102] the Supreme Court considered whether a more severe sentence following a successful appeal violated the Due Process Clause of the Fifth Amendment.[103] Before the defendant's second sentencing, the trial judge considered the defendant's intervening conviction for conduct that occurred prior to his first sentencing.[104] The same judge imposed both sentences.[105] The Court held that these circumstances gave rise to a presumption of vindictiveness.[106] However, the trial judge had carefully set out his reasons for imposing a more severe sentence at the retrial:

> When I imposed sentence the first time, the only conviction on [petitioner's] record in this Court's eyes, this Court's consideration, was failure to file income tax returns, nothing else. I did not consider then and I don't in other cases either,

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95. 322 S.C. 256, 471 S.E.2d 702 (Ct. App. 1996).
96. *Id.* at 259, 471 S.E.2d 704.
97. *Id.*
98. *Id.*
99. *Id.* at 261, 471 S.E.2d 705.
100. *Id.*
101. *Id.* at 262, 471 S.E.2d 705.
102. 468 U.S. 559 (1984).
103. *Id.* at 560.
104. *Id.*
105. *See id.* at 569.
106. *Id.*

> pending matters because that would result in a pyramiding of sentences. At this time he comes before me with two convictions. Last time, he came before me with one conviction.[107]

The Court concluded that considering a conviction that occurred during the time between the initial sentencing and the resentencing was "manifestly legitimate," thus rebutting the presumption of vindictiveness.[108]

State v. Hidalgo[109] raised the issue of whether, after an attempted withdrawal of a guilty plea and a motion to reconsider sentence, imposing a more severe sentence constitutes a due process violation.[110] After his guilty plea, the defendant was originally sentenced to ten years of hard labor, but was only required to serve thirty months of the sentence because the remaining time was suspended.[111] The defendant later filed a motion "to set aside his guilty plea and have his sentence reconsidered."[112] The trial judge denied the motion to set aside the guilty plea and extended the defendant's sentence to thirty-six months rather than the thirty months he originally received.[113] The Louisiana Court of Appeals held that the trial judge did not overcome the *Pearce* presumption because the judge did not indicate in the record any adequate justification for an extended sentence.[114] Furthermore, from the trial judge's language it appeared that the sentence was extended simply because the defendant exercised his right to attempt to have his guilty plea set aside.[115]

In support of a presumption of vindictiveness the Supreme Court has acknowledged that actual vindictiveness would be difficult to prove and would require the courts to probe actual motive.[116] The presumption still arises when there is a reasonable likelihood that the court based the extended sentence on actual vindictiveness.[117] The Supreme Court's decisions regarding the issue of vindictiveness in resentencing "reflect a recognition by the Court of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided."[118]

When a higher sentence is imposed based solely upon vindictiveness, the defendant who receives the higher sentence is not the only person harmed.

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107. *Id.*
108. *Id.* at 569-70.
109. 684 So.2d 26 (La. Ct. App. 1996).
110. *Id.* at 28, 30.
111. *Id.* at 28.
112. *Id.*
113. *Id.*
114. *Id.* at 31.
115. *Id.* For the exact language used by the judge, see *infra* text accompanying n. 161.
116. United States v. Goodwin, 457 U.S. 368, 372-73 (1982).
117. Alabama v. Smith, 490 U.S. 794, 799 (1989) (citing *Goodwin*, 457 U.S. at 373); State v. Fletcher, 322 S.C. 256, 261, 471 S.E.2d 702, 704-05 (Ct. App. 1996).
118. *Goodwin*, 457 U.S. at 376. The doctrines of stare decisis, res judicata, law of the case, and double jeopardy are examples of this institutional bias. *Id.*

Those defendants who choose not to exercise their rights for fear of retaliation are also harmed.[119] The presumption of vindictiveness is designed to free the criminal defendant from the *apprehension* that she might receive a harsher sentence if she exercises constitutional or statutorily created rights.[120] The presumption applies when there is no explicit evidence of bad faith or retaliation[121]and when it appears that the sentencing authority may have a considerable stake in the outcome of the case.[122] After *Pearce*, the Supreme Court stated that "[t]he rationale of [the] judgment in the *Pearce* case . . . was not grounded upon the proposition that actual retaliatory motivation must inevitably exist," but that due process requires that the defendant not be unconstitutionally deterred by a fear of such retaliation.[123]

