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Jeffrey Neil Robinson

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Constitutional Law—*United States v. DiFrancesco*: "Continuing Jeopardy"—An Old Concept Gains New Life

In *Kepner v. United States*[1] Justice Holmes stated in regard to the double jeopardy clause of the fifth amendment:[2] "[L]ogically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause."[3] While the United States Supreme Court repeatedly has rejected Holmes' concept[4] of "continuing jeopardy,"[5] a recent decision has given it new life. In a case of first impression,[6] the Court in *United States v. DiFrancesco*[7] considered the constitutionality of a statute that allows the government to appeal a sentence as too lenient.[8] In affirming the

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1. 195 U.S. 100 (1904).

2. "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V.

3. 195 U.S. at 134 (Holmes, J., dissenting).

4. The phrase "continuing jeopardy" has been said to describe "both a concept and a conclusion." Breed v. Jones, 421 U.S. 519, 534 (1975). The concept denotes the notion advanced by Justice Holmes: once jeopardy attaches in a particular action a defendant remains in jeopardy throughout the proceedings related to that action. 195 U.S. at 134. However, the conclusion "has occasionally been used to explain why an accused who has secured the reversal of his conviction on appeal may be retried for the same offense." 421 U.S. at 534. See, e.g., Price v. Georgia, 398 U.S. 323, 326-29 & n.3 (1970); Green v. United States, 355 U.S. 184, 189 (1957).

5. See, e.g., United States v. Scott, 437 U.S. 82, 90 & n.6 (1978); Breed v. Jones, 421 U.S. 519, 534 (1975); United States v. Jenkins, 420 U.S. 358, 369 (1975); Green v. United States, 355 U.S. 184, 193, 197 (1957).

6. United States v. DiFrancesco, 449 U.S. 117 (1980), was the first case in which the government appealed a sentence imposed pursuant to 18 U.S.C. § 3575 (1976). For a discussion of § 3575, see note 12 infra. In several other cases, the government has appealed because of the trial court's refusal to sentence a defendant under § 3575. See, e.g., United States v. Ilacqua, 562 F.2d 399 (6th Cir. 1977); United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977); United States v. Bailey, 537 F.2d 845 (5th Cir. 1976); United States v. Stewart, 531 F.2d 326 (6th Cir.), cert. denied, 426 U.S. 922 (1976); United States v. Kelly, 519 F.2d 251 (8th Cir. 1975).

7. 449 U.S. 117 (1980).

8. 18 U.S.C. § 3576 (1976). This statute provides:

> With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and impo-

constitutionality of this statute, the Court held that section 3576 of the Criminal Code[9] did not violate either the guarantee against multiple trials or the guarantee against multiple punishment, both inherent in the double jeopardy clause.[10]

Eugene DiFrancesco was convicted of racketeering and bombing in two separate jury trials in the United States District Court for the Western District of New York.[11] Subsequently, the court conducted a special sentencing hearing at which it ruled that DiFrancesco was a "dangerous special offender,"[12]

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sitions of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of a sentence taken by the United States shall foreclose imposition of a sentence more severe that that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review.

9. Section 3576 is part of the Dangerous Offender Sentencing Statutes of Title X of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1001(a), 84 Stat. 950 (1970) (codified at 18 U.S.C. §§ 3575-78 (1976)).

10. 449 U.S. at 126-43. In so holding, the Court to some extent settled what has become a favorite controversy among academic and professional commentators. For conclusions that prosecutorial appeals of sentences are constitutional, see Dunsky, The Constitutionality of Increasing Sentences on Appellate Review, 69 J. Crim. L. & Criminology 19 (1978); Stern, Government Appeals of Criminal Sentences: A Constitutional Response to Arbitrary and Unreasonable Sentences, 18 Am. Crim. L. Rev. 51 (1980); Westen, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L. Rev. 1001 (1980); Note, Double Jeopardy Limits on Prosecutorial Appeal of Sentences, 1980 Duke L. J. 847; Recent Development, Government Appeal of Dangerous Special Offender Sentence Violates Double Jeopardy Clause, 65 Cornell L. Rev. 715 (1980).

For conclusions that such appeals are unconstitutional, see ABA Ad Hoc Committee on Federal Criminal Code, Report on Government Appeal of Sentences, 35 Bus. Law. 617 (1980); Freeman & Earley, *United States v. DiFrancesco*: Government Appeal of Sentences, 18 Am. Crim. L. Rev. 91 (1980); Spence, The Federal Criminal Code Reform Act of 1977 and Prosecutorial Appeal of Sentences: Justice or Double Jeopardy?, 37 Md. L. Rev. 739 (1978); Note, Twice in Jeopardy: Prosecutorial Appeals of Sentences, 63 Va. L. Rev. 325 (1977).

See also Note, The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals, 89 Harv. L. Rev. 356 (1975) (question unclear).

11. United States v. DiFrancesco, 604 F.2d 769, 772-73 (2d Cir. 1979), rev'd, 449 U.S. 117 (1980). DiFrancesco was indicted first on the bombing charges (18 U.S.C. §§ 1361, 371, 842(j) (1976)), but was tried first on the racketeering indictment (18 U.S.C. §§ 1962(c), (d) (1976)). 604 F.2d at 772-73.

