IN THE SUPREME COURT OF IOWA

No. 16–0203

Filed February 16, 2018

STATE OF IOWA,

Appellee,

vs.

CHRISTOPHER SCOTT JEPSEN,

Appellant.

On review from the Iowa Court of Appeals.

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

Appellant seeks further review from a court of appeals decision awarding him credit against a corrected prison sentence only for time spent on probation in an alternate jail facility or a community correctional residential treatment facility. **DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT ORDER REVERSED AND CASE REMANDED WITH INSTRUCTIONS.**

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

Thomas J. Miller, Attorney General, Louis S. Sloven, Assistant Attorney General, Roger Sailer, County Attorney, and Ian McConeghey, Assistant County Attorney, for appellee.

CADY, Chief Justice.

A criminal defendant was convicted of two counts of sexual abuse in the third degree. Although one count constituted a forcible felony, the district court suspended the defendant's prison sentence and instead ordered a five-year term of probation. After the defendant served four years, four months, and four days of probation, the district court vacated the suspended sentence for illegality and resentenced the defendant to two concurrent ten-year terms of incarceration. The court declined to credit the time spent on probation against the new term of imprisonment.

On our review of a decision by the court of appeals, we find the failure to award credit for time spent on probation pursuant to the initial sentence violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Double jeopardy prohibits imposing multiple punishments for the same offense. When an initial sentence is voided for illegality, any punishments already endured must be credited against the corrected sentence. We hold that all time spent on probation pursuant to a voided sentence must be fully credited against a corrected sentence of incarceration.

I. Factual Background and Proceedings.

On August 24, 2011, following a jury trial, Christopher Jepsen was convicted of one count of sexual abuse in the third degree, in violation of Iowa Code section 709.4(2)(*c*) (2009), and one count of sexual abuse in the third degree, in violation of Iowa Code section 709.4(2)(*b*). The victim of the crime described in the second count was thirteen years old, which made the crime a forcible felony under section 702.11. On September 23, 2011, the district court sentenced Jepsen to two ten-year periods of incarceration, but suspended the sentences and placed him on

probation for five years. The conditions of probation included completing a cognitive empathy course, maintaining consistent employment, and participating in any rehabilitative programs that his probation officer deemed necessary, such as placement in a residential treatment facility.

On October 28, 2014, the State applied to revoke Jepsen's probation. It argued Jepsen violated the terms and conditions of his probation, based on his admission to his probation officer that he had been viewing pornographic images of children. Yet, the application to revoke Jepsen's probation never came before the court for a hearing. Instead, further investigation into Jepsen's probation violation revealed a potential illegality in his initial suspended sentence.

On December 21, 2015, the State filed a motion to correct Jepsen's illegal sentence pursuant to Iowa Court Rule 2.24(5). The State argued Jepsen was convicted of a forcible felony and was therefore ineligible for a suspended sentence under Iowa Code section 907.3. Jepsen's counsel raised a number of arguments, including that if the court imposed a new sentence, Jepsen should be awarded "credit for his time served on probation from 9/26/11 through the present."

On January 29, 2016, the district court concluded it had lacked authority to suspend Jepsen's prison sentence in 2011. Accordingly, it found the sentence was illegal and vacated it. The court then conducted a new sentencing hearing and sentenced Jepsen to two concurrent ten-year periods of incarceration. The district court did not suspend either sentence and only awarded credit for time served in the county jail pursuant to Iowa Code section 903A.5. The court determined credit for probation was not applicable to a new sentence of incarceration. As of the date of resentencing, Jepsen had served four years, four months, and four days of his five-year probation sentence.

Jepsen appealed the new sentence. He claimed his counsel was ineffective for failing to argue that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution required the time Jepsen spent on probation be credited against his corrected sentence. We transferred the case to the court of appeals.

The court of the appeals addressed the issue by considering whether the total punishment imposed exceeded the punishment intended by the legislature. It found the legislature only intended to award credit for days on probation spent in an alternate jail or community correctional residential treatment facility. Consequently, the court remanded the case to the district court to determine whether Jepsen spent any time in an alternate jail or residential treatment facility and, if so, instructed the district court to credit such days against his new prison sentence. Jepsen sought, and we granted, further review.

II. Standard of Review.

Jepsen raises a double jeopardy challenge to his corrected sentence through an ineffective-assistance-of-counsel claim. We review double jeopardy claims de novo. *State v. Stewart*, 858 N.W.2d 17, 19 (Iowa 2015). An illegal sentence may be corrected at any time. Iowa R. Crim. P. 2.24(5)(*a*). Therefore, if Jepsen's corrected sentence violates double jeopardy, we will not review counsel's effectiveness.

