The Burger Court Opinion Writing Database

Wasman v. United States

468 U.S. 559 (1984)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-173

MILTON R. WASMAN, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1984]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Due Process Clause of the Fifth Amendment was violated when a federal defendant was given a greater sentence after retrial following a successful appeal than he had been given after his original conviction because the sentencing court considered an intervening criminal conviction for acts committed prior to the original sentencing.

I

Petitioner, an attorney, was indicted on four counts of mail fraud in violation of 18 U. S. C. § 1341. Prior to trial on these charges, he was indicted, tried, and convicted of the unrelated offense of knowingly and willfully making false statements in a passport application, in violation of 18 U. S. C. § 1542. At the sentencing hearing following petitioner's first conviction, the government advised the court that charges were then pending against petitioner for mail fraud and that petitioner previously had been convicted for failure to file a tax return. Petitioner's counsel replied that it would be inappropriate for the court to consider the pending mail fraud charges in its sentencing on the passport conviction because petitioner had yet to respond to the charges.

The District Court judge informed the parties that he would not consider the pending mail fraud charge in sentenc-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 8, 1984

Personal

83-173 - Wasman v. United States

Dear Lewis:

I have your note on the above and would appreciate it if you would defer action until I see if I can accommodate your view.

Pearce is clearly ambivalent on this point and I have simply adopted one of the two inconsistent theories.

Let me see if I can take care of your point.

Regards,

WEB

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 14, 1984

PERSONAL

Re: 83-173 - Wasman v. United States

Dear Lewis:

If I understand your proposed concurrence correctly, you would say simply that the intervening conviction in this case was an event occurring after the first trial and, thus, that the case can be resolved on its facts under Pearce. We can do this. There are at least two reasons, however, why this narrow approach is unwise.

First, there is a square conflict among the circuits on whether an increased sentence can be based on events or just on conduct of the defendant occurring after the original trial. We took this case to resolve at least this issue. Under your approach, this direct conflict would go unaddressed; we would offer no guidance whatsoever to other courts. I--and I dare say, others--would not even have voted to grant certiorari to dispose of the case on this ground alone. It is too plain that the conviction was an event to merit plenary review on only this issue. Indeed, we granted certiorari on the following question, which your disposition of the case would not resolve at all: "Whether a sentence may be enhanced following re-trial and conviction after a first conviction is reversed on appeal based upon conduct of a defendant which occurred prior to the first sentencing hearing?"

But the only change was an "event"

Second, were your approach followed, a judge would still not be permitted to consider any information relating to anything that occurred before the first trial. Suppose that a defendant is convicted of burglary and that this is apparently his first offense. The conviction is reversed on appeal. On retrial, it is learned for the first time that the defendant in fact has a lengthy criminal record which includes other burglaries, murders and several rapes. This has happened. Under your reading, the sentencing judge would not be allowed to increase the defendant's sentence based upon his new-found

knowledge of these other convictions! Does that make sense? Hugo's Williams v. New York has been regarded as the classic utterance and your reading of Pearce castrates Williams. I would rather DIG or reargue this case than put my name on this diluted treatment of reality.

Regards,

LFB

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 18, 1984

83-173 - Wasman v. United States

MEMORANDUM TO THE CONFERENCE:

Since Thurgood has now joined Lewis' concurrence in the judgement, I will revise the opinion to conform with this development. It will be around shortly.

Regards,

WEB

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justi

Circulated: _____

Recirculated: JUN 19 1984

CHANGES AS MARKED: 12, 13

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-173

MILTON R. WASMAN, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1984]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 25, 1984

83-173 - Wasman v. United States

Dear Lewis:

I began a line-by-line comparison of the "draft" you sent me today. After three pages I gave up.

I will be glad to consider any suggestions you have - other than style - if you will have your Clerk take my 2nd Draft dated June 19, 1984 and make inserts of changes proposed. Then I can see clearly whether these are changes in style or in substance. I will consider the latter.