IV ANALYSIS

A. Presumption of Vindictiveness

The trial judge in *Higgenbottom* who extended his sentence in response to Higgenbottom's motion to reconsider was the same trial judge who imposed the initial sentence.[124] The day after Higgenbottom entered this plea and received his sentence, his attorney appeared before the same trial judge on a motion to reconsider the probation, specifically requesting a reduction of probation to twelve months.[125] Based on prior decisions of the Supreme Court and the South Carolina Court of Appeals, the South Carolina Supreme Court in this case should have found a presumption of vindictiveness, particularly because the same judge imposed both sentences.[126]

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119. Chaffin v. Stynchcombe, 412 U.S. 17, 24-25 (1973).

120. North Carolina v. Pearce, 395 U.S. 711, 725 (1969).

121. *See* Blackledge v. Perry, 417 U.S. 21, 28 (1974).

122. *Blackledge,* 417 U.S. at 27. Extending the Pearce presumption of vindictiveness to prosecutorial vindictiveness, the Court in *Blackledge* based its decision on the likelihood that a prosecutor might have a "considerable stake in discouraging convicted misdemeanants from appealing . . . ." *Id.*

123. *Id.* at 28. The Court in *Blackledge* found that where a prison inmate was convicted on a misdemeanor charge and appealed that conviction resulting in a trial de novo in North Carolina's two-tiered appellate system, the prosecutor could not then charge the defendant with a felony stemming from the same incident on which the prior misdemeanor conviction was based. *Id.* at 28-29. The facts in *Blackledge* differed from the facts in *People v. Williams*, where the court found that it was constitutional for the prosecutor to charge the defendant with a more serious crime at the second trial because the information the prosecutor needed to support a higher charge was unavailable to the prosecutor at the time of the initial trial. People v. Williams, 916 P.2d 624, 627 (Colo. Ct. App. 1996).

124. State v. Higgenbottom, 337 S.C. 637, 639, 525 S.E.2d 250, 251 (Ct. App. 1999).

125. *Id.* at 639-40, 525 S.E.2d at 251.

126. *See* Wasman v. United States, 468 U.S. 559, 569 (1984); *see also* State v. Hilton, 291 S.C. 276, 278-79, 353 S.E.2d 282, 284 (1987) (holding the presumption inapplicable when the resentencing judge and trial judge are different).

The Court in *Chaffin v. Stynchcombe*[127] emphasized the fact that the initial sentencing authority may have a personal stake in the outcome of the case.[128] Applying the presumption of vindictiveness to a case in which the same judge imposes both the initial and second sentence is logical because a retaliatory motive is greater when a judge is forced to rehear a matter that the judge believes to have been previously settled. The same rationale underlies the *Chaffin* Court's holding that the presumption does not arise where the jury imposes the second sentence.[129] The Court reasoned that the jury: (1) typically is unaware of the prior sentence; (2) has no personal stake in the prior conviction nor motivation to engage in self-vindication (unlike a judge who has been reversed); and (3) is not as likely to be sensitive to the institutional interests giving judges incentives to discourage "meritless" appeals.[130]

In finding no presumption of vindictiveness in *Higgenbottom*, Judge Anderson distinguished between a trial judge who imposes a harsher sentence in response to a motion to reconsider and a trial judge who imposes a harsher sentence when the initial sentence has been reversed.[131] Judge Anderson concluded that a trial judge who has been reversed has a motive to vindicate himself by punishing the defendant with a more severe sentence, but the trial judge in *Higgenbottom* had no such motive.[132] This distinction purports to consider the rationale supporting the presumption of vindictiveness. However, by attempting to distinguish scenarios in which a judge would have a motive for vindication, Judge Anderson essentially minimized the reality that a variety of circumstances might lead to retaliatory or vindictive actions on the part of the judge.