12. 604 F.2d at 779-80. Prior to the trial on the racketeering charges, the government filed notice pursuant to 18 U.S.C. § 3575(a) (1976), alleging that DiFrancesco was a "dangerous special offender" as defined in sections 3575(e)(3) and (f). 604 F.2d at 779. Such notice indicates the government's intention to seek, upon defendant's conviction, imposition of an enhanced sentence under section 3575(b). Section 3575(b) requires the district court to hold a special sentencing hearing to determine whether the defendant is a "dangerous special offender." This statute provides in pertinent part:

> Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held, before sentence is imposed, by the court sitting without a jury. . . . If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony.

and sentenced him to concurrent ten-year prison terms on the racketeering charges, to be served concurrently with the nine-year sentence imposed previously on the bombing charges.[13] Dissatisfied with this sentence, the government appealed pursuant to section 3576.[14] The United States Court of Appeals for the Second Circuit, rejecting the government's request for an enhanced sentence on the ground that section 3576 violated the double jeopardy clause,[15] affirmed both the sentences and the convictions.[16]

In reversing the Second Circuit, the Supreme Court analyzed three basic issues. First, noting that the double jeopardy focus fell on the sentence rather than on the appeal,[17] the Court considered whether a criminal sentence should be accorded the degree of finality that attaches to a verdict of acquittal.[18] Citing early English common law,[19] *North Carolina v. Pearce*,[20] and the policy behind the double jeopardy bar to reprosecution after an acquittal,[21] the Court concluded that "neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy sup-

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The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

18 U.S.C. § 3575(b) (1976).

13. 604 F.2d at 780.

14. Id. The government based its appeal on the ground that the trial court abused its discretion: despite its findings that defendant was a "dangerous special offender," the trial court imposed sentences that amounted to additional imprisonment for defendant of only one year. See notes 8, 12 and accompanying text supra. DiFrancesco appealed from both convictions, but did not seek review of the sentences. 449 U.S. at 123.

15. 604 F.2d at 783. The Second Circuit's holding was based principally on Kepner v. United States, 195 U.S. 100 (1904), and United States v. Benz, 282 U.S. 304 (1931). 604 F.2d at 783-85. For a discussion of *Kepner* and *Benz*, see text accompanying notes 35-38 & 59-63 infra. The court distinguished North Carolina v. Pearce, 395 U.S. 711 (1969), on the ground that the defendant in *Pearce* had voluntarily subjected himself to the risk of an increased sentence. 604 F.2d at 786; see text accompanying notes 53-57 infra. By holding that section 3576 was unconstitutional, the Second Circuit lacked jurisdiction to consider the merits of the government's appeal, and therefore dismissed it. See United States v. Wilson, 420 U.S. 332, 339 (1975).

In a concurring opinion, District Judge Haight (sitting by designation from the Southern District of New York) argued that the government's appeal should have been dismissed because 18 U.S.C. §§ 3575-76 did not apply to the defendant. He reasoned that DiFrancesco could have been sentenced to two consecutive 20-year terms without imposition of the "dangerous special offender" sentence, and therefore did not qualify under section 3575(f) for the special sentence. 604 F.2d at 787-89 (Haight, J., concurring). He added, however, that in the event his interpretation proved incorrect, he would support the majority's constitutional analysis. Id. at 789 n.7.

16. Id. at 773-79.

17. 449 U.S. at 132-35.

18. Id. at 132-33.

19. Id. at 133-34. The Court observed that at early English common law, the trial court practice of increasing a sentence during the same term of court was not thought to violate double jeopardy principles. For several brief summaries of the United States Constitution's assimilation of early English common law principles of double jeopardy, see United States v. Scott, 437 U.S. 82, 87 (1978); United States v. Wilson, 420 U.S. 332, 339-40 (1975); Green v. United States, 355 U.S. 184, 187-88 (1957); id. at 200 (Frankfurter, J., dissenting).

20. 395 U.S. 711 (1969). See text accompanying notes 52-55 infra.

21. "We have noted above the basic design of the double jeopardy provision, that is, as a bar against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent." 449 U.S. at 136 (paraphrasing Green v. United States, 355 U.S. 184, 187-88 (1957)). The Court stated that a government appeal of a sentence did not subject a defendant to this ordeal, because the appeal must be taken promptly and because the appeal is essentially a nonadversarial judicial review of the record of the sentencing court. 449 U.S. at 136-37.

port" the proposition that a sentence carries the same degree of finality as an acquittal.[22] The Court then considered whether an increase in a sentence pursuant to section 3576 constituted multiple punishment. In concluding that it did not, the Court stated that the Second Circuit's reliance on dictum in *United States v. Benz*[23] was unfounded, because the dictum's source, *Ex parte Lange*,[24] stood only for the proposition that a defendant may not be sentenced beyond what is legislatively authorized.[25] Finally, the Court compared the sentence review procedure provided in section 3576 with the two-stage criminal proceeding held constitutional in *Swisher v. Brady*.[26] Noting that the procedure under section 3576 is more limited in scope than the procedure in *Swisher*, the Court concluded that "the limited appellate review of a sentence authorized by section 3576 is necessarily constitutional."[27]

In a vigorous dissent,[28] Justice Brennan argued that sentencing and acquittal procedures are sufficiently similar so that no meaningful distinction may be drawn between the two for double jeopardy purposes.[29] He also criticized the majority's refusal to follow established dicta in *Lange, Benz*, and *Reid v. Covert*,[30] which stated that an increase in sentence severity subsequent to its imposition constituted multiple punishment.[31] He characterized the Court's comparison of the procedure provided in section 3576 with that upheld in *Swisher v. Brady* as being "similarly misplaced."[32]

Although the Supreme Court's application of the double jeopardy clause has been infamously amorphous,[33] a brief survey of prior decisions is a pre-

22. 449 U.S. at 132. Accordingly, a government appeal of a sentence did not constitute a second prosecution in violation of the double jeopardy clause. Id. at 139.

