Mercer Law Review

Volume 32
Number 4 *Annual Fifth Circuit Survey*

Article 14

7-1981

United States v. Di Francesco: Court Upholds State Initiated Sentence Appeals

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NOTES

United States v. Di Francesco: Court Upholds State Initiated Sentence Appeals

In *United States v. Di Francesco*,[1] the Supreme Court upheld a statute that allowed the government to seek, through an appeal, an increase of the sentence imposed by the trial court.[2] The Court found that the statute did not violate the protections of the double jeopardy clause[3] against multiple trials and multiple punishment.[4] The question of state initiated appeals assumes further significance when it is considered that proposed revisions of the Federal Criminal Code include wider implementation of sentence appeals by the state.[5]

The statute in question, the Organized Crime Control Act of 1970 (Act),[6] allows the state to request that the trial judge make a finding that the defendant meets the statutory definition of a special dangerous offender and, if that finding is made, to seek enhanced sentencing at the trial level. Section 3576 allows the prosecution to take the sentence to an appellate court to determine "whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused."[7] If the appellate court finds that the trial judge made one of these errors specified in the act, it can "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. . . ."[8] Although the Act had been in force for a decade, *Di Francesco* was its first constitutional challenge.[9]

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1. 101 S. Ct. 426 (1980).
2. 101 S. Ct. at 440.
3. "[n]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . ." U.S. CONST. amend. v.
4. 101 S. Ct. at 438.
5. *See* S. 1722, 96th Cong., 1st Sess. § 101 (1979).
6. 18 U.S.C. §§ 3575, 3576 (1976).
7. 18 U.S.C. § 3576 (1976).
8. *Id.*
9. 101 S. Ct. at 431. The act may have been silent, but commentators have not. *See generally* Ad Hoc Committee on Federal Criminal Code, *Report on Government Appeal of*

Di Francesco had its genesis in two trials in the District Court for the Western District of New York.[10] Prior to the first trial, the government, pursuant to section 3575 of the Act, notified the trial judge of its desire to seek enhanced sentencing under the special dangerous offender provision. At this trial, Di Francesco was convicted for participation in an arson for hire scheme. The second trial resulted in a conviction for crimes arising from Columbus Day bombings, including the bombing of a federal building.

Di Francesco was first sentenced for his convictions at the second trial and received a total of nine years. Before sentencing for the first convictions, the trial judge found Di Francesco to be a special dangerous offender and then imposed two concurrent ten year sentences. Sentencing as a special dangerous offender increased Di Francesco's existing sentence by one year.

The state appealed, pursuant to section 3576 of the Act, alleging abuse of discretion by the trial judge. The Second Circuit Court of Appeals upheld the convictions but dismissed the government's appeal. The court held "that to subject the defendant to the risk of substitution of a greater sentence, upon an appeal by the government, is to place him a second time 'in jeopardy of life or limb.' "[11] The Supreme Court granted certiorari to determine the double jeopardy question.[12]

The principles underlying the double jeopardy clause may well predate the common law itself.[13] At the Constitutional Convention, the double

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Sentences, 35 BUS. LAWYER 617, 624-28 (1980); Dunsky, *The Constitutionality of Increasing Sentences on Appellate Review*, 69 J. CRIM. L. AND CRIMINOLOGY 19 (1978); Freeman and Early, *United States v. Di Francesco: Government Appeal of Sentences*, 18 AM. CRIM. L. REV. 91 (1980); Low, *Special Offender Sentencing*, 8 AM. CRIM. L. QUAR. 70, 91 (1970) (reprint of statement submitted at *Hearings on S. 30 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 91st Cong., 1st Sess., 184, 197 (1969)); Spence, *The Federal Criminal Code Reform Act of 1977 and Prosecutorial Appeal of Sentences: Justice or Double Jeopardy?*, 37 MD. L. REV. 739 (1978); Stern, *Government Appeals of Sentences: A Constitutional Response to Arbitrary and Unreasonable Sentences*, 18 AM. CRIM. L. REV. 51 (1980); Westen, *The Three Faces of Double Jeopardy: Reflection's on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001 (1980); Note, 63 VA. L. REV. 325 (1977). *See also* ABA STANDARDS FOR CRIMINAL JUSTICE 20-.1.1(d), and appended commentary, pp. 20-7 through 20-13 (2d ed., 1980).