As to leaving the Pearce question open, Brennan joined your earlier draft.

I am not interested in Brennan's views about my opinion on this score. I try to accommodate "joiners" but not dissenters.

My second draft omitted what you requested. That is the draft I will stand on.

Regards,

WEB

Justice Powell

I thought I had modeled your points in the 2nd Draft 6/19. I don't give a "TSD" for what WJB et al think - or write!

WJB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

6/25/84

Dear Jean,

Reading your 6/23 memo again, it occurs to me that you intended to send TWO drafts, but only a typewritten total re-run was enclosed.

Maybe this is the source of the confusion

Regards

WEB

(cf. the CJ's letter of 6/25/51)

Supreme Court of the United States

Memorandum

Dear Tom,

----------, 19----

Our search fails to turn up the printed copy you marked up. Thank you for a new copy. These things happen in June!

I am opting for your marked up version. Brennan + Co. can do as they like!

Regards

WOD3

Draft follows.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 25, 1984

PERSONAL

83-173 - Wasman v. United States

Dear Lewis:

Here is the version containing your mark-up of my 2nd Draft of June 19, 1984.

It is more important to have five on this than nine on Brennan's watered down approach. We leave open a clarification of the Pearce ambiguity.

Regards,

Justice Powell

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: JUN 19 1984

CHANGES AS MARKED: 12,13

As received from C. J. with his letter of June 25th

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-173

MILTON R. WASMAN, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1984]

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The District Court judge informed the parties that he would not consider the pending mail fraud charge in sentenc-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 27, 1984

PERSONAL

83-173 Wasman v. United States

Dear Lewis:

From your note of June 26, I take it that you are troubled by the final "paragraph" on page 11 which begins, "[i]n addition, two of the separate opinions in Pearce...," and with the footnote on page 13. I will begin a section "C" on the top of page 12. This will enable you to separate yourself from the discussion of the separate opinions in Pearce. I also will change the footnote to read as follows:

> "The Solicitor General argues that the 'temporal limitation' imposed by Pearce on information that may be considered by a sentencing authority is unnecessary to advance the policies underlying that decision. However, the question whether an increased sentence can be justified by reference to an event or conduct occurring before the original sentencing is not presented in this case."

This change will eliminate any suggestion that a "question" was presented as to an "event" or "conduct" occurring before the original sentencing. The whole thrust of Pearce was the vindictiveness factor and that, of course, is not remotely related to the so-called "temporal" time frame aspect.

My understanding is that, with these changes, you would be able to join all but Parts IIB and IIIB. If I am correct in this, we can finally get this out.

Regards,

WEB

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

tice Brennan
tice White
tice Marshall
tice Blackmun
tice Powell
tice Rehnquist
tice Stevens
tice O'Connor

om: **The Chief Justice**

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Jews
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The District Court judge informed the parties that he would not consider the pending mail fraud charge in sentenc-

CHANGES AS MARKED: 12, 13

e Brennan
ce White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: JUN 19 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–173

MILTON R. WASMAN, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1984]

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The District Court judge informed the parties that he would not consider the pending mail fraud charge in sentenc-

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justi

Circulated: _____

Recirculated: JUN 28 1984

CHANGES AS MARKED: 11-13

STYLISTIC CHANGES

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-173

MILTON R. WASMAN, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1984]

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The District Court Judge informed the parties that he would not consider the pending mail fraud charge in sentenc-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 2, 1984

Re: 83-173 - Wasman v. United States

MEMORANDUM TO THE CONFERENCE:

A final reading of the opinion in this case leads me to strike the pre-semi-colon portion of the sentence beginning on line 5, second paragraph of Part "C" on page 12. The stricken part reads,

"Our holdings make clear that vindictiveness should play no part in sentencing decisions."

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 18, 1984

No. 83-173

Wasman v. United States

Dear Lewis,

Please join me.

