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THE CONSTITUTIONALITY OF INCREASING SENTENCES ON APPELLATE REVIEW

GREGORY P. DUNSKY*

The National Commission on Reform of Federal Criminal Laws, in its Study Draft of a New Federal Criminal Code, recommended denying federal appellate courts the power to increase criminal sentences on appeal.[1] Peter W. Low, Professor at the University of Virginia School of Law and consultant to the commission, explained that:

> As a matter of principle, it could be argued rather convincingly that the government should be entitled to take an appeal seeking an increase if it feels that the sentence of the court is too low. *It is clear,* however, *that such a provision would offend the constitutional prohibition against double jeopardy.*[2]

The United States Senate's Committee on the Judiciary, in its Report to Accompany S. 1, came to the opposite conclusion regarding the constitutionality of an appellate court's increase of a sentence on appeal. It stated that, "Provided due process considerations are observed, *increasing the sentence should be entirely permissible.*"[3] Section 3725 of the Criminal Code Reform Act of 1977 (S. 1437)[4] would empower federal appellate courts to increase criminal sentences on appeal in certain cases.[5]

This article will discuss whether it is a violation of the double jeopardy or due process clauses of the United States Constitution to permit an appellate court to increase a defendant's sentence on appeal without any new evidence to support the

* B. A., University of Dayton; J. D., University of Michigan. This article originated as a paper written for and discussed in a Sentencing and Corrections Seminar conducted by Professor Peter Westen of the University of Michigan Law School. The author is deeply indebted to Professor Westen for the time and energy he spent unraveling the vagaries of the double jeopardy clause.

[1] "With respect to the controversial issue as to whether the appellate court should be able to increase, as well as decrease, the sentence, this draft would deny it the power to increase." NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE, proposed 28 U.S.C. § 1291 Comment, at 311.

[2] 2 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (1970) 1335 (emphasis added).

[3] SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., REPORT TO ACCOMPANY S. 1, CRIMINAL JUSTICE REFORM ACT OF 1975, at 1052 n.18 (Comm. Print 1975) (emphasis added).

[4] The Criminal Justice Reform Act of 1975 (S. 1) was introduced into the 95th Congress (1st Sess.) as the Criminal Reform Act of 1977 (S. 1437). This bill is expected to go to the Senate floor early in 1978.

[5] SENATE COMM. ON THE JUDICIARY, 94th CONG., 1ST SESS., REPORT TO ACCOMPANY S. 1, CRIMINAL JUSTICE REFORM ACT OF 1975, at 1052 n.18 (Comm. Print).

§ 3725. REVIEW OF A SENTENCE OTHER THAN A SENTENCE OF DEATH.

....

(b) APPEAL BY THE GOVERNMENT—The government may, with the approval of the Attorney General or his designee, file a notice of appeal in the district court for review of a final sentence imposed for a felony if the sentence includes a fine or a term of imprisonment or a term of parole ineligibility lower than the minimum established in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a) (1), and that are found by the sentencing court to be applicable to the case, unless:

(1) the sentence is consistent with policy statements issued by the Sentencing Commission to 28 U.S.C. 994(a) (2);

(2) the sentence is equal to or greater than the sentence recommended or not opposed by the attorney for the government pursuant to a plea agreement under Rule 11(e) (1) (B) of the Federal Rules of Criminal Procedure; or

(3) the sentence is equal to that provided in an accepted plea agreement pursuant to Rule 11(e) (1) (C) of the Federal Rules of Criminal Procedure.

....

(e) DECISION AND DISPOSITION—If the court of appeals determines that the setence is:

(1) clearly unreasonable it shall state specific reasons for its conclusions and:

....

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), shall set aside the sentence and:

(i) remand the case for imposition of a greater sentence;

(ii) remand the case for further sentencing proceedings; or

(iii) impose a greater sentence;

increase. This article considers the question of the constitutionality of Section 3725 of S. 1437 as well as the constitutionality of current statutes providing for increase of sentences on appeal.

Two federal statutes currently allow for increased sentences on review.[6] Both permit increased sentences for dangerous offenders on appeal when a petition for review of the sentence is filed by the government. Six states and two commonwealths provide for appellate increase of sentences, as well. In Alaska, both the government and the defendant may appeal the criminal sentence in certain cases. However, an appellate court may increase the sentence only when both the state *and* the defendant appeal the sentence. Should the state alone appeal the sentence, the appellate court's decision that the original sentence was too lenient is only advisory.[7] Colorado, Connecticut, Maine, Maryland, Massachusetts, Montana and New Hampshire empower appellate courts to increase sentences in certain cases as well.[8] In these states, however, only the defendant may bring an appeal to review a sentence. In Colorado, a sentence may be increased only on proof of aggravation.[9]

The commentators are divided on the question of the constitutionality of statutory schemes providing for increase of sentences on appeal.[10] Moreover, the American Bar Association has had a difficult time wrestling with this question.[11] It is the opinion of the author of this article that the Constitution presents no barriers to a statutory scheme providing for increase of sentences on appeal.

The question of the constitutionality of an increase of sentence on appeal is of more than academic interest. A recent law review article[12] reported that in five percent of the sentence appeals decided by the Alaska Supreme Court during the first five years of that state's appellate review statute, the Alaska Supreme Court disapproved of the

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[6] 18 U.S.C. § 3576 (1970) and 21 USC § 849 (1970). Section 3576 and § 849(h) are virtually identical.

§ 3576. REVIEW OF SENTENCE

With respect to the imposition, correction, or reduction of a sentence . . . 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. . . . The court of appeals on review of the sentence may . . . 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, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing.

[7] ALASKA STAT. § 12.55.120 (1969).

§ 12.55.120 APPEAL OF SENTENCE

. . . .

(b) A sentence of imprisonment lawfully imposed by the superior court may be appealed to the supreme court by the state on the ground that the sentence is too lenient; however, when a sentence is appealed by the state and the defendant has not appealed the sentence, the court is not authorized to increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.

[8] MONT. REV. CODE §§ 95-2501 to 95-2504 (1947) are patterned after CONN. GEN. STAT. ANN. §§ 51-194 to 51-197 (1960). MD ANN. CODE. art. 27, §§ 645 JA to 645 JG (1976) are patterned after MASS. GEN. LAWS. ch. 278, §§ 28A to 28D (1968). ME. REV. STAT. ANN. tit. 15, §§ 2141 to 2144 (1970), N.H. REV. STAT. ANN §§ 651:57 to 651:61 (1975), COLO. REV. STAT. § 18-1-409 (1973).

[9] *Id.* § 18-1-409 (3):

No sentence in excess of the one originally imposed shall be given unless matters of aggravation in addition to those known to the court at the time of the original sentence are brought to the attention of the court during the hearing conducted under this section. If the court imposes a sentence in excess of the one first given, it shall specifically identify the additional aggravating facts considered by it in imposing the increased sentence.

[10] *See* Coburn, *Disparity in Sentences and Appellate Review of Sentencing*, 25 RUTGERS. L. REV. 207, 224-25 (1971) ("The validity of an increased sentence is somewhat uncertain . . . . Considering the possible double jeopardy questions . . . it seems preferable to discard the power to increase . . . ."); Crystal, *The Proposed Federal Criminal Justice Reform Act of 1975: Sentencing—Law and Order With a Vengeance*, 7 SETON HALL L. REV. 33, 70-77 (1975) (increasing a sentence on appeal is multiple punishment and therefore violative of the double jeopardy clause.); Kutak & Gottschalk, *In Search of a Rational Sentence: A Return to the Concept of Appellate Review*, 53 NEB. L. REV. 463, 511 (1974) ("Until the Supreme Court speaks further, there appears to be no constitutional prohibition against statutorily empowering appellate courts to increase sentences."); Labbe, *Appellate Review of Sentences: Penology on the Judicial Doorstep*, 68 J. CRIM. L. & C. 122, 127-28 (1977) ("The right of the state to appeal the leniency of a sentence is one of the most controversial aspects of appellate review of sentences."); Note, *Twice in Jeopardy: Prosecutorial Appeals of Sentences*, 63 VA. L. REV. 325 (1977) [hereinafter cited as *Twice in Jeopardy*], (S. 1's appellate review of sentences proposal is antagonistic to the double jeopardy and due process clauses.).

[11] *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (1968) [hereinafter cited as ABA PROJECT]. The Advisory Committee, noting constitutional problems in the area, would have prohibited an appellate court from increasing a sentence on appeal (Standard 3.4 Limitation on available dispositions). The Special Committee, however, in its Proposed Revisions of Standards, voted to eliminate Standard 3.4, thereby allowing appellate courts to increase sentences on appeal. *See id.* at 54-66 & supplement.

[12] Erwin, *Five Years of Sentence Review in Alaska*, 5 UCLA-ALASKA L. REV. 1 (1975).

trial court's sentence as being too lenient.[13] As noted above,[14] that court cannot increase a sentence on appeal unless it is appealed by both the state and the defendant. It is likely that Alaska would allow for an increase of sentence on appeal by the government alone if it were clear that such an increase of sentence were constitutional. Moreover, it is likely that other states would follow suit if the question of the constitutionality of an increased sentence on appeal was decided in favor of such an increase.

The American Bar Association's Advisory Committee on Sentencing and Review noted that, "Perhaps the most controversial question involved in the decision to provide for sentence review is whether the reviewing court should be authorized to increase the penalty imposed by the sentencing court."[15] The constitutionality of such authorization is a question which every state legislature must face if it considers enacting a system of appellate review of sentences which includes the power to increase sentences on appeal.

I. Appellate Increase of Sentences and the Double Jeopardy Clause

It is often argued that the double jeopardy clause of the fifth amendment to the United States Constitution prohibits an increase of sentence on appeal. I shall examine the double jeopardy arguments that have been advanced and determine whether the double jeopardy clause presents any special problems for statutory schemes providing for increase of sentences on appeal by the government.