III. Analysis.

A. Double Jeopardy Prohibits Multiple Punishments. The Fifth Amendment to the United State Constitution guarantees no person shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. The principle is enforceable against the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062 (1969).

Double jeopardy's protections have ancient roots. During the sixth century, the Digest of Justinian instructed that "the governor should not permit the same person to be again accused of a crime of which he had been acquitted." Jay A. Sigler, *A History of Double Jeopardy*, 7 Am. J. Legal Hist. 283, 283 (1963) (quoting Digest of Justinian, Book 48, Title 2, Note 7, as translated in Scott, *The Civil Law* (1932), XVII). William Blackstone wrote in his seminal *Commentaries* that

> the plea of *auterfoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence.

4 William Blackstone, *Commentaries on the Laws of England* 329 (Legal Classics Library ed. 1983). Indeed, in 1641, the Massachusetts Body of Liberties—the first legal code in the New World—ensured, "No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse." *The Body of Liberties of 1641* ¶ 42, in *A Bibliographical Sketch of the Laws of the Massachusetts Colony from 1630 to 1686* (William H. Whitmore ed. 1890).

Double jeopardy, as developed by the United States Supreme Court, encompasses three primary guarantees: "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, 89 S. Ct. 2072, 2076 (1969) (footnotes omitted), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 798, 109 S. Ct. 2201, 2204 (1989). Double jeopardy, therefore, restrains prosecutors from continuously trying defendants until the right theory or jury produces a conviction, as well as restrains the judiciary

from exceeding the bounds of its authority and imposing greater punishments than intended by the legislature.

The Supreme Court in *Ex Parte Lange* first recognized that double jeopardy prohibits courts from imposing a second punishment "in the same court, on the same facts, for the same statutory offence." 85 U.S. (18 Wall.) 163, 168 (1873). In *Lange*, the defendant was convicted of stealing government mailbags, an offense punishable by one year in prison *or* a $200 fine. *Id.* at 164. However, the trial court erroneously sentenced the defendant to one year in prison *and* a $200 fine. *Id.* After the defendant had paid the fine in full and served five days in prison, the court recognized its error and vacated the original sentence. *Id.* At resentencing, it ordered the defendant to serve one year in prison. *Id.* The Supreme Court reversed, finding the corrected sentence violated double jeopardy. *Id.* at 175.

In deciding the case, the Court observed the constitutional principle of double jeopardy "was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." *Id.* at 173. "For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict?" *Id.* Thus, once the fine was paid as required under the first sentence, the defendant had served one of the two permissible statutory sentencing options. As a result, the second sentence would serve to punish him twice if imposed. The Court emphasized that the Double Jeopardy Clause was not animated by the threat of being twice found guilty, but rather the threat of being twice punished for the same act. *Id.* Furthermore, double jeopardy's protections were not curtailed in any way by the intention of the

sentencing court in both sentences to impose the statutory alternative of imprisonment.

In *Pearce*, the Court again examined the boundaries of imposing multiple punishments for the same underlying criminal act. The Court reviewed the sentence of William Rice, who was convicted of burglary and served two and a half years in prison before his conviction was overturned. 395 U.S. at 714, 89 S. Ct. at 2075. Rice was retried, convicted again, and resentenced to twenty-five years in prison with no credit for the two and a half years he served under the initial sentence. *Id.* The Court reversed the new sentence, holding the Fifth Amendment "absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense." *Id.* at 718–19, 89 S. Ct. at 2077 (footnote omitted). The Court aptly noted that

> [i]f, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is reconvicted, those years can and must be returned—by subtracting them from whatever new sentence is imposed.

Id. at 719, 89 S. Ct. at 2077. Thus, the Double Jeopardy Clause was applied, as in *Lange*, to give the defendant credit for the sentence served against the new sentence imposed.

Although *Pearce* dealt with a defendant who was retried and reconvicted after his initial sentence was deemed unconstitutional, we believe the mandate is not limited to its facts. Indeed, the Court explained when an initial conviction has been overturned, the defendant's sentence has "been wholly nullified and the slate wiped clean." *Id.* at 721, 89 S. Ct. at 2078. However, the Court took care to acknowledge that this "premise" is an "unmitigated fiction" with respect

to "whatever punishment has actually been suffered under the first conviction." *Id.* Consequently, if a defendant's initial conviction is overturned because the defendant was deprived of a constitutionally required procedure or if a defendant's initial sentence is voided for illegality, it remains an "unmitigated fiction" to find that the punishment endured has been "wiped clean." Therefore, we conclude that when a defendant's original sentence is voided for illegality and the defendant is subsequently resentenced without being again convicted, *Pearce* requires courts to fully credit any punishment already endured against the new sentence.