10. 101 S. Ct. at 429. All facts are from the Court's opinion. At the first trial, Di Francesco was convicted for violations of 18 U.S.C. § 1962(c) (racketeering) and (d) (1976) (conspiracy). At the second trial, he was convicted for violations of 18 U.S.C. § 1361 (1976) (damaging federal property), 18 U.S.C. § 842(j) (1976) (unlawfully storing explosives), and 18 U.S.C. § 371 (1976) (conspiracy).

11. United States v. Di Francesco, 604 F.2d 769, 783 (2d Cir. 1979).

12. 144 U.S. 1070 (1980).

13. *See* M. FRIEDLAND, DOUBLE JEOPARDY (1969). Professor Friedland traced the clause's history to 391 A.D. when St. Jerome commented on the prophet Nahum, "For God judges not twice for the same offense." (citation omitted). Blackstone traced the clause's history to

jeopardy clause was adopted with no apparent dissent.[14] Early on, its principles were rarely considered because appeal of a final verdict was prohibited.[15] By 1889, Congress allowed defendants the right to appeal, and the Court began the task of articulating double jeopardy policy.[16]

The interests protected by the double jeopardy clause have been eloquently described by Justice Black:

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense . . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[17]

In addition to the defendant's interest in avoiding repeated attempts by the state to convict, the Court has also recognized the defendant's interest in having his trial completed by a "particular tribunal."[18] The Court has recognized that the essence of the protected interest is guarding against the punishment that would legally follow the second conviction.[19] There are two ways the Court has construed the double jeopardy clause to protect this interest: it protects against multiple prosecutions and multiple punishment for the same offense.[20] A natural tension arises when the interests of the defendant are weighed against the "competing and equally legitimate demand for public justice."[21] Society in every criminal trial has an interest in "one complete opportunity to convict those who

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the common law writs of *autre fois acquit, autre fois convict,* and *pardon,* 4 W. BLACKSTONE, COMMENTARIES 329-30 (1st ed. 1769).

14. United States v. Wilson, 420 U.S. 332, 342 (1975) (citation omitted).

15. *Id.* at 343.

16. United States v. Scott, 437 U.S. 82, 88 (1978) (citation omitted). Double jeopardy now extends to the states. Benton v. Maryland, 395 U.S. 784 (1969). Its protections do not extend beyond criminal trials. One Lot Emerald Cut Stones & One Ring, 409 U.S. 232 (1972). Juvenile proceedings, even though labeled civil, are within the clause's ambit, Breed v. Jones, 421 U.S. 519 (1975). The Court has held that jeopardy attaches at the swearing of the jury, Crist v. Bretz, 437 U.S. 28 (1978), or at the swearing of the first witness in a beach trial, Serfass v. United States, 420 U.S. 377 (1975).

17. Green v. United States, 355 U.S. 184, 187-88 (1957).

18. Wade v. Hunter, 336 U.S. 684, 689 (1949).

19. Ex Parte Lange, 85 U.S. (18 Wall.) 163, 173 (1873).

20. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

21. Illinois v. Somerville, 410 U.S. 458, 471 (1973).

have violated its laws."[22]