A. Introduction

In the early 1960's, two state supreme courts held that double jeopardy does not prohibit an increase of sentence on appeal by defendant. This was the holding of both the Supreme Judicial Court of Massachusetts in *Hicks v. Commonwealth*[16] and the Supreme Court of Errors of Connecticut in *Kohlfuss v. Warden of Connecticut State Prison.*[17] In *Hicks,* the defendant pleaded guilty to four indictments charging armed robbery and was sentenced to concurrent prison terms of from fifteen to twenty years on each indictment. The defendant appealed his sentences to the Appellate Division, which increased his sentences to from twenty to twenty-five years. On appeal to the Massachusetts Supreme Court, the defendant argued that the Appellate Division's harsher sentence placed him twice in jeopardy, in contravention of the fifth amendment. The court held that the substitute sentences did not constitute double jeopardy.[18] In concluding that the legislature properly granted the Appellate Division "continuing jurisdiction to revise a sentence on appeal by defendant," the court analogized the defendant's situation to that of a retrial following a successful appeal of conviction:

> Had the petitioner been convicted and sentenced and if on his appeal the conviction had been reversed, a subsequent conviction followed by a longer sentence than the one initially imposed would not be objectionable. We are of opinion that when a convicted defendant resorts to the statutory procedure prescribed by §§ 28A-28D for review of a sentence he assumes the same risks inherent in an appeal from a conviction.[19]

The Massachusetts court's rationale was this: If the prohibition against double jeopardy does *not* provide that the sentence originally imposed by the trial judge is a ceiling for any subsequent sentencing of defendant on retrial following successful appeal of the original conviction, then the prohibition does not demand that the original sentence be a ceiling when the Appellate Division considers defendant's sentence on appeal by defendant. Either an increase in sentence is permissible in both situations, or it is prohibited in both situations. The *Hicks* Court held that the increase is permissible in both situations.

In *Kohlfuss,* the defendant pleaded guilty to a charge of robbery and was sentenced to a term of from two to seven years imprisonment. He filed a petition for review of his sentence by the superior court, which ordered his sentence to be increased to a term of from three to seven years. The defendant applied for a writ of habeas corpus, arguing that the increase of sentence caused him to be put twice in jeopardy. His application for the writ was denied, and the Connecticut Supreme Court heard

[13] *Id.* at 3.

[14] Alaska Stat., § 12.55.120 (1969).

[15] ABA Project, *supra* note 11, at 55.

[16] 345 Mass. 89, 185 N.E.2d 739 (1962), *cert. denied,* 374 U.S. 839 (1963).

[17] 149 Conn. 692, 183 A.2d 626 (1962), *cert. denied,* 371 U.S. 928 (1962).

[18] The Massachusetts Supreme Court expressly declined to decide whether the fourteenth amendment to the United States Constitution protects citizens against double jeopardy in state criminal proceedings. 185 N.E.2d at 740. This question was answered affirmatively by the United States Supreme Court in Benton v. Maryland, 395 U.S. 784 (1969).

[19] 185 N.E.2d at 740-41.

his double jeopardy arguments on appeal.[20] The court, relying heavily on federal cases,[21] concluded that since the double jeopardy clause does not prohibit a convicted person from initiating proceedings which result in a heavier penalty, (*i.e.*, a person may appeal his conviction, be retried and convicted, and sentenced to a longer sentence than initially imposed), double jeopardy prohibitions do not prevent a larger sentence being imposed where the defendant appeals his sentence.

B. The Double Jeopardy Principle of the Finality of a Verdict of Acquittal

The Advisory Committee on Sentencing and Review of the American Bar Association noted that the rationale of *Green v. United States*[22] undercuts the rationale of the *Kohlfuss* and *Hicks* cases.[23] In order to thoroughly examine this argument, an examination of some earlier United States Supreme Court opinions is required.

The Advisory Committee's view rests upon *United States v. Ball*.[24] In *Ball*, Millard Ball, John Ball and Robert Boutwell were tried in United States Circuit Court for the murder of William Box. The jury found John Ball and Robert Boutwell guilty as charged, but found Millard Ball not guilty. John Ball and Robert Boutwell successfully appealed their convictions, and subsequently new indictments were returned against all three defendants. Millard Ball filed a plea of previous jeopardy and acquittal, which was rejected by the second trial court. The jury in the second trial found Millard Ball and the other two defendants guilty. Millard Ball appealed his conviction to the United States Supreme Court, arguing that he had been placed twice in jeopardy for the same offense, in violation of the fifth amendment. The Court, in reversing the conviction, held the general verdict of acquittal upon the issue of guilt in the first trial was a bar to the second indictment against Millard Ball:[25]

> The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. . . . [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense.[26]

This principle of the finality of a verdict of acquittal in criminal cases was applied by the Supreme Court in *Kepner v. United States*.[27] In *Kepner*, the defendant was charged with having embezzled his client's funds. He was tried and acquitted by a court of first instance in Manila, Philippine Islands.[28] In accordance with the procedure provided in amendments to the Philippine Criminal Code of Procedure,[29] the United States appealed the defendant's acquittal to the Supreme Court of the Philippine Islands. That court reversed the defendant's acquittal, found him guilty as charged and sentenced him to imprisonment. The defendant appealed his conviction to the United States Supreme Court, arguing that he had been put in jeopardy a second time by the appellate proceedings, in violation of the fifth amendment. The Supreme Court, relying upon *Ball*, held that the government appeal upon acquittal constituted double jeopardy for the same offense:[30]

[20] This was a pre-*Benton v. Maryland* case and did not deal directly with the federal double jeopardy clause. The Connecticut Supreme Court viewed the defendant's double jeopardy arguments as arising from common law protections which had been largely adopted by the due process guarantee of Article 1, § 9 of the Connecticut Constitution. 183 A.2d at 627.

[21] The court cited Stroud v. United States, 251 U.S. 15 (1919); United States v. Ball, 163 U.S. 662 (1896); and Murphy v. Massachusetts, 177 U.S. 155 (1900), 183 A.2d at 628.

[22] 355 U.S. 184 (1957).

[23] ABA PROJECT, *supra* note 11, at 63.

[24] 163 U.S. 662 (1896).

[25] *Id.* at 671.

[26] *Id.* The *Ball* case is better known for the proposition that defendant can be retried following reversal of his conviction.

[27] 195 U.S. 100 (1904).

[28] The Philippine Islands were then possessions of the United States. They were acquired by cession under the treaty of peace executed at Paris, between the United States and Spain, on Dec. 10, 1898. *Id.* at 111.

[29] Military Order Number 58 (Apr. 23, 1900) amended the Philippine Criminal Code of Procedure. Section 44 empowered either party in a criminal case to appeal a final judgment of the court of first instance. *See* 195 U.S. at 111-13.

[30] Specifically, the Supreme Court held that § 44 of Military Order Number 58, insofar as it permitted an appeal by the government after acquittal, was repealed by § 5 of the Act of Congress of July 1, 1902, which *inter alia*, provided to the citizens of the Philippines the protections of the double jeopardy clause of the fifth amendment to the United States Constitution. 195 U.S. at 133-34. Although the Court was interpreting the statutory language of the Act of Congress, the Court decided the case as though it was interpreting the double jeopardy clause itself. *See id.* at 124, 133. In United States v. Wilson, 420 U.S. 332 (1975), the Court stated "we accept *Kepner* as having correctly stated the relevant double jeopardy principles." *Id.* at 346 n.15. Last term, in United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977), the Court stated, "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Consti-

> The *Ball* case ... establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment. That is practically the case under consideration, viewed in the most favorable aspect for the Government. The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense.... [31]

Justice Holmes dissented, arguing that the defendant was not placed twice in jeopardy by the government's appeal because the defendant's jeopardy was a continuing one:

> The jeopardy is one continuing jeopardy, from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case.... If a statute should give the right to take exceptions to the Government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm.[32]

In *Trono v. United States*,[33] the Supreme Court examined the scope of the *Kepner* rule. There, three defendants were tried in the province of Bulacan, Philippine Islands, for the murder of Benito Perez. They were acquitted of the crime of murder, but were convicted of the crime of assault, a lesser included offense, and were sentenced to six months imprisonment and the payment of fines. The defendants appealed their convictions to the Supreme Court of the Philippine Islands, which reversed the judgment of the trial court and convicted them of second degree murder. The defendants were sentenced to the payment of fines and prison terms of eight years and one day for one defendant and fourteen years, eight months and one day for the other two defendants. All three appealed to the United States Supreme Court, arguing that their murder convictions, imposed by the Philippine Islands Supreme Court after acquittal by the court of first instance, placed them twice in jeopardy for the same offense.[34] The Supreme Court held that the prohibition against double jeopardy did not prohibit the Philippines from convicting the defendants of the higher offense on appeal.[35] The Court distinguished *Kepner* from this case on the basis of there being a "vital difference" between an attempt by the government to review the verdict and action by a defendant in appealing from the judgment.[36] The Court explained that:

> [T]he accused waives the right to thereafter plead once in jeopardy, when he has obtained a reversal of the judgment, even as to that part of it which acquitted him of the higher while convicting him of the lower offense. When at his own request he has obtained a new trial he must take the burden with the benefit, and go back for a new trial of the whole case.[37]

The rationale of the Court was that a defendant, in appealing his conviction, *waived* the double jeopardy protections created not only by his previous conviction of assault, but also those created by his acquittal of the murder charge. The Court expressly rejected the argument that a defendant, by appealing his conviction, waived *only* his double jeopardy protections which arose from the prior conviction and *not* those that arose from his acquittal of the murder charge.[38]

Justice Harlan and two other Justices dissented.[39] They argued that *Kepner* governed this case, that the defendant's acquittal of the murder charge in the lower court created a bar to defendant's being again tried on the murder charge. They rejected the waiver theory of the majority:

> An accused would not purposely and consciously appeal from an acquittal of a grave crime and cast from himself the immunity that such an acquittal gives him. Should such consent be imputed? ... [A] defendant should not be required to give up the protection of a just ... acquittal of one crime as the

tution.' United States v. Ball ... See also Kepner v. United States." (Citations omitted).

[31] 195 U.S. at 133.

[32] *Id.* at 134-35.

[33] 199 U.S. 521 (1905).

[34] Once again, the Court viewed the double jeopardy issue in terms of § 5 of the 1902 Act of Congress. *Id.* at 528. *See also* note 30 *supra*. The Court specifically noted that in *Kepner*, the double jeopardy language in the 1902 statute was construed as "the same phrase would be construed in the instrument from which it was originally taken, *viz.*, the Constitution of the United States ...." *Id.* at 529.

[35] *Id.* at 535.

[36] *Id.* at 529-30.

[37] *Id.* at 534.