Awarding credit for punishments already endured is in line with double jeopardy's guarantee that a defendant's "total punishment [does] not exceed that authorized by the legislature." *United States v. Halper*, 490 U.S. 435, 450, 102 S. Ct. 1892, 1903 (1989), *abrogated on other grounds by Hudson v. United States*, 522 U.S. 93, 95, 118 S. Ct. 488, 491 (1997). Because of this protection, a court must first determine whether the legislature intended a criminal act to be cumulatively punished before sentencing a defendant under multiple statutory provisions for a single criminal transaction. *See Blockburger v. United States*, 284 U.S. 299, 303–04, 52 S. Ct. 180, 182 (1932). Such an inquiry guarantees "sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." *Jones v. Thomas*, 491 U.S. 376, 381, 109 S. Ct. 2522, 2525–26 (1989).

The Supreme Court in *Ohio v. Johnson* clarified the distinction between the two multiple-punishment inquiries. 467 U.S. 493, 104 S. Ct. 2536 (1984).

> In contrast to the double jeopardy protection against multiple trials, the final component of double jeopardy—protection against cumulative punishments—is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature. Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, the question under the Double Jeopardy Clause whether punishments are "multiple" is essentially one of legislative intent. But where a defendant is retried following conviction, the Clause's third protection ensures that after a subsequent conviction a defendant receives credit for time already served.

Id. at 499, 104 S. Ct. at 2540–41 (1984) (footnote omitted) (citations omitted).

In sum, the legislature has the substantive power to define criminal activity and its attendant punishment. If the legislature directs, a defendant may be sentenced pursuant to multiple criminal statutes. However, when a defendant has been convicted and is subsequently resentenced, the Constitution requires the defendant be awarded credit for punishments already endured under the original sentence. The legislature's substantive powers do not override a defendant's constitutional guarantee against being twice punished for the same conviction. As such, we do not look to whether the legislature intended a defendant to receive credit for his time served. Rather, we look to whether the defendant has in fact been punished and, if so, what credit the defendant should receive against the new sentence. Thus, in this case, we must look to see if Jepsen was punished when he was placed on probation and, if so, what credit he should receive for serving that sentence.

B. Probation Is Punishment. It is well-settled that probation is a form of punishment. "[A] probation order is 'an authorized mode of mild and ambulatory punishment' " and is " 'intended as a reforming discipline.' " *Korematsu v. United States*, 319 U.S. 432, 435, 63 S. Ct.

1124, 1126 (1943) (quoting *Cooper v. United States*, 91 F.2d 195, 199 (5th Cir. 1937)). "The probationer is not a free man, but is subject to surveillance, and to such restrictions as the court may impose." *Cooper*, 91 F.2d at 199. We have previously held "lifetime parole is a form of punishment," as "it increases the penalty for the defendant's crime." *State v. Lathrop*, 781 N.W.2d 288, 298 (Iowa 2010).

Other courts that have addressed this issue have easily concluded that probation is punishment for double jeopardy purposes. In *United States v. Martin*, the United States Court of Appeals for the First Circuit readily found that double jeopardy's crediting principle "applies to sentences of probation which, although not as harsh as imprisonment, are nonetheless 'punishments' imposed for the offenses of conviction." 363 F.3d 25, 37 (1st Cir. 2004). Similarly, in *United States v. McMillen*, the Third Circuit vacated a defendant's partially served three-year probation sentence and instructed that the *Pearce* credit requirement was "equally applicable" to the defendant's resentencing. 917 F.2d 773, 774, 776 (3d Cir. 1990). Finally, in *Kennick v. Superior Court of California*, the Ninth Circuit concluded double jeopardy's protections contemplate probation, as probation imposes "a moderately intrusive regime of government supervision and regulation." 736 F.2d 1277, 1282 (9th Cir. 1984). The court further stated,

> In this case, as in *Pearce*, the defendant was subjected to punishment as the result of a mistake to which the government was a party. In *Pearce*, the offending governmental entity was the court; here, it is the Probation Department. In both cases, the government has been permitted to correct its mistake and proceed. But, in both instances, the Constitution requires that the defendant not be made to suffer as a result of a mistake in which the government participated. Consequently, appellant, like the defendant in *Pearce*, must be credited for time already served.

Id. at 1283.