23. 282 U.S. 304 (1931). See text accompanying notes 59-63 infra.

24. 85 U.S (18 Wall.) 163 (1874). See text accompanying notes 56-58 infra.

25. 449 U.S. at 138-39.

26. 438 U.S. 204 (1978). See text accompanying notes 67-69 infra.

27. 449 U.S. at 141. The Court interpreted section 3576 "as establishing at the most a two-stage criminal proceeding." Id. at 439 n.16.

28. Id. at 143-52 (Brennan, J., dissenting; White, Marshall, Stevens, JJ., joining). In addition to joining Justice Brennan's dissent, Justice Stevens filed a separate dissenting opinion that merely echoed Justice Harlan's dissent in *Pearce*. See note 54 infra.

29. "The sentencing of a convicted criminal is sufficiently analogous to a determination of guilt or innocence that the Double Jeopardy Clause should preclude government appeals from sentencing decisions very much as it prevents appeals from judgments of acquittal." Id. at 146. In Bullington v. Missouri, 101 S. Ct. 1852 (1981), the Court adopted this position with respect to the sentencing procedure employed by the State of Missouri. See discussion at note 70 infra.

30. 354 U.S. 1, 37 n.68 (1957) (plurality opinion) ("In *Swain v. United States*, 165 U.S. 553, this Court held that the President or commanding officer had power to return a case to a court-martial for an increase in sentence. If the double jeopardy provisions of the Fifth Amendment were applicable such a practice would be unconstitutional."). *Reid* was subsequently adopted as the controlling opinion of the Court in Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 237 (1960); Grisham v. Hogan, 361 U.S. 278, 280 (1960); and McElroy v. United States ex rel. Guagliardo, 361 U.S. 281, 284 (1960).

31. 449 U.S. at 144-45. This criticism approved the position taken by the Second Circuit. See note 15 supra.

32. 449 U.S. at 151.

33. "[V]irtually all of the [double jeopardy] cases turn on the particular facts and thus escape meaningful categorization. . . ." Illinois v. Somerville, 410 U.S. 458, 464 (1973). "[T]he riddle of double jeopardy stands out today as one of the most commonly recognized yet most commonly misunderstood maxims in the law, the passage of time having served in the main to burden it with

requisite to understanding the Court's tripartite analysis in *DiFrancesco*. Beginning with *United States v. Ball*,[34] the Supreme Court established that the double jeopardy clause is an absolute bar to a second trial following an acquittal. In *Kepner v. United States*[35] the Court applied this rule to a government appeal.[36] In that case, the defendant was acquitted at his original trial, but the government appealed pursuant to traditional Philippine procedure that provided for a trial de novo in the Philippine Supreme Court. Applying the *Ball* principle, the United States Supreme Court rejected Justice Holmes' "continuing jeopardy" theory[37] and held that the procedure in the appellate court was a second trial on the merits.[38] The Court subsequently has applied the *Ball* principle to bar retrials following an acquittal even when "the acquittal was based upon an egregiously erroneous foundation."[39]

In *Green v. United States*[40] the Court extended this rule to cases of "implied acquittals." In *Green*, the defendant was convicted of first-degree murder after an appellate court had reversed his prior conviction on the lesser included offense of second-degree murder. Rejecting an argument based on *Trono v. United States*[41] that the defendant had "waived" his double jeopardy claim by appealing his first conviction, the Court reversed the second conviction on the ground that the prior verdict of guilty on the second-degree murder

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confusion upon confusion." Note, 24 Minn. L. Rev. 522, 522 (1940), quoted in Westen & Drubel, Toward a General Theory of Double Jeopardy, 1978 Sup. Ct. Rev. 81, 82. This Note does not attempt to examine the vast and integrated history of the double jeopardy clause. For a brief but in-depth survey of such history, see J. Sigler, Double Jeopardy 1-37 (1969).

34. 163 U.S. 662 (1896). In *Ball*, three defendants were tried upon a technically defective murder indictment: one was acquitted and two were convicted. Subsequent to the Supreme Court's reversal of the convictions in Ball v. United States, 140 U.S. 118 (1891), all three defendants were retried and convicted. On second appeal, the Court held that the double jeopardy clause prohibited reprosecution of the formerly acquitted defendant but did not prohibit reprosecution of the defendants formerly convicted. The Court reasoned that the double jeopardy clause prohibited retrial of a defendant following a favorable ruling by the finder of fact. 163 U.S. at 671.

35. 195 U.S. 100 (1904).