[38] *Id.* at 533.

[39] Mr. Justice Harlan wrote a separate dissenting opinion. *Id.* at 535-37. Mr. Justice White joined Mr. Justice McKenna's dissent. *Id.* at 537-40.

> price of obtaining a review of an unjust conviction of another crime.[40]

Justice Holmes concurred in the result without writing an opinion.[41] Presumably, his rationale was the continuing jeopardy rationale explicated in his *Kepner* dissent.

The holding of the Supreme Court in *Green v. United States*[42] is directly contrary to the holding in *Trono.* In *Green,* defendant was tried in the District of Columbia for arson and the murder of a woman who died in the fire. The jury found the defendant guilty of arson and of second degree murder. The defendant was sentenced to from one to three years imprisonment for arson and to from five to twenty years for murder in the second degree. The court of appeals, on defendant's appeal, reversed his conviction for second degree murder and remanded the case for a new trial.[43] On remand, the defendant was tried for first degree murder under the original indictment. The new trial court overruled his plea of former jeopardy, and the new jury found him guilty of first degree murder. The defendant was sentenced to death. The court of appeals affirmed this conviction, relying on *Trono.*[44] On appeal to the Supreme Court, the defendant argued that he was placed twice in jeopardy, in violation of the fifth amendment, when he was retried for first degree murder after his successful appeal of the second degree murder conviction. The Court reversed the defendant's conviction, holding that the second trial for first degree murder was double jeopardy.[45] Citing *Ball* and *Kepner,* the Court noted that, "[i]t has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offense.' "[46] Moreover, the Court explained that the original jury's verdict of guilty of second degree murder contained an *implicit acquittal* on the charge of first degree murder.[47] This implicit acquittal provided double jeopardy protection for the defendant in the same way that the express acquittals in *Ball* and *Kepner* protected the defendants there. The Court concluded: "Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense."[48] Rather than expressly overruling *Trono,* the Court chose to limit that case to its particular factual setting. "All that was before the Court in *Trono* was a statutory provision against double jeopardy pertaining to the Philippine Islands—a territory just recently conquered with long-established legal procedures that were alien to the common law."[49]

Green was reaffirmed by the Supreme Court in *Price v. Georgia.*[50] In *Price,* the defendant was charged with murder, but was only convicted of voluntary manslaughter and sentenced to from ten to fifteen years imprisonment. Following the defendant's successful appeal of his conviction,[51] he was retried for murder and once again was convicted of voluntary manslaughter and sentenced to ten years imprisonment. The Supreme Court held that even though the defendant was not convicted of the higher offense (murder) on retrial, he was placed twice in jeopardy:

> Although the petitioner was not convicted of the greater charge on retrial, whereas Green was, the risk of conviction on the greater charge was the same in both cases, and the Double Jeopardy Clause of the Fifth Amendment is written in terms of potential or risk of trial and conviction, not punishment.[52]

The rule that the fact-finder's verdict of acquittal on the issue of guilt provides finality in a case which cannot be destroyed by the government or defendant on appeal is well established. It matters not whether the acquittal is express or implicit. An acquittal on the issue of guilt by the fact-finder provides the defendant with a constitutional bar to any subsequent retrial for the same offense.[53]

1. The American Bar Association's Advisory Committee on Sentencing and Review's Argument

[40] *Id.* at 538-39.
[41] *Id.* at 535.
[42] 355 U.S. 184 (1957).
[43] 218 F.2d 856 (D.C. Cir. 1955).
[44] 236 F.2d 708 (D.C. Cir. 1956).
[45] 355 U.S. at 198.
[46] *Id.* at 188.
[47] *Id.* at 190.
[48] *Id.* at 191.
[49] *Id.* at 197.
[50] 398 U.S. 323, 329 (1970).
[51] Price v. State, 108 Ga. App. 581, 133 S.E.2d 916 (1963).
[52] 398 U.S. at 329.
[53] In *United States v. Martin Linen Supply Co.,* the Supreme Court held that the double jeopardy clause also bars government appeal from an acquittal entered by a federal district court under Federal Rule of Criminal Procedure 29(c) after a hung jury has been discharged, 430 U.S. 564, 575 (1977).

The argument of the ABA's Advisory Committee builds on the principle of finality. Justice Frankfurter, dissenting in *Green*, argued against any distinction as to when increased sentences for the *same* crime are permitted:

> As a practical matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly different punishment....[54]

In other words, "For practical purposes, Green was no doubt more concerned about the amount of punishment he would receive if convicted lawfully under a first-degree murder charge than he was about the formal label placed on his criminal act."[55] This is precisely the concern of most criminal defendants—what punishment is likely to be imposed upon conviction? The argument is that since the double jeopardy clause prohibits the retrial of a defendant on a higher offense once he has been acquitted of that offense, the double jeopardy clause also prohibits the imposition of a more severe sentence on retrial than was initially imposed. For, when a particular penalty is imposed upon the defendant, the judge or jury is impliedly acquitting him of a greater penalty, just as Green was impliedly acquitted by the jury of the higher offense.[56]

The California Supreme Court accepted this argument in *People v. Henderson*.[57] There, the court held that the imposition of the death penalty on defendant on retrial, after the reversal of the first judgment sentencing defendant to life imprisonment, was a violation of double jeopardy prohibitions.[58] Justice Traynor, for the court, explained that this conclusion followed from the rule of *Green v. United States*.

> *Green* ... [has] now established that a reversed conviction of a lesser degree of a crime precludes conviction of a higher degree on retrial.... It is immaterial to the basic purpose of the constitutional provision against double jeopardy whether the Legislature divides a crime into different degrees carrying different punishments or allows the court or jury to fix different punishments for the same crime.[59]

The conclusion of the California Supreme Court reflected Justice Frankfurter's view. Since the real concern of defendants is the amount of punishment they will receive upon conviction, the double jeopardy clause prohibits the imposition of a higher sentence on retrial. This is so regardless of whether the higher sentence is the result of the judge or jury fixing the punishment or the result of a defendant's being convicted on a more serious legislatively distinguished offense, with its accompanying higher punishment.

Since the imposition of a particular sentence on a defendant implies that he is acquitted of any charge which is deserving of a higher punishment, and since this implicit acquittal bars a more severe sentence on retrial, it also bars an increase of sentence on appeal. For, as the state supreme courts explained in *Hicks* and *Kohlfuss*, either an increased sentence is permissible in both situations, or it is prohibited in both. The conclusion of the *Henderson* Court is that it is prohibited in both situations.

2. *Rejection of the ABA's Advisory Committee's Argument*

The ABA Advisory Committee's argument is difficult to reconcile with the holding of the Supreme Court in *Stroud v. United States*.[60] In *Stroud*, the defendant, a federal prisoner, was indicted for the murder of a prison guard. He was convicted of first degree murder and sentenced to be hanged. The court of appeals reversed the judgment, and the defendant was tried again. At the second trial, the defendant was again found guilty of first degree murder, but the jury verdict's recommendation was against capital punishment. The defendant was sentenced to life imprisonment. This conviction was reversed on appeal,[61] and the defendant was tried a third time for murder. At the third trial, the defendant was once again found guilty of first degree murder. The jury made no recommendation regarding capital punishment and the defendant was sentenced to death. The defendant appealed this conviction to the Supreme Court, arguing that the third trial placed him twice in jeopardy.

[54] 355 U.S. at 213 (Frankfurter, J., dissenting).

[55] *Appellate Review of Sentences, Hearings on S. 2722 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong, 2d Sess. 106 (1966) (statement of Professor George).

[56] *See* Van Alstyn, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606, 634-635 (1965).

[57] 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P.2d 677 (1963).

[58] 386 P.2d at 686.

[59] *Id.*

[60] 251 U.S. 15 (1919).

[61] Stroud v. United States, 245 F. 990 (8th Cir. 1916).

The Supreme Court affirmed the defendant's conviction,[62] rejecting his double jeopardy argument. Noting that in each of the trials the conviction was for the same offense, first degree murder, the Court explained that the jury in the second trial merely made a recommendation regarding punishment. It had the right to do so under federal law. The Court refused to read an implicit acquittal of the higher penalty into this action by the jury. The Court noted, "The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first-degree murder."[63] The Court relied upon *Trono* to support its holding that there was no violation of the double jeopardy clause in the case. "[T]he plaintiff in error himself invoked 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. *Trono* v. *United States* . . . ."[64]

The impact of *Stroud* on the ABA Advisory Commitee's argument was thought to be very slight. Justice Traynor in *Henderson,* argued that because *Stroud* relied upon *Trono* and the scope of *Trono* was narrowed in *Green, Green* vitiated the rationale of *Stroud.* Therefore, any doubt cast by *Stroud* upon the implicit acquittal theory of *Henderson* was negligible.[65] The impact of *Stroud* cannot be said to be neutralized by *Green,* however. In *Green,* the Court expressly distinguished *Stroud* from that case saying, "*Stroud* v. *United States* . . . is clearly distinguishable. In that case a defendant was retried for first degree murder after he had successfully asked an appellate court to set aside a prior conviction for that same offense."[66] If the rationale of *Green* had vitiated the rationale of *Stroud,* the Court would not have expressly stated that the two cases were distinguishable.

