CONSTITUTIONAL LAW—DOUBLE JEOPARDY—INCREASE IN SENTENCE AFTER PARTIALLY SERVED CUSTODIAL TERM VIOLATIVE OF DOUBLE JEOPARDY CLAUSE—*State v. Ryan*, 86 N.J. 1, 429 A.2d 332, *cert. denied*, 102 S. Ct. 363 (1981).

The guarantee of the fifth amendment articulates the intuitive understanding that to try or to punish an individual twice for the same offense is contrary to the dictates of civilized society.[1] The double jeopardy guarantee is succinctly stated and the protection it affords is theoretically clear: no person shall "be twice put in jeopardy of life or limb."[2] Complex, confusing, and often contradictory judicial interpretations, however, have obscured rather than explicated the basic provisions of the clause.[3]

It is noteworthy, then, when a court abandons the theoretical convolutions accompanying the application of the double jeopardy protections and returns to the fundamental principles animating it. The Supreme Court of New Jersey accomplished just that in *State v. Ryan*.[4] The court considered the constitutional validity of increasing a defendant's custodial term once service of sentence had commenced, and held that because jeopardy attaches immediately upon the beginning of the sentence, a later increase is impermissible.[5] By so concluding, the *Ryan* decision focused upon the underlying safeguards incorporated in the double jeopardy clause.[6]

Edward Joseph Ryan's sentencing process began when, pursuant to a plea bargain agreement,[7] he pleaded guilty to charges of breaking and entering and larceny.[8] On Janurary 4, 1974, he was sentenced to concurrent terms aggregating three to five years in New Jersey State Prison.[9]

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[1] *See* Western & Drubel, *Toward a General Theory of Double Jeopardy*, 113 S. CT. REV. 81, 81 (1978). The principles underlying the guarantee against double jeopardy are ancient. Over 2,000 years ago Demosthenes observed that "[t]he laws forbid the same man to be tried twice on the same issue." *Id.* (quoting DEMOSTHENES 589 (Vance trans. 1962)).

[2] U.S. CONST. amend. V.

[3] *See* Western & Drubel, *supra* note 1, at 82-85.

[4] 86 N.J. 1, 429 A.2d 332, *cert. denied*, 102 S. Ct. 363 (1981).

[5] *Id.* at 9, 429 A.2d at 336.

[6] *Id.*

[7] State v. Ryan, No. A-1429-79 (N.J. Super. Ct., App. Div., Nov. 15, 1974). The defendant later challenged the validity of these guilty pleas on a technicality. The superior court, appellate division, however, affirmed the earlier proceedings as substantively, if not technically, sufficient. *Id.*

[8] State v. Ryan, 171 N.J. Super. 427, 433, 409 A.2d 821, 823-24 (App. Div. 1979), *rev'd*, 86 N.J. 1, 429 A.2d 332, *cert. denied*, 102 S. Ct. 363 (1981). Two indictments and one accusation were lodged against the defendant citing him for breaking and entering with intent to steal and three counts of larceny. *Id.*

[9] State v. Ryan, 171 N.J. Super. 427, 433, 409 A.2d 821, 824 (App. Div. 1979), *rev'd*, 86 N.J. 1, 429 A.2d 332, *cert. denied*, 102 S. Ct. 363 (1981).

Approximately six months after he began serving his term,[10] Ryan initiated sentence modification proceedings,[11] petitioning the Monmouth County court for transfer to a drug rehabilitation program.[12] The judge who had originally sentenced Ryan granted the motion, suspended Ryan's three to five year term,[13] transferred him to a narcotics treatment center, and placed him on probation for two years.[14]

In February 1977, the defendant pleaded guilty to charges of probation violation and was subsequently sentenced to concurrent terms totalling five to seven years, the statutory maximum for the original offenses.[15] This sentence represented a two-year increase in Ryan's original custodial term and was the basis of Ryan's double jeopardy arguments. Prior to appealing his sentence the defendant was released on parole.[16]

Ryan filed an appeal addressing three points: 1) the constitutionality of the increased sentence following partial execution of the original term; 2) the impact of a sentence modification motion on resentencing; and 3) the right to sentence credit for time spent on probation.[17] He argued that an increase in sentence imposed subse-

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[10] 86 N.J. at 3, 429 A.2d at 333.

[11] N.J. Cr. R. 3:21-10(b). Under this rule a defendant may petition the court for a modification of the original sentence. The rule states: "A motion may be filed and an order may be entered at any time (1) changing a custodial sentence to permit entry of the defendant into a custodial or non-custodial treatment or rehabilitation program for drug or alcohol abuse." *Id.*

[12] 86 N.J. at 3, 429 A.2d at 333.

[13] Brief & Appendix on Behalf of Defendant-Appellant at 2, State v. Ryan, 171 N.J. Super. 427, 409 A.2d 821 (App. Div. 1979) [hereinafter cited as Defendant's Brief]. The supreme court found that the imposition of probation resulted in a "suspension of the execution" of the original term, "not in a vacation or annulment." 86 N.J. at 14, 429 A.2d at 338. Indeed, the initial judicial order placing Ryan on probation provided that "the original sentence . . . be suspended." Defendant's Brief, *supra*, at DA 17.

[14] 86 N.J. at 3-4, 429 A.2d at 333.

[15] State v. Ryan, 171 N.J. Super. 427, 433, 409 A.2d 821, 824 (App. Div. 1979), *rev'd*, 86 N.J. 1, 429 A.2d 332, *cert. denied*, 102 S. Ct. 363 (1981). Ryan was cited for violation of probation because of 1) a disorderly persons conviction for growing marijuana (this conviction was ultimately reversed for procedural defect involving proof of test used on plants. *Id.* at 443 n.3, 409 A.2d at 829 n.3); 2) absconding from probationary supervision; 3) leaving the state for over 24 hours; and 4) changing residence without notifying his probation officer. Defendant's Brief, *supra* note 13, at 4-5. The trial court learned that Ryan was serving 30 days for malicious damage and larceny and facing 30 more for a contempt of court conviction. *Id.* at 6. Additionally, a number of detainers were lodged against Ryan, and the State of New York had initiated extradition proceedings. *Id.* at 5-6.

[16] Brief on Behalf of the State of New Jersey at 2, State v. Ryan, 171 N.J. Super. 427, 409 A.2d 821 (App. Div. 1979). The supreme court concluded that the defendant's appeal was not mooted by his release on parole. 86 N.J. at 6-7 n.3, 429 A.2d at 334 n.3.

