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Double Jeopardy—Sentencing—Government Appeal of Dangerous Special Offender Sentence Violates Double Jeopardy Clause

United States v. DiFrancesco,
604 F.2d 769 (2d. Cir. 1979), cert. granted,
48 U.S.L.W. 3514 (Feb. 19, 1980)

In 1969, Congress recognized that organized crime figures consistently received significantly lower sentences than ordinary convicted offenders.1 As part of its corrective action, Congress enacted the Dangerous Special Offender (DSO) provisions of the Organized Crime Control Act of 1970.2 The provisions authorize federal courts to impose enhanced maximum sentences upon specified offenders.3 In addition, the DSO statute provides for prosecutorially initiated appellate review of such sentences.4

In 1977, the Department of Justice first sought review of a DSO sentence. The Second Circuit Court of Appeals, in United States v. DiFrancesco,5 rejected the government's request for an enhanced sentence and held the DSO review provisions unconstitutional under the double jeopardy clause of the fifth amendment.6

1 A staff study by the Senate Criminal Laws Subcommittee reported that two-thirds of La Cosa Nostra members indicted by the federal government since 1960 received maximum sentences of five years or less. See S. Rep. No. 91-617, 91st Cong., 1st Sess. 85 (1969) [hereinafter cited as Senate Report]; 115 Cong. Rec. 34,389 (1969) (statement of Sen. McClellan); Memorandum Embodying Results of Staff Study, id. at 34,390. See also McClellan, The Organized Crime Act (S. 30) Or Its Critics: Which Threatens Civil Liberties?, 46 Notre Dame Law. 55, 146-49 (1970).
4 Id. § 3576.
5 605 F.2d 769 (2d Cir. 1979), cert. granted, 48 U.S.L.W. 3514 (Feb. 19, 1980).
6 Prior cases construing the DSO provisions did not consider the double jeopardy implications of the government's attempt to appeal a sentence imposed under § 3575. See United States v. Ilacqua, 562 F.2d 399 (6th Cir. 1977), cert. denied, 435 U.S. 917 (1978); United States v. Stewart, 531 F.2d 326 (6th Cir. 1976), cert. denied, 426 U.S. 922 (1976); United States v. Duardi, 529 F.2d 125 (8th Cir. 1975).
I

HISTORICAL BACKGROUND

A. The Dangerous Special Offender Statute

Senator John L. McClellan, sponsor of the bill that led to the DSO provisions, argued that sentencing maximums set by Congress to "reduce the risk of abusively high sentences for ordinary criminals . . . are too lenient to protect society by confining recidivists, professionals, and organized criminals." Heeding the Senator's warning, Congress enacted a statute that, while sensitive to the convicted criminal's interests, assures both individualized punishment and uniform sentencing standards developed by appellate review.

The DSO statute requires a federal prosecutor to notify the defendant and the court before trial of his intention to seek an enhanced sentence. If the defendant is found guilty of the underlying offense, the court must hold a separate hearing to determine if the defendant is a dangerous special offender. Three types of convicted felons are subject to the special sentencing provisions: recidivists, professional offenders, and organized crime offenders. An offender falling into one of the three categories must also fit the statute's definition of "dangerous." If the court concludes upon a preponderance of the information that the defendant is both dangerous and a special offender, it may impose an enhanced sentence. The sentence may not be dispro-
portionate to the maximum terms otherwise applicable and may not exceed twenty-five years.15

Under section 3576 of the statute, either the government or the defendant may obtain appellate review of the sentence.16 The appellate court must determine whether the sentencing court abused its discretion, employed unlawful procedures, or made clearly erroneous findings.17 The reviewing court may affirm, impose any sentence originally possible, or remand for further

determines the defendant is a dangerous special offender, "the court shall sentence the defendant to imprisonment for an appropriate term. . . . Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony."

16 18 U.S.C. § 3576 (1976) states:

With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of the sentence and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and impositions of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review.