North Carolina v. Pearce[67] increased the doubt cast by *Stroud.* In *Pearce,* the Court faced the question, "[T]o what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial?"[68] In *North Carolina v. Pearce,* the defendant Pearce was convicted in a North Carolina court of assault with intent to commit rape and was sentenced to prison for a term of from twelve to fifteen years. His conviction was later reversed by the North Carolina Supreme Court.[69] On retrial, Pearce was convicted and sentenced to an eight year prison term, which, when added to time already served, amounted to a greater sentence than was originally imposed. Pearce applied to federal district court for a writ of habeas corpus, arguing that the increased sentence on retrial violated the double jeopardy clause. The district court agreed with the defendant and reversed the conviction. The Fourth Circuit affirmed on appeal.[70]

In *Rice v. Alabama,*[71] the defendant Rice pled guilty in an Alabama court to four charges of burglary and was sentenced to a total of ten years imprisonment. These judgments were later set aside in a state *coram nobis* proceeding. On retrial, Rice was convicted of three of the original charges and was sentenced to a total of twenty-five years imprisonment. No credit was given to Rice for the time he had spent in prison on the original judgments. Rice brought a habeas corpus proceeding in the federal district court, arguing that the Alabama trial court unconstitutionally failed to give him credit for the time he had served in prison and that he was unfairly sentenced on retrial. The district court held that he was denied due process of law in the sentencing process of the second trial. The Court of Appeals for the Fifth Circuit affirmed on appeal.[72]

The Supreme Court held that the double jeopardy clause required that punishment already exacted be fully credited when imposing sentence on retrial for the same offense.[73] The Court went on to say that "[l]ong-established constitutional doctrine makes clear that, beyond the requirement already discussed, the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction."[74] The Court cited *Stroud,* among other cases, to support its conclusion regarding the scope of double jeopardy protection noting that "at least since . . . *Stroud* v. *United States* . . . it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose what-

[62] 251 U.S. at 22.
[63] *Id.* at 18.
[64] *Id.*
[65] 386 P.2d at 686.
[66] 355 U.S. at 194–95 n.15. The Supreme Court of Errors of Connecticut also argued that *Green* was clearly distinguishable from *Stroud* and *Kohlfuss. Kohlfuss,* 183 A.2d at 628.
[67] 395 U.S. 711 (1969).
[68] *Id.* at 713.
[69] 266 N.C. 234, 145 S.E.2d 918 (1966).
[70] 397 F.2d 253 (4th Cir. 1968).
[71] Doc. No. 418. This was the companion case to North Carolina v. Pearce, 395 U.S. 711 (1969).
[72] Simpson v. Rice, 396 F.2d 499 (5th Cir. 1968).
[73] 395 U.S. at 718–19.
[74] *Id.* at 719.

ever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction."[75]

Justice Douglas, joined by Justice Marshall, disagreed with the Court's explanation of the double jeopardy clause protections. Citing *Green,* he argued that the theory of double jeopardy was that a person need "run the gauntlet" only once, and that "if for any reason a new trial is granted and there is a conviction a second time, the second penalty imposed cannot exceed the first penalty, if respect is had for the guarantee against double jeopardy."[76] Justice Douglas rejected the government's argument that there is a vital difference between an increased sentence on retrial which results from reconviction for the same offense, and an increased sentence which results from defendant's conviction on retrial for a higher offense than that which he was originally convicted of. He agreed with Justice Traynor's opinion in *Henderson* and Justice Frankfurter's dissent in *Green.*[77]

Justice Harlan also disagreed with the majority's analysis of the double jeopardy clause and the scope of the *Green* rule.

> Every consideration enunciated by the Court in support of the decision in *Green* applies with equal force to the situation at bar.... [T]he 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.[78]

Despite these strong dissents, the Court expressly noted that the rule of *Green* did not apply to the situation at bar in that "[t]he Court's decision in *Green* v. *United States* ... is of no applicability to the present problem. The *Green* decision was based upon the double jeopardy provision's guarantee against retrial for an offense of which the defendant was *acquitted.*"[79]

The clear implication of this language and the plain effect of the holding in *Pearce* is that the implicit acquittal argument of Frankfurter, Traynor and the ABA Advisory Committee has been rejected by the Supreme Court.[80] A defendant is *not* implicitly acquitted of all offenses deserving of more punishment when he is initially sentenced. This argument will not prevail in a challenge to an increase of sentence on appellate review.[81]

C. The Double Jeopardy Prohibition Against Multiple Punishment

Another argument frequently advanced to support the proposition that the double jeopardy clause prohibits an increase of sentence by appellate courts is based upon language from *United States v. Benz.*[82] In that decision the Court concluded:

> Wharton ... says: "As a general practice, the sentence, when imposed by a court of record, is within the power of the court during the session in which it is entered, and may be amended at any time

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[75] *Id.* at 720.

[76] *Id.* at 726-27.

[77] *Id.* at 727-28.

[78] *Id.* at 746.

[79] *Id.* at 720 n.16.

[80] The Supreme Court has not clearly explained why it has chosen to narrow the scope of the *Green* rule in the manner in which it did in *Pearce.* The Court has noted that: "The vital thing is that it is a distinct and different offense." 355 U.S. at 194 n.14. When a legislature divides a package of criminal activity into separate offenses and attaches a range of punishment to each offense, it creates public policy. It makes a general statement regarding the culpability of each offense. When a judge or jury imposes sentence on defendant, it is not making public policy. It is merely applying policy previously made by the legislature. The Court explained in Cichos v. Indiana, 385 U.S. 76 (1966), that the *Green* rule applied only when the conviction of defendant on one offense necessarily excluded a finding of guilt by the factfinder on the other offense. In the same vein, the Court noted in *Martin Linen Supply Co.,* 430 U.S. at 571, that an acquittal "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." This was restated in Lee v. United States, 97 S. Ct. 2141, 2146 n.8 (1977). When the factfinder decides which, if any, crime the defendant has committed, it actually resolves, correctly or not, some or all of the factual elements of the offense charged. In contrast, when the sentencing official imposes sentence, he does not resolve factual elements of the offense charged. He considers a number of other factors (*e.g.,* the rehabilitation of defendant, the deterrence of potential offenders, the protection of society) in making his sentencing decision. Therefore, his decision is not an implicit acquittal of defendant of more culpable offenses.

[81] The argument that the double jeopardy clause prohibits the imposition of an enhanced penalty upon reconviction was raised in Colten v. Kentucky, 407 U.S. 104, 119 (1972). The Supreme Court rejected this argument, citing *Pearce.* The *Pearce* Court's analysis of the double jeopardy clause protections was again reaffirmed by the Court in Chaffin v. Stynchcombe, 412 U.S. 17, 24 (1973). In Ludwig v. Massachusetts, 427 U.S. 618, 630-31 (1976), the Court once again relied upon *Pearce* to uphold the Massachusetts two-tier court system against a double jeopardy attack.

[82] 282 U.S. 304 (1931).

during such session, *provided a punishment already partly suffered be not increased.*"

The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that *to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution,* which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This is the basis of the decision in *Ex parte Lange, supra.*[83]

1. The Benz Argument

In a prepared statement to a subcommittee of the Senate's Committee on the Judiciary, Professor Peter W. Low explained this argument against the constitutionality of increased sentence on appellate review.[84] The argument proceeds from the premise that the underlying justification for the *Benz* rule is that defendant's jeopardy ends once the sentencing court has effectively imposed sentence. Thereafter, the sentence cannot be increased by anyone else without placing defendant twice in jeopardy.

The United States Court of Appeals for the Fourth Circuit considered this argument in *Robinson v. Warden, Maryland House of Correction.*[85] In *Robinson,* the defendant was convicted in the Criminal Court of Baltimore for robbery and assault and was sentenced to concurrent prison terms of ten years. He applied for review of his sentence in accordance with Maryland law, and the sentence review panel increased the defendant's sentence for the assault charge to fifteen years imprisonment. Defendant applied to the United States district court for habeas relief, arguing that the increased sentence violated the double jeopardy clause. The district court denied his petition. In the court of appeals the defendant, relying upon the passage from *Benz* quoted above, argued that the double jeopardy clause barred an increase of sentence on appeal. The Fourth Circuit rejected this argument.[86]

To fully understand the Fourth Circuit's reasoning, a closer look at *Benz* is required. In *Benz,* defendant pleaded guilty to a Prohibition Act violation and was sentenced to a term of imprisonment of ten months. He filed a petition in the federal district court, asking that the sentence be modified. The court thereupon reduced the term of imprisonment to six months. The government appealed, and the court of appeals certified the following question to the Supreme Court:

> 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?[87]

This was the only issue before the Court in the case, and it was answered affirmatively.[88] The Court's entire discussion of the unconstitutionality of *increasing* a sentence was merely *dictum.* The statement that to increase a sentence violates double jeopardy is dictum. Furthermore, this statement was supported by the citation of only one case, *Ex parte Lange.*[89] Therefore, in order to ascertain the correctness of the court's dictum in *Benz,* one must consider *Lange.*

2. An Analysis of Ex parte Lange

In *Lange,* the defendant was convicted of stealing mail bags from the United States Post Office. The appropriate sentencing statute provided that the punishment for this offense was imprisonment for not more than one year, *or* a fine of not less than ten dollars, nor more than two hundred dollars. The judge at the defendant's trial sentenced him to prison for one year *and* ordered him to pay a $200 fine. The defendant was committed to jail in execution of the sentence. He also paid the fine to the clerk of the court who, in turn, paid the same into the United States Treasury. The defendant filed for a writ of habeas corpus, challenging the legality of his sentence. An order was entered by the judge who presided at Lange's trial, vacating the illegal sentence, and Lange was resentenced to one year's imprisonment from that date. The defendant filed for a second writ of habeas corpus, challenging the new sentence. A writ of certiorari was issued to the circuit court by the Supreme Court in order to bring the proceedings before the Court.[90]

The Supreme Court began its analysis of the case by noting that there is a general power of the

[83] *Id.* at 307 (emphasis added).

[84] *See Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, Measures Relating to Organized Crime,* 91st Cong, 1st Sess. 195-96 (1969) (statement of Professor Low).

[85] 455 F.2d 1172 (1972).

[86] *Id.* at 1175-76.

[87] 282 U.S. at 306.

[88] *Id.* at 311.

[89] 85 U.S. (15 Wall.) 163 (1874).

[90] *Id.* at 164.

trial court over its own judgments, decrees and orders, during the existence of the term at which they were made.[91] However, the Court explained, there are limits to this general power of the court. One of these limitations is the constitutional prohibition against double punishment.

> If there is anything settled in the jurisprudence of England and America, it is that no man can be *twice* lawfully *punished for the same offense*.... [T]here has never been any doubt of its [this rule's] entire and complete protection of the party when a *second punishment* is proposed in the same court, on the same facts, *for the same statutory offense*....
>
> ....
>
> ... The protection against the action of the same court in *inflicting punishment twice* must surely be as necessary ... as protection from chances or danger of a *second punishment* on a second trial
>
> ... [W]e do not doubt that *the Constitution was designed* as much *to prevent the criminal from being twice punished for the same offense* as from being twice tried for it.[92]

What is the nature and scope of this prohibition against double punishment? The *Lange* Court explained that this protection arises from the double jeopardy clause of the fifth amendment.[93] Moreover, the Court noted that the protection provides defendant with a bar to double punishment for the same offense whether the second punishment is inflicted by the same court or by a different court at a subsequent trial.