Sincerely,

Bill

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 21, 1984

Re: Wasman v. United States, No. 82-173

Dear Lewis:

Thank you for giving me the opportunity to review the latest changes. I understand your desire to accommodate the Chief, and I think your suggestions to him go a long way toward that goal. If I may, however, I would like to suggest three additional modifications:

First, I feel very strongly that the last footnote in the Chief's opinion must be removed. As I read it, it simply invites a petition for certiorari to overrule the explicit holding of Pearce ("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." 395 U.S. 711, 726 (1969)).

Second, I would prefer to delete the full paragraph at the end of page 11, since the language used in that paragraph and the quotations from Justices Douglas and Black are taken out of context and serve only to cloud the issue presented by the case.

Third, to make part IIB consistent with our refusal to join IIA, I would prefer to delete the "Given that the concern of our cases has been with actual vindictiveness" language from page 12. As you know, the Pearce presumption is not simply concerned with actual vindictiveness, but also is designed to protect against the fear of vindictiveness.

Finally, although I do not mean to discourage you in your efforts, I would like to leave open the option of joining only your separate opinion. And again, thank you for seeking my views.

Sincerely,

Bill

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 28, 1984

Re: No. 83-173, Wasman v. United States

Dear Chief:

I have sent the following down to the printer:

JUSTICE BRENNAN, concurring in the judgment.
Substantially for the reasons expressed by JUSTICE POWELL in his separate opinion, I concur in the judgment.

Sincerely,

Bill/BC

WJB, Jr.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 2, 1984

No. 83-173

Wasman v. United States

Dear Thurgood,

Do you think we need separate statements of the same thing in the above? If not, I'll withdraw mine if you'll please add me to yours.

Sincerely,

Bill

Justice Marshall

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: JUL 2 1984

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–173

MILTON R. WASMAN, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[July ——, 1984]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

Substantially for the reasons expressed by JUSTICE POWELL in his separate opinion, I concur in the judgment.

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 4, 1984

Re: 83-173 - Wasman v. United States

Dear Chief,

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 18, 1984

Re: No. 83-173-Wasman v. United States

Dear Lewis:

Please join me.

Sincerely,

T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 29, 1984

Re: No. 83-173-Wasman v. United States

Dear Chief:

Please add the following sentence to the end of your opinion:

"JUSTICE MARSHALL, concurring in the judgment: For substantially the reasons stated in JUSTICE POWELL's opinion, I concur in the judgment of the Court."

Sincerely,

T.M.

The Chief Justice

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: JUL 2 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-173

MILTON R. WASMAN, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[July ——, 1984]

JUSTICE MARSHALL, concurring in the judgment.

For substantially the reasons stated in JUSTICE POWELL's opinion, I concur in the judgment of the Court.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1984

Re: No. 83-173 - Wasman v. United States

Dear Lewis:

Please join me in your opinion concurring in the judgment.

Sincerely,

Harry

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

'84 JUN 29 A9:19

June 28, 1984

Re: No. 83-173, Wasman v. United States

Dear Lewis:

I am still with you and join your recirculation of today.

Sincerely,

Harry

Justice Powell

cc: The Conference

June 8, 1984

83-173 Wasman v. U.S.

Dear Chief:

I have considered your opinion in this case with great care, and find it difficult to join.

It may be that if I had been here when Pearce was before the Court, I would not have joined Potter's opinion. It has been the law, however, since 1969, and the system has adjusted to it very well - as evidenced by the care exercised by the District Court in this case.

On its facts, and in view of the record made by the District Court, this is an easy and straightforward case for affirmance simply applying Pearce. Your opinion can be read - at least implicitly - as limiting the authority of Pearce. If it should become necessary, I may consider some clarification. This certainly is not necessary in this case.

Unlike the exclusionary rule, Pearce has had no significant adverse societal effects.

Your opinion holds that "any factual information relevant to the sentence and not known to the sentencing authority at the time of the first sentencing" may be considered. Ante, at 13. This is a departure from Pearce that we really need not consider. Also, you describe the burden on the criminal defendant as being able to prove "actual vindictiveness" - also a requirement not articulated in Pearce.

