ELECTRONICALLY FILED APR 25, 2017 CLERK OF SUPREME COURT

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

APPLICATION TO THE SUPREME COURT FOR FURTHER REVIEW
Date of Filing of Court of Appeals Opinion Under Review: Apr. 5, 2017

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QUESTION PRESENTED FOR REVIEW

Whether the Double Jeopardy Clause of the Fifth Amendment requires that a criminal defendant who receives an illegal sentence of probation, and then is subsequently resentenced to a term of incarceration, receive credit against the subsequent sentence of incarceration for time spent on the prior probation sentence.

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STATEMENT SUPPORTING FURTHER REVIEW

The decision of the Court of Appeals in this case is contrary to clearly established, controlling United States Supreme Court case law; is contrary to the decision of every United States Court of Appeals that has addressed the issue here; and, if left in place, likely will irreparably corrupt – in several respects – the analysis long recognized under Iowa and federal law as applicable to cases involving the Double Jeopardy Clause's prohibition of double punishments.

At issue here is whether Appellant Christopher Jepsen is entitled under the Double Jeopardy Clause of the Fifth Amendment to credit against his current sentence of incarceration, for over four years that he spent on probation under an illegal sentence previously imposed on the same offense. The Court of Appeals, in holding that Jepsen is entitled only to credit against his current sentence for time that he spent "in an alternative jail facility or a residential treatment facility," erred in ways sufficiently significant to warrant further review by this Court.

First, the Court of Appeals opinion violates the rule of *North Carolina v. Pearce*, 395 U.S. 711, 719 (1969), under which 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."

Second, the Court of Appeals opinion puts the law of this State at odds with the holdings (or implications) of all of the United States Courts of Appeals that have addressed this issue, likely rendering this case cert.-worthy if the Court of Appeals opinion is allowed to stand. *Cf. United States v. Martin*, 363 F.3d 25 (1st Cir. 2004); *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 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).

Finally, the Court of Appeals decision corrupts the analysis applicable to the Double Jeopardy Clause's prohibition on double punishments, in a way that is likely to confuse the law in this State if the Court of Appeals opinion is allowed to stand. The prohibition on double punishments "ensure[s] that the total punishment does not exceed that authorized by the legislature." *Jones v. Thomas*, 491 U.S. 376, 381 (1989). The analysis applicable to a double punishment claim thus requires the court facing such

a claim to determine "the total punishment" authorized by the legislature for the offense at issue. But here, the Court of Appeals transformed the analysis from one asking what total punishment the General Assembly authorized for Jepsen's offense of conviction, into an analysis asking what the General Assembly "intend[ed] in *this situation*." *See State v. Jepsen*, No. 16-0203, Slip Op. at 10 (Iowa Ct. App. Apr. 5, 2017). And under this incorrect analysis, the Court of Appeals transformed the applicable inquiry from "what punishment did the legislature authorize for the offense of conviction" to "what provision did the legislature make for granting credit for time served." This analysis is obviously contrary to well-established Double Jeopardy Clause law, as it allows a criminal defendant to be sentenced to a substantially greater punishment than the legislature authorized for an offense, so long as the imposition of this greater punishment – which, as here (where Jepsen served over four years of probation *and* will serve a ten year prison term, while the sentencing statute provides only for the ten year prison term), unquestionably exceeds the penalty statute enacted by the legislature – comports with the rules for granting credit for time served.

As such, this Court should grant Jepsen's application for further review under Iowa R. App. P. 6.1103(1)(b)(1), (2), and (4).

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. In an opinion issued on April 5, 2017, the Court of Appeals conditionally affirmed the district court's order, and remanded with instructions for the district court to conduct a hearing to determine whether Jepsen spent any of his time on probation in an alternative jail facility or a community corrections residential treatment facility, and to credit any such time against Jepsen's prison sentence. *See Jepsen*, Slip Op. at 12.

Jepsen seeks further review by this Court.

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 offenses.

ARGUMENT

A. The Rule of *Pearce*.

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 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.

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.