The question, when is a defendant "twice punished for the same offense?," is more difficult to answer. What is "double punishment" or a "second punishment"? The *Lange* Court held that the defendant in that case was punished twice for the same offense.[94] It explained that the trial court had erroneously imposed both of the statutory punishments, prison term and fine, when it had the power to impose only one. Once the defendant had paid the fine and that money had passed beyond the legal control of the court, any further punishment was double punishment. This was because the $200 fine was one of the alternative maximum punishments provided by the statute for the crime, and any punishment in addition to the statutory maximum was prohibited.[95] Thus, punishment that is greater than the statutory maximum punishment is multiple punishment.

Lange suffered double punishment for another reason, as well. He was resentenced to a year's imprisonment by the trial court after he had already *fully suffered* a valid alternative portion of the original sentence. The Court explained:

> We are of opinion that when the prisoner ... had *fully suffered* one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. That the principle we have discussed then interposed its shield, and for[bade] that he should be punished again for that offence.[96]

Thus, once the defendant fully serves a valid sentence for an offense, it is double punishment to punish him again for that offense.

It is double punishment to punish the defendant for an offense after he has *fully suffered* a valid sentence for that offense. This remains true even if the original sentence which has been fully suffered by the defendant can be compensated for by the government. This is the holding of *In re Bradley*.[97] In *Bradley*, the defendant was convicted of contempt of court because of his intimidation of a witness. He was sentenced to six months imprisonment *and* a fine of $500. The sentencing statute provided for the punishments as alternatives. The defendant paid the fine and was committed to prison. Later that day, the court realized its error in sentencing the defendant and amended the sentence by omitting the fine. The court instructed the clerk to refund the fine money to the defendant. The defendant refused to accept the refund money and successfully petitioned the Supreme Court to consider his case. The Supreme Court ordered the defendant freed.[98] The Court explained that when the defendant paid the fine to the clerk, he "complied with a portion of the sentence which could lawfully have been imposed."[99] Furthermore, the Court cited *Lange* as authority for its holding that:

> As the judgment of the court was thus executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court was at

[91] This was established by Bassett v. United States, 76 U.S. (9 Wall.) 38 (1869). The Court noted, however, that that case did not consider or decide the question of the power of a court to increase a sentence. 85 U.S. at 167.

[92] 85 U.S. (15 Wall.) at 168-69, 173 (emphasis added).

[93] *Id.* at 170.

[94] *Id.* at 176.

[95] *Id.* at 175-76.

[96] *Id.* at 176 (emphasis added).

[97] 318 U.S. 50 (1943).

[98] *Id.* at 53.

[99] *Id.* at 52.

> an end .... Since one valid alternative provision of the original sentence has been satisfied, the petitioner is entitled to be freed of further restraint.[100]

It is double punishment to punish a defendant for an offense after he has fully served a valid sentence for that offense even if the sentence fully served by a defendant was not the statutory maximum sentence for the offense. This is the holding of *State v. Heyward.*[101] There, the defendant was convicted for a violation of the narcotic drug statute and was sentenced to a prison term of from five to seven years. The defendant appealed his sentence in accordance with Connecticut law. The sentence review division reviewed the sentence and decided that it should be increased. It directed the court to impose a sentence of from five to ten years imprisonment. The court imposed said sentence; however, it did not do so until more than seven years after the original sentence was given. The defendant appealed from this judgment increasing his sentence. The Connecticut Supreme Court of Errors set aside the judgment.[102] It explained that since defendant had fully satisfied his original sentence before the increased sentence was imposed, he was entitled to be a free man. "To subject him, instead, to another, and more severe, judgment for the same offence ... placed him again in jeopardy for the crime for which he had already paid the penalty."[103]

In *Robinson,* the Court of Appeals for the Fourth Circuit recognized the limited scope of the holding of *Lange,* the sole support for the *Benz* dictum. This limited holding provided the foundation for the court's opinion, which rejected the defendant's double jeopardy argument.

> The increase in Robinson's punishment is not similar to Lange's. When Robinson's sentence was reviewed, he had not served his initial sentence. While the Maryland statute authorized the review panel to increase his sentence, it did not subject him to multiple punishment by superimposing a new sentence on one already served. ... We find no suggestion that by dictum the *Benz* Court intended to broaden *Ex parte Lange*'s interpretation of the double jeopardy clause.[104]

The *Lange* holding does not support the *Benz* dictum. Simply because it is double punishment to impose another penalty on defendant after he has *fully suffered* an initial penalty, it does not necessarily follow that it is double punishment to increase a penalty which defendant has *not yet fully suffered.* The *Lange* Court asked:

> [I]f the judgment of the court is that the convict be imprisoned for four months, and he enters immediately upon the period of punishment, can the court, after it has been fully completed, because it is still in session of the same term, vacate that judgment and render another, for three or six months' imprisonment, or for a fine?[105]

The Court quickly answered the question. "Not only the gross injustice of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal, is manifest."[106] This conclusion follows from the holding of the Court that it is double punishment to impose a new punishment on the defendant after he has fully suffered the initial penalty.

3. Rejection of the Benz Argument

There is language in *Lange,* however, which is arguably broader than its holding:

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?[107]

One may choose to read the above passage without taking into consideration the factual setting of the case. If so, one could argue that the rule of this passage is that the double

[100] *Id.* at 52. Chief Justice Stone dissented, arguing that there was no substance to defendant's contention that he would suffer double punishment if he were compelled to serve his prison sentence. *Id.* at 53 (Stone, C.J., dissenting).

[101] 152 Conn. 426, 207 A.2d 730 (1965).

[102] 207 A.2d at 732.

[103] *Id.* at 731 (citing *ex parte* Lange, 85 U.S. 163 (1873)).

[104] 455 F.2d at 1176.

[105] 85 U.S. at 168.

[106] *Id.*

[107] *Id.* at 173. The *Benz* Court relied upon this language. 282 U.S. at 308.

jeopardy clause prohibits any increase of sentence once defendant has begun to serve that sentence.[108] However, this argument is difficult to reconcile with other holdings of the Supreme Court.

Murphy v. Massachusetts[109] is one such case. In *Murphy,* the defendant was convicted on multiple counts of embezzlement and was sentenced to a term of from ten to fifteen years imprisonment. After serving nearly three years of the prison term, the defendant succeeded in overturning his sentence on the ground that he was sentenced under a statute which was unconstitutionally applied to him. The defendant was resentenced under the proper sentencing statute to nine years, ten months and twenty-one days, which, when added to the time already served by the defendant, totaled twelve years and six months. The defendant appealed his case to the Supreme Court. Mr. Louis D. Brandeis, and others, argued on behalf of the defendant that he was put in double jeopardy when, after the execution of a substantial part of the original sentence, the court imposed a new and larger sentence. Mr. Brandeis relied upon *Lange* to support this argument.[110]

The Supreme Court rejected the defendant's argument, noting that there, unlike *Lange,* "the original sentence had not been fully satisfied."[111] The Court went on to explain that:

> [T]he mere fact that ... he had served a portion of the erroneous sentence could not entitle him to assert that he was being twice punished. ... [T]he plea of former jeopardy or of former conviction cannot be maintained because of service of part of a sentence, reversed or vacated on the prisoner's own application.[112]

Two other cases, *Flemister v. United States*[113] and *Ocampo v. United States,*[114] create problems for advocates of a broader reading of the language in *Lange.* In *Flemister,* the defendant struck a police officer who was attempting to arrest him after he had assaulted another person. The court of first instance in the city of Manila, Philippine Islands, originally sentenced the defendant, but the Philippine Islands Supreme Court increased the sentence on defendant's appeal.[115] The United States Supreme Court affirmed the conviction, noting that defendant's objection to the increase of sentence on appeal was disposed of by *Trono.*[116]

In *Ocampo,* a number of defendants were convicted of libeling a member of the Philippine Commission. The Manila court of first instance sentenced the defendants to imprisonment and fines. On defendants' appeal, the Philippine Islands Supreme Court increased the sentence of one defendant from nine to twelve months imprisonment.[117] The United States Supreme Court affirmed the convictions on appeal, citing *Flemister* and *Trono.*[118] In neither of these cases did the Supreme Court hold that the increase of sentence was double punishment and therefore a violation of the double jeopardy clause.[119]

North Carolina v. Pearce[120] has apparently shut the door to the double punishment argument. In *Pearce,* the Court specifically noted that it was the double jeopardy's prohibition against multiple punish-

[108] There is a series of federal cases in which the courts have chosen to interpret this passage and the *Benz* case in such a manner. *See Twice in Jeopardy, supra* note 10, at 336 nn.55 & 57.

[109] 177 U.S. 155 (1900).

[110] 44 L. Ed. 711, 712.

[111] 177 U.S. at 160.

[112] *Id.* at 161-62. In United States v. Durbin, 542 F.2d 486, 488 n.3 (8th Cir. 1976), the Court of Appeals for the Eighth Circuit cited *Murphy* in a footnote. However, the court appears to have overlooked the scope of its holding. *Murphy* had been cited as good law in *Pearce.* 395 U.S. at 720 n.16. I agree with dissenting Judge Ross that the district court should have been affirmed in that case. *Pearce* and *Murphy* are the controlling precedents.

[113] 207 U.S. 372 (1907).

[114] 234 U.S. 91 (1914).

[115] On appeal the Philippine Supreme Court re-examined the evidence adduced at trial and concluded that the defendant was guilty of a more serious offense than his original conviction reflected. It therefore imposed a more severe penalty on him. 5 Philippine 650, 655-56 (1906).

[116] 207 U.S. at 374. The facts of *Flemister* are not very clearly presented in the United States Supreme Court opinion. The Philippine Islands Supreme Court opinion, 5 Philippine 650 (1906), presents a more detailed factual setting of the case. *Flemister* can arguably be read as an illegal sentence case, but it need not be read in that fashion.

[117] The Philippine Supreme Court increased defendant Kalaw's sentence after reviewing the trial record and weighing a number of other factors. 18 Philippine 1, 57-58 (1910).

[118] 234 U.S. at 102-03.

