April 7, 2008

The Honorable Glenn G. Reese
Senator, District 11
P.O. Box 142
Columbia, South Carolina 29202

Dear Senator Reese:

We understand from your letter that you seek an opinion of this Office on behalf of Mr. Ronald Blanchard regarding sentencing after a post conviction relief hearing. As we understand his question, he inquires whether, following a post conviction relief hearing, an individual can receive a longer sentence than his original sentence.

Law/ Analysis

Post-conviction relief proceedings are governed by the Uniform Post-Conviction Procedure Act, found in S.C. Code Ann. Section 17-27-10 *et. seq*. A Post-Conviction Relief (PCR) action usually focuses upon alleged errors made by trial or plea counsel. Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d, 742, 747 (2000). The PCR applicant "attempts to show that his or her attorney erred in a manner that a reasonably proficient attorney would not, and that the error prejudiced his case." Id. at 364.

S.C. Code Ann. Section 17-27-20(a) describes who may institute a PCR proceeding:

> Any person who has been convicted of, or sentenced for, a crime and who claims:
>
> (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
> (2) That the court was without jurisdiction to impose sentence;
>
> (3) That the sentence exceeds the maximum authorized by law;
>
> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

> (5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
>
> (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction."

In Al-Shabazz, the South Carolina Supreme Court gave an overview of the PCR process. Id. The Court examined the above statute and explained that

> [A]side from two non-collateral matters specifically listed in the PCR Act, PCR is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence as authorized by Section 17-27-20(a). A typical PCR claim of ineffective assistance of counsel falls into this category because, if the applicant proves his case, his conviction or sentence will be overturned.
> Id. at 367 (emphasis omitted).

As the Court noted, the result of a successful PCR action for ineffective assistance of counsel is that the conviction or sentence is overturned. Of course, the State may then retry the defendant. If the defendant is convicted at the second trial, it is possible that a different sentence may be imposed. Depending on the facts and circumstances of the case, the sentence imposed following the second trial could be greater than the sentence imposed following the original trial. However, as the United States Supreme Court held in the landmark case of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969), "[d]ue process of law...requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." Id. at 725. The Court held 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...so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." Id. at 726.

This rule became known as the Pearce presumption. State v. Higgenbottom, 344 S.C. 11, 15; 542 S.E. 2d 718, 720 (2001). In Higgenbottom, the South Carolina Supreme Court stated that "without objective evidence of a proper motivation to increase the sentence, the Pearce presumption applies to find a due process violation." Id. at 720.

The Court went on to examine subsequent cases that restricted the application of the Pearce presumption:

> As we noted in *State v. Hilton,* 291 S.C. 276, 353 S.E.2d 282, *cert. denied,* 484 U.S. 832, 108 S.Ct. 106, 98 L.Ed.2d 66 (1987), the Supreme Court has restricted the *Pearce* rule in subsequent cases. For instance, the *Pearce* presumption does not apply when the harsher sentence is imposed by the higher court in a two-tiered trial system. *Colten v. Kentucky,* 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972). The Court in *Colten* noted that the higher court which conducted Colten's trial and imposed the final sentence "was not the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal; **and it is not the court that is asked to do over what it thought it had already done correctly**." *Id.* at 116-17, 92 S.Ct. at 1960, 32 L.Ed.2d at 593 (emphasis added).
> In several other cases, the Supreme Court has held that the *Pearce* presumption was inapplicable. *E.g., Chaffin v. Stynchcombe,* 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973) (the *Pearce* presumption does not apply when a second jury on retrial imposes a harsher sentence than the first jury); *Texas v. McCullough,* 475 U.S. 134, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986) (the *Pearce* presumption does not apply when the first sentence was imposed by a jury and the second, harsher sentence was imposed by a judge); *Alabama v. Smith,* 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989) (the *Pearce* presumption does not apply when a defendant is sentenced to a harsher sentence upon retrial after successfully appealing from a guilty plea). Moreover, we held in *Hilton* that when the second sentencing judge is someone other than the original trial judge, the *Pearce* presumption does not apply. *Hilton,* 291 S.C. at 279, 353 S.E.2d at 284.

However, citing Alabama v. Smith, the Court noted that the Pearce presumption remains applicable in circumstances "in which there is a 'reasonable likelihood'...that the increase of sentence is the product of actual vindictiveness on the part of the sentencing authority." Higgenbottom at 720-721, citing Alabama v. Smith, 490 U.S. 794, 799, 109 S.Ct. 1977, 2205 (1989). It is clear from the foregoing cases that imposing a harsher sentence after a conviction on retrial is permissible if there are proper reasons for the harsher sentence. However, a defendant cannot be given a harsher sentence out of vindictiveness to punish him for challenging the original conviction.

Conclusion

If a defendant successfully attacks his conviction and a new trial is held following a PCR action, it is possible that the sentence imposed following the second trial could be greater than his original sentence. Whether a harsher sentence is imposed depends on the facts and circumstances of the individual case. However, as stated above, under Pearce, due process of law "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." Pearce at 725.

We caution that this opinion should not be construed as legal advice regarding a particular criminal case. Any questions regarding post conviction proceedings or the likelihood of an increased sentence in a specific criminal case should be directed to a private attorney.

Sincerely,

Henry McMaster
Attorney General

By: Elizabeth H. Smith
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Deputy Attorney General