B. 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]

Accordingly, the *Pearce* Rule requires that a defendant whose first probation sentence if 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.*

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[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 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 of these problems by holding that *Pearce* requires a one-day-for-one-day credit apply in every case, including this one. But even if this Court concludes that something less than one-for-one credit is required, some credit is required, and in such case this Court should determine what that requirement is.

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 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).

C. 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 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 Arix. 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.”).

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.

D. The *Pearce* Rule Applies Here.

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.

E. The Court of Appeals' Opinion So Confuses Iowa Law on the Double Jeopardy Clause's Prohibition on Double Punishments that Further Review Is Warranted.

The Court of Appeals has erred by conflating two distinct legal principles. The Court of Appeals conflated (1) the question whether a sentence violates the double jeopardy clause, and (2) the question what is the remedy for a violation of the double jeopardy clause. Perhaps more precisely, the Court of Appeals conflated (1) what the legislature intended to be the punishment for a crime (which is controlling on the double jeopardy issue – a punishment is not "double," for Double Jeopardy Clause purposes, if it is the punishment that the legislature intended be imposed); and (2) what the legislature intended be the credit granted to a criminal defendant against a second sentence, for time that the criminal defendant spent serving a prior, illegal sentence for the same offense (which has no relevance to the Double Jeopardy Clause analysis).

Here, it is indisputable that the legislature did not intend that the punishment for the offense of conviction here be *both* ten years' imprisonment *and* the years of probation that Jepsen served under his prior, illegal sentence. Rather, the legislature, through the sentencing provisions of the Code relevant here, intended that the punishment for Jepsen's offense be *only* ten years' imprisonment. This ends the inquiry: since the

punishment that Jepsen actually endured – the years of probation he already served, *plus* the years of incarceration that he is presently serving – exceeds what the legislature intended be the punishment for Jepsen's offense, then Jepsen's punishment violates the Double Jeopardy Clause's prohibition on double punishment unless Jepsen is given credit against his sentence of incarceration for the time that he already spent on probation.

The Court of Appeals erred by failing to conduct this analysis, and instead conducting a similar analysis applied to a different question – a question that has no relevance to the double jeopardy inquiry that controls in this case. Rather than determining what punishment the legislature intended to impose for Jepsen's offense here, the Court of Appeals instead sought to determine what the legislature intended to be the credit against a second sentence that a criminal defendant like Jepsen should receive for time he spent serving a prior, illegal sentence. *See State v. Jepsen*, No. 16-0203, Slip Op. at 10 (Iowa Ct. App. Apr. 5, 2017).[2]

There is simply no support in any of the cases cited by the Court of Appeals or by the parties for such an analysis. Indeed, the Court of Appeals

[2] The Court of Appeals, in its opinion, noted correctly that neither party discussed in any brief Iowa Rule of Criminal Procedure 2.24(5)(b), which the Court concluded controls here. *Cf. Jepsen*, Slip Op. at 10. The Court of Appeals did not give the parties an opportunity to address, by way of supplemental briefing, *cf.* Iowa R. App. P. 6.901(4), the applicability of

opinion does not cite a single case where any court has ever considered, in analyzing a Double Jeopardy Clause double punishment issue, not what punishment the legislature intended for the offense of conviction, but rather what the legislature intended in terms of credit for time served.

That the Court of Appeals' analysis is incorrect is also apparent as a matter of logic. Under Court's reasoning, the legislature simultaneously intends *two different punishments* for every offense. As an example of the problems that arise from an application of this reasoning, where – as here – the legislature expressly states that the punishment for an offense is ten years' imprisonment, then the Court of Appeals would hold that the legislature intends a punishment for that offense of ten years' imprisonment in cases where the sentencing court imposes a legal sentence; *and* that the legislature *simultaneously* intends a punishment for *the same offense* of ten years' imprisonment, plus however much of a previously imposed illegal the defendant already severed at the time of resentencing, in cases like this one where the sentencing court first imposes an illegal sentence and then subsequently corrects it.

