

[REDACTED] [REDACTED]

defendant has met his burden of showing that the increase results from prosecutorial or judicial misconduct or vindictiveness.

■ In a trial *de novo*, therefore, trial judges may impose increased sentences so long as the increase is not a penalty for pursuing the appeal. See *State v. Goding*, 128 N.H. at 271, 513 A.2d at 328. There is no more reason for this court to believe that an increased sentence is a penalty for seeking a superior court trial than to believe that the district court sentence was too lenient. *Colten v. Kentucky*, 407 U.S. 104, 117 (1972); see *Goding*, 128 N.H. at 271, 513 A.2d at 329.

■ In the case at bar, the defendant has failed to meet his burden. The superior court judge, in his discretion, imposed a harsher sentence than did the district court judge. Just as defendants might receive more lenient sentences upon retrial, they also risk stricter ones. As the defendant has pointed to no indicia of vindictiveness, the superior court sentence was within the court's sound discretion.

Affirmed.

All concurred.

[REDACTED]

Hillsborough
No. 87-471

ROBERT E. STEWART

v.

MICHAEL J. CUNNINGHAM, WARDEN,
NEW HAMPSHIRE STATE PRISON

October 31, 1988

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

amend the habeas corpus petition, denied the amended petition, and denied the motion for a temporary restraining order.

The only issue on appeal concerns the propriety of the plaintiff's sentence. The plaintiff concedes that at the time he was arrested, tried, and sentenced, neither the Criminal Code nor the Superior Court Rules required the State to provide him with pretrial notice of its intent to request an extended term of imprisonment under RSA 651:6, II. The only notice issue in this case, then, is whether due process under part I, article 15 of the New Hampshire Constitution and the fourteenth amendment to the United States Constitution required pretrial notice to the defendant, when both the extended term statute and the court rules were silent as to notice.

Because the protection provided by the United States Constitution on this issue is no greater than that of the State Constitution, we need not separately address the fourteenth amendment issue. *See State v. Ball*, 124 N.H. 226, 232, 471 A.2d 347, 351 (1983); *see also Oyler v. Boles*, 368 U.S. 448, 452 (1962); *State v. Morehouse*, 120 N.H. 738, 743, 424 A.2d 798, 801 (1980).

■ This court has held that the enhanced sentencing statute under which the plaintiff was sentenced meets the constitutional notice requirement by clearly delineating that the enhanced sentencing provision is applicable to all crimes. *State v. Morehouse*, *supra* at 743, 424 A.2d at 801. Similarly, the United States Supreme Court has held that ". . . due process does not require advance notice that the trial on the substantive offense will be followed by a habitual criminal proceeding." *Oyler v. Boles*, 368 U.S. at 452.

The petitioner was tried, convicted, and sentenced to an extended term under RSA 651:6 in 1974. In 1981, RSA 651:6, II was amended to require notice of an intent to request an extended term of imprisonment prior to trial. Superior Court Rule 99-A was added in 1982 to require the prosecutor to give notice to the defendant prior to trial and to file a copy with the clerk. This court has decided two cases since 1981 regarding the statutory notice requirement, but neither has addressed individualized notice as a constitutional due process requirement or considered overruling *State v. Morehouse*. *See State v. Toto*, 123 N.H. 619, 465 A.2d 894 (1983); *State v. Coppola*, 130 N.H. 148, 536 A.2d 1236 (1987).

■■ In 1983, we held that the statutory notice requirement embodied in RSA 651:6, II, as amended in 1981, applies not only to prosecutors but also to judges seeking to invoke the extended