[17] State v. Ryan, 171 N.J. Super. 427, 432, 409 A.2d 821, 823 (App. Div. 1979), *rev'd*, 86 N.J. 1, 429 A.2d 332, *cert. denied*, 102 S. Ct. 363 (1981).

quent to partial execution of the initial custodial term was barred by the double jeopardy clauses of the federal and state constitutions.[18] The defendant also contended that the court rule under which his sentence was modified[19] limits the resentencing court to the term already pronounced and partially served. He claimed that a probation violator whose sentence is modified can be compelled only to complete the balance of his initial sentence.[20]

The appellate division held that an increased sentence imposed upon revocation of probation was permissible under the double jeopardy clause.[21] Relying upon statutory authority, probation policy, and precedent, the court justified the increased sentence as lawful, constitutional, and warranted by the defendant's criminal record.[22]

Judge Botter explained that courts are endowed with broad powers in relation to probation.[23] The power granted is sufficient to enable the court to suspend a sentence partially executed and to place a defendant on probation.[24] The court reasoned that the applicability of the probation revocation statute, sanctioning the imposition of any sentence originally proper,[25] follows from these general powers. The appellate division rejected the defendant's claim that the resentencing provisions of the probation statute did not apply because his probation was granted pursuant to a sentence modification motion.

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[18] U.S. CONST. amend. V. The fifth amendment guarantees: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." *Id.* The New Jersey provision states that "No person shall, after acquittal, be tried for the same offense." N.J. CONST. art. 1, para. 11. It is accepted that "[a]lthough the language of the former seems to be broader in scope than the latter, actually in operation their boundaries are co-extensive." State v. Wolf, 46 N.J. 301, 303, 216 A.2d 586, 587 (1966).

[19] *See* note 11 *supra.*

[20] State v. Ryan, 171 N.J. Super. 427, 436, 409 A.2d 821, 825 (App. Div. 1979), *rev'd*, 86 N.J. 1, 429 A.2d 332, *cert. denied*, 102 S. Ct. 363 (1981).

[21] *Id.* The court found that "[d]ouble jeopardy concepts should not condemn the imposition of a new sentence in place of the suspended sentence as part of a state's sentencing plan when a defendant violates conditions of probation imposed on his release from prison." *Id.*

[22] *Id.* at 438-39, 409 A.2d at 826-27.

[23] State v. Ryan, 171 N.J. Super. 427, 438, 409 A.2d 821, 826 (App. Div. 1979), *rev'd*, 86 N.J. 1, 429 A.2d 332, *cert. denied*, 102 S. Ct. 363 (1981). The court referred to N.J. STAT. ANN. § 2A:161-1 (West 1929) (repealed 1978), which authorized a court "to suspend the imposition or execution of sentence, and also to place the defendant on probation." *Id.*

[24] N.J. STAT. ANN. § 2A:161-1 (West 1929) (repealed 1978).

[25] *Id.* § 2A:168-4 provided that "the court . . . may continue or revoke the probation and the suspension of sentence, and may cause the sentence imposed to be executed or impose any sentence which might originally have been imposed." *Id.* This statute was repealed after the appellate division decided *Ryan*. The New Jersey Supreme Court noted, however, that the provision replacing the statute was essentially similar. 86 N.J. at 6 n.2, 429 A.2d at 334 n.2. The revised statute, N.J. STAT. ANN. § 2C:45-3b (West 1981) states: "When the court revokes a suspension or probation, it may impose on the defendant any sentence that might have been imposed originally for the offense of which he was convicted." *Id.*

The court concluded that increased sentences are, in fact, within the contemplation of the pertinent probation legislation.[26]

Ancillary to the appellate court's acceptance of the probation violation statute[27] was its rejection of New Jersey's split-sentence statute[28] as appropriate in Ryan's situation. Under this statute the defendant must complete a designated custodial term before being released on probation.[29] The defendant argued that, by analogy, the split-sentence statute was applicable to his particular situation[30] because in both instances the defendant is incarcerated prior to release on parole. Significantly, an offender sentenced under this statute can only be resentenced to the balance of the original custodial term.[31] The appellate division concluded, however, that the split-sentence statute is operative only in relation to sentences served in county institutions.[32] The court refused to apply the split-sentence strictures to Ryan's state prison term, despite the apparent similarity in the nature of the sentence.[33] Finally, the court declined to credit Ryan with the time spent on probation.[34]

The Supreme Court of New Jersey granted certification[35] and subsequently reversed the appellate division. Its action was premised

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[26] State v. Ryan, 171 N.J. Super. 427, 438-39, 409 A.2d 821, 826-27 (App. Div. 1979), *rev'd*, 86 N.J. 1, 429 A.2d 332, *cert. denied*, 102 S. Ct. 363 (1981).

[27] *See* note 25 *supra*.

[28] N.J. STAT. ANN. § 2A:164-16 (West 1971) (repealed 1978).

[29] The split-sentence statute provided that:

> In any sentence involving imprisonment in any county jail, penitentiary or workhouse the court may, as part of the sentence imposed, require the person so sentenced to serve a designated part of such sentence in the jail, penitentiary or workhouse itself, and, thereafter, after having been given credit for days remitted, if any, to be released on probation. . . . The court may, upon proof of such violation or violations of any of the conditions of such probation, resentence such person to such jail, penitentiary or workhouse for the remaining portion of the sentence originally pronounced.

Id.

[30] State v. Ryan, 171 N.J. Super. 427, 438, 409 A.2d 821, 826 (App. Div. 1979), *rev'd*, 86 N.J. 1, 429 A.2d 332, *cert. denied*, 102 S. Ct. 363 (1981).

[31] *See* note 29 *supra*.

[32] State v. Ryan, 171 N.J. Super. 427, 438, 409 A.2d 821, 826 (App. Div. 1979), *rev'd*, 86 N.J. 1, 429 A.2d 332, *cert. denied*, 102 S. Ct. 363 (1981).