But the immediately preceding paragraph, with its suggestion that the Court of Appeals' reasoning requires that the legislature intended *only two*

Rule 2.24 here.

different punishments for the same offense, does not fully capture the problems with the Court's analysis. This is because, in reality, the Court's reasoning requires a holding that the legislature simultaneously intended *a nearly infinite* number of different punishments for the same offense. For a defendant sentenced to a proper, legal sentence, for exactly the same offense as Jepsen was convicted of here, the legislature intended a punishment of ten years' imprisonment. For a defendant like Jepsen, the legislature intended a punishment of ten years' imprisonment, plus the number of days that Jepsen spent on probation under his prior illegal sentence. For a defendant who was in precisely Jepsen's position, but was resentenced a day earlier, the legislature intended punishment of ten years' imprisonment, plus the number days that Jepsen spent on probation minus one. For a defendant who was sentenced two days earlier, the legislature intended ten years plus the number of days Jepsen spent on probation minus two. And so on, *ad infinitum*. Reasoning that allows such results – as the Court of Appeals' reasoning necessarily does – is repugnant to the Double Jeopardy Clause's prohibition against double punishments.

Finally, the flaw in the Court of Appeals' reasoning is apparent in light of the incentive that it creates for legislatures. If the Court of Appeals is correct, then all any legislature would have to do to avoid any defendant in

its jurisdiction from ever being given credit against a second sentence for time served on an earlier, illegal sentence, would be to pass a statute stating that it is the intention of the legislature that any defendant who receives an illegal sentence that is subsequently corrected be given no credit toward the corrected sentence for any time served under the prior, illegal sentence. And this would apply to prison sentences, as well – there is simply nothing in the Court of Appeals opinion that limits its analysis to cases involving probation sentences. Thus, for example, if the Court of Appeals is correct, and if the General Assembly of this State passed a statute like the one just described, then a defendant who serves nine years and three hundred sixty-four days on an illegal ten-year prison sentence, would receive no credit toward a subsequently imposed, corrected twenty-five-year prison sentence, and that result would not offend the Double Jeopardy Clause's prohibition on double punishments. The protections of the Double Jeopardy Clause cannot be so easily circumvented by a state legislature.

In sum, it is no exaggeration to state that the Court of Appeals opinion in this case eviscerates the Double Jeopardy Clause analysis that has been established for decades, by United States Supreme Court case law, by the case law propagated by the United States Courts of Appeals, and by the appellate courts of this State. The Court of Appeals opinion transforms the

analysis applicable to whether a sentence is impermissible double punishment, from an inquiry into what punishment the legislature intended for the offense of conviction, into an inquiry into what the legislature intended regarding the granting of credit for time already served.

CONCLUSION

For the foregoing reasons, Appellant Christopher Jepsen respectfully requests that this Court grant his application for further review, vacate the Court of Appeals decision and the sentence imposed by the district court, and remand for further calculation of the credit against his sentence of incarceration that Jepsen is entitled to for time he previously served on probation.

Respectfully submitted,

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BY: _/s/ Zachary S. Hindman_____

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CERTIFICATE OF SERVICE

The undersigned certifies a copy of this document was served on the 25th day of April, 2017, upon the following persons, by EDMS and United States Mail, respectively:

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The undersigned further certifies that this document was sent to the Clerk of the Supreme Court, Iowa Judicial Branch, 1111 East Court Avenue, Des Moines, Iowa 50319, on the 25th day of April, 2017, 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 5,268 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 25th day of April, 2017.

_/s/ Zachary S. Hindman_____

IN THE COURT OF APPEALS OF IOWA

No. 16-0203
Filed April 5, 2017

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTOPHER JEPSEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Crawford County, Steven J. Andreasen, Judge.

A defendant challenges his sentence of incarceration, claiming a double jeopardy violation. **SENTENCE CONDITIONALLY AFFIRMED, REMANDED WITH INSTRUCTIONS.**

Zachary S. Hindman of Mayne, Arneson, Hindman, Hisey & Daane, Sioux City, for appellant.

Thomas J. Miller, Attorney General, and Louis S. Sloven, Assistant Attorney General, for appellee.

Considered by Potterfield, P.J. and Doyle and Tabor, JJ.

TABOR, Judge.