36. Prior to 1970 the government's authority to appeal was severely limited. In United States v. Sanges, 144 U.S. 310 (1892), the Supreme Court held that the government could not appeal a criminal decision absent explicit legislative authorization. Id. at 318, 322-23. This authorization was first granted by the Criminal Appeals Act of 1907, ch. 2564, 34 Stat. 1246 (1907), which empowered the government to appeal from a decision dismissing an indictment or arresting a judgment when such decision was based upon the construction or invalidation of a statute. After several amendments, Congress repealed the 1907 Act in 1970 and replaced it with its current version: the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, 84 Stat. 1890 (1971) (codified at 18 U.S.C. § 3731 (1976)). For a thorough account of the evolution of the Omnibus Act, see United States v. Sisson, 399 U.S. 267, 291-96 (1970).

37. See notes 3-5 and accompanying text supra.

38. 195 U.S. at 133.

39. Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam); Arizona v. Washington, 434 U.S. 497, 503 (1978) (quoting *Fong Foo*) (dictum). But cf. United States v. Wilson, 420 U.S. 332, 344-45 (1976) (government appeals following acquittals are prohibited only when there is the possibility of reprosecution for the same offense).

40. 335 U.S. 184 (1957).

41. 199 U.S. 521 (1905). See text accompanying notes 45-47 infra. With respect to the waiver doctrine of *Trono*, the *Green* Court stated: "Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." 355 U.S. at 193-94 (footnote omitted).

charge operated as an "implicit acquittal" of the first-degree murder charge.[42] The Court reasoned that with respect to the first-degree murder charge, jeopardy attached in the first trial when the jury "was given a full opportunity to return a verdict" on that charge.[43]

The Court has refused to extend the absolute rule applied to acquittals of substantive offenses to the sentencing area. The Court has at various times advanced several different theories to explain the permissibility of increasing a sentence following an appeal of a conviction.[44] The oldest of these theories was enunciated in *Trono v. United States*.[45] There the defendants were acquitted of murder but convicted of assault. On defendants' appeal, the Philippine Supreme Court reversed the assault conviction but convicted the defendants of murder.[46] The United States Supreme Court upheld the murder conviction, stating that the defendants had "waived" their right to invoke the plea of former jeopardy on the murder charge by appealing their assault convictions.[47]

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42. 355 U.S. at 190.

43. Id. at 191.

44. Aside from the waiver doctrine of *Trono*, the Court has employed two other theories. One is the balancing theory espoused by Justice Harlan in United States v. Tateo, 377 U.S. 463 (1964):

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. 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. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interests.

Id. at 466. Although this theory easily explains reprosecution following a conviction, it does not easily explain an increase in sentence following reconviction. To strike the balance in favor of the state, a court would have to find that the defendant did not preserve his interest in avoiding the anxiety of resentencing, and his interest in having the same tribunal that tried the case fix the sentence. Clearly, the balance swings against the defendant, provided that he forfeits his interests by appealing his conviction; however, this result simply restates the "waiver" theory.

The third theory is the continuing jeopardy "conclusion" most recently employed in Price v. Georgia, 398 U.S. 323, 326-27 & n.3 (1970). Although the *Price* opinion referred to the theory as a "concept," id. at 326, the Court later sought to distinguish Holmes' notion of continuing jeopardy from *Price*'s by denoting Holmes' as a "concept" and *Price*'s as a "conclusion." Breed v. Jones, 421 U.S. 519, 534 (1975). See note 4 supra. Despite this unnecessary confusion, the two notions are readily distinguishable. Holmes' *concept* means simply that for any one crime there can attach only one jeopardy regardless of how often a defendant may be tried for that crime. For example, if a defendant's sentence for a certain crime is increased, he is not subjected to a second jeopardy because he is being punished only for the *one* crime he committed. Thus, the jeopardy does not terminate until the state has exhausted its power to pursue the defendant. *Price*'s *conclusion* is just that: a conclusory or *post hoc* characterization of a certain event that facilitates an understanding of the rationale upon which the event is based. Price permitted reprosecution of a defendant whose conviction was reversed because of an erroneous jury instruction. In this context, "continuing jeopardy" was merely a shorthand expression used to convey the Court's belief that a defendant once adjudged guilty should not be set free upon a procedural technicality which may or may not be related to the original verdict.

45. 199 U.S. 521 (1905).

46. As in *Kepner*, the Supreme Court of the Philippine Islands was empowered to determine the guilt or innocence of the defendants and to impose sentences upon appeal. Id. at 533-34.

47. Id. at 533. With respect to a defendant's appeal from the judgment of a trial court, the Court stated:

> As the judgment stands before he appeals, it is a complete bar to any further prosecu-

This waiver doctrine was extended in *Flemister v. United States*,[48] *Ocampo v. United States*,[49] and *Stroud v. United States*[50] to allow sentence increases following conviction upon retrial.

Although *Green* is cited for substantially vitiating *Trono* and its progeny,[51] the underlying substantive import of these decisions was reaffirmed emphatically in *North Carolina v. Pearce*.[52] There the defendant was sentenced to prison after his conviction for assault with intent to commit rape. Upon securing the reversal of his conviction, the defendant was again convicted and was sentenced to a prison term greater than the original. In holding that the double jeopardy clause did not bar an increase in sentence following a retrial for the same offense[53], the Court rejected the argument that the defendant's initial sentence should be treated as an "implied acquittal" of any greater sentence, distinguishing *Green* as "based upon the double jeopardy provision's guarantee against retrial for an offense of which the defendant was *acquitted*."[54] In what smacks of a subtle resurrection of the waiver doctrine, the

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tion for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed.

Id.