The rationale behind the *Pearce* presumption is that a judge may feel the need to retaliate against the defendant for exercising the right to make post-trial motions or the right to appeal.[133] A post-trial collateral attack and an appeal are both efforts to alter the sentence the defendant has received. It is illogical to suggest that a judge would retaliate when the defendant attacks the sentence or conviction in a higher court but not when the defendant attempts to attack the sentence in the same court where he initially received the sentence. Admittedly, a retaliatory motive is more likely to exist when a judge is forced to sit through a retrial ordered by an appellate court, which he may consider a waste of time. However, even without a retrial, the judge still must use his valuable time to hear and rule on a motion to reconsider.

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127. 412 U.S. 17 (1973).

128. *See id.* at 27.

129. *Id.*

130. *Id.* at 26-27; *see also* United States v. Goodwin, 457 U.S. 368, 374 n.5 (1982) (paraphrasing *Chaffin*'s rationale).

131. *Higgenbottom*, 337 S.C. at 649, 525 S.E.2d at 256; *cf.* Williams v. State, 494 N.E.2d 1001, 1005 (Ind. Ct. App. 1986) (holding that a trial judge who overturned a conviction for prosecutorial misconduct cannot have a motivation for self-vindication).

132. *Id.*

133. *See, e.g. Chaffin*, 412 U.S. at 24-25.

An even stronger argument for the existence of a retaliatory motive in circumstances such as *Higgenbottom* is that the defendant is not only disagreeing with the judge, but is essentially arguing that the judge erred in his initial determination. Although the Supreme Court has indicated that a presumption of vindictiveness should not apply solely because a defendant seeks an acquittal,[134] other factors warrant the presumption in *Higgenbottom*.

The trial judge in *Higgenbottom* not only failed to indicate any factual basis for extending Higgenbottom's sentence, but he also failed, through his conduct, to give any grounds for believing that he was not acting vindictively. In contrast, the trial judge in *McCullough* granted the defendant's motion for a new trial, was chosen by the defendant to impose his sentence, and explained in the record that the higher sentence was due to new evidence presented at the subsequent trial.[135] Based on these factors, the Court did not find that the circumstances warranted a presumption of vindictiveness.[136] The trial judge's statements to Higgenbottom's counsel implicitly indicate that his only basis for extending the sentence was that Higgenbottom made the motion to reconsider his sentence.[137] The record in *Higgenbottom* lacks any evidence similar to the evidence in *McCullough* that would rebut the appearance that the trial judge was acting vindictively.

The rationale for requiring that the supporting facts be included in the record is to ensure that the constitutionality of the increased sentence may be fully reviewed on appeal.[138] The reason for the higher sentence "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."[139] Additionally, evidence beyond the defendant's conduct subsequent to the initial sentencing may be considered.[140]

In *McCullough* the Court held that when the *Pearce* presumption applies, the harsher sentence may be justified by facts which occurred prior to the first trial but were unknown to the sentencing authority at the first sentencing.[141] Additionally, an increased sentence may be justified by relevant conduct or

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134. Texas v. McCullough, 475 U.S. 134, 139 (1986).

135. *Id.* at 136, 138-39. In particular, the trial judge stated that the sentence which the defendant "received initially was unduly lenient in light of significant evidence not before the sentencing jury in the first trial." *Id.* at 140.

136. *Id.* at 138-39.

137. *Higgenbottom*, 337 S.C. at 640, 525 S.E.2d at 251 (quoting the trial judge: "since he is asking for a reconsideration maybe I ought to just reconsider it on my own and extend his sentence"); *see infra* Part IV.B.

138. North Carolina v. Pearce, 395 U.S. 711, 726 (1969).

139. *Id.*

140. *See McCullough*, 475 U.S. at 141; Wasman v. United States, 468 U.S. 559, 571-72 (1984).