Accordingly, although I will certainly join the judgment, I am writing a brief concurring opinion.

Sincerely,

The Chief Justice

lfp/ss

June 15, 1984

PERSONAL

83-173 Wasman

Dear Chief:

The tone of your typed and handwritten letters of yesterday concerns me.

I would not have thought that disagreement over how a case should be decided - at least as between you and me - would seem to arouse personal rather than professional displeasure. This seems all the more unusual in view of the fact that I wrote you private letters on June 8 and on June 13 expressing and indentifying my concerns with your opinion. Moreover, I had refrained from circulating any opinion in the hope that you would be willing to make some changes.

In any event, I now respond to the substance of your letter of June 14. It is, of course, true that two Circuits have held that an intervening conviction is not a legitimate reason for increasing a sentence because it is not "conduct of the defendant occurring after the first sentencing proceeding". See United States v. Williams, 651 F.2d 644, 648 (CA9 1981); United States v. Markus, 603 F.2d 409, 414 (1979).

The draft concurrence that I sent you addresses this issue. I quote the ambiguous language in Pearce, i.e., the "conduct" and the "events" paragraphs. I then state that Wasman's intervening conviction was a legitimate explanation for his increased sentence because it was an "event" occurring after the first sentencing proceeding. Perhaps I should have added a sentence stating expressly that the broader term "event" subsumes the term "conduct", so that whether a judge views the occurrence as an event or as conduct is immaterial. This, of course, is a common-sense view. The occurrence of either one, if it is otherwise relevant, is entirely consistent with the basic rationale of Pearce.

The SG's statement of the question presented is:

> "Whether the district court's imposition of a higher sentence at petitioner's retrial, to take into account a conviction subsequent

> to the first trial, violated the Due Process Clause."

Although the SG argued that the prophylactic rule of Pearce should be modified to allow consideration of prior events, the SG recognized that the Pearce rule applied only to events occurring "after the first trial". Br., p. 8. Moreover, the SG made the following pertinent statements with which I wholly agree:

> "[I]t is clear that the sentencing court's reason for imposing the increased sentence satisfies the Pearce rule; * * * Neither the rationale of Pearce, the other opinions in the case, nor later statements by this Court suggest that the Court intended that such 'events' be limited to those involving conduct by the defendant subsequent to the first trial."

Thus, a decision to this effect would resolve the conflict, and as contrasted with the unnecessarily narrow reading of Pearce by CA2 and CA9, would be a clarifying and helpful one. I appreciate, of course, that this would not extend Pearce to permit consideration of what may have occurred "before" the first trial. But this question is not before us, and I think it is institutionally undesirable to decide it unnecessarily.

As we seem to have exchanged letters to the point of impasse, I am circulating my little opinion concurring in the judgment.

Sincerely,

The Chief Justice

lfp/ss

Justice Brennan
Justice White
Justice Marshall √
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

1st Draft

From: Justice Powell

No. 83-173

Circulated: 6/15/84

Wasman v. United States

Recirculated: _____

JUSTICE POWELL, concurring in the judgment.

This case, as I view it, involves only a straightforward application of the Court's holding in North Carolina v. Pearce, 395 U.S. 711 (1969). In Pearce, the Court stated:

> "In order to assure the absence of such a [vindictive] 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 726.

The trial judge in this case clearly stated on the record his reasons for imposing a greater sentence on petitioner after the second trial.[1] "At this time,

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Footnote(s) 1 will appear on following pages.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: JUN 18 1984

Recirculated: _____

p. 3

Previously circulated in typewritten form.

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-173

MILTON R. WASMAN, PETITIONER *v.*
UNITED STATES

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[June ——, 1984]

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> "In order to assure the absence of such a [vindictive] 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 726.