For more than four years, Christopher Jepsen was mistakenly allowed to serve probation following his conviction for a forcible felony. In 2016, on the State's motion, the district court corrected the illegally lenient sentence and ordered Jepsen to serve a prison term not to exceed ten years. In this appeal, Jepsen contends the court's failure to credit his corrected sentence for the time he served on probation violated double jeopardy.

Because the multiple-punishment protection under the Double Jeopardy Clause turns on legislative intent, we must examine whether Jepsen was entitled to a sentencing credit under Iowa Rule of Criminal Procedure 2.24(5)(b).[1] Finding our examination hindered by a limited record, we conditionally affirm the corrected sentence and remand with directions for the district court to determine whether Jepsen served any of his probationary sentence in a residential treatment facility or an alternative jail facility. Under rule 2.24(5)(b), Jepsen is entitled to "full credit" for any time spent in "custody" in those facilities, but he is not entitled to credit for time otherwise spent under supervised probation.

I. Facts and Prior Proceedings

On August 24, 2011, a jury convicted twenty-five-year-old Jepsen on two counts of third-degree sexual abuse, class "C" felonies. On count I, the jury

[1] Article V, section 14 of the Iowa Constitution charges our legislature with the duty to provide "a general system of practice" for the state courts. *Iowa Civil Liberties Union v. Critelli*, 244 N.W.2d 564, 568 (Iowa 1976). In turn, the legislature has endowed our supreme court with the authority to prescribe rules of criminal procedure. *See* Iowa Code § 602.4201(3)(b) (2015). The supreme court's authority is subject to rulemaking procedures established by the legislature. *Id.* § 602.4202. The rules have the same force and effect as statutes. *State v. Mootz*, 808 N.W.2d 207, 221 (Iowa 2012). And the courts are obligated to interpret the rules "pursuant to their original intent." *See State v. Liddell*, 672 N.W.2d 805, 816 (Iowa 2003) (Cady, J., specially concurring).

found Jepsen performed a sex act in 2010 with E.G., who was fourteen or fifteen years old at the time. *See* Iowa Code § 709.4(2)(c) (2009). On count II, the jury decided Jepsen performed a sex act in 2010 with H.B., who was thirteen years old. *See id.* § 709.4(2)(b). On September 11, 2011, the court entered judgment and sentenced Jepsen to indeterminate terms not to exceed ten years on each count, to run consecutively for an indeterminate twenty-year term. Under section 907.3(3), the court then suspended the prison sentences, placing Jepsen on probation for five years to the Third District Department of Correctional Services upon the terms and conditions required by his probation officer. Among those conditions, the sentencing order recognized Jepsen could be placed in a residential treatment facility at the probation officer's discretion.

In October 2014, the State filed an application to revoke Jepsen's probation due to his admitted use of the internet to obtain pornographic images of children. While investigating the probation violation, the State noticed the illegality of Jepsen's original sentence on count II. Specifically, because H.B. was thirteen years old, this conviction was a forcible felony, and a person convicted of a forcible felony was not eligible for a suspended sentence. *See id.* § 702.11. In December 2015, the State filed a motion to correct the illegal sentence. The court ordered an updated presentence investigation (PSI) report. Jepsen resisted the motion, arguing double jeopardy should prevent the court from correcting his sentence at such a late date and also requesting "credit for his time served on probation from 9/26/11 through the present"—but trial counsel did not link the double-jeopardy argument to the credit request as Jepsen now does on appeal.

At the hearing on the State's motion, the court found the original sentence on count II was illegal and void because the sentencing court did not have the authority to suspend the sentence and order probation. The court then told the parties it "would stand by the general rule that double jeopardy arguments generally cannot be applied when the sentence is void."

The court conducted a full resentencing hearing, noting it had all sentencing options available to it. The court referenced the updated PSI report and the materials filed by the State for an anticipated revocation hearing. The court's January 29, 2016 corrected judgment and sentencing order voided the conflicting portions of the original sentence and imposed indeterminate ten-year terms of incarceration on each count, to run concurrently. The court gave Jepsen credit for time served in the county jail, but it did not grant his request for credit for time served on probation under section 907.3(3) and *Anderson v. State*, 801 N.W.2d 1, 4 (Iowa 2011). The court explained: "[F]rom a procedural standpoint, this is a new sentence. Mr. Jepsen is not being sent to prison based upon a revocation of that probation under section 907.3[(3)], which was applied by the *Anderson* case. That is where the credit is received following a revocation of probation." Based on the new sentence, the court dismissed the State's application for probation revocation as moot on February 1, 2016.