141. *See McCullough*, 475 U.S. at 144. Similarly, a prosecutor is not acting vindictively when he brings additional charges after reversal of the previous conviction when the facts supporting the additional charges were not available to the prosecutor at the time of the initial trial. People v. Williams, 916 P.2d 624, 627 (Colo. Ct. App. 1996).

events that occurred subsequent to the original sentencing.[142] If a lesser sentence was imposed initially and the resentencing authority may not consider any evidence obtained after the initial sentence, the defendant has essentially received less punishment than deserved. These decisions are consistent with the modern sentencing philosophy.[143]

The trial judge in *Higgenbottom* was not presented with any additional facts beyond those facts he had the previous day when he imposed the initial sentence.[144] The trial judge did not explain why a harsher sentence was warranted. Thus, this case differs from a situation in which a defendant enters a guilty plea, receives a sentence, and later receives a harsher sentence after a full trial.[145] A sentence imposed after a trial is based on much more information than a sentence resulting from a guilty plea. As Judge Connor said in dissent, "One day after the original sentencing, the only thing that was different about Higgenbottom's case was his motion to reconsider."[146]

The Supreme Court has indicated that the *Pearce* presumption is a "prophylactic rule [that] must be given a common sense interpretation consistent with the function of that rule."[147] A reconsideration by the same judge of the very same facts available to him at the initial sentencing warrants, at the very least, a presumption of vindictiveness when a harsher sentence is imposed. The trial judge could have given Higgenbottom the harsher sentence at the initial sentencing without encountering a constitutional dilemma. However, because the extended sentence was imposed after Higgenbottom exercised his right to make a motion to reconsider, an entirely plausible explanation for the increase in the sentence is that it was imposed in retaliation against Higgenbottom for exercising his rights. The circumstances indicate a

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142. *Wasman*, 468 U.S. at 572. The Court reasoned that there is no logical support for distinguishing between 'events' and 'conduct' occurring after the initial sentence in light of the fact that the modern philosophy of sentencing is to consider any information that sheds light on every aspect of the defendant's life. *Id.* at 571-72. The events and conduct need not negatively affect the defendant. For example, in a Wisconsin case, defense counsel attempted to introduce evidence at the resentencing hearing pertaining to defendant's good conduct since the first sentencing, his offer of employment upon release from prison, and a dismissal of a previously pending charge against the defendant. State v. Carter, 560 N.W.2d 256, 258 (Wis. 1997). The court, holding that the trial court should consider all relevant information, stated that the court's role in determining an initial sentence and a resentence is the same—the sentencing and resentencing courts should have "accurate, complete and current information." *Id.* at 262.

143. *See supra* Part III.A.

144. *Higgenbottom*, 337 S.C. at 654, 525 S.E.2d at 258 (Connor, J., dissenting).

145. *See, e.g.*, Alabama v. Smith, 490 U.S. 794 (1989). The dissenting opinion in *Higgenbottom* specifically points out that "[n]one of the things the Court considered in *Smith* in determining there was no reasonable likelihood of vindictiveness were present [in this case]." *Higgenbottom*, 337 S.C. at 654, 525 S.E.2d at 258 (Connor, J., dissenting). The trial judge in *Higgenbottom* had no new evidence before him on the day of the motion to reconsider; therefore, he did not "'gather a fuller appreciation of the nature and extent of the crimes charged.'" *Id.* (quoting *Smith*, 490 U.S. at 801).

146. *Higgenbottom*, 337 S.C. at 654, 525 S.E.2d at 259 (Connor, J., dissenting).

147. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 26.1(C) (1985).

reasonable likelihood that the trial judge was acting with vindictiveness in extending Higgenbottom's sentence.

B. Actual Vindictiveness

Judge Anderson concluded that there was no actual vindictiveness when the trial judge extended Higgenbottom's sentence.[148] When the circumstances do not warrant a presumption of vindictiveness, the defendant has the burden of proving actual vindictiveness.[149] In *People v. Williams*[150] the court addressed the issue of prosecutorial vindictiveness. The defendant successfully attacked his conviction, and, at the second trial, the district attorney added additional charges against the defendant as a habitual offender.[151] Information regarding an out-of-state conviction was not available on the National Crime Information Computer, so the prosecutor did not have that information available to him in time to add such charges at the initial trial.[152] The court concluded that because the prosecutor did not know of, and could not have known of, the facts that were the basis for the additional charge, there was no actual vindictiveness in seeking a conviction on habitual criminal charges.[153]