17 Id.
sentencing proceedings. Only when the government initiates review may the appellate court increase the sentence.

B. The Double Jeopardy Clause

Although firmly rooted in English tradition, the double jeopardy protection never attained the status of a basic right of citizenship until the framers of the United States Constitution incorporated it into the Bill of Rights. The framers considered different versions of the double jeopardy clause before settling on its "familiar but unilluminating" language. Mandating that no man should twice be subjected to "jeopardy of life or limb," the clause is an imprecise historical vestige. Drawing the contours of the double jeopardy guarantee became the task of the courts.

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18 Id.

For a compilation of state statutes permitting increase of sentences on appeal, see Dunsky, The Constitutionality of Increasing Sentences on Appellate Review, 69 J. CRIM. L. & CRIMINOLOGY 19, 20 n.8 (1978).

20 In early English common law, the double jeopardy protection barred successive trials by combat among private citizens. By the 15th century, the concept of double jeopardy had been transformed to a limitation on the prosecutorial power of the state. See J. SIGLER, DOUBLE JEOPARDY 7-16 (1969); Kirk, "Jeopardy" During the Period of the Year Books, 82 U. PA. L. REV. 602, 605-09 (1934). Blackstone wrote that the double jeopardy principle was a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense." 4 W. BLACKSTONE, COMMENTARIES *335. For a comprehensive history of the double jeopardy protection, see Bartkus v. Illinois, 359 U.S. 121, 151-52, 152 n.3 (1959) (dissenting opinion, Black, J.); United States v. Jenkins, 490 F.2d 868, 870 (2d Cir. 1973), aff'd, 420 U.S. 358 (1975), overruled, United States v. Scott, 437 U.S. 82 (1978). See also J. SIGLER, supra at 2-4; Sigler, A History of Double Jeopardy, 7 AM. J. OF LEGAL HIST. 283 (1963); Note, Double Jeopardy and Government Appeals of Criminal Dismissals, 52 TEXAS L. REV. 303, 305-09 (1974).


23 J. SIGLER, supra note 20, at 33.
In its struggle to define this guarantee, the Supreme Court analyzed the policies underlying the clause.\(^{24}\) Justice Black stated that:

The underlying idea [of the double jeopardy protection], 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 embarrassment, 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.\(^{25}\)

No single principle unifies the double jeopardy guarantee. The government’s interests in enforcing the criminal law compete with the defendant’s interests in repose and in the finality of a judgment.\(^{26}\)

Double jeopardy protection has been invoked in three archetypal situations. The clause clearly prohibits retrial after a final judgment of acquittal. In *Kepner v. United States*,\(^{27}\) the Supreme Court established that a verdict and judgment in the defendant’s favor bars reprosecution.\(^{28}\) The defendant’s interest in the finality of his judgment after acquittal far outweighs any government interest in reprosecution.\(^{29}\) This policy is so strong that the state may not retry an acquitted defendant even where the acquittal was based on egregious error.\(^{30}\) Furthermore, the Court has re-

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\(^{26}\) See note 24 supra.

\(^{27}\) 195 U.S. 100 (1904).

\(^{28}\) Id. at 130.

\(^{29}\) In United States v. Wilson, 420 US. 332 (1975), the Court recognized the symmetry of a system which permitted appeal of all verdicts. Nevertheless, the Court declined to sanction government appeals of acquittals, stating:

> Granting the Government such broad ... rights [to appeal acquittals] would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal.

*Id.* at 352 (dicta).

jected artificial distinctions between acquittals and their less formal counterparts. Nonetheless, the reach of the double jeopardy clause has limits. The protection against retrial after acquittal does not apply where a mistrial is declared because of "manifest necessity" or on the defendant's initiative.

The double jeopardy clause also shields the defendant from reprosecution for the same offense after conviction. Yet the Court ruled in *United States v. Ball* that the double jeopardy guarantee imposes no limitation upon the state's power to retry a defendant who has succeeded in having his first conviction set aside on appeal. At various times, the Court has advanced theories of waiver and continuing jeopardy to explain the permissibility

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32 In deciding that a declaration of mistrial did not preclude retrial in *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824), the Court stated:

> We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . .


33 In *United States v. Dinitz*, 424 U.S. 600, 607 (1976), the Court held that the "manifest necessity" standard is inapplicable where a mistrial is declared at a defendant's behest. The double jeopardy clause would not bar reprosecution in the absence of "'bad-faith conduct by judge or prosecutor' . . . threaten[ing] the 'harassment of an accused . . . or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict.'" *Id.* at 611 (quoting *United States v. Jorn*, 400 U.S. 470, 485 (1971); *Downum v. United States*, 372 U.S. 734, 736 (1963)). See also *United States v. Scott*, 437 U.S. 82 (1977) (where defendant obtains dismissal on basis unrelated to factual guilt or innocence, the double jeopardy clause does not prevent retrial).

34 163 U.S. 662 (1896).

35 *Id.* at 671-72.

36 In *Trono v. United States*, 199 U.S. 521 (1905), the Court held that the defendants "waived" the opportunity to claim double jeopardy protections by appealing their convictions. The trial court had found the defendants guilty of assault but acquitted them of murder. The Court held that defendant's successful appeal of the assault convictions opened the murder acquittal to retrial. Reversal of the original convictions "open[s] up the whole controversy and act[s] upon the original judgment as if it had never been" for the
of retrial. Neither justification has proved as satisfactory as the balancing approach espoused by Justice Harlan in United States v. Tateo and adopted by the Court in Burks v. United States:

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

As a necessary corollary, retrial after an appellate reversal of a conviction is permissible only where reversal was based on trial error rather than on insufficiency of the evidence.

The third branch of the double jeopardy guarantee, the prohibition against multiple punishments, is far more diffuse. The multiple punishment ban precludes a sentencing court from “exceed[ing] its legislative authorization by imposing multiple punishments for the same offense.” Thus, in Ex parte Lange, the Court held that the double jeopardy clause prevented a court from imposing an additional sentence on a defendant who had completed the maximum authorized sentence. The multiple punishment branch also functions as a limitation on sentencing options upon retrial after conviction. Accordingly, in North Carolina v. Pearce, the Court held that the double jeopardy clause “requires

purposes of retrial and sentencing. Id. at 533. In Green v. United States, 355 U.S. 184 (1957), however, the Court limited Trono to its facts stating that “[a]ll that was before the Court in Trono was a statutory provision against double jeopardy [in] ... the Philippine Islands—a territory ... with ... procedures ... alien to the common law.” Id. at 197. It rejected the waiver theory, as “totally unsound and indefensible.” Id. United States v. Dinitz, 424 U.S. 600 (1976), renounced the principle that “the permissibility of a retrial following a mistrial or reversal of a conviction on appeal depends on a knowing, voluntary, and intelligent waiver of a constitutional right.” Id. at 609-10 n.11.

Justice Holmes, dissenting in Kepner v. United States, 195 U.S. 100, 134 (1903), enunciated the continuing jeopardy theory: “[L]ogically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause.” See Price v. Georgia, 398 U.S. 323, 326 (1970) (one continuing jeopardy where defendant obtains reversal on appeal of a guilty verdict).

37 377 U.S. 463, 466 (1964).
38 437 U.S. 1, 15 (1978).
39 377 U.S. at 466.
40 437 U.S. at 15, 18.
41 437 U.S. at 176.
43 85 U.S. (18 Wall.) 163 (1873).
44 Id. at 176.
that credit must be given for punishment already endured.” The Court added, however, that “the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction.” Both of these aspects of the multiple punishment ban can be characterized as constitutionally mandated judicial deference to the legislature’s judgment on appropriate sentences. The Court in *United States v. Benz,* however, offered a more attenuated application of the multiple punishment ban. In holding that a district court could decrease a sentence upon petition by a defendant, the Court noted in dicta 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....” Although one federal circuit court has attempted to portray the *Benz* dicta as a principle no broader than that stated in *Lange,* *Benz* clearly cast doubt on the validity of government appeals under the DSO provisions.