In the context of retrial following acquittal, the Court has consistently found the state's interests in public justice outweighed by the defendants' interests in avoiding reprosecution. The Court first addressed this question in *United States v. Ball.*[23] Ball was acquitted and his two co-defendants were convicted at the first trial. The indictments were ruled defective upon the appeal of the two convicted defendants. All three were convicted in a subsequent trial after new indictments had been issued. In ruling on Ball's plea of double jeopardy, the Court held "that a general verdict of acquittal upon the issue of not guilty to an indictment . . . not objected to before the verdict is insufficient in that respect and is a bar to a second indictment . . . ."[24] The Court disapproved the possibility of manipulation by the prosecutor if he were allowed to try the case with the knowledge that, if he lost, he could get another chance because of error in the first trial. Allowing retrial would have the effect of arming "the government with a potent instrument for oppression"[25] by allowing the state to discover the weaknesses and strengths of both the defendants and their cases, thus strengthening their chances of conviction the second time around.[26] The Court has consistently held that the double jeopardy clause's "protections would be negated were . . . the Court to afford the government an opportunity for the proverbial 'second bite at the apple.' "[27]

One commentator has stated that the Court is in the process of limiting the double jeopardy protections to retrials following acquittals.[28] The Court has consistently protected the two-tier trial systems from double jeopardy challenges. Kentucky's two-tier system for minor offenses provides for a first trial at the inferior court level.[29] If the defendant is acquitted, the proceedings are terminated. If convicted, the defendant can move for a trial de novo before a court of general jurisdiction. The Court found no risk of multiple trials in this system because the defendant could avoid the expense and anxiety of the first trial by entering a guilty

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22. Arizona v. Washington, 434 U.S. 497, 507 (1978).

23. 163 U.S. 662 (1896).

24. *Id.* at 669. This general principle was applied when "upon an egregiously erroneous foundation," the trial judge has directed the jury to return a verdict of acquittal. Fong Foo v. United States, 369 U.S. 141, 143 (1962). It has also applied when the judge discharges the jury and enters an acquittal. United States v. Martin Linen Supply, 430 U.S. 564, 575 (1977). It also bars retrial if the appellate court decides the evidence was insufficient to convict. Burks v. United States, 437 U.S. 1 (1978).

25. 430 U.S. at 569.

26. 420 U.S. at 352.

27. 437 U.S. at 17.

28. *See* C. WHITEBREAD, CRIMINAL PROCEDURE 482-513 (1980).

29. Colten v. Kentucky, 407 U.S. 104 (1971).

plea.[30] Maryland's two-tier juvenile system differs only in that the recommendations of the first hearing officer are not considered final and the defendant can elect a de novo hearing before the juvenile court.[31] The Court ruled that the total system comprises just one hearing because the first tier hearing resulted only in proposed findings.[32] Further, because no additional evidence can be heard at the second level without the juvenile's consent, the Court thought that the system posed no threat of multiple prosecutions.[33]

The double jeopardy clause has not been given an expansive reading in regard to mistrials. Since 1824, it has been settled that reprosecution is not barred following mistrial when "manifest necessity in order to meet the ends of justice" warrants the mistrial decision.[34] This principle "accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws."[35] However, the Court has been reluctant to find manifest necessity if the error underlying the mistrial decision is one which could lend itself to manipulation by the prosecution to gain an unfair advantage.[36] The Court has stated:

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor" . . . threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant.[37]

When the error warranting mistrial arises from the conduct of the de-

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30. *Id.* at 119-20.

31. Swisher v. Brady, 438 U.S. 204 (1978).

32. *Id.* at 215. The *Swisher* decision to difficult to reconcile with the Court's earlier decision in Kepner v. United States, 195 U.S. 100 (1904). Kepner was tried and acquitted in a federal court in the Philippines during the American occupation. An appellate court reversed the acquittal, convicted and sentenced Kepner. The Court held that the statute authorizing the state's appeal was subordinate to another statute extending the double jeopardy clause's protection to the Philippines.

33. 438 U.S. at 216.

34. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). In *Perez*, a hung jury was found to constitute manifest necessity. Manifest necessity has been found present when doubts existed as to a jury's impartiality, Simmons v. United States, 142 U.S. 148 (1891); when a juror has served on the grand jury returning the indictment and the trial jury, Thompson v. United States, 155 U.S. 271 (1894); when the indictment was defective, Illinois v. Somerville, 410 U.S. 458 (1973); and in war time emergency, Wade v. Hunter, 326 U.S. 684 (1949).

35. 434 U.S. at 509.

36. Downum v. United States, 372 U.S. 734 (1963). In *Downum*, the prosecutor proceeded to trial aware that his witnesses were unavailable to testify.

37. United States v. Dinitz, 424 U.S. 600, 611 (1976).

fense, the same risk of prosecutorial manipulation is not present and "[u]nless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases."[38] It would be an unfair advantage to allow defense counsel to err with the knowledge that retrial would be barred in order to induce a mistrial if the trial were proceeding adversely to his client.

If no mistrial were declared, defense counsel would be free to commit whatever errors necessary to win acquittal. The defendant retains primary control over the course to be followed and may proceed to verdict and, if convicted, face retrial following appeal,[39] or accept the mistrial declaration and face reprosecution.[40] When the error caused by defense conduct results in the declaration of mistrial, it is treated as if the defendant requested the mistrial. "In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions."[41]

The Court has applied the mistrial analysis to the question of retrial following dismissal.[42] The only exception to the mistrial-dismissal line of cases has arisen when the dismissal operates as a function equivalent of an acquittal, that is, a dismissal that is based on a ruling on the facts relating to the defendant's guilt or innocence.[43] If the dismissal is not predicated on the merits of the case, "the distinction between mistrials and dismissals has no significance . . . and . . . established double jeopardy principles governing the permissibility of retrial after a declaration of mistrial are fully applicable."[44]

The defendants' interests protected under the double jeopardy clause have been subordinated to the interests of the state when the question presented was retrial following the successful reversal of conviction. The Court, in weighing the competing interests, has stated:

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error. . . .[45]

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38. 434 U.S. 497, 513 (1978).
39. 163 U.S. at 662.
40. 424 U.S. at 609. The Court has termed this "a Hobson's choice."
41. *Id.* at 608.
42. 437 U.S. 82 (1978).
43. 430 U.S. at 564.
44. Lee v. United States, 432 U.S. 23, 31 (1977).
45. United States v. Tateo, 377 U.S. 463, 466 (1964).

The Court has reasoned that allowing retrial in these circumstances serves to protect defendants' interests as well as society's interests, because appellate courts would be chilled when considering whether to reverse a clearly erroneous conviction if the effect would be to let a possibly guilty defendant go free.[46] Following the second trial, a stronger sentence may be imposed without running afoul of the double jeopardy clause.[47] The reasoning underlying this decision recognizes the trial judge's discretionary power to consider behavior subsequent to the first trial that may reflect on the defendants' "life, health, habits, conduct, and mental and moral propensities,"[48] but the reasons for the increase over the prior sentence must affirmatively appear in order to safeguard against the imposition of heavier sentences as a means of deterring appeals.[49] The primary rationale for the decision to permit retrial and a greater sentence following a successful appeal of a prior conviction is that "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean."[50]

Despite these restrictions limiting the protection of the double jeopardy clause, its scope is not yet limited only to retrial following acquittal. A conviction of a lesser offense than the one charged is an implied acquittal of the more serious charge. The Court refused to accept the argument that the defendant has waived his constitutional protection by appealing the lesser conviction. Of course, the implied acquittal is treated no differently from any express acquittal.[51]

The double jeopardy clause also safeguards against the imposition of

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46. *Id.* It would follow that the same chilling effect would be present when a trial judge faces the decision of acquitting a possibly guilty defendant, yet retrial is nonetheless barred. The Court has never explained why society has more interest in retrying a defendant erroneously convicted than it does in retrying a defendant erroneously acquitted. It would seem that there is no difference in the interests of society in either situation. It has been suggested by at least one commentator that what shifts the balance in favor of the defendant following an acquittal is the trier of facts' prerogative to acquit in the face of overwhelming evidence. *See* Westen and Drubel, *Toward a General Theory of Double Jeopardy*, 1978 S. CT. REV. 81.