Jepsen now appeals, claiming his trial attorney rendered ineffective assistance "because she failed to argue the Double Jeopardy Clause . . . 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."

II. Scope of Review/Preservation of Error

Jepsen is challenging the constitutionality of his corrected sentence. We review double-jeopardy claims de novo. *State v. Stewart*, 858 N.W.2d 17, 19 (Iowa 2015). Jepsen raises the claim as ineffective assistance of counsel. But the State acknowledges we may directly review Jepsen's constitutional challenge to the corrected sentence because the illegality of a sentence may be raised at any time under Iowa Rule of Criminal Procedure 2.24(5)(a). *See State v. Bruegger*, 773 N.W.2d 862, 872 (Iowa 2009) (holding a claim "that the sentence itself is inherently illegal, whether based on constitution or statute . . . may be brought at any time"). Accordingly, we need not consider the effectiveness of trial counsel's performance.

III. Analysis

It is important to note Jepsen does not dispute that his original sentence was illegal and subject to correction under rule 2.24(5)(a). *See State v. Allen*, 601 N.W.2d 689, 690 (Iowa 1999); *State v. Ohnmacht*, 342 N.W.2d 838, 843 (Iowa 1983). Neither does he argue that he had discharged his sentence, making it too late for a corrected sentence.[2] When a court corrects an illegal sentence, our rules provide the defendant "shall receive full credit for time spent in custody under the sentence prior to correction." Iowa R. Crim. P. 2.24(5)(b). In this appeal, Jepsen contends he was entitled to credit for the time he spent on probation before the January 2016 resentencing hearing.

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[2] Where a defendant has discharged his or her sentence, double jeopardy principles prevent the court from modifying the sentence to include an additional probationary term. *State v. Houston*, No. 09-1623, 2010 WL 5050564, at *4 (Iowa Ct. App. Dec. 8, 2010).

Jepsen premises his demand for a sentencing credit on the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.[3] Among other protections, the Double Jeopardy Clause prohibits "multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *narrowed on other grounds by Alabama v. Smith*, 490 U.S. 794, 795 (1989). In the context of multiple punishments, the purpose of the Double Jeopardy Clause is "limited to ensuring that the total punishment [does] not exceed that authorized by the legislature." *Jones v. Thomas*, 491 U.S. 376, 381 (1989) (citation omitted); *see also Missouri v. Hunter*, 459 U.S. 359, 368 (1983) ("Where Congress intended, as here, to impose multiple punishments, imposition of such sentences does not violate the Constitution." (citation omitted)). Under *Pearce*, "the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense." 395 U.S. at 718–19. *Pearce* also advised "the same principle obviously holds true whenever punishment already endured is not fully subtracted from any new sentence imposed." *Id.* at 718. The crediting principle from *Pearce* has been applied to a new sentence imposed for the same conviction after a successful challenge by the prosecution. *See United States v. Martin*, 363 F.3d 25, 37 (1st Cir. 2004); *United States v. McMillen*, 917 F.2d 773, 777 (3d Cir. 1990).

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[3] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V. The Fifth Amendment applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794–96 (1969). We note the Iowa Constitution also has a double jeopardy clause, but its protections are limited to defendants who have been acquitted. *See* Iowa Const. art. I, § 12 ("No person shall after acquittal, be tried for the same offence.").