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46 Id. at 717.
47 Id. at 719 (emphasis added). The due process clause, however, requires that the longer sentence must be based on defendant’s conduct after the original sentencing. *Id.* at 726.
48 The Court in *Pearce* noted that, were the defendant not given credit for time served, the court upon retrial could sentence him to the statutory maximum causing his total time served to exceed that maximum. The Court found this to be a “flagrantly apparent” constitutional violation. *Id.* at 718. The Court went on to state that “the same principle obviously holds true whenever punishment already endured is not fully subtracted from any new sentence imposed.” *Id.* The principle is neither obvious nor supported by precedent. For example, suppose a defendant has been convicted and sentenced to eight years in prison under a statute that authorizes a maximum sentence of ten years. After appellate reversal and retrial, the defendant has already served four years. The trial judge wants to sentence him to the longest time possible. Under the Court’s formulation, the judge may sentence him anew to ten years but must give credit for the term served. Absent parole, the defendant would serve a total of ten years, the statutory maximum. Under the second part of the *Pearce* holding, the judge must justify the imposition of an increased sentence to avoid a presumption of harassment in violation of due process. While it is sensible to measure the amount of the sentence increase (i.e., the amount that the judge must justify) in terms of the total time that will be served, only the statutory maximum and due process limit the judge’s discretion in imposing a sentence. In the situation that the Court found “obvious”—where the total time to be served was less than the statutory maximum—the trial judge may simply mouth the correct “credit” language to arrive at any sentence (i.e., total time served) he desires. In either the “flagrant” or “obvious” case, the statutory maximum and due process protection against harassment (see *Pearce,* 395 U.S. at 725) are the only bright-line limitations.
49 282 U.S. 304 (1931).
50 *Id.* at 307.
51 Robinson v. Warden, 455 F.2d 1172 (4th Cir. 1972).
52 The Supreme Court’s decision in *Bozza v. United States,* 330 U.S. 160 (1947), cast some doubt on the continuing vitality of the *Benz* dictum. In *Bozza,* the trial court imposed
C. Prosecutorial Appeals in Criminal Cases

The Supreme Court, in *United States v. Sanges*, held that federal prosecutors had no right to take an appeal in a criminal case absent an express enabling statute. In 1907, Congress passed the first Criminal Appeals Act permitting appeals by the government in a limited number of situations. The ambiguities of this act, however, undermined its effectiveness. The Criminal Appeals Act of 1970 took another tack, authorizing government appeals in all criminal cases except "where the double jeopardy clause of the ... Constitution prohibits further prosecution." Thus, while "[c]riminal appeals by the Government 'always threaten to offend the policies behind the double-jeopardy prohibition,'" the Supreme Court has only recently been forced to consider the constitutional limitations on prosecutorial appeals.

In *United States v. Wilson*, the Court offered its clearest exposition of the constitutional limits on government appeal. The a sentence below the statutory minimum but, when informed of his error, increased the penalty. The Court found that the judge's action did not violate the double jeopardy clause. Furthermore, *Benz* is arguably inapposite where a statute specifically authorizes sentencing increases by an appellate court:

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.

*Senate Report*, *supra* note 1, at 97.

53 144 U.S. 510 (1892).
54 *Id.* at 312.
60 *See* United States v. Wilson, 420 U.S. 332, 339 (1975).
trial court in Wilson, after a guilty verdict by the jury, dismissed the indictment on the ground of unreasonable preindictment delay. The Third Circuit, relying on the Court's decision in United States v. Sisson, dismissed the government's appeal. The court held that the government's appeal was barred by the double jeopardy clause because the district court had relied on facts brought out at trial in dismissing the indictment. The Supreme Court reversed, concluding "that when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause." Against the background of prior double jeopardy decisions, the Court observed:

Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.

The Court's treatment of Sisson is revealing. The majority of the Court in Sisson apparently found that a post-verdict dismissal based on evidence adduced at trial functioned as an acquittal. In a passage not marked by clarity, the Sisson Court, relying on Ball, implied that the double jeopardy clause barred any review of the trial court's order. The Wilson Court, however, portrayed the result in Sisson as grounded solely on the jurisdictional restraints of the Criminal Appeals Act of 1907. Thus, Wilson not only makes clear that the government may appeal post-verdict orders where review would not result in a new trial, but also suggests
that appellate court review of trial evidence considered by the lower court does not constitute "a second trial before a second trier of fact."