48. 207 U.S. 372 (1907). In *Flemister*, the defendant was convicted in the court of first instance of resisting arrest. On defendant's appeal, the Philippine Supreme Court decided that the offense fell within a different statute, and increased the sentence. The United States Supreme Court upheld the increase. Id. at 374.

49. 234 U.S. 91 (1914). The facts in *Ocampo* were very similar to those in *Flemister*. The Court relied on *Kepner* and *Flemister* in again upholding an increase in sentence by the Philippine Supreme Court. Id. at 102.

50. 251 U.S. 15 (1919). The defendant in *Stroud*, popularly known as the "Birdman of Alcatraz," was tried and convicted three times on the same first degree murder charge. Imposed respectively were sentences of death, life imprisonment, and death. Relying on *Trono*, the Court held that the sentence of life imprisonment following the second trial did not prohibit imposition of the death penalty following the third trial. Id. at 17-18. The Court observed that "the plaintiff in error himself evoked the action of the court which resulted in a further trial. In such cases he is not placed in second jeopardy within the meaning of the Constitution." Id. at 18.

51. See, e.g., Burks v. United States, 437 U.S. 1, 17 (1978) (citing *Green*) ("It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial."). But see note 55 & accompanying text infra.

52. 395 U.S. 711 (1969).

53. Id. at 719-23.

54. Id. at 720 n.16 (emphasis in original). See also Chaffin v. Stynchcombe, 412 U.S. 17, 25 (1973) ("The possibility of a higher sentence was recognized and accepted [in *Pearce*] as a legitimate concomitant of the retrial process."). In response to the *Pearce* majority's distinction of *Green*, Justice Harlan wrote:

> Every consideration enunciated by the Court in support of the decision in *Green* applies with equal force to the situation at bar. In each instance, the defendant was once subjected to the risk of receiving a maximum punishment, but it was determined by legal process that he should receive only a specified punishment less than the maximum. . . . And the concept or fiction of an "implicit acquittal" of the greater offense . . . applies equally to the greater sentence: in each case it was determined at the former trial that the defendant or his offense was of a certain limited degree of 'badness' or gravity only, and therefore merited only a certain limited punishment . . . .
>
> If, as a matter of policy and practicality, the imposition of an increased sentence on retrial has the same consequences whether effected in the guise of an increase in the degree or an augmentation of punishment, what other factors render one route forbidden and the other permissible under the Double Jeopardy Clause? It cannot be that the

Court argued that the "rationale" for allowing the government to retry a defendant after a reversed conviction "rests ultimately upon the premise that the original conviction has, *at the defendant's behest*, been wholly nullified and the slate wiped clean."[55]

In the multiple punishment area, the Supreme Court in *Ex parte Lange*[56] established that a trial court may not impose an additional sentence subsequent to one legally imposed and fully executed. In *Lange*, the defendant was convicted of stealing mail bags, a crime punishable by imprisonment for not more that one year *or* a fine of not less than $10 nor more than $200. Nonetheless, the defendant was sentenced to one year's imprisonment *and* fined $200. Noting that the defendant had paid the fine, the Court granted defendant's writ of habeas corpus, holding that "when the prisoner, as in this case, had fully suffered one of the alternative punishments for which alone the law subjected him, the power of the court to punish further was gone."[57] More importantly, the Court observed in dictum that "after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he [cannot] be again sentenced on that conviction to another . . . punishment."[58]

In *United States v. Benz*,[59] the Court again addressed the issue of a trial court's sentencing authority. There the defendant pleaded guilty to a charge of violating the National Prohibition Act and was sentenced to a ten-month prison term. While serving this sentence, and before expiration of the term of the federal district court which had imposed the sentence, the defendant petitioned the court for a modification of his punishment. Over the government's objection, the court reduced the term of imprisonment to six months. On appeal by the government, the Circuit Court of Appeals for the Third Circuit certified to the Supreme Court the question of whether a federal court had the power to reduce a term of imprisonment under such circumstances.[60] Holding that such reduction was permissible,[61] the Court, citing *Lange*,[62] added in dic-

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provision does not comprehend "sentences"—as distinguished from "offenses"—for it has long been established that once a prisoner commences service of sentence, the Clause prevents a court from vacating the sentence and then imposing a greater one.

395 U.S. at 746-47 (Harlan, J., dissenting) (citations omitted).

55. Id. at 720-21 (emphasis added). At least one commentator recognized the possible effect of *Trono* and its progeny post-*Green*. Low, Special Offender Sentencing, 8 Am. Crim. L.Q. 70, 86-87 (1970) ("It seems clear to me that if *Stroud, Ocampo*, and *Flemister* are correct, then it should be constitutional for the government to seek an increase in the sentence on appeal.").

56. 85 U.S. (18 Wall.) 163 (1874).

57. Id. at 176.

58. Id. at 173.

59. 282 U.S. 304 (1931).

60. Id. at 306. The question certified to the Court was:

> After a District Court of the United States has imposed a sentence of imprisonment upon a defendant in a criminal case, and after he has served a part of the sentence, has that court, during the term in which it was imposed, power to amend the sentence by shortening the term of imprisonment?