Likewise, in *McCullough* the Court held there was no actual vindictiveness when the trial judge thoroughly explained her reasons for imposing a sentence that was higher than the initial sentence imposed by the jury.[154] At the second trial, the judge relied on the testimony of two new witnesses to set the defendant's sentence.[155] The Court found that the judge's more severe second sentence was based on an "on-the-record, wholly logical, *nonvindictive* reason."[156]

The burden of proving actual vindictiveness is difficult to carry.[157] To prove actual vindictiveness, the defendant must show some action on the judge's part that indicates he was acting out of vindictiveness. In *Hidalgo*, where the court found actual vindictiveness, the court based its decision on the words spoken by the trial judge.[158] After he was sentenced, Hidalgo made a

148. *Higgenbottom*, 337 S.C. at 649, 525 S.E.2d at 256.

149. *See* United States v. Wasman, 468 U.S. 559, 569 (1984); State v. Fletcher, 322 S.C. 256, 261, 471 S.E.2d 702, 705 (Ct. App. 1996).

150. 916 P.2d 624 (Colo. Ct. App. 1996).

151. *Id.* at 626.

152. *Id.*

153. *Id.* at 626-27.

154. Texas v. McCullough, 475 U.S. 134, 140 (1986); *see supra* notes 134-35 and accompanying text. In *McCullough*, the same factors that led the Court to conclude that a presumption of vindictiveness was not warranted are the same factors the Court considered to conclude there was no actual vindictiveness. *Id.* at 141-42.

155. *McCullough*, 475 U.S. at 136.

156. *Id.* at 140 (emphasis added).

157. *See supra* Parts III.C., III.D.

158. State v. Hidalgo, 684 So.2d 26, 31 (La. Ct. App. 1996).

motion to set aside his guilty plea and have his sentence reconsidered.[159] The trial judge denied the motion to set aside the guilty plea and ruled on the motion to reconsider.[160] The judge stated:

> Instead of taking his medicine, admitting his guilt, and accepting his sentence, he chose instead to attack his plea when he knew it was free and voluntary. And in thinking about it, I think I was too easy on him the first time around. So I am going to reconsider his sentence, and I am going to amend it by increasing his hard labor time to 36 months rather than 30 months, which is in accordance with the pre-sentence investigation.[161]

The circumstances in *Higgenbottom* are remarkably similar to those in *Hidalgo*. When defense counsel made the motion to reconsider, the trial judge stated, "'*He just about talked himself into jail as it was*. No, sir; *I'm going to give him twenty-four months probation. We're going to see if he can do probation* . . . . Since you made the motion to reconsider, I'm denying that motion and I'm reconsidering my sentence and extending his probation to twenty-four months.'"[162]

Judge Anderson found that Higgenbottom did not meet his burden of proving actual vindictiveness.[163] Rationalizing his decision, Judge Anderson stated that the trial judge based his decision to extend Higgenbottom's sentence on a review of the facts of the case.[164] Judge Anderson further explain that the trial judge did not believe Higgenbottom's explanation of why there was a spoon in his pocket with traces of cocaine.[165] However, Judge Anderson did not point to anything in the record that indicated that the trial judge considered any new facts when he ruled on the motion to reconsider. The only indication in the judge's words that might have led Judge Anderson to conclude that the extended sentence was based on a review of the facts is the trial judge's statement, "He just about talked himself into jail as it was . . . . Maybe he'll be cleaning up his lot again."[166]

Assuming the trial judge did increase Higgenbottom's sentence based on a review of the facts that he had at the time of the original sentencing, the result in *Higgenbottom* would remain problematic. As the dissent points out, "[a]llowing an increased sentence based on a reconsideration of the same

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159. *Id.* at 28.
160. *Id.* at 31.
161. *Id.*
162. *Higgenbottom*, 337 S.C. at 640, 525 S.E.2d at 251 (emphasis added).
163. *Id.* at 649, 525 S.E.2d at 256.
164. *Id.*
165. *Id.* at 649-50, 525 S.E.2d at 256.
166. *Id.* at 640, 525 S.E.2d at 251 (referring sarcastically to defendant's excuse that he found the cocaine-tinged spoon while cleaning up the parking lot of his tire store).

evidence would effectively eliminate the protection the United States Supreme Court attempted to provide in *Pearce*."[167] Moreover, the cases that the South Carolina Court of Appeals considered in *Higgenbottom*, with the exception of *Hidalgo*, involved factual or procedural circumstances that differed from the circumstances in *Higgenbottom*.[168] In those cases, there were factors that the courts emphasized in concluding that the presumption of vindictiveness did not apply or that there was no actual vindictiveness.