47. 395 U.S. 711 (1969).

48. *Id.* at 723 (quoting Williams v. New York, 337 U.S. 241, 245 (1945)).

49. *Id.* at 726. The rule is equally applicable to jurisdictions in which the jury imposes sentence. Chafin v. Stynchcombe, 412 U.S. 17 (1973).

50. 395 U.S. at 720-21.

51. Green v. United States, 355 U.S. 184 (1957). Green was indicted for first degree murder but the jury returned a verdict of second degree murder. Following a reversal of the second degree conviction, he was retried and convicted of first degree murder. The Court found that Green, having been "forced to run the gauntlet once," could be "treated no differently for purposes of former jeopardy than if the jury had returned a verdict which expressly read '[w]e find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.'" 355 U.S. at 190-91.

multiple punishment. The Court has defined multiple punishment as that in excess of what the legislature intended to be the punishment for the particular offense.[52] However, the protections against multiple punishment are not offended when subsequent to the first sentencing, the sentence is increased to bring it within the minimum prescribed by the legislature.[53] In deciding this question the Court reasoned that, since a sentence not in compliance with the law may be set aside on appeal, "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the sentencing judge means immunity for the prisoner."[54]

From these varied applications, limitations, and extensions of the double jeopardy clause, the Court in *Di Francesco* advanced three principles. First, when there is no threat of multiple prosecutions, the double jeopardy clause is not a complete barrier to state initiated appeals.[55] Second, a sentence is not accorded the same degree of finality as an acquittal,[56] and finally, a defendant has no right to know, at any given time, the maximum limit of his sentence.[57]

The Court relied on *United States v. Martin Linen Supply*,[58] *United States v. Wilson*,[59] and *United States v. Scott*[60] to support the proposition that the double jeopardy clause is not a complete barrier to sentence appeals. In all three of these cases, the states' appeals were brought pursuant to statutes authorizing appeals by the state from judgments dismissing indictments except when the double jeopardy clause prohibits further prosecution.[61] In *Martin*, the Court found that the clause did not permit a state appeal from a judgment of acquittal entered after the jury became hopelessly deadlocked.[62] By negative implication, a dismissal that was not an acquittal could be appealed. In *Wilson*, the Court approved an

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52. Ex Parte Lange, 85 U.S. (18 Wall.) 163, 178 (1873). Lange was sentenced to imprisonment and a fine for an offense that was punishable by either but not both. After payment of the fine, the court modified his sentence to imprisonment. The Court found this to be punishment in excess of legislative intent and therefore, prohibited multiple punishment. *In Re Bradley*, 318 U.S. 50 (1943), presented facts similar to *Lange* except that the fine paid by the defendant could be returned to him. The Court held that Bradley, having paid the fine, had suffered the punishment contemplated by the legislature and any further punishment was barred. *Id.* at 52.

53. Bozza v. United States, 330 U.S. 160 (1947).

54. *Id.* at 166-67.

55. 101 S. Ct. at 434.

56. 101 S. Ct. at 436.

57. 101 S. Ct. at 437.

58. 430 U.S. 564 (1977).

59. 420 U.S. 332 (1975).

60. 437 U.S. 82 (1978).

61. 18 U.S.C. § 3731 (1976).

62. 430 U.S. at 576.

appeal of a judgment of acquittal entered subsequent to the jury's verdict of guilty because retrial was not an issue when the only further proceedings necessary were the reinstatement of the jury's verdict.[63] In *Scott*, the Court allowed an appeal of a dismissal that did not go to guilt or innocence of the defendant.[64] The Court emphasized that although the proceedings in *Scott* and *Wilson* had terminated in a manner that allowed the defendants to go free, the states' appeals were not barred.