61. Id. at 306-07, 311.

62. Although the Court cited *Lange* extensively, it did not attempt to rationalize the distinguishing fact that *Lange* dealt only with the prohibition against imposing punishment beyond that which was statutorily authorized.

tum "that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment . . . ."[63]

Sixteen years later, however, the *Benz* dictum was qualified in *Bozza v. United States*.[64] The defendant in *Bozza* was convicted of violating several Internal Revenue provisions that mandated both a fine *and* imprisonment, but was sentenced to imprisonment only. Upon discovering his error, the trial judge several hours later returned the defendant to court and added the mandatory fine. Relying on *Benz*, the defendant urged that the increased punishment placed him twice in jeopardy. The Court rejected this argument on the ground that the pronouncement of final sentence does not preclude correction when that sentence is invalid.[65] Accordingly, the court held that substitution of a valid sentence for an invalid one, despite its increased severity, "did not twice place the [defendant] in jeopardy for the same offense."[66]

In the recent case of *Swisher v. Brady*,[67] the Court again had occasion to examine the double jeopardy clause. In that case, the Court considered a challenge to a procedure employed by the Maryland juvenile criminal system. Under that procedure, a master submitted a record of findings of fact, conclusions of law and recommendations to the juvenile court judge who could adopt, modify or reject it. This record was then subject to review at the election of the juvenile defendant, the State or the judge sua sponte, except that when the State filed exceptions and sought review of the judge's decision, the review was limited solely to the record developed by the master.[68] In rejecting the argument that the Maryland procedure required a juvenile defendant to stand trial a second time in violation of the double jeopardy clause, the Court stated that "an accused juvenile is subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge."[69]

Faced with these variegated and tangentially related prior cases, the Supreme Court decided *United States v. DiFrancesco*. Although yet to express

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63. 282 U.S. at 307. Similar dicta have been expressed in other Supreme Court and lower court cases. See, e.g., Reid v. Covert, 354 U.S. 1, 37 n.68 (1957); United States v. Bynoe, 562 F.2d 126 (1st Cir. 1977); Virgin Islands v. Henry, 533 F.2d 876 (3d Cir. 1976); United States v. Turner, 518 F.2d 14 (7th Cir. 1975); Barnes v. United States, 419 F.2d 753 (D.C. Cir. 1969); United States v. Sacco, 367 F.2d 368 (2d Cir. 1966); United States v. Adams, 362 F.2d 210 (6th Cir. 1966); United States v. Walker, 346 F.2d 428 (4th Cir. 1965); United States v. Chiarella, 214 F.2d 838 (2d Cir.), cert. denied, 348 U.S. 902 (1954); Oxman v. United States, 148 F.2d 750 (8th Cir.), cert. denied, 325 U.S. 887 (1945); Frankel v. United States, 131 F.2d 756 (6th Cir. 1942); Rowley v. Welch, 114 F.2d 499, 501 n.3 (D.C. Cir. 1940). But cf. Vincent v. United States, 337 F.2d 891 (8th Cir. 1964), cert. denied, 380 U.S. 988 (1965) (sentence could be increased where defendant has not commenced service). See also Robinson v. Warden, 455 F.2d 1172, 1176 (4th Cir. 1974) (upholding increase) ("We find no suggestion that by dictum the *Benz* Court intended to broaden *Ex parte Lange's* interpretation of the double jeopardy clause.").

64. 330 U.S. 160 (1947).

65. Id. at 166.

66. Id. at 167.

67. 438 U.S. 204 (1978).

68. Id. at 210-11 & n.9 (describing and quoting Md. R.P. 911).

69. 438 U.S. at 215.

a satisfactory rationale,[70] the Court's prior decisions have evidenced different treatment of acquittals and sentencing. In *United States v. Ball* and *Kepner v. United States*, the Court established that the double jeopardy clause is an absolute bar to a second trial following an acquittal.[71] This rule was extended in *Green v. United States* to preclude retrial of a defendant for a greater offense following a reversal of his conviction on a lesser included charge.[72] In *North Carolina v. Pearce*, however, the Court refused to extend *Green*'s rationale to sentencing.[73] Based arguably on the waiver doctrine of *Trono v. United States*,[74] *Pearce* effectively demonstrated that a sentence does not carry the finality of an acquittal.

The *DiFrancesco* Court's reliance on *Pearce* nonetheless may be criticized in at least two respects. First, the *DiFrancesco* Court's interpretation of *Pearce*'s dictate regarding the finality of sentences is illogical. The Court reasoned that "[i]f any rule of finality had applied to the pronouncement of a sentence, the original sentence in *Pearce* would have served as a ceiling on the one imposed at retrial."[75] The Court then added that any difference between the imposition of a new sentence after retrial and one imposed following an appeal "is no more than a 'conceptual nicety.' "[76] However, this "conceptual nicety"—retrial before resentencing—is the very mechanism that removed the sentence ceiling in *Pearce*: "[W]e deal here, not with increases in existing sentences, but with the imposition of wholly new sentences after wholly new trials."[77] Second, the waiver doctrine asserted in *Pearce* does not fit *DiFrancesco*. In *Pearce*, the defendant initiated the appeal; in *DiFrancesco*,

70. The *DiFrancesco* Court did note Professor Westen's explanation of the underlying basis for the Court's distinction between judgments of acquittal and verdicts of conviction: the jury's prerogative to acquit against the evidence. 449 U.S. at 130 n.11. See Westen, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L. Rev. 1001, 1064-65 (1980). The cogency of this rationale can be seen in Bullington v. Missouri, 101 S. Ct. 1852 (1981), a decision handed down several months after *DiFrancesco*. There the defendant initially was convicted of first-degree murder and sentenced to life imprisonment, and subsequently reconvicted and sentenced to death. Under Missouri procedure, once a defendant is convicted of first-degree murder, the prosecutor in a separate proceeding before the same jury must prove beyond a reasonable doubt that the defendant's crime warrants imposition of the death penalty. The Court held that because under Missouri law the sentencing proceeding at the defendant's first trial was almost identical to the trial on the question of innocence or guilt, the death penalty could not be imposed upon retrial. Id. at 1862. The Court distinguished *Pearce*, on the ground that "there was no separate sentencing proceeding at which the prosecution was required to prove—beyond a reasonable doubt or otherwise—additional facts in order to justify the particular sentence." Id. at 1858.