Furthermore, Judge Anderson's decision on the issue of error preservation supports the contention that at least a presumption of vindictiveness was warranted, if not a finding of actual vindictiveness. Judge Anderson based the decision regarding the preservation of issues in the trial court on the rule of futility.[169] The rule of futility excuses an appellant's failure to make an objection in the trial court on the basis that such an objection would have been futile.[170] Judge Anderson inferred that the tone and tenor of the trial judge were such that an objection would have been futile.[171] Apparently Judge Anderson, reviewing the exchange between defense counsel and the trial judge regarding the motion to reconsider, interpreted the judge's words to indicate that any further objection by defense counsel would have been harassment or would have been met by a response adverse to the defendant.[172]

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167. *Id.* at 655, 525 S.E.2d at 259 (Connor, J., dissenting).

168. *See id.*

169. *Id.* at 640, 525 S.E.2d at 251.

170. *Id.* (citing State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994)). In explaining the impropriety of a question defense counsel asked a witness, the judge made the following statements to the jury:

> I hate to fuss at a pretty girl . . . . But it was a kind of below the belt shot [sic]. But she was doing the best, she thought. But anyhow as she gains experience [sic] . . . . It was a shot in the dark which implies wrongdoing . . . . So don't hold it against her, she's a nice girl I was young once myself, I put it to plain inexperience or whatever, but you'll get over it as you learn [sic].

Pace, 316 S.C. at 73, 447 S.E.2d at 187. The supreme court held that the tone and tenor of the trial judge's remarks indicated that any objection defense counsel could have made would have been futile. *Id.* at 74, 525 S.E.2d at 187.

171. *Higgenbottom*, 337 S.C. at 640, 525 S.E.2d at 251. The concurring opinion noted that the exchange between defense counsel and the trial judge indicated that counsel was well aware of the trial judge's authority and the possibility of an extended sentence and, in fact, conceded that the trial judge had the power to do what he did. *Id.* at 650-51, 525 S.E.2d at 256-57 (Goolsby, J., concurring). Even if Judge Goolsby's interpretation of defense counsel's words is correct, it is still constitutionally impermissible for a trial judge to extend a defendant's sentence based on vindictiveness. Defense counsel's acknowledgment that vindictiveness may result in some judges imposing increased sentences does not obviate the need to examine the constitutionality of the increased sentence.

172. *Id.* at 640, 525 S.E.2d at 251. Judge Anderson stated, "Higgenbottom objected to his original sentence and received a higher sentence on resentencing. If Higgenbottom objected to his sentence in this resentencing scenario, surely he would place himself in a perilous posture." *Id.* The use of "perilous" suggests that Judge Anderson thought that any objection by defense counsel to the extension of the sentence would have resulted in Higgenbottom receiving an even

While concluding Higgenbottom's failure to object was excused, Judge Anderson referred to the dilemma of a defense attorney, hypothesizing that an objection by a defense attorney may result in harassing a judge who has ruled on an issue by presenting the issue to him again.[173] The very fact that Judge Anderson made this observation seems to indicate that his decision on the issue of vindictiveness was ill-reasoned. Judge Anderson's reasoning on this issue is similar to the reasoning that led to the application of the *Pearce* presumption in certain situations. The policy behind the presumption is to assure that vindictiveness plays no part in the resentencing process.[174] By excusing the defendant's failure to object below because the judge may have imposed an even harsher sentence, Judge Anderson implies that such an increased sentence surely would have been due to vindictiveness.