[33] *Id.*

[34] *Id.* at 441-42, 409 A.2d at 828. The court qualified this holding by noting that the denial of credit was without prejudice to defendant's right to petition the trial court to grant credit for the time spent at the rehabilitation center. *Id.* at 442, 409 A.2d at 828. While asserting that the "defendant cannot demand credit for probation time as a matter of right," the appellate division explained that the nature of the probation and the extent to which the defendant's freedom was restricted may be sufficient to compel the court to credit Ryan's sentence for the time spent on probation. *Id.*

[35] 82 N.J. 297, 412 A.2d 802 (1980).

primarily on the double jeopardy issue.[36] Although the court held that the imposition of a custodial term following a revocation of probation is permissible,[37] the majority noted that the increase of an already commenced custodial term following probation revocation would be unconstitutional.[38] Justice Clifford found that the increase of a prison term following a revocation of probation is contrary to basic double jeopardy principles as jeopardy attaches immediately upon the commencement of the custodial term.[39] Accordingly, the sentence becomes final upon complete or partial execution of the term.[40]

An examination of *Ryan* in light of the long history of the double jeopardy clause establishes this New Jersey case as an integral part of a theoretical progression apparent in federal and state cases. Preserved by the traditions of colonial America,[41] codified in the fifth amendment, and eventually extended to the states through the fourteenth amendment,[42] the double jeopardy clause has assumed a number of roles. It has been variously defined as "central to the objective of the prohibition against successive trials,"[43] essential to the preservation of the "finality"[44] or "integrity"[45] of judgments, and necessary to the maintenance of "the defendant's valued right to have his trial completed by a particular tribunal."[46] "The terms of the double jeopardy clause are not self-defining,"[47] and the plethora of decisions interpreting it is complex and confusing.[48] Thus, it is essential to identify, at

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[36] 86 N.J. at 6, 429 A.2d at 334. The supreme court agreed with the lower court's resolution and reasoning in the denial of sentence credit for time spent on probation and the applicability of the split-sentence statute, *see* note 29 *supra*, to sentence modification proceedings. 86 N.J. at 6, 429 A.2d at 334.

[37] 86 N.J. at 8, 429 A.2d at 335.

[38] *Id.* at 9, 429 A.2d at 335-36.

[39] *Id.*

[40] *Id.*

[41] *See* United States v. DiFrancesco, 449 U.S. 117, 128 (1980). *See also* Note, *The Supreme Court's Treatment of the Defendant's Double Jeopardy Interests in the 1977 Term*, 48 U. CIN. L. REV. 517, 520 (1979).

[42] Benton v. Maryland, 395 U.S. 784, 794 (1969).

[43] Burks v. United States, 437 U.S. 1, 11 (1978). The Court in *Burks* defined double jeopardy as the guarantee protecting the defendant from repeated attempts to prosecute. *Id.*

[44] Crist v. Bretz, 437 U.S. 28, 33 (1978).

[45] United States v. Scott, 437 U.S. 82, 92 (1978).

[46] Arizona v. Washington, 434 U.S. 497, 503 (1978) (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)).

[47] Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1001 (1980).

[48] United States v. Scott, 437 U.S. 82 (1978). The "historical purposes of the Double Jeopardy Clause are necessarily general in nature, and their application has come to abound in often subtle distinctions." *Id.* at 87.

least briefly, the enduring principles which animate this "fundamental ideal of our constitutional heritage."[49]

A distillation of the opinions interpreting the clause reveals two basic principles.[50] It is firmly established that an acquittal based on a jury verdict or a legal ruling is an absolute bar to retrial.[51] Equally well-established is the fact that following the defendant's successful appeal of conviction, based on anything other than the insufficiency of the evidence, the prosecution is free to retry the defendant.[52] The double jeopardy principles associated with punishment and sentencing and which are most significant to convicted defendants, however, are less certain.

In *Ex parte Lange*,[53] the seminal case in this area, the trial court imposed upon the defendant both a $200 fine and a one year prison term.[54] The statute under which the defendant was sentenced, however, provided for fine *or* imprisonment.[55] After the petitioner had paid the fine and served five days in prison, the original sentencing judge discovered the mistake, vacated the original sentence, and resentenced the defendant to a one year term.[56] Following this procedure, the defendant's punishment consisted of a fine as well as a one year and five day jail sentence. The Supreme Court reversed the lower court's resentencing of the petitioner, concluding that it would have resulted in double punishment in violation of the fifth amendment.[57] The court in *Lange* realistically assessed the double jeopardy guarantee, noting: "Manifestly it is not the danger or jeopardy of being found guilty a second time. It is the punishment that would legally follow the second conviction which is the real danger."[58]

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[49] Benton v. Maryland, 395 U.S. 784, 794 (1969). The double jeopardy protections are deeply rooted in common law and derive from common law pleas of autrefois acquit, autrefois convict, and pardon. *Id.* The purpose of these pleadings was to insulate those previously acquitted, convicted, or pardoned from further judicial proceedings. *See* Westen & Drubel, *supra* note 1, at 85. *See generally* United States v. DiFrancesco, 449 U.S. 117, 128 (1980); *Ex parte* Lange, 85 U.S. 168, 169 (1873).

[50] United States v. Scott, 437 U.S. 82, 90-91 (1978).

[51] *Id.* at 90.

[52] *Id.* The Court in United States v. Scott, 437 U.S. 82, 90 (1978), described these concepts as "two venerable principles of double jeopardy jurisprudence."

[53] 85 U.S. 163 (1873).

[54] *Id.* at 164.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 175. The Court asked: "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?" *Id.* at 173.

[58] *Id. See* United States v. Wilson, 420 U.S. 332 (1975). "When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he

The application of double jeopardy principles to resentencing was again considered by the Supreme Court in *United States v. Benz*.[59] The Court held that the judiciary had the power to reduce sentence but acknowledged, in dictum, that a sentence could not be later increased.[60] The *Benz* Court relied on *Lange* and concluded that an increase in a sentence already partially served is constitutionally invalid.[61]

The United States Supreme Court considered resentencing in a slightly different context in *North Carolina v. Pearce*.[62] In *Pearce*, the Court upheld a more stringent sentence imposed following a retrial.[63] The Court explained that the power to retry implied the power to resentence the defendant to any term permissible under the applicable statute for the initial crime.[64] This power derived from the fact that the retrial and reconviction functioned to nullify and void the original sentence.[65] With the sentencing "slate wiped clean,"[66] the second court is, in effect, writing upon a *tabula rasa* and is free to exercise its sentencing authority.

Most recently the Supreme Court examined the basic tenets of *Lange* and its progeny in *United States v. DiFrancesco*.[67] In *DiFrancesco*, the Court examined the ramifications of the Dangerous Special Offenders Act[68] in light of the defendant's constitutional protections against double jeopardy. With this Act Congress provided for governmental appeal and sentence increase for terms considered to be too lenient.[69] The central question examined by the Supreme Court was "whether a criminal sentence, once pronounced, was to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal."[70] Unable to analogize sentencing with acquittal, the Supreme Court held that an increased sentence

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not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense." *Id.* at 343.

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

[60] *Id.* at 307. The majority opinion explained that the increase in sentence would "subject the defendant to double punishment for the same offense in violation of the Fifth Amendment." *Id.*

[61] *Id.*

[62] 395 U.S. 711 (1969).

[63] *Id.* at 719.

[64] *Id.* at 720. The Supreme Court stated 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." *Id.*

[65] *Id.* at 720-21.

[66] *Id.* at 721.