As Professor Westen points out, however, this rationale cannot explain the Court's willingness to attribute the same degree of sanctity to bench trial acquittals as it does to jury acquittals. He suggests that the Court could eliminate a great deal of the confusion plaguing the double jeopardy decisions by recognizing *why* acquittals should be accorded such a high degree of finality—because the jury should be the final arbiters of the defendant's innocence or guilt. This recognition would of course entail a redefining of the word "acquittal." See Westen, supra, at 1064-65.

71. See text accompanying notes 34-39 supra.

72. See text accompanying notes 40-43 supra.

73. See text accompanying notes 52-55 supra.

74. See text accompanying notes 45-47 supra.

75. 449 U.S. at 135 (footnote omitted).

76. Id. at 136.

77. 395 U.S. at 722.

the government appealed over the objection of the defendant.[78]

Similarly, the Court's analysis of the multiple punishment issue is also subject to criticism. In concluding that an increase in sentence on appellate review does not constitute multiple punishment, the Court stated that a defendant has no expectation of finality in an original sentence that Congress specifically subjected to review.[79] Manifestly, this syllogism merely begs the constitutional question of the validity of such a provision.

Though the Court's characterizations of the holdings in *Ex parte Lange* and *United States v. Benz* are technically correct, the Court chose to ignore a well-established principle spawned by dicta in both of the cases. The Court observed that *Lange* stated simply that a trial judge may impose only a statutorily authorized sentence, while *Benz* stated that a trial judge had the power to reduce a defendant's sentence after service had begun.[80] In limiting the *Benz* dictum to *Lange*'s specific context,[81] however, the Court ran roughshod over dicta in those cases[82] and others which stated that a trial court may not increase a validly imposed sentence once service of that sentence had begun.[83] Furthermore, such cavalier treatment of these time-honored dicta cannot be justified on *Bozza*'s qualification of *Benz*.[84] *Bozza* dealt with the issue of increasing an invalid sentence and in no way addressed the issue of increasing a valid sentence. Thus, *Bozza* does not disturb the *Lange-Benz* prohibition against increasing validly imposed sentences.[85]

Finally, the *DiFrancesco* Court's analogy to the procedure upheld in *Swisher v. Brady*[86] invites criticism. The *DiFrancesco* Court lightly dismissed the difference between an informal master's proceeding and a federal trial as being "of no constitutional consequence."[87] The Court failed to recognize, however, that under the Maryland system the master has no authority to impose sentences.[88] As Justice Brennan pointed out in his dissent, surely the majority did not intend to characterize a federal trial judge's imposition of

78. Brief for Respondent at 2-9, United States v. DiFrancesco, 449 U.S. 117 (1980). Congress attempted to circumvent this problem by providing for an automatic review of a defendant's conviction and sentence upon the taking of a review by the government. See note 8 supra. Such a provision, however, is at most a forced consent.

79. 449 U.S. at 139.

80. Id. at 138. See text accompanying notes 56-63 supra.

81. 449 U.S. at 139.

82. See text accompanying notes 58 & 63 supra.

83. See cases cited note 63 supra.

84. See text accompanying notes 64-66 supra.

85. Indeed, several circuit courts have treated *Bozza* in precisely this manner. See, e.g., Mayfield v. United States, 504 F.2d 888 (10th Cir. 1974); United States v. Scott, 502 F.2d 1102 (8th Cir. 1974); United States v. Richardson, 498 F.2d 9 (8th Cir.), cert. denied, 419 U.S. 1020 (1974); Thompson v. United States, 495 F.2d 1304 (1st Cir. 1974); United States v. Mack, 494 F.2d 1204 (9th Cir. 1974), cert. denied, 421 U.S. 916 (1975). Nevertheless, *Bozza* may provide precedential support for the Court's holding in *DiFrancesco*. If *DiFrancesco*'s initial sentence is regarded as invalid because of the trial court's abuse of discretion in imposing it, *Bozza* mandates that the sentence *must* be increased. The *DiFrancesco* Court, however, failed to make this argument.

86. 438 U.S. 204 (1978). See text accompanying notes 67-69 supra.

87. 449 U.S. at 141.