The State concedes if Jepsen "served time in prison, in jail, or under some other level of restraint comparable to incarceration" he would likely receive credit against his new sentence. But the thorny question is whether Jepsen is entitled to receive credit for his time served on probation. Probation is a form of punishment—on this point, Jepsen and the State agree. *See Toyosaburo Korematsu v. United States*, 319 U.S. 432, 435 (1943) (describing probation as "an authorized mode of mild and ambulatory punishment" intended as a "reforming discipline"). But the State says Jepsen is not entitled to credit for his probationary sentence because "the restrictions imposed cannot be equated with incarceration," citing *Trecker v. State*, 320 N.W.2d 594, 595 (Iowa 1982) (ruling defendant, after probation revocation, was not entitled to sentencing credit for time spent on probation as no statute authorized credit), *superseded by statute*, 1996 Iowa Acts ch. 1193, § 19 (codified as amended at Iowa Code § 907.3(3) (1997)) (providing sentencing credit upon probation revocation where defendant was committed to the judicial district department of correctional services for supervision or services), *as recognized in Anderson*, 801 N.W.2d at 4–5 (granting credit for time served subject to electronic monitoring and home supervision), *superseded by statute*, 2012 Iowa Acts ch. 1138, § 91 (codified as amended at Iowa Code § 907.3 (2013)),[4] *as recognized in State v. Walden*, 870 N.W.2d 842, 845 (Iowa 2015).

[4] As of the 2012 amendment, Iowa Code § 907.3(3) now provides:

> [T]he court may suspend the sentence and place the defendant on probation upon such terms and conditions as it may require including commitment to an alternate jail facility or a community correctional residential treatment facility to be followed by a period of probation . . . or commitment of the defendant to the judicial district department of correctional services for supervision or services . . . at the level of

Jepsen relies on *Martin* for the proposition that because a probationary sentence is "a punishment already exacted" for his offense, it must be credited against the new sentence of imprisonment imposed after the State's motion to correct his illegal sentence. *See* 363 F.3d at 37. In *Martin*, the First Circuit Court of Appeals held while probation and imprisonment are "different types of sentences, each restricts a defendant's liberty (albeit to varying degrees) over a specific period of time, allowing the sentencing court to compare the degree and length of restriction when determining the proper amount of credit." *Id.* at 38. The *Martin* court remanded for resentencing under the federal sentencing guidelines, stating "'fully crediting' probation against a subsequent sentence of imprisonment, *Pearce,* 395 U.S. at 717–18, does not require a day-to-day offset against time to be served in prison" and holding the amount of credit depended upon the specific conditions of the defendant's probation. *Martin*, 363 F.3d at 39–40.

Jepsen's enthusiasm for the *Martin* opinion wanes at the point of the remedy. He argues: "[I]t 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." Jepsen maintains *Pearce* requires "full credit" for the time he spent on probation under his first sentence. 395 U.S. at 717–18.

The State balks at Jepsen's suggestion that he should receive credit on his prison term at a one-to-one ratio for every day spent on probation, believing

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> sanctions [the] department determines to be appropriate . . . . A person so committed who has probation revoked shall not be given credit for such time served. However, a person committed to an alternate jail facility or a community correctional residential treatment facility who has probation revoked shall be given credit for time served in the facility.

instead the difficulty in crafting a non-arbitrary formula for subtracting some fraction of the days on probation from the prison sentence "illustrates the folly of *Martin*." The State prefers the approach taken by the Illinois Supreme Court in *People v. Whitfield*, which held "a defendant sentenced to probation, and then sentenced to imprisonment for the same offense, is not subjected to an unconstitutional second punishment for double jeopardy purposes and, therefore, is not entitled to credit for time spent on probation." 888 N.E.2d 1166, 1176 (Ill. 2007). The *Whitfield* court opined, under Illinois law, "probation is not a 'punishment' in the same sense as imprisonment is a punishment." *Id*. (noting legislature recognized a distinction by statute mandating credit for time spent in prison but instructing credit for time spent on probation was discretionary).

The parties' competing positions offer us an all-or-nothing solution—*either* remand for the district court to subtract more than four years from Jepsen's indeterminate ten-year prison sentence to compensate for the time he spent on supervised probation, even though such probation was a much less demanding punishment than prison, *or* affirm and leave Jepsen with zero days of credit, even though he endured the conditions of his probation for nearly the entire five-year term. Neither position is wholly satisfying. The first option undercuts the length of the prison sentence our legislature intended for the forcible felony of sexual abuse against a thirteen-year-old child. The second option appears to ignore the full-credit principle from *Pearce*, 395 U.S. at 718–19. To reconcile these positions, we turn to our case law interpreting the prohibition against multiple punishments.