[119] It is true that *Trono* was restricted by the Supreme Court in *Green.* However, the Court has never expressly undercut the holdings of *Flemister* and *Ocampo.* These cases provide substantial support for the proposition discussed above. Bozza v. United States, 330 U.S. 160 (1947), is another case that undercuts the argument that the *Benz* dictum is good law. There, the Court permitted a federal district court to increase an initial sentence erroneously imposed to the statutory minimum sentence.

[120] 395 U.S. 711 (1969).

ment which was being considered in the case.[121]. Relying upon *Lange,* the Court held "that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense."[122] However, the Court held that beyond this requirement, the multiple punishment prohibition "imposes no restrictions upon sentencing upon reconviction."[123] If the Court believed that an increase in sentence was double punishment, it would have adopted the rule of *Patton v. North Carolina.*[124] In that case, the Court of Appeals for the Fourth Circuit, citing *Lange,* specifically held that the double jeopardy prohibition against multiple punishment prohibits an increase in a defendant's sentence, once service of the sentence has commenced.[125] In failing to consider the *Patton* rule, the Court effectively rejected the double punishment argument outlined above.[126]

The series of lower federal court cases[127] holding that a court may not increase a sentence after commencement of the sentence by defendant is best explained in the following manner:

> The decisions applying the dictum of *United States v. Benz* ... must be understood as applying the double jeopardy clause in view of the absence of statutory or case law authorization for sentence increase by an appellate court. Since, according to statutory and common law, only the trial court can consider increasing the sentence, it was necessary to determine when the sentencing proceeding in the trial court had ended and the sentence had therefore become final. The beginning of service of sentence was a sensible point in time to select for various reasons.... The time when the sole sentencing proceeding ended, once fixed, then marked the end of sentence jeopardy. Thus, those decisions did not consider whether statutory provision of appellate review of sentences would, by postponing sentence finality, also postpone the end of sentence jeopardy.[128]

These cases do not provide convincing authority for the proposition that appellate increase of sentences is prohibited by the double punishment prohibition of the double jeopardy clause. That argument has been substantially rejected by the Supreme Court.

D. Government Appeals of Sentences

This section will examine whether the double jeopardy clause presents any special obstacles to statutes providing for increase of sentence on appeal by the government. The Court of Appeals for the First Circuit has stated that it does. In *Walsh v. Picard,*[129] the First Circuit considered a challenge to the Massachusetts procedure providing for increase of sentence on appellate review initiated by the defendant, stating in dictum that, "the Massachusetts procedure does not permit the state to reopen the question of sentence on its own initiative. Were it to do so, it would of course violate the proscription against double jeopardy."[130]

Frankel is one of a series of lower federal court cases relying upon the *Benz* dictum. As we have seen above,[131] the *Benz* dictum does not support the statement made by the court of appeals. An increased sentence on appeal is not a violation of the double jeopardy clause, unless credit for time already served in prison is not given to the defendant,[132] or the sentence is increased after defendant has already fully served the initial sentence.[133] This is the law, regardless of who initiates appellate review of a sentence. The same is true of the inapplicability of the "implicit acquittal" concept to increased sentences on appeal.

A theory that would suggest double jeopardy difficulties in increased sentences on government appeal is a waiver or forfeiture argument. The argument is that an increase of sentence on appeal is per se a violation of the double jeopardy clause. However, when defendant appeals his sentence, he

[121] *Id.* at 717.

[122] *Id.* at 718-19.

[123] *Id.* at 719.

[124] 381 F.2d 636 (4th Cir. 1967), *cert. denied,* 390 U.S. 905 (1968). The Court of Appeals for the Fourth Circuit relied upon *Patton* when it ordered Pearce's release.

[125] *Id.* at 645.

[126] Professor Low commented on the impact of *Pearce* as follows. "[T]he double jeopardy and equal protection arguments that could be made against an increased sentence on appeal are weakened if not completely destroyed." *Senate Subcomm. Hearings, supra* note 84 at 544.

[127] *See Twice in Jeopardy, supra* note 10, for a sampling of these cases.

[128] SENATE COMM. ON THE JUDICIARY, ORGANIZED CRIME CONTROL ACT OF 1969, S. DOC. NO. 617, 91st Cong., 1st Sess. 97 (1969).

[129] 446 F.2d 1209 (1st Cir. 1971), *cert. denied,* 407 U.S. 921 (1972).

[130] *Id.* at 1211 (citing United States v. Benz, 282 U.S. 304 (1931) and Frankel v. United States, 131 F.2d 756 (6th Cir. 1942)).

[131] See text accompanying notes 75-120 *supra.*

[132] North Carolina v. Pearce, 395 U.S. 711 (1969).

[133] *Ex parte* Lange, 85 U.S. (15 Wall.) 163 (1874).

waives or forfeits his double jeopardy protections.

This theory has never found favor with the Supreme Court. Moreover, it is an unsatisfactory method of justifying increased sentences on appeal by defendants. Justice Holmes recognized the fiction of this theory in his dissent in *Kepner:*

> It cannot matter that the prisoner procures the second trial. . . . [A] man cannot waive, and certainly will not be taken to waive without meaning it, fundamental constitutional rights. . . . Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.[134]

The *Green* Court was persuaded by Justice Holmes' argument and specifically rejected the waiver rationale.

> "Waiver" is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right . . . . [I]t is wholly fictional to say that he "chooses" to forego his constitutional defense of former jeopardy . . . .[135]

The Supreme Court restated its rejection of the waiver theory in *Price*[136] and in *United States v. Dinitz.*[137]

More importantly, the Court declined to adopt the waiver theory in *Pearce.* Noting that the rationale for permitting an increased sentence on retrial has been variously phrased, the Court explained that "it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean."[138] Although it is difficult to ascertain the Court's rationale from this language, it is doubtful that this language is simply a formulation of the waiver theory.[139] It is also very unlikely that it is an adoption of the "continuing jeopardy" theory of Justice Holmes. That theory has recently been expressly rejected by the Supreme Court in both *United States v. Jenkins*[140] and *United States v. Wilson.*[141]

E. The Common Law Pleas of Autrefois Acquit and Autrefois Convict

What did the Court mean when it said that "the slate has been wiped clean"? What theory of double jeopardy will reconcile the holdings of the Supreme Court in this area? The Court hinted at this theory over seventy years ago when it stated that:

> There is also the view to be taken that the constitutional provision was really never intended to, and, properly construed, does not cover the case of a judgment under these circumstances, which has been annulled by the court at the request of the accused, and there is, therefore, no necessity of relying upon a waiver, because the correct construction of the provision does not make it applicable.[142]

In order to make "the correct construction of the provision," the Court has suggested that the double jeopardy clause be "construed with reference to the common law from which it is taken."[143] The common law background of the double jeopardy clause has been discussed frequently by the Supreme Court in its cases during the past century.[144] From these discussions, the conclusion arises that the double jeopardy clause provides defendants with the protections of the common law pleas of *autrefois acquit* (plea of former acquittal) and *autrefois convict* (plea of former conviction).[145] These two pleas provide defendant with different protections and are designed to accomplish different goals. As one commentator noted:

> [A] former conviction raises problems different from those that grow from a former acquittal. And the bases of the two pleas are different. If the first trial

[134] 195 U.S. at 135 (Holmes, J., dissenting).

[135] 355 U.S. at 191-92.

[136] 398 U.S. at 328.

[137] 424 U.S. 600 (1976). "This court has implicitly rejected the contention that the permissibility of a retrial following a mistrial or a reversal of a conviction on appeal depends on a knowing, voluntary, and intelligent waiver of a constitutional right . . . . " *Id.* at 609 n.11.

[138] 395 U.S. at 721.

[139] The fourth circuit does not believe that *Pearce's* rationale is the waiver theory. "The result we reach is not dependent on waiver or the concept of continuing jeopardy. It rests instead on the lesson *Pearce* teaches—the double jeopardy clause is not an absolute bar to increased punishment." *Robinson,* 455 F.2d at 1175.

[140] 420 U.S. 358 (1975). "[T]he 'continuing jeopardy' concept that was articulated by Mr. Justice Holmes . . . has never been adopted by a majority of this Court." *Id.* at 369.

[141] 420 U.S. 332 (1975). "[W]e have rejected this position in the past, and we continue to . . . . " *Id.* at 352.

[142] *Trono,* 199 U.S. at 534.

[143] *Kepner,* 195 U.S. at 125.

[144] *See, e.g.,* Brown v. Ohio, 97 S. Ct. 2221, 2225 (1977), *Wilson,* 420 U.S. at 340-42; *Green,* 355 U.S. at 187; *Kepner,* 195 U.S. at 126-27; *Ball,* 163 U.S. at 666-68; *Lange,* 85 U.S. at 168-73.

[145] *See* J. SIGLER, DOUBLE JEOPARDY ch. 1 (1969).

> results in a conviction, the criminal is protected against a renewal of the prosecution by the moral precept, found in natural law, that no one ought to be punished twice for the same wrong .... But a plea of former acquittal rests on another maxim ... It is a rule of policy adopted by the courts to put an end to litigation.[146]

A person *convicted* of a criminal offense is provided by the double jeopardy clause with protection against being punished twice for the same offense. This is the protection of *autrefois convict.* As explained above, this double jeopardy protection does not prohibit an increase of sentence on appeal.

A person *acquitted* of a criminal offense is provided by the double jeopardy clause with protection against being tried again for the same offense. The acquittal puts an end to the litigation. This is the protection of *autrefois acquit.* As in the case of *autrefois convict*, this double jeopardy protection does not prohibit an increase of sentence on appeal.

F. The Double Jeopardy Protection Against a Second Prosecution For the Same Offense After Conviction

In *Pearce,* the Supreme Court noted that the fifth amendment guarantee against double jeopardy consists of three separate constitutional protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense."[147] Having already discussed the protection against a second prosecution following *acquittal* and the protection against *multiple punishment,* we shall now examine whether the protection against a second prosecution for the same offense after *conviction* presents any obstacles to appellate increase of sentences.