Probation is a set of conditions exacted by a court of law as a consequence for the defendant's criminal conduct. Even though it is not the most restrictive means of punishment, the liberty of a probationer is nevertheless affirmatively restrained throughout the term of probation. Jepsen, for example, was ordered to complete a cognitive empathy course and "maintain gainful and full-time employment at a lawful occupation unless excused by [a] probation officer for schooling, training, or other acceptable reasons." If Jepsen's probation officer deemed it necessary, Jepsen would be required to enter a "Residential Treatment Facility (and follow all rules of said facility and successfully complete the program)." Jepsen was also ordered to register as a sex offender, obtain a sex offender evaluation, and comply with "any and all sex offender treatment." The requirements associated with the sex offender registry are substantial.[1] Finally, Jepsen was ordered to "participate in any other programs deemed necessary for his rehabilitation by his probation officer." On top of these specific mandates, Jepsen was required to abide by all of the general probation requirements, including regular meetings with his probation officer.

A probationer restrained by these terms unquestionably experiences "mild and ambulatory punishment." *Korematsu*, 319 U.S. at 435, 63 S. Ct. at 1126 (quoting *Cooper*, 91 F.2d at 199). As such, the rationale of *Pearce* is fully applicable. The time spent on probation,

[1]*See, e.g.*, Iowa Code § 692A.104 (2011) (offender must notify sheriff of any information or residence changes); *id.* § 692A.111 (offender commits an aggravated misdemeanor for the first registry violation and class "D" felony for any subsequent offense); *id.* § 692A.113 (offender is subject to a number of exclusion zones and employment restrictions); *id.* § 692A.114 (offender is subject to residency restrictions); *id.* § 692A.121 (offender's personal information is published on sex offender website).

either within a residential treatment facility or otherwise subject to the conditions and surveillance of the judicial district department of correctional services, cannot be returned to a probationer. Of course, if a probationer fails to abide by the conditions of probation, the State is free to seek revocation. Because Jepsen spent four years, four months, and four days on probation prior to resentencing, we must now determine how to credit this restraint under the principle of double jeopardy against his new sentence of incarceration.

C. Credit for Time Spent on Probation. The State argues Jepsen should not receive a credit against a new sentence of incarceration for the time he was on probation because the nature of probation is dissimilar from incarceration, and such a credit would permit defendants like Jepsen to "escape any *real* punishment." While the argument seeks to draw the ultimate punishment in line with the punishment intended under the statute, the question is whether this approach conforms to the constitutional construct at issue.

Some courts have attempted to craft standards to calculate the appropriate credit owed to a defendant who has served time on probation prior to being resentenced to a term of incarceration. In *Martin*, the First Circuit concluded "the proper means for crediting probation, including home detention, against imprisonment is a downward departure by the district court upon remand." 363 F.3d at 39. The court instructed that "[t]he amount of any departure should depend on the specific conditions of Martin's probation and the effect of a sentence reduction on the underlying purposes of the" federal sentencing guidelines. *Id.* However, the court cautioned against awarding day-for-day credit, as such a sentence "would be too lenient to represent the punishment that Congress intended." *Id.* at 39–40. Moreover, the court instructed that

any period a defendant spent "on probation after his period of home detention should reduce any new sentence of imprisonment to an even lesser degree, reflecting its less restrictive conditions." *Id.* at 40.

In *United States v. Derbes*, the United States District Court for the District of Massachusetts declined to create a uniform formula for calculating credit and, instead, found the question should be resolved by considering "all of the circumstances of the case, including those that are personal to the defendant." No. CR NO. 02–10391–RGS, 2004 WL 2203478, at *2 (D. Mass. Oct. 1, 2004). In applying this standard, the court weighed

> the conditions of the sentence itself, . . . Derbes' remorse, his mental fragility, his evident anguish at the prospect of having to twice face the prospect of imprisonment, his charitable works in the Quincy community, and his role in reviving a business on which some thirty people depend for their livelihoods.

Id. The court concluded the defendant's new term of imprisonment should be reduced by six months to account for the prior nine months of home detention and seventeen months of probation. *Id.*

We acknowledge that many reasons can be articulated to support a rule that would recognize less than full credit, or no credit, for time served on probation. Yet, none of these reasons overcome the fundamental flaw of either approach, which is the failure to accept that probation is a form of punishment of constitutional dimension. Instead, the approaches accept the flaw as a means to protect against a sentencing outcome less severe to the defendant than the statute intended. The no-credit approach simply ignores probation's constitutional station and the less-than-full-credit approach uses a loose and arbitrary analysis to give the constitutional command lip service.

