

## A 2013 Rollback of State Procedural Protections for Defendants

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Most folks who are involved in appellate litigation and post-conviction motions know about G.S. 15A-1335. For those who don't, it is a N.C. statute providing that when a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, that is more severe than the prior sentence less the portion of the prior sentence previously served.

G.S. 15A-1335 generally embodies the rule of *North Carolina v. Pearce*, 395 U.S. 711 (1969), but is more restrictive than the rule set out in that case. *Pearce* involved two cases, one of which originated in North Carolina. In the North Carolina case, the defendant was convicted in state court and sentenced to prison for twelve to fifteen years. Later, the defendant initiated a post-conviction proceeding and obtained a new trial. The defendant then was retried, convicted, and sentenced to an eight-year term in prison. When the eight-year term was added to the time the defendant already spent in prison, it resulted in a sentence greater than the one initially imposed. The defendant challenged the more severe sentence on constitutional grounds. The Court held that penalizing a defendant for having successfully pursued a right of appeal or collateral attack violates due process. *Id.* at 724. It continued, stating that due process "requires that vindictiveness against a defendant for having successfully attacked [a] first conviction must play no part" in the sentence imposed after a new trial and that a defendant must be freed of the apprehension of vindictiveness that might deter exercise of the right to appeal or collaterally attack a conviction. *Id.* at 725. Because of this, the Court concluded that whenever a judge imposes a more severe sentence after a new trial, "the reasons for his doing so must affirmatively appear." *Id.* at 726. Those reasons must be based on "objective information" regarding "identifiable conduct" by the defendant after the original sentencing. *Id.* Thus, *Pearce* allows for a more severe sentence based on conduct that occurs after the initial sentencing, provided the reasons are clearly set forth in the record so that the reviewing court can verify that the increased sentence did not result from vindictiveness. Subsequent cases have restricted *Pearce's* application. In one such case, in *Alabama v. Smith*, 490 U.S. 794 (1989), the Court held that *Pearce's* presumption of vindictiveness does not apply when the original sentence was entered after a guilty plea.

Unlike *Pearce*, G.S. 15A-1335 is a blanket prohibition on the imposition of a more severe sentence. Thus, while *Pearce* permits a more severe sentence to be imposed if articulated factors would support it, G.S. 15A-1335 does not. This means that North Carolina statutory law offers greater protection to defendants than federal constitutional law. Official Commentary to G.S. 15A-1335 (recognizing this point); *State v. Mitchell*, 67 N.C. App. 549, 551 (1984) ("North Carolina has changed that part of ... [*Pearce*] which would have allowed a more severe sentence").

In 2013, however, the statute's protections were limited and it was brought in line with the federal constitutional protection, at least in one respect. Specifically, S.L. 2013-385, sec. 3.1 amended G.S. 15A-1335 to provide that it only applies when the original conviction resulted from a guilty verdict rendered by a jury; the statute no longer applies when the original sentence was imposed pursuant to a guilty plea. This statutory change overrides earlier case law holding that the statute applies to such convictions. See, e.g., *State v. Wagner*, 356 N.C. 599, 602 (2002). As discussed above, *Smith* held that *Pearce* offers no protection when the original sentence was entered pursuant to a guilty plea. Thus, in this respect the *Pearce* rule and the amended state statute now provide parallel (non)protection.