II

UNITED STATES V. DIFRANCESCO

Eugene DiFrancesco was convicted of bombing and racketeering in two separate trials in the United States District Court for the Western District of New York. The government sought an enhanced sentence under the DSO provisions for the racketeering conviction. The trial court held the prescribed sentencing hearing and concluded that DiFrancesco was a dangerous special offender.

The finding that DiFrancesco was a dangerous special offender triggered the possibility of two twenty-five year sentences on the racketeering counts and sentences totalling nine years on the bombing counts. The court, however, sentenced him to two ten-year terms of imprisonment for racketeering, to be served concurrently with the sentences for the bombing convictions. The trial judge chose to increase the sentence by one year over the maximum sentence otherwise applicable. The government countered with its remaining weapon under the DSO provisions by seeking review of the trial court's sentence. The Second Circuit, while upholding DiFrancesco's conviction, held that a government appeal of a sentence uncontested by the defendant violated the double jeopardy clause.

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72 Id. at 779.
73 Id. at 780. The district court determined DiFrancesco's criminal history, based upon proven facts, reveals a pattern of habitual and knowing criminal conduct of the most violent and dangerous nature against the lives and property of the citizens of this community. It further shows the defendant's complete and utter disregard for the public safety. The defendant, by virtue of his own criminal record, has shown himself to be a hardened habitual criminal from whom the public must be protected for as long a period as possible. Only in that way can the public be protected from further violent and dangerous criminal conduct by the defendant.
75 604 F.2d at 780.
76 Circuit Judges Smith and Meskill joined in the majority opinion. District Judge Haight, from the Southern District of New York, sitting by designation, based his concur-
The government apparently offered two arguments in support of the DSO appeals provisions. First, the government attempted to characterize the trial court's sentence as merely tentative such that the defendant was placed in jeopardy only once. In the alternative, the government argued that, since Congress could have structured the review provisions to place final sentencing authority in the appellate courts without impinging on defendant's double jeopardy protections, the present DSO provisions should also pass constitutional muster. The Second Circuit observed that the statutory language directing that the trial judge "shall sentence the defendant" did not admit of the government's characterization. Further, the court refused to consider the DSO provisions in light of the other sentencing options available to Congress.

In support of its conclusion that the DSO provisions violated the double jeopardy clause, the Second Circuit assembled eighty years of dicta; all of the cited decisions predated the Supreme Court's construction of the broad government appeals provisions of the Criminal Appeals Act of 1970. All of the decisions, echoing Benz, suggested that the double jeopardy clause barred an increase in a validly imposed sentence by either the trial or appellate court. The Court distinguished Pearce concluding

[726] [Vol. 65:715]
that a higher sentence on retrial is permissible only if defendant
has initiated the review of his first conviction.\(^8\) In closing, the
court emphasized the sweep of the guarantee against double
jeopardy: "'[W]here [, as here,] the Double Jeopardy Clause is
applicable, its sweep is absolute. There are no equitites to be bal-
anced, for the Clause has declared a constitutional policy, based
on grounds which are not open to judicial examination.'"\(^8\)\(^6\)

III

THE CONSTITUTIONALITY OF THE DSO PROVISIONS

In an area of law devoid of clear precedents, the Second Cir-
cuit presented a plausible application of general double jeopardy
policy to government initiated review of criminal sentencing. But
a broader inquiry into underlying policy as evidenced by recent
Supreme Court decisions, particularly \textit{Wilson} and \textit{Pearce}, justifies
the opposite result.

The Second Circuit portrayed government appeals as a \textit{rara
avis} deserving of almost a presumption against their validity. \textit{Wil-
son} makes clear, however, that where appellate review would not
result in a second trial, government appeals of post-verdict orders
favorable to the defendant do not violate the double jeopardy
guarantee.\(^8\)\(^7\) And \textit{Wilson} necessarily permits appellate courts to
consider evidence adduced at trial in reviewing post-verdict or-
ders; such review does not constitute a second trial.\(^8\)\(^8\) The
Second Circuit's reliance on multiple punishment dicta and its
hesitancy to impose upon the defendant the burden of the
government's "second chance" obscures the fact that \textit{Wilson} per-
mits government appeals when the trial court has dismissed all
charges against the defendant.\(^8\)\(^9\) While the defendant's interests
in repose is a preeminent concern of the double jeopardy guaran-
tee,\(^9\)\(^0\) the government's appeal of an unqualified dismissal engen-
ders more anxiety than the appeal of a sentence after conviction.
A principled distinction can be made only if the court's imposition
of a DSO sentence is characterized as an implicit acquittal of