The Court's second proposition, that a sentence was not to be accorded the same degree of finality as an acquittal, focused not on whether an appeal was permissible but on the relief requested by that appeal.[65] The Court rejected the Second Circuit's contention, based on *Kepner v. United States*,[66] that a final sentence operates as an implied acquittal of a more severe sentence. The Second Circuit had held:

> We cannot perceive, however, how a defendant who after being sentenced to several years' imprisonment by a district court, might be subject to imposition of a sentence of death upon a government appeal, would be any less placed twice in jeopardy of life or limb than was the defendant in *Kepner*, who, after acquittal in the court of the first instance, was found guilty and sentenced . . . upon appeal by the government.[67]

The Court tersely emphasized that the focus of *Kepner* was on the undesirability of a second trial and that the lower court's reliance on *Kepner* disregarded the historical distinctions between acquittals and sentences. The Court emphasized that at early common law, the predecessors of the double jeopardy clause were concerned with protecting the finality of acquittals only and the double jeopardy clause was drafted with these protections in mind.

The Court then examined the small number of precedents concerning the finality of sentences and found they supported its conclusion. In *Bozza v. United States*,[68] the Court had approved an increase of a sentence already imposed because the original sentence was below the minimum imposed by the legislature.[69] In *North Carolina v. Pearce*,[70] a greater sentence imposed on retrial following the successful appeal from a prior conviction was sanctioned by the Court. The Court in *Di Francesco*

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63. 420 U.S. at 353.

64. 437 U.S. 82 (1978). Specifically, Scott succeeded in having charges dropped because of prejudice from preindictment delay.

65. 101 S. Ct. at 436.

66. 195 U.S. 100 (1904). This case is discussed in note 32, *supra*.

67. 604 F.2d at 783.

68. 330 U.S. 160 (1947).

69. *Id.* Not to have allowed the increase would have allowed the defendant to go free.

70. 395 U.S. 711 (1969).

found the distinction between *Di Francesco,* in which the greater sentence was imposed following a state initiated appeal, and *Pearce,* in which the greater sentence followed retrial, to be no more than a "conceptual nicety."[71]

As a third proposition, the Court stated that a defendant has no right to know, at any given time, the maximum limit of his sentence.[72] The Court cited a line of probation and parole revocation cases[73] to buttress this idea. While these decisions did not concern the increase of a final sentence and the defendants were aware that a term of imprisonment could be imposed later, the Court found this to be a distinction without a difference since Di Francesco was similarly on notice of the state's authority to appeal. The Court concluded, based on the foregoing, that the considerations that bar reprosecution following acquittal do not bar sentencing appeals by the state.

> The appeal is no more of an ordeal than any Government appeal under [section] 3731 from the dismissal of an indictment or information. The defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him. The defendant is subject to no risk of being harassed and then convicted, although innocent.[74]

The Court then turned to the question of whether state initiated sentence appeals offend the double jeopardy clause's prohibition against multiple punishment. The Second Circuit had found that state initiated sentence appeals offended the prohibitions against multiple punishment and relied on dicta from several earlier cases for support of this conclusion.[75] The Court refused to be persuaded by dicta and held it not suscep-

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71. 101 S. Ct. at 437.

72. *Id.*

73. *See, e.g.,* United States v. Walden, 578 F.2d 966, 972 (3d Cir. 1978), *cert. denied,* 444 U.S. 849 (1979); United States v. Kuch, 573 F.2d 25 (10th Cir. 1978); Dunn v. United States, 561 F.2d 259 (D.C. Cir. 1977); United States v. Jones, 540 F.2d 465 (10th Cir. 1976), *cert. denied,* 429 U.S. 1101 (1977); Thomas v. United States, 327 F.2d 795 (10th Cir. 1964), *cert. denied,* 377 U.S. 1000 (1964).

74. 101 S. Ct. at 437.