88. See Swisher v. Brady, 438 U.S. 204, 211-12 n.9 (1978) (quoting Md. R.P. 911).

sentence as a "mere recommendation."[89] Logically extended, *Swisher*'s rationale would define a federal trial as "a single proceeding which begins with a [trial judge's] hearing and culminates in an adjudication by [an appellate court]."[90]

Criticism notwithstanding, the impact of *DiFrancesco* cannot be underestimated. With the appellate door now open, prosecutors will be free to appeal a sentence whenever a defendant falls within the definition of a "dangerous special offender."[91] Although this freedom will not be without statutory restraint,[92] appeals pursuant to section 3576 possibly could deluge the already overburdened appellate courts. Nevertheless, appellate review of sentences imposed under the Dangerous Special Offender provisions could to a limited extent provide a check on what has become a major problem in the criminal justice system: lack of sentence uniformity.[93]

Moreover, *DiFrancesco* could have a profound impact on both existing and future legislation. The Dangerous Special Drug Defender provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970[94] practically mirrors the Dangerous Special Offender provisions. To date, the appeal provision provided in section 849(h) of the Act—the counterpart of section 3576[95]—has not been used by the government. In light of *DiFrancesco*, however, it will not be surprising to see a proliferation in the government's use of this appeal provision. More importantly, section 3576 could be a forerunner of a wide-ranging system of appellate review of all criminal sentences. Legislation now pending in Congress would allow the government to appeal any sentence that falls below that established by a set minimum guideline.[96] The timeliness of *DiFrancesco* is thus crucial in that it may well assuage Congress'

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89. 449 U.S. at 152 (Brennan, J., dissenting).

90. 438 U.S. at 215. See text accompanying note 69 supra. Furthermore, the appellate procedure in *DiFrancesco* conceivably could allow the prosecution a forbidden "second crack" at the defendant, because review may incorporate facts outside the trial record.

> The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or *remand for further sentencing proceedings and imposition of sentence* . . . .

18 U.S.C. § 3576 (emphasis added).

91. See 18 U.S.C. § 3575(e) (1976).

92. The government may appeal only when "the sentencing procedure employed [is] [un]lawful, the findings made [are] clearly erroneous, or the sentencing court's discretion [is] abused." 18 U.S.C. § 3576 (1976).

93. See, e.g., S. Rep. No. 553, 96th Cong., 2d Sess. 918 (1980) ("Unwarranted disparity occurs in the sentences imposed by judges in the same district and in sentences imposed from one district or circuit in the Federal system to another."). See generally M. Frankel, Criminal Sentences: Law Without Order (1973); P. O'Donnel, M. Churgin & D. Curtis, Toward a Just and Effective Sentencing System (1977). This argument was one of the underlying bases of the decision in *DiFrancesco*. 449 U.S. at 142.

94. Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. §§ 841-849 (1976)).

95. 21 U.S.C. § 849(h) is a verbatim replication of 18 U.S.C. § 3576.

96. Compare S. 1722, 96th Cong., 1st Sess. § 3725 (1979) (allowing government appeals of sentences) with H.R. 6915, 96th Cong., 2d Sess. § 4101 (1980) (omitting any provision allowing government appeals of sentences).

doubts concerning the constitutionality of such legislation.[97] Similarly, *DiFrancesco* may give rise to the enactment of state statutes similar to section 3576. Thus far, no state has allowed its prosecutors to appeal a sentence unilaterally.[98] But with the constitutionality of section 3576 now secure, states may begin affording their prosecutors the same power as that enjoyed by their federal counterparts.[99]

The Supreme Court rightly decided *United States v. DiFrancesco*, but not without paying a high price. As the Court noted, the Dangerous Special Offender provisions, including section 3576, represent a concentrated effort by Congress to attack a specific problem in our criminal justice system.[100] Section 3576 was enacted as a direct result of the lenient sentences imposed in cases involving organized crime management personnel.[101] As a result of the legal maze created by the double jeopardy cases, the Court was able to effectuate Congress' intent by concocting a decision that rests precariously within the bounds of stare decisis. Though the Supreme Court has in good faith attempted to find its way through this maze, it has done nothing less than return to the point from which it began. By failing to articulate a satisfactory theory for its conviction-acquittal distinction regarding double jeopardy, the *DiFrancesco* Court has given life to a theory that it long ago rejected.[102] *DiFrancesco* redefines double jeopardy, at least for defendants designated as "dangerous special offenders," as "one continuing jeopardy from its beginning to the end of the [appeal]."[103]

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97. See S. 1722, 96th Cong., 1st Sess. § 3725(b) (1979). Despite the Second Circuit's holding in *DiFrancesco*, the Senate Judiciary Committee Report on S. 1722 noted that while the Committee disagreed with that holding, it modified its bill to provide that an initial sentence subject to review is "provisional." S. Rep. No. 553, 96th Cong., 2d Sess. 1140 (1979). For a complete documentary tracing the American Bar Association's sinuous history concerning its position on government appeals, see ABA Ad Hoc Committee on Federal Criminal Code, Report on Government Appeal of Sentences, 35 Bus. Law. 617 (1980).

98. Several states allow appellate courts to increase sentences, but only upon the defendant's motion for review. For a list of state statutes permitting such increases, see Note, Double Jeopardy Limits on Prosecutorial Appeal on Sentences, 1980 Duke L.J. 847, 847 n.5.

99. This result assumes that the state constitution in question would allow government appeals of sentences.

100. 449 U.S. at 142.

101. See S. Rep. No. 617, 91st Cong., 1st Sess. 85-87 (1969), reprinted in 1970 U.S. Code Cong. & Ad. News 4007-09.

102. See notes 51 & 70 supra.

103. Kepner v. United States, 195 U.S. 100, 134 (1904) (Holmes, J., dissenting). See text accompanying note 3 supra.