We implement the principles of the Double Jeopardy Clause as developed in *Pearce* and its progeny by asking: what punishment did our legislature intend in this situation? *See State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994) ("[T]he question of what punishments are constitutionally permissible is no different from the question of what punishments the legislature intended to be imposed." (citation omitted)). In other words, we must ask whether the total punishment imposed on Jepsen exceeded the punishment authorized under Iowa law. *See id.* Although the parties do not discuss rule 2.24(5)(b), it provides the foundation for determining what credit the legislature intended the courts to provide to a defendant whose illegal sentence has been corrected. *See* Iowa R. Crim. P. 2.24(5)(b). The rule directs courts to provide "full credit for time spent in custody under the sentence prior to correction." *Id.* Our supreme court has interpreted "custody" in this rule to mean "being in jail or a detention facility," i.e., "institutional custody," as opposed to being in police custody. *State v. Rodenburg*, 562 N.W.2d 186, 188 (Iowa 1997) (stating this rule "deals with credit for time served after sentence and before correction of a sentence").

The concept of institutional custody is also found in the statute governing probation revocation. *See* Iowa Code § 907.3(3) (2013). We believe the legislative intent would be the same when crediting a defendant whose probation is revoked as when resentencing a defendant upon a belated discovery that he was not entitled to probation in the first instance. At the resentencing hearing, Jepsen asked for *Anderson* credit, referring to our supreme court's decision interpreting section 907.3(3) (2011). *See* 801 N.W.2d at 4. The *Anderson* court held a convicted sex offender incarcerated after revocation of his probation was

entitled to credit against his prison sentence for time spent living at home under supervised probation wearing an electronic monitoring device. *Id*. at 5 (interpreting post-*Trecker* amendment to section 907.3(3) as allowing sentencing credit for a revoked probationary term where the district's department of correctional services provided supervision or services). Critically, after *Anderson* was filed, the legislature again amended section 907.3(3), this time providing a person *shall not* be given sentencing credit for probation supervised by the district's department of correctional services. *See* 2012 Iowa Acts ch. 1138, § 91 (codified as amended at Iowa Code § 907.3(3) (2013)). But the 2012 amendment made an exception—"a person committed to an alternate jail facility or a community correctional residential treatment facility who has probation revoked shall be given credit for time served in the facility." *See id*. The legislative change essentially equated the credit allowed for probation revocation with the credit allowed for "custody" upon correction of an illegal sentence. *See Rodenburg*, 562 N.W.2d at 188 (discussing "custody" credit and "institutional credit"). *Compare* Iowa Code § 907.3(3) (2013) (probation revocation), *with* Iowa R. Crim. P. 2.24(5)(b) (illegal sentence "custody" credit).

Accordingly, when the court corrected Jepsen's sentence in January 2016, both section 907.3(3) (revocation) and rule 2.24(5)(b) (correction) authorized sentencing credit only for probationary sentences served in an alternative jail facility or a residential treatment facility. *See Crouch v. State*, No. 12-1826, 2013 WL 4011010, at *3 (Iowa Ct. App. Aug. 7, 2013) ("The legislature's deliberate decision [in 2012] to afford sentencing credits for probationary periods in residential facilities indicates a view of placement in such facilities as a punitive

correctional measure.”). Based on these expressions of legislative intent, we find the Double Jeopardy Clause requires an award of sentencing credit for any time Jepsen has spent living in those more restrictive facilities but not for time he otherwise has spent on supervised probation outside of such a facility.

Finally, our record on appeal does not include a complete record from the district’s department of correctional services showing all the conditions of Jepsen’s probation imposed at the discretion of probation officers between September 2011 and January 2016. Thus, we conditionally affirm Jepsen’s sentence and remand for a hearing where the parties will provide that missing information to the district court. Any days spent by Jepsen in an alternate jail facility or a community correctional residential treatment facility shall be fully credited against his corrected prison sentence by the district court. We do not retain jurisdiction.

SENTENCE CONDITIONALLY AFFIRMED, REMANDED WITH INSTRUCTIONS.