Both approaches implicitly guard against any benefit to the defendant from the application of the constitutional principles at stake. This is not, however, the approach of our constitutional analysis. Our Constitution is applied to protect the values and principles it gives to people, despite the cost to the state or a windfall to the defendant. *Cf. Mapp v. Ohio*, 367 U.S. 643, 659, 81 S. Ct. 1684, 1693–94 (1961) ("There are those who say . . . that under our constitutional exclusionary doctrine, '[t]he criminal is to go free because the constable has blundered.' In some cases this will undoubtedly be the result. But . . . 'there is another consideration—the imperative of judicial integrity.' The criminal goes free, if he must, but it is the law that sets him free." (footnote omitted) (citations omitted) (first quoting *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926); then quoting *Elkins v. United States*, 364 U.S. 206, 222 80 S. Ct. 1437, 1447 (1960))); *Weeks v. United* States, 232 U.S. 383, 393, 34 S. Ct. 341, 344 (1914) ("The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established [by] years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."); *State v. Cline*, 617 N.W.2d 277, 292 (Iowa 2000) ("The inevitable result of the Constitution's prohibition against unreasonable searches and seizures . . . is that police officers who obey its strictures will catch fewer criminals. . . . [That] is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, home and property against unrestrained governmental power." (alteration in original) (quoting Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365,

1393 (1983)), *abrogated on other grounds by State v. Turner*, 650 N.W.2d 601, 606 n.2 (Iowa 2001).

The guarantee under the Double Jeopardy Clause relevant to this case protects against the imposition of punishment greater than that intended by the legislature. Thus, the requirement of a credit under *Pearce* served to guard against the imposition of greater punishment. This constitutional mandate of a credit was not concerned with the risk that it might result in a lesser sentence, but served to guarantee against the risk of a greater sentence. Therefore, this guarantee necessarily accepts the risk of a lesser sentence to ensure the guarantee of no greater sentence. Justice can often be served by a context-specific inquiry, but such an inquiry still needs a meaningful standard that ensures no constitutional violation occurs. A credit that is inherently imprecise and arbitrary can risk both greater and lesser punishment, but the Double Jeopardy Clause does not. It demands a bright-line day-for-day credit that eliminates all risk of greater punishment. Any standard that does less must measure and quantify time by something other than time.

We therefore hold that when a defendant has been sentenced to a term of probation and is subsequently resentenced to a term of incarceration for the same offense, the Double Jeopardy Clause requires the defendant's new prison term be reduced by one day for each day spent on probation. Accordingly, in this case, the ten-year period of incarceration under the new sentence must be reduced by the four years, four months, and four days Jepsen served on probation prior to the imposition of the new sentence. The credit should have been given at the time the sentence was imposed.

IV. Conclusion.

We vacate the decision of the court of appeals, reverse the sentence of the district court, and remand the case to the district court to give credit as directed in this opinion. On remand, each day Jepsen spent on probation under his initial sentence shall be fully credited against the corrected ten-year sentence of incarceration.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT ORDER REVERSED AND CASE REMANDED WITH INSTRUCTIONS.

All justices concur except Mansfield and Waterman, JJ., who concur in part and dissent in part, and Zager, J., who dissents.

MANSFIELD, Justice (concurring in part and dissenting in part).

I concur in part and dissent in part. I agree that probation is a form of punishment under our law. Therefore, the Double Jeopardy Clause requires that Jepsen receive *some* credit for time spent on probation. *See North Carolina v. Pearce*, 395 U.S. 711, 718, 89 S. Ct. 2072, 2077 (1969) (stating that "punishment already endured [must be] fully subtracted from any new sentence imposed"), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 798, 109 S. Ct. 2201, 2204 (1989). However, a one-to-one credit, i.e., one day deducted from Jepsen's prison sentence for each day previously spent on probation, is neither constitutionally required nor appropriate in this case.

Christopher Jepsen was convicted in 2011 of two counts of third-degree sexual abuse for repeated sex acts he perpetrated on two victims. The victims were thirteen and fourteen years old respectively; Jepsen was twenty-five years old at the time. Jepsen received two indeterminate ten-year prison terms, to run consecutively, but the prison terms were suspended and he was placed on five years' probation.

While on probation, Jepsen got married and had a daughter. In October 2014, a search was conducted on Jepsen's residence pursuant to a warrant and he admitted to viewing child pornography. A motion to revoke probation was filed, continued, and remained pending. In the fall of 2015, Jepsen's spouse found that Jepsen had been creating fake email and Facebook accounts and using them to contact girls and arrange for naked photos to be exchanged. Jepsen's spouse separated from him at that time.