C. *Chilling Effect*

Not only does the *Higgenbottom* decision violate Higgenbottom's right to due process, but it also could have devastating effects on the basic principles embodied in the appellate process. A criminal defendant's fear of an extended sentence could deter the defendant from exercising a statutory or constitutional right to appeal. The following is a letter written by an inmate to a judge regarding the possibility of a retrial:

> "Dear Sir:
> I am in the Mecklenburg County jail. Mr. ____ chose to re-try me as I knew he would. . . .
> Sir the other defendant in this case was set free after serving 15 months of his sentence, I have served 34 months and now I am to be tried again and with all probility I will receive a heavier sentence then before as you know sir my sentence at the first trile was 20 to 30 years. I know it is usuelly the courts prosedure to give a larger sentence when a new trile is granted I guess this is to discourage Petitioners.
> Your Honor, I don't want a new trile I am afraid of more time. . . .
> Your Honor, I know you have tried to help me and God knows I apreceate this but please sir don't let the state retry me if there is any way you can prevent it.
> Very truly yours"[175]

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harsher sentence.

173. *Id.* Provided the judge has occasion to consider an issue, it is "'not incumbent upon defense counsel to harass the judge by parading the issue before him again.'" State v. McDaniel, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) (quoting Dunn v. Coca-Cola Bottling Co., 311 S.C. 43, 46, 426 S.E.2d 756, 758 (1993)).

174. North Carolina v. Pearce, 395 U.S. 711, 725 (1969).

175. Patton v. North Carolina, 381 F.2d 636, 639 n.7 (4th Cir. 1967) (alteration and errors in original).

This letter indicates that there may indeed be a chilling effect when a defendant fears that resentencing routinely results in a harsher sentence.

However, not all such effects are problematic; the Court clearly distinguished between permissible and impermissible chilling effects:

> [A] defendant may be more reluctant to appeal if there is a risk that new, probative evidence supporting a longer sentence may be revealed on retrial. But this Court has never recognized this "chilling effect" as sufficient reason to create a constitutional prohibition against considering relevant information in assessing sentences.[176]

The Court has expressed "no doubt about the constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent effect they might have on the right to appeal."[177]

The circumstances in *Higgenbottom* appear to fall under the impermissible category. No new, probative evidence was produced at the motion to reconsider to support the harsher sentence imposed by the trial judge. Rather, Judge Anderson seemed to construe the trial judge's words to find that the extended sentence was based on consideration of the facts, but no new facts were presented.[178] A resentencing based on a review of the same facts that were known and considered at the initial sentence is no different from a review without new, probative evidence. Such a holding will chill a criminal defendant's choice of pursuing statutory or constitutional rights after conviction and sentencing. A defendant who feared a severe sentence, but received a lesser one, will be reluctant to appeal his conviction, even when an appeal is justified, for fear of a harsher sentence based on the exact same evidence.

V. CONCLUSION

From *Pearce* to the present, courts considering the issue of vindictiveness in sentencing have been concerned that, even without an actual interference with a defendant's right to exercise constitutional or statutory rights, there must be no apprehension on the part of the defendant in exercising those rights. It appears that the court in *Higgenbottom* did exactly what it purported not to do—it hindered the criminal defendant's exercise of his right to appeal or to pursue statutory remedies for fear of a longer sentence imposed by a vindictive judge.

A judge should be able to impose a proper sentence at resentencing in light of the facts and circumstances surrounding the case. It is in society's best

176. Texas v. McCullough, 475 U.S. 134, 143 (1986).
177. Chaffin v. Stynchcombe, 412 U.S. 17, 29 (1973).
178. *Higgenbottom*, 337 S.C. at 654-55, 525 S.E.2d at 258 (Connor, J., dissenting).

interest that criminals be punished for their wrongdoings.[179] There should not be an absolute ban on imposing higher sentences on resentencing. However, there are constitutional requirements that must not be ignored when a sentence is imposed. When the judge imposes a more severe sentence than the initial sentence - whether imposed by the same judge, a different judge, or a jury - the judge should have objective reasons constituting the basis of his decision to impose a more severe sentence. A requirement that the judge set out those reasons in the record is not unreasonable.[180]