The trial judge in this case clearly stated on the record his reasons for imposing a greater sentence on petitioner after the second trial.[1] "At this time, [petitioner] comes before

[1] At the sentencing proceeding following petitioner's first trial, the trial judge explained that he would not consider the charges pending against petitioner in setting the appropriate sentence. The trial judge stated:

"I don't consider pending cases in determining sentence because my theory of sentencing is simply that one can consider prior convictions, and each

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 20, 1984

82-173 Wasman v. United States

Dear Bill:

The Chief has sent me a copy of his opinion in which he deleted the most objectionable language, and concludes with a holding that is consistent with Pearce. He inquired whether the changes would be agreeable to me.

I would prefer, of course, to have an opinion along the lines of my draft that you joined. Yet, this was the Chief's case and - to the extent we reasonably can do so - I would like to accommodate him.

I enclose the copy he sent me with his changes, and a draft of a letter to the Chief indicating what I would be willing to do. In addition, I would make very limited changes in my opinion that you, Harry, Thurgood and John have joined.

There would remain some language in the Chief's opinion that in my view is quite irrelevant. But our concurring opinion - with five votes - would be the law of the case on the critical question. Any language of the Chief's to the contrary would be minority dicta.

I would appreciate your views when you have had an opportunity to take a look at this.

Sincerely,

Lewis

Justice Brennan

lfp/ss
Enc.

lfp/ss 06/20/84 WAS SALLY-POW

Draft

83-173 Wasman v. United States

Dear Chief:

The changes you suggest in Wasman (in your marked-up draft sent to me) are substantively good as far as they go.

For the reasons stated in my previous letters, and summarized in my concurring opinion circulated on June 18, I still find portions of your opinion that have little relation to the issue before us.

It is evident from the decision of the Court of Appeals, the question submitted in the petitioner for certiorari, and the briefs of the parties, that the only question is whether Pearce intended to draw a distinction between "conduct" of the defendant and "events" that occurred subsequently to the original conviction. Much of your opinion seems irrelevant to this question, and may be puzzling to lower courts.

I therefore make the following suggestions. If you would make the modest changes indicated in the margin, and divide your opinion into five rather than three parts, commencing Part II A where Part II starts in your present draft; Part II B with the first full paragraph on page 6; and Part III with the paragraph that begins at the bottom of page 9, I could join the opinion except Part II B. In the alternative, you could simply omit Part II B altogether. I

would write a brief concurrence with the view to sharpening the focus on the only issue before us.

This would give you a Court for the greater part of your opinion - or all of it if II B were omitted. We would leave open your question whether prior as well as subsequent events may be considered.

This is about as far as I reasonably can go. As four Justices have joined my opinion, of course I have an obligation to consider their views before making a firm commitment.

Sincerely,

The Chief Justice

lfp/ss

June 22, 1984

83-173 Wasman

Dear Chief:

This is a report on our "favorite" case.

In order to move this matter forward, I have shown your suggested changes - together with some further changes I made - to Bill Brennan. As he and four other Justices joined my opinion I have an obligation to respect their views. Bill suggested some further changes.

At this point, it occurs to me that perhaps your alternative suggestion merits a try. In our last conversation, when I expressed the view that aditional changes in your circulated opinion seemed desirable, you suggested the possibility of simply incorporating the substance of my concurring opinion with appropriate changes. I am undertaking to do this now.

I will try to get something to you by tomorrow - or Monday at the latest.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 23, 1984

No. 83-173

Wasman v. United States

Dear Chief:

As stated in my note to you of yesterday, I have substantially revised and shortened your draft opinion to focus solely on the explicit issue before us. I have not had an opportunity to show this to any of the Justices who joined me. I would expect, however, that if this is acceptable to you, they would join it.

An alternative that seems less attractive to me is indicated in the enclosed copy of your second draft with changes in it suggested by me and also by Bill Brennan - to whom I showed the draft. You will note that it would be necessary to have five rather than three parts, commencing Part II A where Part II now starts; Part II B with the first full paragraph on page 6, and part III with the paragraph that begins at the bottom of page 9. With the foregoing changes, I think I could join the opinion except for Part II B.