On December 21, 2015, the State filed a motion to correct an illegal sentence, because Jepsen should not have been eligible for

probation.[2] The motion was heard on January 29, 2016. The State requested that the two ten-year prison terms be imposed consecutively, with credit only for jail time; Jepsen requested that they be imposed concurrently, with credit both for jail time and for time spent on probation. The district court resentenced Jepsen to two ten-year sentences of incarceration, to run concurrently. The court at the same time granted Jepsen credit for days spent in jail but denied credit for time spent on probation.

Iowa Rule of Criminal Procedure 2.24(5)(*b*) is directly on point. It provides that when an illegal sentence is corrected, "[t]he defendant shall receive full credit for time spent *in custody* under the sentence prior to correction or reduction." Iowa R. Crim. P. 2.24(5)(*b*) (emphasis added). Thus, the rules of criminal procedure, which have the force and effect of law, *see State v. Mootz*, 808 N.W.2d 207, 221 (Iowa 2012), require a credit only for time in custody, not time spent living at home, getting married, and having a daughter while on probation.

Here the Double Jeopardy Clause requires us to deviate from rule 2.24(5)(*b*). But we should minimize the deviation in order to be as faithful as possible to the rule. Separation of powers requires no less.

The Double Jeopardy Clause does *not* mandate a one-to-one credit that treats all forms of probation the same as actual custody. It requires only a credit that takes into account the degree of restraint on liberty. As the United States Court of Appeals for the First Circuit has said,

> We note, however, that "fully crediting" probation against a subsequent sentence of imprisonment does not require a day-to-day offset against time to be served in

[2]The sexual abuse perpetrated on the thirteen-year-old was a forcible felony and not eligible for probation. *See* Iowa Code § 702.11(1) (2009); *id.* § 709.4(2)(*b*); *id.* § 907.3.

> prison. Time served in home detention is normally far less onerous than imprisonment, and time served on probation without home detention is even less restrictive of a defendant's freedom. Thus, a sentence on remand that reduced imprisonment by one day for each day that Martin served in home detention would be too lenient to represent the punishment that Congress intended.

United States v. Martin, 363 F.3d 25, 39–40 (1st Cir. 2004) (footnote omitted) (citation omitted). The First Circuit in *Martin* reiterated, "[A] departure that 'fully credits' the time Martin has already served will provide less than one-to-one credit for each day of home detention and probation." *Id.* at 40.

Other jurisdictions either agree with the First Circuit or hold that the Double Jeopardy Clause does not demand any credit against prison time for time previously spent on probation prior to resentencing. *See United States v. Carpenter*, 320 F.3d 334, 346 (2d Cir. 2003) ("[T]he conditions of home detention are typically much less onerous than even the least restrictive institutional incarceration. We would be puzzled if, on remand, the district court reduced Carpenter's term of imprisonment by more than half the time he spent in home detention."); *People v. Whitfield*, 888 N.E.2d 1166, 1176 (Ill. 2007) (finding that a defendant who previously served a void probation sentence need not be given credit against prison time because probation "is not a 'punishment' in the same sense as imprisonment is a punishment"); *State v. Brooke*, No. 52408, 1987 WL 15253, at *2 (Ohio Ct. App. Aug. 6, 1987) (holding that the trial court complied with the Double Jeopardy Clause in giving credit upon resentencing for twenty-four days spent in jail and three weeks spent in compulsory inpatient treatment but not a year spent on probation); *State v. Sulayman*, 983 P.2d 672, 675–76 (Wash. Ct. App. 1999) (granting the state's sentencing appeal and stating that "[a]lthough not constitutionally mandated, we direct that the sentencing court consider and credit as it

deems appropriate time Sulayman spent under community supervision"); *see also United States v. Defterios*, 195 Fed. App'x 685, 687 (9th Cir. 2006) (finding no double jeopardy violation when a defendant who was resentenced to a lengthier prison term was denied "credit for time already served on supervised release toward his new term of imprisonment"). The majority cites no case to the contrary.

The majority implicitly concedes that its ruling may result in "a windfall to the defendant." Still, it maintains that we would give the constitutional requirements "lip service" if we do not always equate time spent on probation to time spent in custody. It invokes "the constitutional principles at stake" as well "the values and principles" of our Constitution. To support these sweeping statements, the majority compares what it is doing in the present case to the exclusionary rule.

The analogy is flawed. We apply the exclusionary rule on appeal to remove the effects of an unconstitutional search or seizure from a criminal proceeding, but we still allow the state to retry the defendant. Similarly, here, we can vacate a sentence that unconstitutionally denies *any* credit to the defendant, but this shouldn't prevent the district court (or this court) from imposing a sentence that allows *an appropriate* credit that complies with the Double Jeopardy Clause. That's what several of the foregoing courts have done, and they too recognize the constitutional principles and values at stake.