1. An Analysis of Snow and Nielsen

The *Pearce* Court cited but one case, *In re Nielsen,*[148] as authority for the proposition that the double jeopardy clause protects against a second prosecution for the same offense after conviction. In order to fully understand *Nielsen,* however, it is necessary to be familiar with an earlier Supreme Court case. *Ex parte Snow.*[149] Snow was charged in three separate indictments with having unlawfully cohabitated with more than one woman. This was a federal offense. Each indictment charged defendant with having cohabitated with the same seven women, but for different periods of time. He was tried separately on each indictment and was convicted on each. He was sentenced to the maximum statutory penalty of a $300 fine and six months imprisonment on each conviction. The terms of imprisonment were to be served consecutively. Snow petitioned a Territory of Utah district court for a writ of habeas corpus. He argued that he had paid $300 in satisfaction of one of the fines and had been imprisoned for more than six months. Therefore, any further imprisonment was unlawful because the district court had no jurisdiction to pass judgment upon more than one of the three indictments. Since the offense set out in each was the same, and the maximum punishment for that offense, six months imprisonment and a $300 fine, had already been fully served and paid, any further punishment would constitute double jeopardy.

The district court denied Snow's petition, but the Supreme Court reversed the district court on appeal.[150] The Supreme Court held that the offense of unlawful cohabitation was inherently a continuous offense. Moreover, since a continuing offense could be committed but once, for purposes of indictment or prosecution, prior to the time the prosecution was instituted, the division of the offense into three separate offenses was "wholly arbitrary."[151] Therefore, the Court concluded that the trial court had no jurisdiction to inflict a punishment in respect of more than one of the convictions.[152] The Court reversed the judgment of the trial court and remanded the case.

Clearly, *Snow* is a multiple punishment case. As in *Lange,* the defendant in *Snow* was sentenced to punishment greater than that provided for by the statutory maximum. Once the defendant had fully served the statutory maximum sentence, any further punishment was double punishment.

In *Nielsen,* defendant was indicted for unlawful cohabitation with two women under the same statute involved in *Snow.* This indictment covered a period of time ending on May 13, 1888. A second indictment charged that Nielsen committed adultery on May 14, 1888 with one of the women whom Nielsen was accused of having unlawfully cohabitated with under the first indictment. Defendant pleaded guilty to the first indictment and

[146] Bigelow, *Former Conviction and Former Acquittal,* 11 RUTGERS L. REV. 487, 490 (1957).

[147] 395 U.S. at 717, *cited in Wilson,* 420 U.S. at 343, and *Brown,* 97 S. Ct. at 2225.

[148] 131 U.S. 176 (1889).

[149] 120 U.S. 274 (1887).

[150] *Id.* at 286-87.

[151] *Id.* at 281-82.

[152] *Id.* at 285.

was sentenced to three months imprisonment and fined $100. After he had fully served the three month sentence and paid the fine, Nielsen was tried for adultery. He entered a plea of former conviction, arguing that the unlawful cohabitation charge included the adultery charge, in that the unlawful cohabitation continued beyond May 13, 1888, even though the written indictment was for a period ending on that date. Nielsen argued that he had fully suffered the penalty prescribed for the unlawful cohabitation and could not be punished any further for it. The district attorney demurred to this plea and defendant was convicted on the adultery charge and sentenced to prison for 125 days.

Nielsen's petition for a writ of habeas corpus was denied by the Territory of Utah district court. On appeal, the United States Supreme Court granted the writ and determined that the adultery charged in the second indictment was a part of the unlawful cohabitation charged in the first indictment. Relying upon *Snow,* the Court explained it's holding as follows:

> The conviction on that indictment [unlawful cohabitation] was in law a conviction of a crime which was continuous, extending over the whole period, including the time when the adultery was alleged to have been committed. The petitioner's sentence, and the punishment he underwent on the first indictment, was for that entire, continuous crime. It included the adultery charged. To convict and punish him for that also was a *second* conviction and *punishment for the same offence.*[153]

The Court held that the conviction on the first indictment was a *bar* to any prosecution on the second indictment. Therefore, the trial court had no authority to give judgment and sentence in the latter case. The Court reversed the trial court's judgment and remanded the case to the lower court.[154]

Nielsen, like *Snow,* can be read as a multiple punishment case. Unlike Snow, Nielsen was not sentenced to the statutory maximum penalty on his unlawful cohabitation charge. However, Nielsen had *fully served* the sentence he did receive for that offense before he was tried on the adultery charge. Therefore, like Snow, Nielsen fell under the double jeopardy prohibition against multiple punishment as described by the Court in *Lange.*

[153] 131 U.S. at 187 (emphasis added).
[154] *Id.* at 191.

2. An Analysis of Waller, Robinson and Breed

Nielsen and *Snow* may also be read in a broader fashion. They can be read to support the proposition that a former conviction bars a retrial for the same offense, regardless of whether there is multiple punishment in the case. Three fairly recent Supreme Court cases, *Waller v. Florida,*[155] *Robinson v. Neil*[156] and *Breed v. Jones,*[157] can be read to support this proposition as well.

In *Waller,* the defendant was convicted in municipal court on two charges, destruction of city property and breach of peace. He was sentenced to 180 days in county jail. Later, Waller was convicted in a circuit court of Florida on a charge of grand larceny. He was sentenced to from six months to five years imprisonment, less the time he had already served in county jail on the municipal court convictions. The state charge and the city charges were based on the same criminal acts of the defendant. On appeal, the United States Supreme Court held that the city of St. Petersburg and the state of Florida were the same sovereign, and that the state trial of Waller for grand larceny constituted double jeopardy.[158]

In *Robinson,* defendant was convicted in municipal court of three assault and battery charges. He was fined $50 for each offense. Later, he was indicted by a state grand jury for three charges of assault with intent to commit murder. These charges grew out of the same conduct which gave rise to the municipal court charges. The defendant pleaded guilty to the state charges and was sentenced to consecutive terms of three to ten, three to ten, and three to five years imprisonment. On appeal, the Supreme Court held that *Waller* was to be accorded full retroactive effect.[159] The Court remanded the *Robinson* case to the district court to determine whether the state and municipal prosecutions were for the same offense. On remand, the district court held that the offenses were the same for purposes of double jeopardy, and ordered the state convictions and sentences to be set aside.[160]

In *Breed,* a petition was filed in California Juvenile Court, alleging that Gary J., age seventeen years, had violated the criminal laws of California and should, therefore, be adjudged a ward of the

[155] 397 U.S. 387 (1970).
[156] 409 U.S. 505 (1973).
[157] 421 U.S. 519 (1975).
[158] 397 U.S. at 394-95.
[159] 409 U.S. at 511.
[160] Robinson v. Neil, 366 F. Supp. 924 (M.D. Ala. 1973).

court. More specifically, it was charged that he committed an act which would have constituted armed robbery if it had been committed by an adult. An adjudicatory hearing was held, and the Juvenile Court found that the allegations in the petition were true. Later, the Juvenile Court declared that Gary J. was unfit for treatment as a juvenile, and it ordered that he be prosecuted as an adult. An information was filed in Superior Court, and Gary J. was tried and found guilty of first degree robbery and committed to the California Youth Authority. The defendant filed for a writ of habeas corpus in United States district court, which denied the petition. The court of appeals reversed that court's denial of the writ, holding that the defendant had been placed twice in jeopardy by the state trial which followed the juvenile court hearing.[161] The Supreme Court agreed with the court of appeals, holding that the prosecution of the defendant in the Superior Court, after the juvenile court adjudicatory proceeding, violated the double jeopardy clause.[162]

Like *Snow* and *Nielsen, Robinson* can be explained as a multiple punishment case. Robinson was tried in state court for assault with intent to commit murder *after* he had *fully served* the sentences imposed on him by the municipal court for the assault and battery charges (*i.e.,* after he had paid the three $50 fines). Viewed in this light, *Robinson* is simply a *Lange*-type case which falls within the double jeopardy proscription against multiple punishment.

Unlike *Snow* and *Nielsen,* however, *Waller* and *Breed* cannot be explained as multiple punishment cases. In *Waller,* defendant had only served 170 of the 180 days imprisonment imposed on him by the municipal court at the time he was sentenced for the state court charge. He had *not* fully served the penalty. Moreover, the state trial court gave Waller credit for the time he had served on the municipal convictions when it sentenced him. In *Breed,* defendant received no definite punishment following his adjudicatory hearing in juvenile court. It was within the court's power to commit him to the California Youth Authority until he reached the age of twenty-one years.[163] Clearly, at the time he was tried in state court for robbery, Breed had *not* fully served an initial sentence. Therefore, neither *Breed* nor *Waller* was a double punishment case.

Neither defendant was twice punished in these cases. Yet, the Supreme Court held that they were put in double jeopardy by the second prosecutions. The Court did not discuss *why* the second prosecutions were violations of the double jeopardy clause. Instead, it gave most of its attention to other issues.[164] Furthermore, once the Court concluded that the double jeopardy clause applied, it assumed that that clause's protections had been violated. The question arises, what double jeopardy protection was violated in these cases? It appears that it was the protection against a second prosecution for the same offense after conviction.[165]

3. The Effect of the Double Jeopardy Protection Against a Second Prosecution for the Same Offense After Conviction

Does double jeopardy protection against a second prosecution provide an obstacle to an increase of sentence on appeal? There is language in recent Supreme Court decisions which suggests that the purpose of this protection is to insure that the defendant need only once endure the hardship of one criminal *trial* for the same offense.[166] The goal of protecting the defendant from twice enduring the heavy burden of marshalling his resources against the state in a criminal trial is not frustrated by allowing government appeal of the defendant's sentence. To the contrary, a government appeal seeking an increase of sentence is analogous to the appeal permitted by the Supreme Court in *United States v. Wilson.*[167] There, the Court explained that

[161] 497 F.2d 1160 (9th Cir. 1974).

[162] 421 U.S. at 541.

[163] *Id.* at 529 n.11.

[164] In *Waller*, the Court focused on the question of whether the city of St. Petersburg and the state of Florida were the same sovereign. In *Breed*, the Court considered whether the protections of the double jeopardy clause applied to persons involved in juvenile court proceedings. These questions were answered by the Court affirmatively.

[165] In *Brown*, 97 S. Ct. at 2225, the Court held that a previous conviction for a lesser included offense bars later prosecution for the greater offense. The two offenses are the "same offense" for double jeopardy purposes. The second prosecution is barred as a result of the double jeopardy protection against prosecution for the same offense after conviction. The Court noted that: "Where successive prosecutions are at stake, the guarantee serves 'a constitutional policy of finality for the defendant's benefit' .... That policy protects the accused from attempts to relitigate the facts underlying a prior acquittal ... and from attempts to secure additional punishment after a prior conviction and sentence.... " *See also* Jeffers v. United States, 97 S. Ct. 2207 (1977).