\(^{85}\) 604 F.2d at 785-86.
\(^{86}\) Id. at 787 (quoting Burks v. United States, 437 U.S. 1, 11 n.6 (1978)).
\(^{87}\) See text accompanying notes 61-70 supra.
\(^{88}\) See id.
\(^{89}\) See 420 U.S. at 333.
\(^{90}\) See Green v. United States, 355 U.S. 184, 187-88 (1957), quoted in text accompanying
note 25 supra.
whatever "danger" or past criminal acts would justify a longer sentence.

_Pearce_ illustrates that such implicit acquittals should not bar sentencing review. The double jeopardy guarantee does not compel the same standard for sentencing as it does in the guilt-determination context. Thus, in _Green v. United States_, the Supreme Court held that conviction for a given offense sets a ceiling on the offense chargeable on retrial._ The Court stated that it was legitimate to assume that conviction of the first offense was an "implicit acquittal" of any higher charge._ In _Pearce_, however, the Court stated:

[It] has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction._

... The 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._

The Second Circuit's conclusions that _Pearce_ turned on defendant's initiation of appellate review_ cannot fully explain the different results in _Pearce_ and _Green_. The cases can be distinguished only by assuming that sentencing commands a lesser degree of immutability than guilt-determination.

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91 335 U.S. 184 (1957).
92 Id. at 189-90.
93 Id. at 190-91.
94 395 U.S. at 720.
95 Id. at 720 n.16. Cf. Dunsky, supra note 19, at 27 n.80:
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 protecting of society) in making his sentencing decision.
96 604 F.2d at 786. Defendant initiation of appellate review should be significant in this context only when it might lead to prosecutorial retaliation or harassment. _Pearce_ was specifically concerned with the possibility of deterring a defendant's appeal because of his fear of an increased sentence on retrial. See 395 U.S. at 725. The drafters of the DSO provisions guarded against such retaliation by providing that the government must take any review five days before the defendant's deadline for doing so, or lose its chance to appeal. Sentences cannot be increased on defendant's appeal alone. Additionally, both the trial judge and the appellate judge are required to state in writing the reasons for increased sentence. See note 16 _supra_. These provisions, however, were drawn in response to due process rather than double jeopardy concerns. Cf. Fisher, _supra_ note 24, at 89-91 (harassment is inappropriate standard for invoking double jeopardy protection).
The Second Circuit gave short shrift to the government's argument that the court should consider the permissible alternatives open to Congress in structuring DSO review.\(^97\) The Supreme Court has been sensitive to legislative attempts to rationalize the criminal justice system even when those attempts tread perilously close to infringing on defendant's constitutional rights; in such cases, the Court has carefully considered the options available to the legislature which, although they might cut deeply against defendant's interests, are unquestionably valid. In *Mullaney v. Wilbur*,\(^98\) for example, the Court invalidated a Maine homicide statute that required the defendant to prove by a preponderance of the evidence that the killing occurred in the heat of passion to rebut the statutory presumption that he committed murder.\(^99\) Two years later, the Court in *Patterson v. New York*\(^100\) upheld a New York statute that defined murder as "(1) 'intent to cause the death of another person'; and (2) 'caus[ing] the death of such person or of a third person.'"\(^101\) The statute permitted the defendant to raise an affirmative defense of extreme emotional disturbance.\(^102\) The Court distinguished the *Mullaney* decision on the grounds that "the New York statute involved no shifting of the burden to the defendant to disprove any fact essential to the offense."\(^103\) The Court observed that "under the present law, New York will have proved beyond a reasonable doubt that the defendant has intentionally killed another person, an act which it is not disputed the State may constitutionally criminalize and punish."\(^104\) In assessing the constitutionality of the method by which New York criminalized homicide, the Court's opinion was informed by Chief Judge Breitel's concurring opinion from the New York Court of Appeals,\(^105\) quoted almost in its entirety.\(^106\) While granting that the state could misuse affirmative defenses, Judge Breitel argued that, absent affirmative defenses, the state could simply define murder to require the intent to kill.\(^107\) Thus,

\(^{97}\) See 604 U.S. at 782.