[67] 449 U.S. 117 (1980).

[68] 18 U.S.C. § 3576 (1976).

[69] *Id.*

[70] 449 U.S. at 132.

under the dangerous special offenders statute was permissible.[71] The *DiFrancesco* opinion limited the applicability of *Lange* and *Benz*, concluding that those cases prohibited an increased term only when it exceeds the limit on sentence imposed by statute.[72]

In addition to considering the constitutionality of an increased term following partial execution of sentence, the Supreme Court has also addressed the problem of resentencing after probation revocation. In *Roberts v. United States*,[73] the Court analyzed the federal Probation Act[74] and held that probation and subsequent revocation did not eliminate the initial sentence but merely suspended it.[75] The Court explained that the statute provided for two alternatives: 1) suspension of execution of a declared term; or 2) suspension of imposition of any term whatsoever.[76] Under the first alternative, the resentencing court would be bound by the original sentence. Under the second, the court would be free to impose any sentence that could originally have been imposed.[77] The Court held that "having exercised its discretion by sentencing an offender to a definite term of imprisonment in advance of probation, a court may not later, upon revocation of probation, set aside that sentence and increase the term of imprisonment."[78] This understanding was eventually codified in the 1948 revision of the probation statute.[79] On the federal level,

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[71] *Id.* at 133. "There are, furthermore, fundamental distinctions between a sentence and an acquittal, and to fail to recognize them is to ignore the particular significance of an acquittal." *Id.*

[72] *Id.* at 139. For further discussion of this problem, see notes 137-45 *infra*.

[73] 320 U.S. 264 (1943).

[74] 18 U.S.C. §§ 724-28 (1940), *as amended by* 18 U.S.C. § 3653 (1948). The statute originally provided that upon revocation of probation "the court may revoke the probation or suspension of sentence, and may impose any sentence which might originally have been imposed." 18 U.S.C. § 725 (1940).

[75] 320 U.S. at 267.

[76] *Id.* at 268.

[77] *Id.*

[78] *Id.* at 272-73. *See also* Note, *Sentencing Upon Revocation of Probation in Florida*, 30 U. MIAMI L. REV. 1063 (1976).

[79] 18 U.S.C. § 3653 (1948) provides:

> As speedily as possible after arrest the probationer shall be taken before the court. . . . Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

Id. In United States v. Lancer, 508 F.2d 719 (3d Cir. 1975), the court explained that "[u]nder the terms of the statute, the district court could revoke [the defendant's probation] . . . and require him either to serve the sentence imposed or any lesser sentence." *Id.* at 726. *See generally* United States v. Clayton, 588 F.2d 1288 (9th Cir. 1979); United States v. Bynoe, 562 F.2d 126 (1st Cir. 1977); Anglin v. Johnston, 504 F.2d 1109 (7th Cir. 1975).

then, the actual declaration of sentence is the central and controlling event.

The New Jersey courts have consistently upheld the imposition of an increased term after probation has been revoked.[80] In 1955 the New Jersey Supreme Court explained that the sentence following a probation violation is "a new sentence caused by the act of the defendant involving probation."[81] The original sentence, then, is expunged and no longer binding.[82]

This rationale was adopted in *State v. Cunningham*.[83] The defendant in *Cunningham*, pursuant to a sentence modification motion, had been released on probation following partial service of a given term.[84] The appellate division upheld the imposition of the more severe sentence reasoning that "although jeopardy attaches at the beginning of execution of sentence . . . the higher second sentence . . . is not a second jeopardy attaching for the original crime. The second sentence is imposed for violation of the terms of probation."[85] *Cunningham*, then, avoided the double jeopardy implications of more severe sentencing by describing the increased term as punishment for the probation violation rather than for the initial criminal activity.

It was from this milieu that the novel question posed in *State v. Ryan* emerged. Indeed, an understanding of this background material

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[80] In *In re* White, 18 N.J. 449, 114 A.2d 261 (1955), the New Jersey Supreme Court rejected the rationale of *Roberts*. The court explained that the *Roberts* decision resulted from the federal statute's failure to specifically provide for a revocation of the suspended sentence which, in turn, precluded an imposition of a second sentence. *Id.* at 454, 114 A.2d at 263. The New Jersey court first stated that it was not bound by the Supreme Court in determining the meaning of state statutes. *Id.* at 453, 114 A.2d at 264. The *White* decision concluded that under New Jersey law, the power to revoke the original sentence is implicit in the statute. "[T]he Legislature clearly meant that the statute is applicable to a situation where the original sentencing judge actually imposed a sentence." *Id.* at 454, 114 A.2d at 264. A number of cases have followed the rationale set forth in *White*. *See, e.g.*, State v. Cunningham, 143 N.J. Super. 415, 363 A.2d 369 (App. Div. 1976); State v. Braeuning, 135 N.J. Super. 89, 342 A.2d 596 (Law Div. 1975), *modified on other grounds*, 140 N.J. Super. 245, 356 A.2d 33 (App. Div. 1976); State v. Fisher, 115 N.J. Super. 373, 279 A.2d 885 (App. Div. 1971); State v. Pallitto, 107 N.J. Super. 96, 257 A.2d 121 (App. Div. 1969), *certif. denied*, 55 N.J. 309, 261 A.2d 354 (1970); State v. Driesse, 95 N.J. Super. 491, 231 A.2d 835 (App. Div. 1967). It is important to note that with the exception of *Cunningham*, none of the defendants in these cases had commenced service of a custodial term.

[81] *In re* White, 18 N.J. 449, 456, 114 A.2d 261, 265 (1955).

[82] State v. Pallitto, 107 N.J. Super. 96, 100, 257 A.2d 121, 123 (App. Div. 1969), *certif. denied*, 55 N.J. 309 (1970). The utility of this argument in avoiding double jeopardy problems is obvious. By defining the new sentence as a separate sentence, a court is able to increase the defendant's initial term to any term that may have been imposed regardless of the strictures of the double jeopardy clause.

[83] 143 N.J. Super. 415, 363 A.2d 371 (App. Div. 1976).

[84] *Id.* at 416, 363 A.2d at 372.

[85] *Id.* at 417, 363 A.2d at 373 (citation omitted).

highlights *Ryan* as a significant development in the evolution of the double jeopardy clause. The confluence of such factors as the partially served term, the sentence modification procedures, the revocation of probation, and the greater sentence ultimately imposed tests the guarantees of the fifth amendment in a unique way. Over a decade ago, the New Jersey Supreme Court noted in dictum that serious double jeopardy problems would result from increasing a partially served sentence.[86] *Ryan* confronts just these serious problems.