[166] *See, e.g., Breed*, 421 U.S. at 530, 533; *Wilson*, 420 U.S. at 343-45; *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977).

[167] 420 U.S. 332 (1975). In *Wilson*, the Court permitted the Government to appeal the district court's grant of a post verdict defense motion to dismiss the case.

although the Government's appeal would subject defendant to continuing expense and anxiety, the defendant had no legitimate double jeopardy claim because "that error could be corrected without subjecting him to a second trial before a second trier of fact."[168] Similarily, although a government appeal of sentence would subject a defendant to continuing expense and anxiety, it would not violate the double jeopardy clause because the error, a too lenient sentence, could be corrected without subjecting the defendant to a second trial. The conclusion is, therefore, that the double jeopardy protection against a second prosecution for the same offense after conviction does not prohibit an increase of sentence on appeal.[169]

II. Appellate Increase of Sentences and the Due Process Clause

This section will examine whether the due process clause of the fourteenth amendment prohibits an appellate court from increasing a defendant's sentence on appeal without any new evidence to support the increase. This question may be rephrased by asking whether the prophylactic rule announced by the *Pearce* Court must be followed by appellate courts in reviewing sentences on appeal. That rule was stated as follows:

> [W]e 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 . . . .[170]

In order to determine whether or not the due process clause requires that this rule be followed by appellate courts in reviewing sentences, one must examine the rationale of the rule. The *Pearce* Court stated the rule's rationale in this manner:

> Due process of law, then, 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. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his 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.[171]

The dual purpose of the *Pearce* due process rule is very clear. First, it is to ensure that *vindictiveness* against a defendant for having successfully attacked his first conviction plays no part in the resentencing process. Secondly, it is to ensure that *apprehension* of such vindictiveness does not deter defendant from exercising his right to appeal his conviction.[172]

Would these purposes be furthered by requiring that appellate courts follow the *Pearce* rule when reviewing sentences? *Colten v. Kentucky*[173] suggests not. In *Colten*, the Court held that the prophylactic rule of *Pearce* was not appropriate in the context of Kentucky's two-tier court system.[174] This was because the possibility of vindictiveness found to exist in *Pearce* was not inherent in the Kentucky system. Why? Because the court which imposed

[168] *Id.* at 345.

[169] The *Pearce* Court cited a *Yale Law Journal* Note to support the proposition that the double jeopardy clause consists of three separate constitutional protections. 395 U.S. at 717 n.8. That Note explained one of the policies underlying the double jeopardy protection against retrial for the same offense after conviction as follows: "Second, the prosecutor should not be able to search for an agreeable sentence by bringing successive prosecutions for the same offense before different judges. Thus reprosecution after a conviction is prohibited." Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 267 (1965). The question arises, if the double jeopardy clause prohibits a prosecutor from searching for an agreeable sentence by way of bringing successive prosecutions for the same offense, why does it not prohibit a prosecutor from seeking an agreeable sentence by way of appealing the sentence? There is a significant difference between a prosecutor's searching for a "hanging judge" before whom to retry a defendant and a prosecutor's appealing a sentence to an appellate court. A sentence appeal is heard by an appellate court, presumably the same court that hears all sentence appeal cases in the jurisdiction. In an appellate review of sentences system, a prosecutor cannot search for a particularly harsh court in which to retry and resentence a particular defendant. To the contrary, every defendant whose sentence is appealed has his case heard before the same appellate court. This court, over a period of time, should develop and apply criteria for sentencing which are both rational and just. The court will hear appeals in cases where the original sentence imposed was too lenient as well as cases where the original sentence imposed was too harsh. By empowering the court to increase sentences when appropriate, the court has a mechanism with which to deal with the problem of sentence disparity (*i.e.*, disparity which results from too great lenience in sentencing at the trial court level). Rather than being a part of the problem which the double jeopardy clause was written to counteract, a system of appellate review of sentences is a part of the solution to the problem of sentence disparity.

[170] 395 U.S. at 726.

[171] *Id.* at 725.

[172] Michigan v. Payne, 412 U.S. 47, 51-52 (1973).

[173] 407 U.S. 104 (1972).

[174] *Id.* at 118.

Colten's final sentence was *not* the same court with whose work Colten was sufficiently dissatisfied with to seek an appeal. No court was asked to do over what it thought it had already done correctly.[175] Similarly, systems of appellate review of sentences do not inherently possess the possibility of vindictiveness found to exist in *Pearce.* Because an appellate judge, not the trial judge, reviews the sentence, the "resentencing decision [is not] based on improper considerations, such as [the trial] judge's unarticulated resentment at having been reversed on appeal."[176] The *Walsh* Court explained this important distinction as follows:

> [A] trial court which has been reversed and then required to engage in a perhaps lengthy retrial, only to end up where it started, may find it difficult in the best of conscience not to feel some irritation towards the defendant. The likelihood that an appellate court hearing a brief appeal would feel vindictive seems to us far more remote.[177]

Thus, because the appellate court will have no personal stake in the prior sentence, it will have no motivation to engage in self-vindication. It will be able to fairly assess the propriety of the sentence, free from any realistic likelihood of vindictiveness.

The court's analysis in *Chaffin v. Stynchcombe*[178] is equally applicable to the appellate review of sentences arena. There, the Court declined to require that the *Pearce* rule be followed where resentencing is performed by a jury rather than a judge. The need to guard against vindictiveness is not as strong in this case as it was in *Pearce.* Likewise, the hazard of vindictiveness in appellate review of sentences cases is not comparable to *Pearce's.*[179]

Moreover, the purposes of the *Pearce* rule would not be furthered in situations where it is the government who appeals the sentence and not the defendant. In these situations, fear of vindictiveness on the part of the defendant is nonexistent.

Two important distinctions between appellate review of sentences proceedings and the *Pearce* situation were noted by the *Robinson* Court.

> The *Pearce* rule was designed to enable a defendant who was wrongfully convicted to seek redress without being deterred by fear of reprisal. However, a prisoner seeking sentence review is not faced with the dilemma of either remaining in jail under an invalid conviction or of risking harsher punishment if he is convicted on retrial. Sentence review deals only with the justness of punishment .... The very purpose of sentence review is to reconsider and reevaluate information bearing on the appropriateness of the prisoner's punishment. Ideally, review should quickly follow sentencing, and it is not designed to examine a defendant's conduct in the interim. Therefore, the sanction fashioned in *Pearce* to assure due process is inappropriate for sentence review.[180]

First, the dilemma that the defendant faces in an appellate review of sentences situation is not as grave as that faced by Pearce. The defendant need not choose between either remaining in jail under an invalid conviction or risking a harsher punishment if he is convicted on retrial. The only issue dealt with on appeal of a sentence is the propriety of the punishment. This is a significant difference from *Pearce.*

Secondly, the very timing and nature of sentence review make the *Pearce* rule inappropriate. The process calls for a re-evaluation of the same information available to the trial judge at the initial sentencing. There will not always be an interim period in which the defendant may conduct himself in such a manner as to justify an increase in his sentence. The application of the *Pearce* due process rule in appellate review of sentences situations would effectively negate the system. Thus it is very unlikely that an appellate court on review of a sentence would be required to follow the prophylactic rule of *Pearce.*

CONCLUSION

It is *not* a violation of either the double jeopardy or due process clauses of the United States Constitution for an appellate judge to increase a defendant's sentence on appeal, even where there is no new evidence to support the increase.

If an increase of sentence on retrial following reversal of a conviction does not violate the double jeopardy clause, then an increase of sentence on appeal of the sentence by the defendant is also non-violative of double jeopardy. An analysis of three areas demonstrates that increase of sentence on retrial following reversal of a conviction does not violate the double jeopardy clause.

A. The double jeopardy protection against being

[175] *Id.* at 116-17.
[176] *Payne*, 412 U.S. at 53.
[177] 446 F.2d at 1212.
[178] 412 U.S. 17 (1973).
[179] *Id.* at 24-28.
[180] 455 F.2d at 1176-77. *See also* State of Montana v. Henrich, 162 Mont. 114, 509 P.2d 288 (1973).

prosecuted for the same offense following acquittal is not violated. *Ball* and *Kepner* establish the proposition of the finality of a verdict of acquittal. *Green* establishes that even an implicit acquittal provides this protection. Mr. Justice Frankfurter, Mr. Justice Traynor and the ABA Advisory Committee argued that the implicit acquittal concept of *Green* applies equally to the sentence. Yet, this argument has been rejected by the United States Supreme Court in *Stroud, Green* and *Pearce.*

B. The double jeopardy protection against multiple punishment is not violated. Arguably, the *Benz* dictum provides support for the proposition that an increased sentence on appeal is double punishment. However, *Benz* relies upon *Lange,* and the holding of *Lange* is much more limited than the *Benz* dictum. Multiple punishment is a penalty greater than the statutory maximum or the imposition of further punishment after a legal sentence has been fully suffered by a defendant. The language in *Benz* cannot be reconciled with holdings of the Supreme Court in *Murphy, Flemister, Ocampo* and *Pearce.*

C. The double jeopardy protection against being tried for the same offense following conviction is not violated. This protection insures that the defendant will not be subject to multiple prosecutions for the same offense. Appellate review of sentences does not subject a defendant to *multiple* prosecutions.

Government appeals of sentences are also not prohibited by the double jeopardy clause. Waiver or forfeiture theories of double jeopardy and the continuing jeopardy theory of Mr. Justice Holmes have not been accepted by the Court. Therefore, government appeals are permitted to the same extent as are defendant appeals. In addition, the double jeopardy clause provides a defendant with the common law protections of the pleas of *autrefois acquit* and *autrefois convict,* but these protections do not prevent government appeal of sentences.

The due process issue revolves around whether or not the prophylactic rule of *Pearce* applies to appellate review of sentences. The purpose of this rule is to insure that vindictiveness plays no role in the sentencing process and does not deter defendants from appealing convictions. The vindictiveness problem is not a realistic one in the appellate review of sentences setting because a different official reviews the sentence than the one who imposed it. The defendant is not faced with a dilemma the magnitude of Pearce's. The nature of the appeal process is different than the process involved in *Pearce.* The rule of *Pearce* does not apply in these cases, as is demonstrated in *Colten* and *Chaffin.*