One further reason not to impose a one-to-one credit is that it would defeat the district court's sentencing plan. The court sentenced Jepsen with the understanding that he would receive credit only for time previously served in custody.

In sum, nothing in the Double Jeopardy Clause requires Jepsen to be given four years plus of prison credit for time he spent getting

married, having a family, and not dealing with the problem that led to his two sexual abuse convictions in the first place. *See Martin*, 363 F.3d at 41 ("Allowing Martin to escape a proper sentence because the district court chose home detention in lieu of prison would merely compound judicial error.")[3] Therefore, I support either of the following: (1) a remand for the district court to determine an appropriate credit against prison time for time Jepsen spent on probation, taking into account the relative restraint on liberty; or (2) our granting Jepsen a credit of one-fifth day for each day spent on probation. *See United States v. Derbes*, No. CR. NO. 02–10391–RGS, 2004 WL 2203478, at *2 n.6 (D. Mass. Oct. 1, 2004) (treating five days of probation as roughly the equivalent of a day in custody for credit purposes).

For the foregoing reasons, I concur in part and dissent in part.

Waterman, J., joins this concurrence in part and dissent in part.

[3]A separate issue is whether Jepsen had developed an expectation of finality in his original sentence such that it would violate double jeopardy now to impose a more severe sentence. *See United States v. DiFrancesco*, 449 U.S. 117, 139, 101 S. Ct. 426, 438 (1980) (finding "no expectation of finality" in the sentence imposed by the trial court when the law provided the government could appeal that sentence); *State v. Allen*, 601 N.W.2d 689, 689–90 (Iowa 1999) (per curiam) (finding no double jeopardy violation when the trial court corrected the defendant's prison sentence and thereby increased it from five to fifteen years after the defendant had been committed to the custody of the department of corrections); *State v. Taylor*, 258 Iowa 94, 96, 137 N.W.2d 688, 689 (1965) (holding the trial court could correct a sentence to add a statutorily required minimum fine even though the defendant had begun serving the sentence and distinguishing the situation where the original sentence had been fully served). Jepsen has not raised such an argument on appeal.

ZAGER, Justice (dissenting).

I respectfully dissent. While I agree with the majority that the district court was required to address the issue of Jepsen's illegal sentence first, I disagree with the majority conclusion that there was a violation of his constitutional right to be free from double jeopardy because Jepsen was not given credit for the time he served on probation.

The majority cites *North Carolina v. Pearce* to support its holding that Jepsen's right to be free from double jeopardy was violated, thereby entitling him to receive credit toward his prison sentence for the time he spent on probation for the same offense. 395 U.S. 711, 89 S. Ct. 2072 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 798, 109 S. Ct. 2201, 2204 (1989). In *Pearce*, one of the defendants whose criminal conviction had been set aside was retried, convicted again, and resentenced without receiving credit for the time he had already spent in prison for the same crime. *Id.* at 713–15, 89 S. Ct. at 2074–75 The United States Supreme Court reversed the new sentence, holding that the Fifth Amendment right to be free from double jeopardy "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 718, 89 S. Ct. 2077. Consequently, the defendant was given credit for the time he previously served against the new sentence imposed following his retrial. *Id.* at 719, 89 S. Ct. at 2077.

Our court now seeks to extend the Supreme Court holding in *Pearce* far beyond the circumstances presented in *Pearce.* The majority would stretch that same proposition to cases where the defendant spent time on probation as part of an illegal sentence—before receiving a prison sentence—to correct an illegal sentence for the same offense. This is

unnecessary and unwarranted. While the Supreme Court in *Pearce* issued its holding based on a situation involving credit for prison time served, and similarly made comments in dicta about giving credit for fines already paid, *id.* at 718 n.12, 89 S. Ct. at 2077 n.12 it never considered whether a defendant should be given credit toward a prison sentence for the time the defendant spent on probation for the same offense. Unlike the defendant in *Pearce*, Jepsen was not retried and reconvicted after he served time in prison for the same offense. Instead, Jepsen was sentenced to a period of probation. It was later discovered to be an illegal sentence because he was required to be sentenced to prison for his offense. Jepsen was subsequently sentenced to his lawful prison term for the same offense when the resentencing court corrected his illegal sentence. Thus, despite the helpful guidance *Pearce* provides on double jeopardy issues, it does not control the issue in front of our court in this case.

Probation, although mildly punitive in the minor restrictions it places on the defendant, should not be equated with punishment in the same way incarceration is considered for double jeopardy purposes.