The United States Supreme Court in *DiFrancesco* reserved judgment on this issue.[87] The *DiFrancesco* Court considered whether sentence, once *pronounced*, was entitled to constitutional finality.[88] Justice Clifford placed the issue in *Ryan* in juxtaposition to that in *DiFrancesco* by asking whether a sentence, once *commenced*, is entitled to constitutional finality.[89] Thus, the stage was set for the New Jersey Supreme Court's consideration of *Ryan*.

The *Ryan* court's decision analyzed the statute which governed the procedure following a probation violation and identified the three options it presented.[90] Under that statute a probation violator could be allowed to continue with the probation, or, if both the probation and accompanying suspension of sentence were revoked, to complete the term imposed or to serve any term which might have originally been imposed for the underlying crime.[91] The court concurred with the appellate division finding that the statute authorizing the resentencing was applicable to probationary terms granted pursuant to a sentence modification motion.[92] It concluded, however, that if the defendant has been imprisoned prior to probation he can be compelled only to complete the given term.[93] Nevertheless, the defendant

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[86] State v. Matlack, 49 N.J. 491, 501, 231 A.2d 369, 375 (1967).

[87] 449 U.S. at 134. The *DiFrancesco* Court observed that:

> [O]ur Double Jeopardy Clause was drafted with the common law protections in mind. . . . This accounts for the established practice in the federal courts that the sentencing judge may recall the defendant and increase his sentence, at least (and we venture no comment as to this limitation) so long as he has not yet begun to serve that sentence.

Id. (citations omitted). Justice Schreiber, dissenting in *Ryan*, suggested that the United States Supreme Court had refrained only from commenting on those situations in which the defendant was free on bail prior to increasing an erroneously imposed sentence. He criticized the majority's reading of the phrase as improperly broad and not applicable to Ryan's situation. 86 N.J. at 15 n.1, 429 A.2d at 339 n.1. (Schreiber, J., dissenting).

[88] 449 U.S. at 132.

[89] 86 N.J. at 9-10, 429 A.2d at 336.

[90] *Id.* at 7, 429 A.2d at 334-35.

[91] *Id.*

[92] *Id.* at 6, 429 A.2d at 334.

[93] *Id.* at 12, 429 A.2d at 337.

whose sentence has been suspended pending probation can be resentenced to the statutory maximum.[94] The court "acknowledged the absence of perfect symmetry"[95] between the two closely allied situations but justified the prohibition against the imposition of an increased term as the "price of vindication of a defendant's right not to be put in double jeopardy."[96]

In considering the impact of the probation violation statute on resentencing after partial service, the court confronted the appellate division's reliance on *State v. Cunningham*.[97] Justice Clifford, while noting that *Cunningham* was factually indistinguishable from *Ryan*,[98] nonetheless rejected that court's reasoning which ascribed the increase in sentence to the violation of probation.[99] The supreme court in *Ryan* explained that the original criminal activity, not the failure to observe the conditions of probation, is the correct focus of the subsequent sentencing procedure.[100] By defining the more severe sentence in terms of the original rather than probation offense, the court overruled *Cunningham*.[101] The court similarly disposed of the other arguments adduced in *Cunningham* in support of the greater sentence. The *Cunningham* court warned that to limit the judge's sentencing discretion to the original term would have a "chilling effect" on the court's willingness to impose probation.[102] Justice Clifford doubted the actual validity of this prediction and discounted the weight of such reliance when balanced against the threat to the defendant's constitutional rights.[103]

The supreme court dismissed the other arguments of the appellate division which, in addition to *Cunningham*, relied on *North Carolina v. Pearce*.[104] In *Pearce*, the court authorized an increase in sentence on retrial,[105] explaining that the imposition of the original

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[94] *Id.*

[95] *Id.*

[96] *Id.* at 13, 429 A.2d at 338.

[97] 143 N.J. Super. 415, 363 A.2d 369 (App. Div. 1976).

[98] 86 N.J. at 11, 429 A.2d at 337.

[99] 143 N.J. Super. at 417, 429 A.2d at 337.

[100] 86 N.J. at 8, 429 A.2d at 335. The *Ryan* court justified its position by noting: "This is borne out by the statute's [N.J. STAT. ANN. § 2A:168-4 (West 1971) (repealed 1978))] limitation on the sentence that follows a violation probation to the sentence already imposed or one that might originally have been imposed, thereby anchoring the proceedings to the original offense." *Id.*

[101] 86 N.J. at 13, 429 A.2d at 338.

[102] 143 N.J. at 418, 363 A.2d at 373.

[103] 86 N.J. at 12-13, 429 A.2d at 338.

[104] 395 U.S. 711 (1969).

[105] *Id.* at 720.

sentence could be considered in later resentencing the defendant.[106] The appellate division applied this rationale to Ryan's situation and justified the more severe term as a punishment for the defendant's failure to conform to the conditions of his probation.[107] Having dismissed the probation violations as the basis for the enhanced sentence, however, the New Jersey Supreme Court in *Ryan* rejected this interpretation.[108] In further distinguishing *Pearce*, Justice Clifford discussed the disposition of the original sentence. The United States Supreme Court in *Pearce* found that retrial functioned to render the original sentence void.[109] In *Ryan*, however, the New Jersey Supreme Court characterized the original sentence as temporarily inoperative rather than void.[110]

Similarly, the majority rejected the dissent's reliance on *DiFrancesco*.[111] An important facet of the *DiFrancesco* opinion is the Supreme Court's belief that because of the existence of the Dangerous Special Offender's Act the defendant was on notice that his sentence could be appealed and possibly increased.[112] The court distinguished *Ryan* from *DiFrancesco*, concluding that Ryan "had no reason to expect that his original sentence was not final at the time it was imposed and his imprisonment began."[113] The court stated that Ryan could fairly anticipate only that the beneficial treatment accorded him pursuant to the sentence modification motion would be revoked and the original sentence reinstated.[114]

The court devoted the bulk of the opinon in *Ryan* to distinguishing it from precedent relied upon by the dissenting opinon and the appellate division. *Ryan* is important, however, not because it is different or distinguishable, but rather because it is the next step in a continuing tradition of interpretation evidenced in the decisions analyzing the double jeopardy safeguards of the fifth amendment.

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[106] *Id.* at 723. By associating the increased term with cognizable behavior the *Pearce* court attempted to insure that the new sentence was imposed for cause rather than out of judicial vindictiveness for bringing the appeal. *Id.* at 724.

[107] State v. Ryan, 171 N.J. Super. 427, 436, 409 A.2d 821, 825 (App. Div. 1979), *rev'd*. 86 N.J. 1, 429 A.2d 332, *cert. denied*, 102 S. Ct. 363 (1981). "By analogy, a sentence imposed after probation has been violated can reflect the added basis for evaluating defendant's amenability to reform, namely, his response to probation." *Id.*

[108] 86 N.J. at 8, 429 A.2d at 335.