\(^{99}\) Id. at 702-04.

\(^{100}\) 432 U.S. 197 (1977).

\(^{101}\) Id. at 198.

\(^{102}\) Id.

\(^{103}\) Id. at 201. See id. at 215-16.

\(^{104}\) Id. at 209.


\(^{106}\) 432 U.S. at 211 n.13.

\(^{107}\) 39 N.Y.2d at 305, 347 N.E.2d at 909, 383 N.Y.S.2d at 584.
affirmative defenses enhance "the ameliorative aspects of a statutory scheme for the punishment of crime, rather than the other way around." If Patterson stands for anything more than the principle that states may evade the strictures of due process by redefining the elements of an offense, it shows that courts should consider the constitutional alternatives to the statute in question.

Congress considered at least two other sentencing schemes before settling on the present DSO appeal provisions. The first would allow the trial court to "recommend" a sentence to the appellate court, the 'recommendation' to become final if neither side appealed. . . . If an appeal were taken by either side, the issue could then be resolved de novo by the appellate court." Alternatively, the trial court could "impose a sentence that would be 'deemed' to be for the maximum, with a recommendation that the appellate court 'reduce' the sentence to a certain level, a recommendation that would become the sentence if neither side appealed, but which would not bind the appellate court if an appeal was taken." The DiFrancesco court noted another alternative "whereby the district court tentatively imposed the maximum permissible sentence with provision for review and possible reduction by the court of appeals." Congress could also have abandoned its goal of appellate review and adopted mandatory minimum sentences for dangerous special offenders. The first two alternatives, although needlessly artificial, would accomplish the same purpose as the present DSO provisions. The third would force criminal defendants to undergo the burden of appeal merely to obtain an individualized sentence. The last, while clearly constitutional, does not enlarge "the ameliorative aspects of a statutory scheme for the punishment of crime." In sum, the Second Circuit was shortsighted in rejecting the government's "permissible alternatives" argument. Rejection of the present DSO

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108 Id. at 306, 347 N.E.2d at 910, 383 N.Y.S.2d at 585.
110 Id. Arguably, Congress would, within the confines of Swisher v. Brady, 438 U.S. 204 (1978), structure DSO sentencing as a single proceeding culminating in an imposition of the sentence by the appellate court.
provisions may lead to far less progressive sentencing schemes. While courts should not yield to legislative blackmail, they should display the pragmatism clearly evident in *Patterson* when ruling on the validity of criminal procedure reforms.

Regardless of the Second Circuit’s comment to the contrary, double jeopardy doctrine is replete with instances of “equities to be balanced.” The Supreme Court has adopted the balancing approach as the best justification for allowing retrial to correct trial error and for determining when a declaration of mistrial permits retrial. Accordingly, the constitutionality of government appeals should be tested by accommodating the legitimate goals of the criminal justice system as well as the defendant’s interests. The DSO provisions promote society’s interests in assuring that “convicted felons prone to engage in further crime are imprisoned long enough to give to society reasonable protection” and in “improving the rationality, consistency, and effectiveness of sentencing by . . . guiding sentencing discretion through the development of sentencing criteria, procedures and appeals.” To the extent that the *Benz* dictum is inconsistent with the DSO provisions, it should be seen as a product of a time before widespread government appeals were permitted, or even imagined.

**Conclusion**

The DSO appeal provisions are well within the double jeopardy limitations set out by the Supreme Court in *United States v. Wilson*. The provisions deal only with sentencing, which should be judged by a lower standard than that accorded guilt-determination. They represent a civilizing reform in criminal sentencing procedure that may be discarded only at a great cost to both society and the convicted offender. The Second Circuit’s decision in *United States v. DiFrancesco* should be reversed.

Claudia Bowman

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114 *See* text accompanying note 86 *supra*.
117 *Senate Report, supra* note 1, at 83.
118 *Id*.
119 *See* text accompanying notes 49-52 *supra*. 