Bill has indicated that probably he would join this marked up version to the same extent, but also would want me to retain the substance of my concurring opinion.

I add one explanatory comment. Bill feels strongly that we should not "invite" a reopening of Pearce - as he thinks your final footnote on page 13 would do. He will not agree to an "invitation" in this form, though I would certainly urge him to leave the question open.

My own recommendation, Chief, is that you adopt as your opinion the "short form" that addresses only the specific issue raised in the petition for certiorari. I think there is a fair chance of obtaining a unanimous Court for this. I would be glad to join it.

At this point I return Wasman to your strong hands. I have played the role of the "honest broker" - but I am not unmindful of what usually happens to one who makes the mistake of getting himself in the middle.

Sincerely,

Lewis

The Chief Justice
lfp/ss

As sent to C.J. with my letter of 6/23/84 L.F.P.

1st Draft

No. 83-173

Wasman v. United States

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Due Process Clause of the Fifth Amendment was violated when a federal defendant was given a greater sentence after retrial following a successful appeal than he had been given after his original conviction because the sentencing court considered an intervening criminal conviction for acts committed prior to the original sentencing.

I

Petitioner, an attorney, was indicted on four counts of mail fraud in violation of 18 U.S.C. §1341. Prior to trial on these charges he was indicted, tried and convicted of the unrelated offense of knowingly and willfully making false statements in a passport application, in violation of 18 U.S.C. §1542. At the sentencing hearing following petitioner's first conviction, the government advised the court that charges were then pending against petitioner for mail fraud and that petitioner previously had been convicted for failure

Draft sent to CJ : 1 letter of 6/23
(With changes of WJB & mine)
~~CHANGES AS MARKED: 12, 13~~

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

Master
File Copy

From: **The Chief Justice**

Circulated: _____

Recirculated: JUN 19 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–173

MILTON R. WASMAN, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June ——, 1984]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Due Process Clause of the Fifth Amendment was violated when a federal defendant was given a greater sentence after retrial following a successful appeal than he had been given after his original conviction because the sentencing court considered an intervening criminal conviction for acts committed prior to the original sentencing.

I

Petitioner, an attorney, was indicted on four counts of mail fraud in violation of 18 U. S. C. § 1341. Prior to trial on these charges, he was indicted, tried, and convicted of the unrelated offense of knowingly and willfully making false statements in a passport application, in violation of 18 U. S. C. § 1542. At the sentencing hearing following petitioner's first conviction, the government advised the court that charges were then pending against petitioner for mail fraud and that petitioner previously had been convicted for failure to file a tax return. Petitioner's counsel replied that it would be inappropriate for the court to consider the pending mail fraud charges in its sentencing on the passport conviction because petitioner had yet to respond to the charges.

The District Court judge informed the parties that he would not consider the pending mail fraud charge in sentenc-

June 25, 1984

CONFIDENTIAL

83-173 Waman

Dear Chief:

This refers to your personal note. I have spent substantially two full days trying to preserve your Court and reconcile differences.

You may not care what certain other Justices think in this case, but they joined my opinion and I have understood since coming to this Court that there is an obligation that one honors not to desert Justices who have joined you formally - absent a change in your own views.

In these circumstances, I leave the matter entirely in your hands. I will stand on my original draft, or on the typewritten draft that I submitted to you as alternative, and confirm that I abandon the role of "Middle Man".

Sincerely,

The Chief Justice

lfp/ss

P.S. This was written and signed and in my messenger's hands when your second Personal letter was handed me. As indicated in my letter of June 23rd, I'll join your "marked up revision" (as sent you) and possibly concur briefly. My view of this case remains the same.

June 26, 1984

83-173 Wasman

Dear Chief:

I received late yesterday afternoon the copy of your recirculated draft of June 19 marked up in conformity with most of the changes I suggested in the draft accompanying my letter to you of June 23. As you know, those changes had been discussed with Bill Brennan.