Judge Anderson states that the *Pearce* presumption has been eviscerated by subsequent cases.[181] Although subsequent cases have defined, thereby limiting, the situations in which the *Pearce* presumption is applicable, *Pearce* has not been overruled.[182] The cases subsequent to *Pearce* have simply limited *Pearce* according to the balance that is needed between society's interest in punishing criminals, the trial judge's discretion in determining a proper sentence, and a criminal's constitutional rights.[183] Indeed, the presumption of vindictiveness is not one which should apply every time a defendant receives a higher sentence, but the presumption is a legitimate method of protecting a criminal defendant's right to appeal a conviction.[184] The erosion of the *Pearce* rule which may result from *Higgenbottom* is detrimental. For defendants, it

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179. "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." North Carolina v. Pearce, 395 U.S. 711, 750 (1969) (Harlan, J., concurring in part and dissenting in part) (quoting United States v. Tateo, 377 U.S. 463, 466 (1964)). "[T]his societal interest is compromised to a degree if the second judge is forbidden to impose a greater punishment on retrial than was meted out at the first trial." *Pearce*, 395 U.S. at 750.

180. In fact, some states require that a resentencing court explain the basis for its sentence in the record. State v. Carter, 560 N.W.2d 256, 258 n.2 (Wis. 1997).

181. *Higgenbottom*, 337 S.C. at 643, 525 S.E.2d at 253.

182. Some courts do cite *Alabama v. Smith* as having overruled *Pearce*. *See* State v. Oliver, 470 S.E.2d 16, 18 (N.C. 1996); Gorham v. Commonwealth, 426 S.E.2d 493, 495 (Va. Ct. App. 1993); State v. Gill, 416 S.E.2d 253, 258 (W.Va. 1992). These cases deal with the issue of double jeopardy and cite *Pearce* as overruled on other grounds. The Court in *Smith* explained that its "conclusion . . . [was] not consistent with *Simpson v. Rice*, the companion case to *North Carolina v. Pearce*" because in that case the Court failed to distinguish between different sentences imposed after two trials and different sentences imposed after a guilty plea and after a trial. Alabama v. Smith, 490 U.S. 794, 802 (1989). The Court overruled *Simpson v. Rice*'s holding that there is a presumption of vindictiveness when the sentence after a trial is more severe than the sentence after a guilty plea. *Id.* at 803.

183. In limiting the circumstances in which the presumption arises, the Court has stated that "[g]iven the severity of such a presumption . . . which may operate in the absence of any proof of an improper motive and thus may block a legitimate response to criminal conduct – the Court has [applied the presumption] only in cases in which a reasonable likelihood of vindictiveness exists." United States v. Goodwin, 457 U.S. 368, 373 (1982).

184. The Massachusetts Supreme Judicial Court took the *Pearce* presumption one step further and adopted as a part of state common law the principle that, upon resentencing, the judge may impose a harsher sentence only if the judge's reasons for imposing the harsher sentence are included in the record and are based on information that the initial sentencing judge did not have. Commonwealth v. Hyatt, 647 N.E.2d 1168, 1173 (1995).

may lead to a reduction in the filing of justified appeals. For society, fewer appeals will reduce the opportunity for higher sentences that would be given where they are actually warranted, thereby correcting sentences that initially may have been too lenient.

The *Pearce* presumption is no insurmountable obstacle and is easy for the state to rebut if there are in fact valid reasons for the increased sentence. The fact that the United States Supreme Court articulated a presumption indicates that the Court thought it more desirable to provide broad protection which may extend to situations that do not necessarily require such protection, rather than to allow unconstitutional interference with a defendant's rights. If and when the South Carolina Supreme Court addresses this issue, the court should consider two factors that lessen the value of the *Higgenbottom* decision. First, only one judge on the Court of Appeals wrote the opinion in *Higgenbottom*. Neither of the other two judges agreed with Judge Anderson's application of the law. Second, the Court of Appeals failed to clearly identify any constitutional provision on which the opinions were based.[185] In the interest of protecting the rights embodied in the United States and South Carolina constitutions, the supreme court should take this opportunity to correct the unwise decision of *Higgenbottom* and to clearly indicate the constitutional provisions which command such a result.

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185. *See supra* Part II.