75. 604 F.2d at 785. The Second Circuit relied on dictum in United States v. Benz, 282 U.S. 304 (1931), in which the Court stated that to increase the sentence during the same term of court is to subject the defendant to double punishment for the same offense. In Murphy v. Massachusetts, 177 U.S. 155 (1900), the Court approved an increase in a defendant's sentence following the successful appeal of his prior conviction but the Court distinguished the case before it from one in which the trial court undertook to "substitute one sentence for another." 177 U.S. at 160. In Swaim v. United States, 165 U.S. 553 (1897), the Court approved the president's power to return a case to a court martial for an increase in sentence, but the Court stated that if the double jeopardy clause was applicable this practice would be unconstitutional.

tible to general application. Conceding that it is arguable that a defendant perceives the length of his sentence as finally determined when the defendant begins to serve it, the Court held that the argument has no force when Congress has provided that the sentence is subject to appeal. Thus, the Court concluded that state initiated sentence appeals under section 3576 do not offend the prohibition against multiple punishment.[76]

The Court analogized its decision to its prior holdings on the constitutionality of two-stage criminal trials. The appeal of Di Francesco's sentence was considered, as was the second tier in *Swisher v. Brady*,[77] to be nothing more than a continuation of the first hearing. The Court emphasized that the district court in *Di Francesco* did not have the power to impose a final sentence and, like the second tier of *Swisher*, the state's appeal was akin to a post trial briefing or argument. The Court found section 3576 to be more limited in scope than the Maryland system. Unlike *Swisher*, in which the trial judge could hold a de novo hearing, section 3576 only allows an appeal to correct a legal error. The Court reasoned that if the Maryland system in *Swisher* was constitutional, section 3576 was also.[78]

The Court hypothesized a system of sentencing that would achieve the same result without raising the double jeopardy issue. Congress could have sidestepped the issue by providing a mandatory sentence for a special dangerous offender and allowing the trial judge to recommend a lesser sentence to the Court of Appeals. "No double jeopardy policy is advanced by approving one of these procedures and declaring the other unconstitutional."[79]

Finally, the Court noted that section 3576 represents Congress' desire to attack the tendency of some trial judges to mete out light sentences in cases concerning organized crime and that state initiated sentence appeals should lead to a greater degree of consistency in sentencing. Based on the foregoing, state initiated sentence appeals under section 3576 were found not to be "the kind of oppression against which the Double Jeopardy Clause stands guard."[80]

Justices Brennan, White, Marshall and Stevens argued in dissent that the majority had fundamentally misperceived "the appropriate degree of finality to be accorded the imposition of sentence by the trial judge," and therefore, the majority had reached the erroneous conclusion "that enhancement of a sentence pursuant to [section] 3576 is not an unconstitu-

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76. 101 S. Ct. at 438.
77. 438 U.S. 204 (1978).
78. 101 S. Ct. at 439.
79. 101 S. Ct. at 440.
80. *Id.*

tional multiple punishment."[81] The dissent observed that multiple punishment was found not only in a second prosecution but also in the imposition of more than one sentence following a single prosecution. The dissent noted that the multiple punishment line of cases[82] was concerned with punishment that exceeded the bounds set by the legislature but pointed out that none of these cases purported to exhaust the reach of the prohibitions of the double jeopardy clause. In the dissent's view, the dicta, rejected by the majority,[83] against the increase of a final sentence provided impressive evidence, because of their number and high authority, of the view that a final sentence was final and increase was barred by the double jeopardy clause.