I believe I can now join your opinion except for Parts II B, III B, and the footnote starred to the last sentence on page 13. This note indicates that a "question" was presented as to an event or conduct occurring "before" the original sentencing. But, no such question was presented. A footnote that I think may be appropriate is n. 1 on p. 5 of the typewritten draft of an opinion I also submitted to you with my letter of June 23. For your convenience, I restate it:

> "The Solicitor General argues that the 'temporal limitation' imposed by Pearce on information that may be considered is unnecessary to advance its policies, and that Pearce should be 'reconsidered.' No such question is presented in this case."

As indicated in our previous correspondence, I also may circulate a brief concurring opinion along the lines of my opinion joined by four other members of the Court.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 26, 1984

CONFIDENTIAL

83-173 Wasman

Dear Chief:

I enclose a separate letter that addresses the changes in your opinion sent me late yesterday afternoon.

In retrospect, I probably made a mistake in writing private letters, and reworking drafts, in an effort to resolve our differing views. After all, I had a Court for my opinion with an obligation to those who joined me.

Your several letters to me seem to reflect impatience that I have disagreed with you. Yet my view of the case has never changed since the argument and Conference discussion. Only one issue was presented by petitioner or addressed by the Court of Appeals. I have seen no reason to address any other issue or to review other cases that have not changed the clear rule of Pearce.

Sincerely,

Lewis

The Chief Justice

lfp/ss

Decided no purpose would be served by sending this — though it reflects on partly my displeasure with the C J's reaction.

June 27, 1984

83-173 Wasman

Dear Chief:

I will be glad to join your opinion with the changes previously indicated and those mentioned in your letter of this date.

As indicated in my letter to you of June 26, I will still file a much reduced concurring opinion. I do this for two reasons. I feel some obligation to the other four Justices who joined my longer opinion and that would have given me a Court as of the writing at that time. A more substantive reason is that I think a brief concurrence that focuses solely on the narrow question presented may be helpful to lower courts.

I hope we are at the end of this exchange of views that has been as unwelcome to me as it has for you.

Sincerely,

The Chief Justice

lfp/ss

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 28 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-173

MILTON R. WASMAN, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[July ——, 1984]

JUSTICE POWELL, concurring in part and concurring in the judgment.

I join all but parts II B and III B of the Court's opinion. I write to emphasize my view that this case involves a straightforward application of the Court's holding in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). The trial judge applied *Pearce* with commendable care, drawing a distinction at the sentencing stage of the first trial between undecided pending charges and prior convictions. At the sentencing stage following the second trial, the judge stated on the record that "[a]t this time, [petitioner] comes before me with two convictions. Last time, he came before me with one conviction." Pet. for Cert. A-42.

Petitioner insists that this explanation of the increased sentence is insufficient because it does not, in the words of *Pearce*, "concern[] identifiable *conduct* on the part of the [petitioner] occurring after the time of the original sentencing proceeding". 395 U. S., at 726 (emphasis added). He argues that the "conduct" was his prior crime; not the conviction.

At a different point in *Pearce*, however, the Court stated that "a new sentence, whether greater or less than the original sentence, [may be imposed] in the light of *events* subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, mental and

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 28, 1984

83-173 Wasman

Dear Thurgood, Harry and John:

As you, together with Bill Brennan, joined my opinion concurring in the judgment in this case, I write to bring you down to date.

When there were five votes for my opinion, the Chief circulated a note saying he was going to make changes in his opinion for the Court. He sent a draft only to me that reflected inadequate changes. As this was the Chief's case and there was agreement as to the judgment, I undertook to cooperate with him in making changes that would enable me to join at least a major portion of his opinion.

Bill Brennan, as the senior among us, was good enough to take a look at the marked up copy that I returned to the Chief Justice. As the Chief has now accepted significant changes, and divided his opinion into subparts, I am joining him except for Parts II B and III B.

I am inclined also to stay with the substance of my somewhat briefer concurring opinion. It is now consistent with the portions of the Chief's opinion I am joining.