[109] 395 U.S. at 721.

[110] 86 N.J. at 14, 429 A.2d at 338. The sentence modification "resulted only in a suspension of the execution of [Ryan's] original sentence." *Id.* at 13, 429 A.2d at 338.

[111] *Id.* at 14-19, 429 A.2d at 338-41 (Schreiber, J., dissenting).

[112] 449 U.S. at 137.

[113] 86 N.J. at 10, 429 A.2d at 336.

[114] *Id.*

The New Jersey Supreme Court's labored efforts to differentiate *Ryan* from recent opinions on the double jeopardy clause obscures the real and determinative point of the decision. The court succinctly stated that the sentence imposed pursuant to a violation of probation is part of the original sentence. The second sentence, then, is not a punishment for the probation violation itself.[115] Having so identified the new sentence, the court logically concluded that since jeopardy had attached upon commencement of the term,[116] the possibility of an increased sentence was foreclosed by the mandates of the double jeopardy clause.[117] The holding of the court is simply stated: the double jeopardy clause forbids an increase in sentence once the defendant has partially executed the given custodial term. The double jeopardy problem in *Ryan* was solved by the court's perception of the increased sentence as an integral element of the initial sentence.

By denying the applicability of the probation violations as the basis for the new sentence, the court eviscerated the complexities of the case, and reduced it to a simple scenario.[118] The fundamental question posed was whether a defendant could be put in jail, released on probation, and ultimately returned for a greater term. Phrased in such a manner, the answer is obvious. The possibility of the state's uninhibited power to manipulate the defendant's sentence would be a patent violation of basic double jeopardy safeguards.[119]

The court, in reversing *Cunningham*, explicitly discredited the rationale of that case and rejected the concept that the more severe term is given for the probation violation and is "not a second or additional punishment for the original crime."[120] The *Cunningham*

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[115] *Id.* at 8, 429 A.2d at 335. "[T]he sentence imposed after revocation of probation should be viewed as focusing on the original offense rather than on the violation of probation as a separate offense." *Id.*

[116] *Id.* at 9, 409 A.2d at 336. *See* State v. Laird, 25 N.J. 298, 135 A.2d 859 (1957); State v. Cunningham, 143 N.J. Super. 415, 363 A.2d 369 (App. Div. 1976). *See also* United States v. Benz, 282 U.S. 304 (1931); *Ex parte* Lange, 85 U.S. 168 (1874).

[117] 86 N.J. at 9, 409 A.2d at 336.

[118] *Id.* at 8, 12, 420 A.2d at 335, 337.

[119] There is no basis for increasing sentence after a probation violation. First, to impose a greater sentence after such a violation would ultimately result in punishing the defendant for leaving the state without permission, failing to report to the probation officer, or transgressing some other condition imposed on probation. Although the probation environment is an artificial one that renders such seemingly unimportant actions more significant, it is not so contrived as to render such behavior criminal. Indeed, the interests of society in censoring the recreant probationer are high, however, the reimposition of the original term would satisfy this concern. Second, any criminal activity which precipitates the revocation of probation will be punished separately.

[120] 143 N.J. Super. at 417, 363 A.2d at 373. The dissenting opinion in State v. Jones, 327 So.2d 18 (Fla. 1976) (Boyd, J., dissenting), adopted the same rationale, concluding: "the court ex-

court made a clear distinction between the sentences and thereby avoided the problem of double punishment for a single offense. Conversely, the New Jersey Supreme Court in *Ryan* reasoned that although the new term is imposed "*because* of the defendant's failure to abide by the conditions of his probation," it is emphatically "not *for* the violation of those conditions."[121] Justice Clifford, by readjusting the court's approach to sentencing subsequent to probation violation, revealed the constitutional invalidity of increasing a sentence following partial execution.[122] It is clear that the court's opinion is more closely related to the federal interpretation of the federal probation statute articulated in *Roberts* than it is to the earlier state court opinions culminating in *Cunningham*.

The court's analysis of the original sentence is similarly dispositive. The New Jersey court clearly differentiated *Ryan* from *Pearce* in relation to the disposition of the term initially imposed.[123] The court suggested that the retrial situation in *Pearce* is unique and distinct from the sentence modification procedures implicated in *Ryan*. In the former, the defendant had challenged the initial conviction and subsequent sentence.[124] As a result, the sentence first imposed was set aside on appeal and the sentencing slate "wiped clean."[125] In Ryan's situation, however, the initial term was never specifically revoked. As the New Jersey court explained, this sentence was modified and suspended.[126]

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ceeded its statutory authority by imposing a new and different sentence from the [one] previously imposed." *Id.* at 26 (Boyd, J., dissenting). The majority opinion, however, affirmed the increased term. The circumstances presented in *Jones* are essentially the same as in *Ryan*. The decision, however, is merely an exercise in statutory interpretation. The Florida court construed the applicable split-sentence statute as providing that the defendant could be resentenced to a greater term. The court concluded that the sentence imposed pursuant to the statute was not conclusive and binding. Rather, it was a condition of probation subject to change. *Id.* at 25 (Boyd, J., dissenting). *Jones*, then, presents yet another rationale for an increased term. By characterizing the initial term as temporary the court provides for later modification free from double jeopardy concerns. If the first sentence is not the total sentence there is no constitutional infirmity in later increasing it. New Jersey statutes do not lend themselves to a similar interpretation. Indeed, *Jones* would appear to have little applicability outside of Florida. *See* Note, *Sentencing Upon Revocation of Probation in Florida*, 30 U. MIAMI L. REV. 1063 (1976), for criticism of *Jones*.

[121] 86 N.J. at 8, 429 A.2d at 335 (emphasis in original). The same conclusion was reached, albeit under slightly different circumstances, in Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), *cert. denied*, 425 U.S. 954 (1976). In denying the petitioner credit for the time spent on probation, the court held that "the validity of [the defendant's] sentence thus is to be measured by the crime for which it was imposed . . . and not by the numerous derelictions that induced the state court to revoke his probation." *Id.* at 992.

[122] 86 N.J. at 9, 429 A.2d at 336.

[123] *Id.* at 13, 429 A.2d at 338.

[124] 395 U.S. at 713.

[125] *Id.* at 721.

[126] 86 N.J. at 13, 429 A.2d at 338.

Justice Clifford further declined to interpret the governing probation statutes as putting a defendant on notice that his sentence is subject to increase.[127] It is important to note that the court qualified this interpretation by specifying that finality would be accorded "at the time [the sentence] was imposed and [the defendant's] imprisonment began."[128] The court suggested that the probation statutes do in fact alert the defendant to the possibility that a suspended sentence may be increased upon revocation of probation.[129] An increase in such a situation is permissible.[130] The court, however, concluded that the beginning of service of a custodial term functions to preclude the later imposition of a more severe sentence.[131]

The distinction between these cases is significant in evaluating the defendant's expectations in relation to his sentence. Because the original sentence was never eradicated or invalidated, Ryan had every right to expect that upon revocation he would be subject to the remainder of the suspended term, not an increased one.[132] Justice Schreiber suggested an alternative approach to an analysis of the defendant's expectation. He explained that the resolution of the issue was a factual one, premising his position on principles of "fundamental fairness or due process."[133] Although he concluded that the probation revocation statute provided the defendant with the requisite notice,[134] he reasoned that Ryan nonetheless may have been justified in believing the original sentence would be reinstated.[135] Justice

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[127] *Id.* at 10, 429 A.2d at 336.

[128] *Id.*

[129] *Id.* at 7-8, 429 A.2d at 334-35. The court observed that in situations in which the defendant's original term was suspended: "'Imposing the maximum sentence for the original offense after revocation of probation without grand jury indictment or trial by jury is not unconstitutional, since the new sentence is only a sanction for defendant's original offense for which he had been properly tried.'" *Id.* at 8, 429 A.2d at 335 (quoting R. KNOWLTON & D. COBURN, NEW JERSEY CRIMINAL PRACTICE § 24.11 (1976)).

[130] *Id.* at 7, 429 A.2d at 334.

[131] *Id.* at 9, 429 A.2d at 336.

[132] *Id.* at 10, 429 A.2d at 336. The notice concept was a central point in Williams v. Wainwright, 650 F.2d 58 (5th Cir. 1981). There, the circuit court of appeals affirmed the applicability of the Florida statutes which authorized the imposition of any sentence originally proper upon revocation of probation in situations where the defendant had partially completed his term. *Id.* at 60-61. An important factor in the case appeared to be the fact that the defendant was specifically made aware of the possibility of increase and acquiesced to it as a condition of his probation. *Id.* at 61-62.

[133] 86 N.J. at 18, 429 A.2d at 341 (Schreiber, J., dissenting).

[134] *Id.* at 17, 429 A.2d at 340 (Schreiber, J., dissenting).

[135] *Id.* at 18, 429 A.2d at 341 (Schreiber, J., dissenting). Justice Schreiber specifically referred to the standard probation form which Ryan had signed. It states: "'If you fail to observe the conditions of your probation you may be returned to court and required to serve your sentence in an institution.'" *Id.* (quoting form). The dissenting opinion further indicated that upon the

Schreiber, therefore, created an opportunity for a defendant to avoid an increased term even if notice is given by the pertinent statute.

At the very least, the defendant can expect that upon revocation of probation the new term imposed will not exceed the statutory maximum for the underlying offense.[136] This protection is a slight one if on revocation of probation the defendant, who has already served time, can be sentenced to a more severe term. This tactic would render the original sentencing procedure little more than a meaningless gesture when the original term was less than the maximum term. Clearly, such a scheme would emasculate the initial sentencing action.

The notion of finality can be traced to *Lange*. Admittedly, the *Lange* decision is ambiguous. The two operative factual considerations—the excessive sentence and the consequent resentencing—so profoundly complicate the court's holding that it cannot be said with any certainty what exactly was proscribed.[137] Nevertheless, the language of the opinion is sufficiently persuasive to support the contention that the beginning of the custodial term precludes later increase. In *Lange*, the court questioned the validity of imposing a second sentence without considering what had been accomplished under the original.[138] "To do so is to punish him *twice* for the same offense."[139] The court expressly stated that once the sentence has been executed the defendant cannot thereafter be resentenced.[140] It is not clear whether the court contemplated total or partial execution. It is submitted that for purposes of double jeopardy there is little if any difference between the two.[141]

The Supreme Court in *DiFrancesco* challenged the general validity of *Lange* and *Benz*.[142] This limitation has grave implications for

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sentence modification motion, the trial court failed to explain the result that a revocation of probation would have on the defendant's original term. *Id.*

[136] *See* note 25 *supra*.

[137] *See* Westen, *supra* note 47, at 1049-50. In this article the author explains the various interpretations of *Lange*. The sentence may be excessive because it is greater than the statutory maximum. Or, disregarding the payment of the fine, the imposition of a one-year prison term after the defendant had already served five days would result in those five days being served twice, thereby constituting a double punishment. *Id.*

[138] 85 U.S. at 175.

[139] *Id.* (emphasis in original).

[140] *Id.*

[141] 282 U.S. at 304.

[142] 449 U.S. at 139. The Court suggested that *Lange* is valid only in those situations in which the sentencing judge had imposed a term greater than that contemplated by the applicable statute. *Id.* Further, the *DiFrancesco* Court also stated, in dictum, that the beginning of service of sentence is irrelevant in a consideration of increased sentence on government appeal under the Dangerous Special Offenders Act. *Id.* Initially, however, the Court refused to consider whether

double jeopardy jurisprudence. First, it threatens to topple the entire double jeopardy structure. By restricting the holding in *Lange*, the Court, in effect, expanded the power of the sentencing authority to modify given and possibly partially or totally executed sentences. *DiFrancesco*'s criticism distorts the vision of a vast number of cases that have adhered to the *Lange-Benz* rule as a basic tenet of the fifth amendment. The Supreme Court's minimization of the defendant's interest in finality deserves greater probity than the summary treatment given it in *DiFrancesco*.[143] Second, the relinquishment of this concept affords the judiciary unfettered authority to change sentences. It should be noted that *DiFrancesco* is a narrow opinion concerned primarily with government appeals of sentences under the Dangerous Special Offenders Act.[144] The circumstances presented and the legislation involved is far different from the situation and statute involved in the *Ryan* case. For this reason, the applicability of *DiFrancesco* to *Ryan* is questionable. Additionally, the New Jersey Supreme Court was ultimately concerned with the interpretation of a state statute. Generally, this is the sole province of the state judiciary.[145]

Judicial interpretations of the sentence modification rule supports the *Ryan* court's holding.[146] The fact that Ryan's sentence was increased pursuant to a sentence modification motion does little to justify a more severe term. The rule is narrowly written and has been narrowly construed to allow for reduction and modification.[147] Significantly, a sentence increase is not explicitly sanctioned by the court rule.[148] Arguably, the word "change" may be understood to mean

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the judiciary had the power to increase sentence once the term had begun. *Id.* at 134. Thus, it appears that the observations of the Court are limited to the problems posed by increased sentences under the Dangerous Special Offenders Act. The broad applicability of the Court's conclusion is questionable.

[143] 449 U.S. at 138-39.

[144] *Id.* at 139-40.

[145] In interpreting the Florida probation statutes, the Fifth Circuit in Williams v. Wainwright, 650 F.2d 58 (5th Cir. 1981), observed that "[q]uestions of interpretation of state statutes are within the special authority of the state supreme court." *Id.* at 61.

[146] State v. Williams, 81 N.J. 498, 410 A.2d 251 (1980); State v. Matlack, 49 N.J. 491, 231 A.2d 369 (1967); State v. Laird, 25 N.J. 298, 135 A.2d 859 (1957); State v. Pratts, 145 N.J. Super. 79, 366 A.2d 1327 (App. Div. 1975), *aff'd*, 71 N.J. 399, 365 A.2d 928 (1975); State *ex rel.* C.B., 163 N.J. Super. 215, 394 A.2d 414 (Bergen County Juv. & Dom. Rel. Ct. 1978).

[147] State v. Williams, 81 N.J. 499, 410 A.2d 251 (1980). The court held that a criminal sentence, while it may be reduced or corrected for legal and clerical errors pursuant to N.J. Ct. R. 3:21-10, cannot be modified so as to impose a new and different sentence increasing the defendant's punishment.

[148] State v. Matlack, 49 N.J. 491, 231 A.2d 369 (1967).

> We read this language to sanction reconsidered leniency and not severity. The word

"increase." Because the term is ambiguous, courts are well advised to avoid straining the statutory fabric by forcing an increase within the purview of "change."[149] The same policies that preclude an increase in term immediately upon a sentence modification motion should apply to increases imposed at a more remote point. If a court cannot increase sentence when a defendant moves for sentence modification, it is unreasonable to allow it to do so during the course of the modified term. This argument is particularly persuasive in that Ryan is not being punished separately for his probation violations. The imposition of a greater term for the defendant's behavior during the course of the modified sentence is a denial of the benevolent purpose of the sentence modification rule. The same guidelines that prevent the court from increasing a sentence in a modification action should be applied in any later proceeding relating to the defendant's modified term.

Further support for the court's holding may be adduced from the provisions of the split-sentence statute.[150] The significance of this statute is that it clearly provides that upon revocation of probation the defendant may be compelled to complete only the unserved portion of the original term. The imposition of an increased sentence would be invalid; however, the split-sentencing alternative is available only to defendants incarcerated in county institutions.[151] The major distinction between this statute and the probation violation statute is that under the latter the defendant may be sentenced to any term originally permissible.[152] The vastly different sentencing schemes seem to be irreconcilable. Since the factual situation contemplated by the

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> "reduce" obviously points to this interpretation; the word "change" seems directed only to differences in kind and not degree . . . the omission of express authority to increase sentences in the context of the rule is highly significant. We conclude that this language does not authorize a trial judge to increase a sentence previously imposed by him.

Id. at 501, 231 A.2d at 374.

[149] *See* Westen, *supra* note 47.

> Indeed, each of these constitutional doctrines . . . the rebuttable presumption against double punishment, the prohibition of vague criminal statutes, and the canon of narrow construction for criminal statutes are all part of the more general principle that no one should be criminally punished except for conduct clearly prohibited . . . when in doubt, a court should construe criminal statutes so as to avoid the risk of punishing a person for conduct the legislature has not proscribed.

Id. at 1029-30 (footnotes omitted).

[150] *See* note 29 *supra*.

[151] State v. McCue, 148 N.J. Super. 425, 372 A.2d 1127 (App. Div. 1977); State v. Pietrowski, 136 N.J. Super. 383, 346 A.2d 427 (App. Div. 1975); State v. Fisher, 115 N.J. Super. 373, 279 A.2d 885 (App. Div. 1971).

[152] 86 N.J. at 12, 429 A.2d at 337.

split-sentence provision is so analogous to that of *Ryan*, it would be incongruous that the same considerations would not adhere.

It is interesting to note the disposition of parole violators under the new criminal code.[153] Upon revocation of parole, the sentencing limit is determined by the original term imposed.[154] The reason for applying a different standard to probation violators is, at best, inexplicable. There appears to be no sensible reason for treating the two situations in such a disparate fashion.

In the final analysis it is apparent that had Ryan's more severe term been maintained by the New Jersey Supreme Court, he would have been punished twice for the same crime. The first sentence was given for the breaking and entering and larceny convictions. Given the court's rejection of the probationary violation as the basis for the second sentence, the increase was similarly imposed for the initial criminal behavior.[155] Broken down in this manner it is apparent that Ryan was sentenced twice; first for three years, then for two more years.[156] The constitutional invalidity of this is clear. "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."[157]

In conclusion, the significance of *Ryan* may be best understood in the context of the double jeopardy framework constructed by the state and federal courts. The history of double jeopardy is a long and tortuous one of realignments, readjustments, and reevaluations.[158] These shifting interpretations, while enlarging the body of double jeopardy principles, have done little to clarify the basic concepts.[159]

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[153] N.J. STAT. ANN. § 2C:43-9(c) (West 1981) states: "If an offender is recommitted upon revocation of his parole, the term of further imprisonment . . . shall not exceed the original sentence determined from the date of conviction."

[154] *Id.*

[155] 86 N.J. at 8, 429 A.2d at 335.

[156] State v. Williams, 167 N.J. Super. 203, 400 A.2d 796 (App. Div. 1979). *Williams* provides support for this analysis. As in *Ryan*, the defendant was placed on probation following partial execution of a given term. The probation, however, was illegally imposed and upon its withdrawal the defendant motioned to have the time spent on probation credited to his term. *Id.* at 205-07. The court held that the probation was a sentence in itself and granted the defendant's motion. *Id.* at 208. *Williams* is based on the premise that the imposition of the second sentence during the course of the first sentence is violative of the double jeopardy clause. *Id.* The refusal to credit "would be to impermissibly increase his sentence previously imposed, thus violating his basic Fifth Amendment guarantee against double jeopardy." *Id.* The court concluded that the probationary period was a new and different term, "substantially increasing the original penalty." *Id.* at 209.

[157] 85 U.S. at 168.

[158] Westen & Drubel, *supra* note 1, at 82-83.

[159] *Id.* at 84.

Ryan is unique in that in such a kaleidoscopic area it sets a clearly cognizable boundary. By establishing the commencement of sentence as the determinate and finalizing component in the sentencing process, the supreme court defined the point beyond which the New Jersey judiciary cannot venture in resentencing.

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