The dissent then addressed the reasons offered by the majority for distinguishing the finality of acquittals and sentences. The historical emphasis on the finality of acquittals did not respond to the additional purpose of the double jeopardy clause to protect against multiple punishment. The probation and parole cases used as support for sentence appeals were inapposite because there the defendant knew from the outset the maximum time he could be forced to serve. At the very worst, from the defendant's point of view, he knew the original sentence could be reinstated if a condition of parole or probation was violated. Unlike the situation in *Di Francesco*, a change in parole or probation would be predicated on defendant's behavior subsequent to the trial, a factor within the defendant's control. In response to the argument that Congress could, by altering the proceedings, have created a system that would have had the same effect without raising the double jeopardy issue, the dissent stated that courts should review statutes as they are written. As long as the district court has the power to impose final sentence, both the form and the substance of the law oppose state initiated sentence appeals. The dissent submitted that the majority's argument that the embarassment and anxiety was behind the defendant once his guilt was determined was "startling,"[84] and suggested that defendants were more concerned with the amount of time to be served than with whether their record showed a conviction. Observing that "the defendant does not breathe a sigh of relief once he has been found guilty,"[85] the dissent argued that the sentencing phase is just as critical to the defendant as the trial phase. In response to the majority's contention that the defendant could have no expectation of finality because he was on notice of the appeal provisions of section 3576, the dis-

81. 101 S. Ct. at 441 (Brennan, J., dissenting).

82. *See* Ex Parte Lange, 185 U.S. (18 Wall.) 163 (1873) and In Re Bradley, 318 U.S. 50 (1943).

83. *See* note 75 *supra*, and accompanying text.

84. 101 S. Ct. at 443.

85. 101 S. Ct. at 444.

sent pointed out that the same argument would also apply to a statute allowing state appeals from acquittals, but such a statute would nevertheless be unconstitutional.

The majority's reliance on *Pearce*, in which an increased sentence was sanctioned by the Court when it was imposed at retrial following the defendant's successful appeal of his prior conviction was criticized because the basis of *Pearce* was the defendant's request to have his first trial nullified. Further, the *Pearce* opinion had distinguished "increases in existing sentences" and "the imposition of wholly new sentences after wholly new trials."[86]

Finally, the dissent disagreed with the majority's use of *Swisher v. Brady*[87] as precedent. It argued that *Swisher* was distinguishable because the trial judge, unlike the special master at the first tier in *Swisher*, had the authority to impose a final sentence, therefore, the proceedings in *Di Francesco* could not be termed one continuing proceeding. Because the majority failed to demonstrate any basis for distinguishing the finality of acquittals from the finality of sentences, the dissent supported holding section 3576 unconstitutional.[88]

In a separate dissent, Justice Stevens found Justice Harlan's analysis of the double jeopardy issue in his dissenting opinion in *North Carolina v. Pearce*[89] unrefuted.

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

86. 395 U.S. at 722.
87. 438 U.S. 204 (1978).
88. 101 S. Ct. at 445.
89. 395 U.S. 711 (1969).

tence and then imposing a greater one.[90]

The road through double jeopardy is hardly a straight path and this reflects the efforts of the Court to balance equally legitimate and competing interests. From a theoretical standpoint, however, the Court has only examined the effect of sentencing appeals on one of the interested parties, the defendant. What are the interests of society after the trial court's imposition of sentence? If the decision of the Court rests on the fact that the defendant's interests have lessened after he was convicted, it follows that society's interests have also lessened since the government has had its "one bite at the apple." The answer to this question may be subordinate to the practical effects of this decision. It is not hard to imagine a new concept of "appeals bargaining" that would be comparable to today's "plea bargaining." To illustrate, it is easily conceivable that the prosecution would bargain its right to appeal a sentence or a promise by the defendant to forego his right of appeal. In the past, the Court has not treated this scenario lightly.[91] The Court's decision certainly reflects great deference to society's interests at the expense of the interests of the individual defendant. How far this deference will eventually extend promises to be the focal point of continuing discussion.

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90. 101 S. Ct. at 445-46 (citations omitted).

91. *See* North Carolina v. Pearce, 395 U.S. 711 (1969), in which the Court safeguarded against the imposition of a heavier sentence after retrial as a means of deterring appeals by requiring the trial judge to affirmatively state his reasons for the increased sentence.