I think our basic objective has been attained.

Sincerely,

Lewis

Justice Marshall
Justice Blackmun
Justice Stevens

lfp/ss

cc: Justice Brennan

P.1

06/30

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: JUL 2 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–173

MILTON R. WASMAN, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[July ——, 1984]

JUSTICE POWELL, with whom JUSTICE BLACKMUN joins, concurring in part and concurring in the judgment.

I join all but parts II–B and III–B of the Court's opinion. I write to emphasize my view that this case involves a straightforward application of the Court's holding in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). The trial judge applied *Pearce* with commendable care, drawing a distinction at the sentencing stage of the first trial between undecided pending charges and prior convictions. At the sentencing stage following the second trial, the judge stated on the record that "[a]t this time, [petitioner] comes before me with two convictions. Last time, he came before me with one conviction." Pet. for Cert. A–42.

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At a different point in *Pearce*, however, the Court stated that "a new sentence, whether greater or less than the original sentence, [may be imposed] in the light of *events* subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, mental and

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 29, 1984

Re: No. 83-173 Wasman v. United States

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 28, 1984

Re: No. 83-173 Wasman v. United States

Dear Chief:

I am still with you.

Sincerely,

WEW

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 29, 1984

Re: 83-173 - Wasman v. United States

Dear Chief:

Although I agree with your result, I would not go any further than Judge Markey did in deciding this case. Specifically, I do not agree that North Carolina v. Pearce would allow a trial judge to justify an increased sentence by referring to some fact that the prosecutor did not call to his attention at the original sentencing hearing, or perhaps to a portion of the presentence report that he failed to read. I would simply base the decision on the fact that there was a significant intervening event in this case.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 18, 1984

Re: 83-173 - Wasman v. United States

Dear Lewis:

Please join me in your separate opinion.

Respectfully,

Justice Powell

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: JUN 28 1984

Recirculated: _____

83-173 - Milton R. Wasman v. United States

JUSTICE STEVENS, concurring in the judgment.

The reason I am unable to join the opinion THE CHIEF JUSTICE has authored is that it interprets North Carolina v. Pearce, 395 U.S. 711 (1969) as resting entirely on a concern with the actual vindictiveness of the sentencing judge and does not fairly identify the interest in protecting the defendant against a reasonable apprehension of vindictiveness that might deter him from prosecuting a meritorious appeal. Because that flaw in the Court's opinion is found in Part IIA and Part IIIC as well as Part IIB and Part IIIB, I cannot join JUSTICE POWELL's opinion. In sum, my reasons for affirming the Court of Appeals are those set forth in the able opinion written by Chief Judge Markey.

Somewhat rewritten

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: JUN 29 198

Printed

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–173

MILTON R. WASMAN, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[July ——, 1984]

JUSTICE STEVENS, concurring in the judgment.

The reason I am unable to join the opinion that THE CHIEF JUSTICE has authored is that it interprets *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), as resting entirely on a concern with the actual vindictiveness of the sentencing judge and does not identify the interest in protecting the defendant against the reasonable apprehension of vindictiveness that might deter him from prosecuting a meritorious appeal. See *id.*, at 724–725. "The rationale of our judgment in the *Pearce* case, however, was not grounded upn the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that 'since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack the 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.'" *Blackledge* v. *Perry*, 417 U. S. 21, 28 (1974) (quoting *Pearce*, 395 U. S., at 725). What I believe to be the correct reading of *Pearce* is set forth in Judge Markey's able opinion for the Court of Appeals. See 700 F. 2d 663 (CA11 1983).

Because the flaw in THE CHIEF JUSTICE's opinion infects its Parts II–A and III–C as well as Parts II–B and III–B, I cannot join JUSTICE POWELL's opinion, though I, like JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN,

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

Supreme Court of the United States
Washington, D. C. 20543

May 30, 1984

No. 83-173 Wasman v. United States

Dear Chief,

Please join me.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference