

IN THE SUPREME COURT OF IOWA

No. 16-0203

STATE OF IOWA,
Appellee,

vs.

CHRISTOPHER JEPSEN,
Appellant

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR CRAWFORD COUNTY, IOWA
THE HONORABLE STEVEN J. ANDREASEN, DISTRICT JUDGE

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

WHETHER JEPSEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE HIS COUNSEL BEFORE THE DISTRICT COUR FAILED TO ARGUE THAT JEPSEN WAS ENTITLED UNDER THE DOUBLE JEOPARDY CLAUSE TO CREDIT AGAINST HIS SECOND SENTENCE OF INCARCERATION FOR TIME SPENT ON PROBATION UNDER HIS FIRST SENTENCE.

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ROUTING STATEMENT

This case presents two substantial constitutional questions, which are also substantial issues of first impression in this State – namely, whether a defendant whose probation sentence is determined to have been illegal, and who is subsequently resentenced for the same offense to a term of incarceration, is entitled under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution to credit against his term of incarceration for the time that the defendant served on probation prior to his probation sentence being vacated; and, if so, how such credit is calculated. This case should therefore be retained by the Supreme Court pursuant to Iowa Rule of Appellate Procedure 6.1101(2)(a), (c).

STATEMENT OF THE CASE

This is an appeal from a “corrected judgment and sentence” entered by the Iowa District Court for Crawford County, adjudging Appellant Christopher Jepsen guilty of Sexual Abuse in the Third Degree in violation of Iowa Code § 709.4(2)(c)(4) (2009) [now § 709.4(1)(b)(3)(d)], and Sexual Abuse in the Third Degree in violation of Iowa Code § 709.4(2)(b) (2009) [now § 709.4(1)(b)(2)], and sentencing Jepsen on each count to an indeterminate term of incarceration not to exceed ten years, to run concurrently for one indeterminate term not to exceed ten years. *See* Corrected Judgment and Sentence at 1-2, App’x at 172-173.

Jepsen was charged, by a trial information filed on February 7, 2011, with two counts: Count 1 – Sexual Abuse in the Third Degree, in violation of Iowa Code §§ 709.1, 709.4(2)(c)(4), and 903B.1 (2009); and Count 2 – Sexual Abuse in the Third Degree, in violation of Iowa Code §§ 709.1, 709.4(2)(c)(4), and 903B.1 (2009). *See* Trial Information, App’x at 60. The State eventually amended Count 2 to charge Jepsen with Sexual Abuse in the Third Degree, in violation of § 709.4(2)(b) (2009), which amendment was made to conform with evidence that the alleged victim in Count 2 was thirteen years old at the relevant time. *See* Motion to Amend Trial Information at 1-2, App’x at 74-75; *accord* Order Approving Amendment to

Trial Information, App'x at 76.

After a jury trial, Jepsen was found guilty of Sexual Abuse in the Third Degree, in violation of Iowa Code § 709.4(2)(c)(4) (2009); and Sexual Abuse in the Third Degree, in violation of Iowa Code § 709.4(2)(b). *See* Verdict Form at 1, App'x at 73. In a judgment and sentence entered on September 23, 2011, the district court sentenced Jepsen on each count to an indeterminate term of incarceration not to exceed ten years, to run consecutively for an indeterminate term not to exceed twenty years, and the district court suspended the sentence of imprisonment and placed Jepsen on probation for a period of five years. Judgment and Sentence at 1-2, App'x at 80-81.

On October 28, 2014, the State filed an application for revocation of Jepsen's probation. *See* Application for Revocation of Probation at 1, App'x at 84. Then on December 21, 2015, the State filed a motion to correct what it described as an illegal sentence imposed by the September 23, 2011 judgment and sentence. *See* Motion to Correct Illegal Sentence, App'x at 87. The State alleged that count 2 was a forcible felony, and that as such the suspension of Jepsen's sentence of incarceration and the probation sentence were not authorized by statute. *See* Motion to Correct Illegal Sentence at 1-2, App'x at 87-88. Jepsen resisted the State's motion.

See Resistance to Motion to Correct Illegal Sentence at 1, App'x at 90.

A hearing on the State's motion to correct illegal sentence was held on January 29, 2016. *See* Corrected Judgment and Sentence at 1, App'x at 172.

Following the hearing, the district court concluded that the State's motion to correct illegal sentence should be granted. Corrected Judgment and Sentence at 1, App'x at 172. The district court thus vacated the judgment and sentence entered on September 23, 2011, and imposed the sentence described above. *See* Corrected Judgment and Sentence at 1-2, App'x at 172-173.

Jepsen timely appealed. *See* Notice of Appeal, App'x at 177.

STATEMENT OF FACTS

Appellant Christopher Jepsen was convicted in 2011 of Sexual Abuse in the Third Degree, in violation of Iowa Code § 709.4(2)(c)(4) (2009); and Sexual Abuse in the Third Degree, in violation of Iowa Code § 709.4(2)(b). *See* Verdict Form at 1, App'x at 73. He was sentenced on each count to an indeterminate term of incarceration not to exceed ten years, to run consecutively for an indeterminate term not to exceed twenty years, which term of incarceration was suspended, and he was placed on probation for a period of five years. Judgment and Sentence at 1-2, App'x at 80-81.

On December 21, 2015, after Jepsen had been on probation for over three years, the State filed a motion to correct what it described as an illegal sentence imposed by the September 23, 2011 judgment and sentence. *See* Motion to Correct Illegal Sentence, App'x at 87. The State alleged that count 2 was a forcible felony, and that as such the suspension of Jepsen's sentence of incarceration and the probation sentence were not authorized by statute. *See* Motion to Correct Illegal Sentence at 1-2, App'x at 87-88. Jepsen resisted the State's motion. *See* Resistance to Motion to Correct Illegal Sentence at 1, App'x at 90.

A hearing on the State's motion to correct illegal sentence was held on January 29, 2016, during which the district court concluded that Jepsen's

probation sentence was in fact illegal and that Jepsen was required to be sentenced to a term of incarceration. *See* Corrected Judgment and Sentence at 1, App'x at 172.

And while Jepsen's counsel before the district court argued that the Double Jeopardy Clause, and myriad other legal theories, precluded the district court from resentencing Jepsen to incarceration so long after he had been originally sentenced, and after he had spent so much time on probation already, Jepsen's district court counsel never argued that Jepsen was entitled under the Double Jeopardy Clause to credit against any sentence of incarceration for the time he had actually spent on probation.

The district court thus ordered that Jepsen receive credit for time served under the first sentence only pursuant to Iowa Code § 903A.5. *See* Mot. to Correct Illegal Sent. Tr. at 37; *accord* Corrected Judgment and Sentence at 2, App'x at 173 (“Defendant is given credit for time served *in the county jail awaiting disposition of the within matter* pursuant to Iowa Code Section 903A.5.”). Jepsen was not granted any credit against his sentence of incarceration for any of the time that he spent on probation.

Jepsen thus spent 1,590 days on probation under his first sentence for the offenses at issue herein, but he received no credit whatsoever for that time against his second sentence for those same offense.

ARGUMENT

JEPSEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE HIS COUNSEL BEFORE THE DISTRICT COUR FAILED TO ARGUE THAT JEPSEN WAS ENTITLED UNDER THE DOUBLE JEOPARDY CLAUSE TO CREDIT AGAINST HIS SECOND SENTENCE OF INCARCERATION FOR TIME SPENT ON PROBATION UNDER HIS FIRST SENTENCE.

The attorney who represented Jepsen during the illegal sentence proceeding before the district court rendered ineffective assistance of counsel, because she failed to argue that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution requires that Jepsen receive credit against his corrected sentence of incarceration for all of the nearly four years that he spent on probation under the illegal sentence. Jepsen's counsel before the district court breached an essential duty by failing to request all of the credit against his sentence to which Jepsen was entitled under the law. And Jepsen was prejudiced by his attorney's error – any such request would have been granted, since such credit is required under the Double Jeopardy Clause and the decisions of the United States Supreme Court, and thus as a result of his trial counsel's error Jepsen was denied credit for time served to which he is entitled. Thus, this Court should vacate the district court's corrected judgment and sentence, and remand for entry of a second corrected judgment and sentence providing

that Jepsen is entitled to credit against his prison sentence for the time he spent on probation.

Preservation of Error

Jepsen's claim that his trial counsel was ineffective, in failing to ask for credit against his term of incarceration for time that Jepsen served under his illegal probation sentence, falls within an exception to the error preservation rules. *See State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005).

Standard of Review

This Court reviews *de novo* claims of ineffective assistance of counsel. *See State v. Tejada*, 677 N.W.2d 744, 754 (Iowa 2004).

Argument

Jepsen is entitled, under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, to credit against his corrected sentence of incarceration for all of the time that he was on probation under his first, illegal sentence. Jepsen's counsel before the district court thus breached an essential duty by failing to request such credit. And since, absent such a request, the district court failed to grant such credit to Jepsen, Jepsen was prejudiced by his trial counsel's error. Thus, Jepsen received ineffective assistance of counsel from his attorney before the district court.

A. Legal Standard – Ineffective Assistance of Counsel.

To prevail on a claim of ineffective assistance of counsel, a defendant must show by a preponderance of the evidence (1) that trial counsel failed to perform an essential duty, and (2) that prejudice resulted. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006); accord *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

This Court often preserves claims of ineffective assistance of counsel for postconviction proceedings, but the Court will decide such claims on direct appeal if the record is adequate to do so. *State v. Tate*, 710 N.W.2d 237, 239 (Iowa 2006).

B. Jepsen’s Counsel Before the District Court Breached an Essential Duty by Failing to Request Credit Against Jepsen’s Term of Incarceration for the Time Jepsen Was on Probation.

Beginning with the first *Strickland* prong, an attorney with ordinary training and skill in criminal law would have requested that Jepsen receive, on resentencing, all of the credit for time already served that he was entitled to under the law – including credit he was entitled to under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Jepsen is entitled, under the Double Jeopardy Clause, to credit against his term of incarceration for all of the time he was on probation under his prior, illegal sentence. But Jepsen’s attorney before the district court failed to

request such credit, and the district court failed to address the matter on its own. Thus, the performance of Jepsen’s trial counsel, in failing to request such credit, was constitutionally deficient, and Jepsen’s counsel breached an essential duty.

1. Legal Standard – Breach of an Essential Duty.

To prove that his trial counsel failed to perform an essential duty, a defendant must show that counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688. “A normally competent attorney . . . should either be familiar with the basic provisions of the criminal code, or should make an effort to acquaint himself with those provisions which may be applicable to the criminal acts allegedly committed by his client.” *Id.* at 71-72. “The same is true of case law.” *State v. Fountain*, 786 N.W.2d 260, 266 (Iowa 2010). The question, in deciding whether Jepsen’s trial counsel breached an essential duty by failing to request the sentencing credit at issue here, is “whether a normally competent attorney could have concluded that the question . . . was not worth raising.” *See State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982).

2. The Double Jeopardy Clause Requires that a Defendant Resentenced to a Term of Incarceration, After an Illegal Probation Sentence is Vacated, Must Be Given Credit Towards the Term of Incarceration for Time Served on Probation.

The Double Jeopardy Clause of the Fifth Amendment requires that a defendant who is sentenced a second time for the same offense must receive full credit, toward the second sentence, for any punishment actually endured under the first sentence. This rule applies when the first sentence was illegal. And this rule requires granting credit for time on probation under the first sentence against a term of incarceration under the second sentence. Thus, Jepsen is entitled to credit against his term of incarceration for all of the time that he spent on probation under his first, illegal sentence.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states:

[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

U.S. Const. amend. V. The reason underlying the prohibition against double jeopardy is stated by the United States Supreme Court to be 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 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.

Green v. United States, 355 U.S. 184, 187-88 (1957); accord *United States v. Scott*, 437 U.S. 82, 87 (1977).

The Supreme Court has identified “three separate constitutional protections” afforded by the guarantee against double jeopardy:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. *And it protects against multiple punishments for the same offense.*

North Carolina v. Pearce, 395 U.S. 711, 717 (1969), overruled on other grounds by *Alabama v. Smith*, 490 U.S. 794 (1989) (emphasis added). The third of these protections – the protection against multiple punishments – is at issue in this case.

i. The Rule of *North Carolina v. Pearce*.

The United States Supreme Court discussed the scope of the Double Jeopardy Clause’s protection against multiple punishments in *North Carolina v. Pearce*, 395 U.S. 711 (1969). *Pearce* held in relevant part that the Double Jeopardy Clause’s “basic constitutional guarantee is violated when punishment already exacted for an offense is not fully ‘credited’ in imposing sentence upon a new conviction for the same offense.” *Id.* at 719.

This “holds true whenever punishment already endured is not fully subtracted from any new sentence imposed.” *Id.*

Pearce thus held that in the circumstances at issue in the relevant part of that case – where a defendant’s conviction and sentence has been set aside at the defendant’s behest, and the defendant is subsequently retried re-convicted, and resentenced – the Double Jeopardy Clause requires that the resentencing court credit against the new sentence of incarceration any time that the defendant spent incarcerated under the first conviction. *Id.*

This rule – that a defendant who is sentenced a second time for the same offense must receive fully credit for any punishment actually endured under the first sentence – is not limited to circumstances exactly like those at issue in *Pearce*. In particular, the *Pearce* rule has been applied where the first sentence was vacated at the State’s behest, rather than the defendant’s; where the first sentence was vacated not because the conviction was reversed but because the sentence was illegal; and where the second sentence was a sentence of incarceration but the first was a sentence of probation.

ii. The *Pearce* Rule Requires that a Vacated Probation Sentence Be Credited Against a Subsequent Sentence of Incarceration.

United States v. Martin, 363 F.3d 25 (1st Cir. 2004) is a leading case holding that the *Pearce* rule applies to a defendant who receives a sentence of probation that is later vacated, and who is resentenced to a term of incarceration – *i.e.*, that the defendant in such a case is entitled to credit for

the time he was actually on probation, even against the term of incarceration that is imposed at resentencing.

In *Martin*, the government appealed a probation sentence imposed by the district court, on the ground that it was unlawful under the then-mandatory Federal Sentencing Guidelines, and that a sentence of imprisonment was required. *Id.* at 34. The defendant argued that “constitutional double jeopardy principles require the court to credit any time he has already served on probation against any imprisonment imposed after an appeal.” *Id.* The defendant further argued that “[b]ecause probation and imprisonment are distinct forms of punishment, . . . crediting probation against imprisonment is not permissible, and thus the court cannot reconcile his time served on probation with a new sentence of imprisonment.” *Id.*

The United States Court of Appeals for the First Circuit held that crediting the defendant’s time on probation against any sentence of incarceration was both permissible, and required. In so holding, the *Martin* Court the stated forcefully the Double Jeopardy Clause’s requirement that a defendant who is resentenced to a term of incarceration be fully credited for time spent on probation under an earlier, erroneous sentence.

The Double Jeopardy Clause “absolutely requires that punishment already exacted must be *fully ‘credited’* in

imposing a sentence upon a new conviction for the same offense.” *North Carolina v. Pearce*, 395 U.S. 711, 718-19 (1969); *see also Jones v. Thomas*, 491 U.S. 376, 381-82 (1989) (holding that crediting time already served against the final sentence fully vindicates the defendant’s double jeopardy rights). This crediting principle applies equally to a new sentence imposed for the same sentence after a government appeal. *See Pearce*, 395 U.S. at 718 (stating that the protection against double punishment is violated “whenever punishment already endured is not fully subtracted from any new sentence imposed”); *United States v. Bogdan*, 302 F.3d 12, 17 (1st Cir. 2002) (remanding after government appeal for resentencing within the guidelines sentencing range subject to credit for time already served); *United States v. McMillen*, 917 F.2d 773, 777 (3rd Cir. 1990) holding that defendant must be given full credit for time served when resentenced after successful government appeal). It also applies to sentences of probation which, although not as harsh as imprisonment, are nonetheless “punishments” imposed for the offense of conviction. *See Korematsu v. United States*, 319 U.S. 432, 435 (1943) (“[A] probation order is ‘an authorized mode of mild and ambulatory punishment’”); *United States v. Bynoe*, 562 F.2d 126, 128 (1st Cir. 1977) (“Probation is nonetheless a punishment imposed on the defendant, albeit a mild one.”)

Martin, 363 F.3d at 37.

The *Martin* court thus concluded that “because the sentence of probation is ‘a punishment already exacted’” for the defendant’s offense – namely, the first, unlawful sentence to probation – “it must be credited against a new sentence of imprisonment after an appeal.” *Id.*¹

¹ The *Martin* court concluded that a defendant is not necessarily entitled to one-to-one credit of days spent on probation against days to be spent imprisoned – the amount of credit, according to the court, would depend on the specific conditions that had been a part of the defendant’s probation, as

Accordingly, the *Pearce* Rule requires that a defendant whose first probation sentence is vacated, and who is resentenced to a term of incarceration, receive credit against his term of incarceration for the time that he spent on probation under the first sentence. *See United States v. Derbes*, No CR02-10391, 2004 U.S. Dist. Lexis 19666 (D. Mass. Oct. 1, 2004) (applying *Martin* to grant credit against subsequent sentence of incarceration for time spent on probation under previous sentence; *accord United States v. McMillen*, 917 F.2d 773 (3d Cir. 1990) (holding that upon resentencing after reversal of sentence not in conformity with then-mandatory Sentencing Guidelines, defendant must be given credit for time

determined by the judgment of the district court – and the court thus remanded so that the district court could determine how to calculate the credit that the defendant should receive for the time he served on probation. *Id.* at 38-39.

There are myriad problems with this approach, and this Court should reject it here. First, this approach is not consistent with the rule in *Pearce* that a defendant must receive “full” credit against a second sentence for time spent on a first sentence. *See People v. Gregorczyk*, 443 N.W.2d 816, 820 (Mich. Ct. App. 1989) (“[T]he same principle obviously holds true *whenever* punishment already endured is not fully subtracted from *any new sentence imposed.*” (quoting *Pearce*, 395 U.S. at 718)). Second, it is impossible to conceive of any formula for equating a certain number of days on probation to a single day of incarceration that is not completely arbitrary. And third, any such calculation as the one proposed in *Martin* would necessarily have to work both ways – such that a defendant who is initially sentenced to a term of incarceration but is subsequently resentenced to a term of probation would have to receive multiple days of credit against his term of probation for each day of incarceration. This Court should avoid all

already served on probation); *cf. Kincaid v. State*, 778 N.E.2d 789 (Ind. 2002) (holding that Double Jeopardy Clause requires that time spent on first sentence of probation must be credited against second sentence of probation); *Kennick v. Superior Court of California*, 736 F.3d 1277 (9th Cir. 1984) (same).

iii. The *Pearce* Rule Applies Where the First Conviction Is Illegal.

Courts in other jurisdictions have likewise held that the *Pearce* rule applies not only where a defendant is resentenced after being reconvicted, but also where a defendant is resentenced after an earlier sentence is vacated as illegal.

For example, in *Allen v. Henderson*, 434 F.2d 26 (1970), the United States Court of Appeals for the Fifth Circuit reviewed the denial of a state prisoner's habeas corpus petition, which petition alleged that the prisoner was not given credit for time served on a previously voided illegal sentence.

Id. at 26. The court held that because it was “clear that [the prisoner] was not accorded full credit for the time previously served,” the district court erred by denying the prisoner relief. *Id.* at 27; *See also, e.g., Commonwealth v. Adams*, 504 A.2d 1264 (Penn. Sup. Ct. 1986) (“Although the instant case does not involve a subsequent conviction for the same

of these problems by holding that *Pearce* requires a one-day-for-one-day

offense as in *Pearce*, it does involve the same question or double punishment for a single crime. Just as in *Pearce*, the years of imprisonment appellant was required to serve under the illegal aggravated assault sentence cannot be given back to him. But because he still must serve a term of imprisonment under the lawful sentence resulting from the same criminal act, those years can be given back to him as credit for time served.”); *Munoz-Perlin v. Ainley*, No 1 CA-SA 10-0037, 20110 Ariz. App. Unpub. Lexis 1341 (Ariz. Ct. App. Apr. 13, 2010) (“When a court resentences a defendant after a determination that the original sentence was illegal, the court must credit the ‘punishment already exacted’ on the defendant against the new sentence imposed.”); *accord Raucci v. Warden, State Prison*, 1992 Conn. Super. Lexis 2362 (Sup. Ct. Conn. 1992) (“The United States Supreme Court has addressed the issue of whether a defendant must be credited for time served under an illegal sentence which is later vacated and the defendant resentenced in the case of *North Carolina v. Pearce*, 395 U.S. 711 (1969).”; *State v. Leonard*, No. 80-K-1812, 1981 La. Lexis 11300 (La. May 19, 1981), Calogero, J., concurring (“I believe that under *North Carolina v. Pearce*, 395 U.S. 711 (1969), defendant must be given credit for the time he has already served on the illegal sentence.”).

credit apply in every case, including this one.

This application of the *Pearce* rule – *i.e.*, to situations where a defendant is re-sentenced after an illegal sentence is vacated – is demanded by the *Pearce* Court’s reasoning. The *Pearce* Court noted that the rationale for its holding “rests ultimately upon the premise that the original conviction has, at the defendant’s behest, been wholly nullified and the slate wiped clean.” *Id.* at 720-21. But as the *Pearce* Court recognized, “[a]s to whatever punishment has actually been suffered under the first conviction, that premise is, of course, an unmitigated fiction,” and thus a defendant is entitled to full credit for that portion of the sentence already served under the first sentence – despite the first sentence being rendered a nullity – against any subsequent sentence. *Id.*

Similarly, while under Iowa law an illegal sentence “is a nullity subject to correction” at any time, *State v. Draper*, 457 N.W.2d 600, 605 (Iowa 1990), that notion is “an unmitigated fiction” as to whatever portion of the sentence the defendant actually serves prior to the illegal sentence being vacated.

And there is no basis in the law for holding that the nullification of a sentence in the circumstances contemplated by *Pearce* is different, for purposes of Double Jeopardy Clause analysis, from the circumstances involving a null illegal sentence, as was the case here. If a defendant is

entitled to credit for time served on a first sentence, when that first sentence is nullified and a second sentence is imposed, then a defendant is likewise entitled to credit for time served of a first sentence that is a nullity as a result of being illegal and a second, legal sentence is imposed.

Accordingly, the *Pearce* Rule requires that a defendant whose first sentence is vacated on the ground that it is illegal, and who is subsequently resentenced, receive credit against his second sentence of any punishment actually endured under the first sentence.

iv. Conclusion.

The Double Jeopardy Clause thus requires that a defendant who is placed on probation under a sentence that is ultimately vacated as illegal, and who is subsequently resentenced to a term of imprisonment, is entitled to credit against the term of imprisonment for the time that he actually spent on probation under the first sentence.

3. Jepsen's Counsel Before the District Court Failed to Argue that the Double Jeopardy Clause Requires that Jepsen Receive Credit Against His Second Sentence for Time Spent on Probation Under His First Sentence.

Jepsen's counsel before the district court did not request that Jepsen receive credit against the term of incarceration imposed at resentencing for time that he had already spent on probation under the first sentence, as is

required by *Pearce* and the Double Jeopardy Clause. Thus, Jepsen received ineffective assistance from his trial counsel.

In particular, Jepsen's counsel before the district court argued in a sentencing brief that the Double Jeopardy Clause barred the district court from imposing on resentencing a harsher sentence than was initially imposed, *see* Defendant's Brief for Resentencing Hearing at 1, App'x at 161 ("To the extent that Iowa [Rule] 2.24 is construed to permit the district court to re-sentence Defendant and impose a greater sentence upon Defendant than imposed in 2011, it violates the 5th Amendment's prohibition against being punished twice for the same offense."). Jepsen's district court counsel likewise argued for credit for time Jepsen had served in jail, and for credit for his time served on probation under *Anderson v. State*, 801 N.W.2d 1 (Iowa 2011). But Jepsen's district court counsel failed to argue that the Double Jeopardy Clause requires that Jepsen's time actually spent on probation be credited against the sentence of incarceration imposed on resentencing.

Jepsen's district court counsel made the same deficient arguments at the resentencing hearing, in that she failed to argue at the resentencing hearing that Jepsen was entitled to credit, under the Double Jeopardy Clause, for time he spent on probation under the first, illegal sentence. Rather, Jepsen's

counsel again asked that the district court grant Jepsen credit for time served in jail, and that he receive credit for time spent on probation under *Anderson v. State*, 801 N.W.2d 1 (Iowa 2011).

None of the arguments made by Jepsen's trial counsel properly raised the issue whether Jepsen would receive credit for time served on probation under the first sentence. Obviously, Jepsen's district court's counsel's request for credit for time served in jail was not an argument that the Double Jeopardy Clause demands that Jepsen receive credit against his second sentence of incarceration for the time he actually spent on probation.

Nor does Jepsen's trial counsel's reliance on *Anderson* raise the issue. *Anderson* is not applicable to Jepsen, because *Anderson* involved credit for time served on probation being applied to a sentence of incarceration imposed after the probation is revoked. *See Anderson*, 801 N.W.2d at 4; accord Iowa Code § 907.3(3). Jepsen was not sentenced to a term of incarceration upon revocation of his probation, but rather was resentenced to prison after his probation sentence was vacated as illegal. Thus, *Anderson* has nothing to do with the Double Jeopardy Clause.

Similarly, Jepsen's district court counsel's failure to argue the Double Jeopardy Clause credit for time served issue was not a result of the district court raising the matter on its own. Rather, the district court expressly

limited Jepsen's credit for time served to the time he spend "in the county jail awaiting disposition of the within matter pursuant to Iowa Code Section 903A.5." Corrected Judgment and Sentence at 2, App'x at 173; *accord* Mot. to Correct Illegal Sentence and Sentencing Tr. at 37.

Nor do this Court's decision in *State v. Hawk*, 616 N.W.2d 527 (Iowa 2000), or the Department of Corrections' procedures for calculating credit for time served, relieve Jepsen's trial counsel of her duty to make the Double Jeopardy Clause argument at issue here. In *Hawk*, this Court held that the statutes governing credit for time served do not require a judicial accounting of credit for time served in a defendant's sentencing order. *Id.* at 529-30. But that decision was based on the requirement in Iowa Code § 903A.5 that a sheriff certify the number of days served to the clerk of court for the district in which the defendant is sentenced, which calculated is forwarded to the warden of the institution where the defendant is incarcerated. *Id.* (citing Iowa Code § 903A.5). This, the *Hawk* Court stated, would ensure that a defendant receive credit for all the time served under the sentence. *Id.* But this is obviously not sufficient here, since the sheriff's certification of time spent in jail would not include any accounting of the time Jepsen spent in jail.

The matter likewise will not be resolved by the Department of Corrections, absent further order by the sentencing court. Department of Corrections Policy Number AD-CR-02 provides for the Department of Corrections policies for granting credit for time served, and although it mentions *Anderson* credit, it contains no provision for the credit for time served on probation that the Double Jeopardy Clause demands for defendants such as Jepsen. Cf. DOC Policy No. AD-CR-02 at 5, <http://www.doc.state.ia.us/Policies/DownloadPolicy/623>.

Accordingly, Jepsen's counsel before the district court had a duty to argue that Jepsen was entitled under the Double Jeopardy Clause to credit against his second sentence of incarceration for the time he actually spent on probation under his first sentence. Jepsen's district court counsel made no such argument, and so she breached that essential duty.

4. Conclusion.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution requires that a defendant receive, against a subsequent sentence of incarceration imposed on resentencing, full credit for the time the defendant spent on probation under his first sentence prior to that sentence being vacated as illegal. Jepsen was thus entitled to credit against his present sentence of incarceration for the time he spent on probation

under his first sentence, before that first sentence was determined to be illegal and void. But Jepsen's trial counsel did not request such credit. Jepsen's trial counsel thus breached an essential duty.

C. Jepsen Was Prejudiced by His District Court Counsel's Error.

Because Jepsen's trial counsel failed to fulfill her essential duty of requesting all the credit for time served to which Jepsen is entitled under the Double Jeopardy Clause, and because the district court did not and the Department of Corrections will not give Jepsen any such credit, Jepsen was prejudiced by his trial counsel's error.

1. Legal Standard.

To prove prejudice, the defendant must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

2. Analysis.

Because of his district court counsel's failure to argue that the Double Jeopardy Clause requires that he receive credit against his second sentence of incarceration for all of the time he served on probation under his first sentence, the district court did not grant Jepsen any such credit. And absent

an order by the district court granting such credit, the Department of Corrections will not credit any of Jepsen's time on probation against his present sentence of incarceration. Further, had Jepsen's trial counsel made such an argument at the resentencing hearing, the district court certainly would have granted Jepsen the credit he now seeks, since that credit is demanded by the Double Jeopardy Clause. Thus, but for his district court counsel's error, the result of the resentencing hearing would have been different, and Jepsen was thus prejudiced by his counsel's breach of an essential duty.

As stated above, the district court ordered that Jepsen receive credit for time served under the first sentence only pursuant to Iowa Code § 903A.5. *See* Mot. to Correct Illegal Sent. Tr. at 37; *accord* Corrected Judgment and Sentence at 2, App'x at 173 ("Defendant is given credit for time served *in the county jail awaiting disposition of the within matter* pursuant to Iowa Code Section 903A.5."). And § 903A.5 does not provide for credit for time served on probation under a previous, illegal sentence. *See id.*

Likewise, as described above, the Department of Corrections will not give Jepsen the credit that he is entitled to under the Double Jeopardy Clause, absent further order by the sentencing court. Department of Corrections Policy Number AD-CR-02 provides for the Department of Corrections

policies for granting credit for time served, and although it mentions *Anderson* credit, it contains no provision for the credit for time served on probation that the Double Jeopardy Clause demands for defendants such as Jepsen. Cf. DOC Policy No. AD-CR-02 at 5, <http://www.doc.state.ia.us/Policies/DownloadPolicy/623>.

Finally, as described at length above, Jepsen would have prevailed had his trial counsel argued that he is entitled to credit against his second sentence of incarceration for the time he actually spent on probation under his first, illegal sentence. *Pearce*'s rule demands that any defendant who is twice sentenced for the same offense receive full credit toward the second sentence for any punishment actually endured on the first sentence – including when the first sentence is illegal, and including when the first sentence is a probation sentence and the second orders incarceration.

Thus, Jepsen was prejudiced by his trial counsel's failure to argue, at the resentencing hearing, that Jepsen is entitled under the Double Jeopardy Clause to credit against his sentence of incarceration for all of the time he spent on probation under the first sentence.

D. Conclusion.

Jepsen is entitled, under the Double Jeopardy Clause, to credit against the term of incarceration imposed at a resentencing hearing for all of the

time that he actually spent on probation under his first, illegal sentence. Jepsen's trial counsel failed to raise this Double Jeopardy argument, and thus breached an essential duty. And Jepsen was prejudiced by his trial counsel's breach, in that the district court failed to grant Jepsen such credit, the Department of Corrections will not grant Jepsen such credit absent an order by the sentencing court to do so.

Thus, Jepsen's trial counsel was ineffective in failing to argue for all of the credit for time served to which Jepsen is entitled. Accordingly, this Court should vacate Jepsen's sentence, and remand with instructions that the district court grant Jepsen credit against his present sentence of incarceration for the time Jepsen actually spent on probation under his first sentence.

CONCLUSION

For the foregoing reasons, Appellant Christopher Jepsen respectfully requests that this Court vacate his sentence, and remand for further calculation of the credit against his sentence of incarceration that Jepsen is entitled to for time her previously served on probation.

REQUEST FOR ORAL ARGUMENT

Appellant Christopher Jepsen respectfully requests oral argument of fifteen minutes per side.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies a copy of this Appellant's Brief was served on the 23rd day of December, 2016, upon the following persons, by EDMS and United States Mail, respectively:

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The undersigned further certifies that the Appellant's Brief was sent to the Clerk of the Supreme Court, Iowa Judicial Branch, 1111 East Court Avenue, Des Moines, Iowa 50319, on the 23rd day of December, 2016, by EDMS.

/s/ Zachary S. Hindman

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Iowa R. App. P. 6.903 (1)(g)(1) because this brief contains 6,100 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14.

Dated this 23rd day of December, 2016.

/s/ Zachary S. Hindman