> A person does not serve a prison sentence while on probation or parole any more than he does while free on bail. In both instances, there are certain restrictions generally on the person's movements but the person's condition . . . "is very different from that of confinement in a prison."

Hall v. Bostic, 529 F.2d 990, 992 (4th Cir. 1975) (quoting *Morissey v. Brewer*, 408 U.S. 471, 482, 92 S. Ct. 2593, 2601, (1972)); *see also Kaplan v. Hecht*, 24 F.2d 664, 665 (2d Cir. 1928) ("[P]robation is not intended to be the equivalent of imprisonment.").

In *People v. Whitfield*, the Illinois Supreme Court concluded probation differed from incarceration for double jeopardy purposes when

it considered a nearly identical situation to the circumstances presented in this case. 888 N.E.2d 1166, 1176 (Ill. 2007). There, the trial court sentenced defendant to two years' probation after the state advised the court that defendant had one prior felony conviction. *Id.* at 1169. A month after sentencing, the state realized defendant actually had two prior felony convictions on his record, making him ineligible for probation and subject to a mandatory Class X sentence. *Id.* Thereafter, the state filed a motion to vacate the defendant's guilty plea, claiming the sentence was void. *Id.* The district court allowed defendant to withdraw his guilty plea, and defendant was subsequently convicted during a bench trial. *Id.* At sentencing, the trial court sentenced defendant to eight years in prison and found he was subject to a mandatory Class X sentence. *Id.*

On appeal, defendant presented the same argument as Jepsen, claiming "that his constitutional right to be free from double jeopardy was violated because he was twice punished for the same offense and was not given credit for the probation he served." *Id.* at 1173. The Illinois Supreme Court rejected this claim and held that sentencing a defendant to probation, and then to imprisonment for the same offense, was not "an unconstitutional second punishment for double jeopardy purposes." *Id.* at 1176. Therefore, the court reasoned, the defendant was not entitled to credit for time spent on probation. *Id.*[4]

[4]Other jurisdictions similarly have held that the Double Jeopardy Clause does not require credit against prison time for the time that defendant previously served on probation. *See United States v. Defterios*, 195 Fed. App'x 685, 687 (9th Cir. 2006) (affirming the district court decision denying a defendant "credit for time already served on supervised release toward his new term of imprisonment"); *State v. Brooke*, No. 52408, 1987 WL 15253, at *2 (Ohio Ct. App. 1987) (holding a defendant is entitled to credit for "days served or spent in treatment," but not for time spent on probation); *State v. Sulayman*, 983 P.2d 672, 675–76 (Wash. Ct. App. 1999 (holding there is no constitutional mandate to credit time spent under community supervision).

In reaching this decision, the court noted defendant's proposed interpretation of *Pearce*—the same interpretation the majority now adopts—"extends the scope of the opinion beyond the facts" since *Pearce* never addressed the factual scenario presented in *Whitfield*. *Id.* at 1174–75. Moreover, the court explained why probation and imprisonment are different for double jeopardy purposes. The court asserted, "Probation is a substitute for imprisonment" that provides defendants with "an opportunity for reformation, provided the trial court could be satisfied there is reasonable ground to expect both that the defendant will be reformed and that the interests of society will be subserved." *Id.* at 1176 (quoting *People ex rel. Barrett v. Bardens*, 68 N.E.2d 710, 713 (1946)).

Our court is faced with the identical issue faced by the Illinois Supreme Court in *Whitfield*, and I believe our court should reach the same conclusion. Probation is a form of "clemency," not punishment. *Id.* at 1176. The liberty restraints experienced on probation are generally much less drastic than those a defendant experiences while imprisoned. To give but one example, police officers in Iowa need a warrant to search the residence of a probationer who enjoys the same privacy rights as any other citizen. *See State v. Short*, 851 N.W.2d 474, 506 (Iowa 2014). By contrast, correctional officers may freely search an inmate's cell or a resident's room at a residential treatment facility. Nevertheless, the majority tries to equate probation with incarceration for double jeopardy purposes. The majority does this, in part, by noting that Jepsen was subject to liberty restraints under the terms of his probation, including the possible requirement to enter a "Residential Treatment Facility (and follow all rules of said facility and successfully complete the program)," if his probation officer deemed it necessary. The majority goes on to assert that probation is punishment because "[t]he time spent on probation,

either within a residential treatment facility or otherwise subject to the conditions and surveillance of the judicial district department of correctional services, cannot be returned to a probationer." In my opinion, this statement misses the mark. Certainly under the facts of this case, there is nothing to return to the probationer. In exchange for minor and insignificant restraints, Jepsen benefitted by not being placed immediately in prison with what we all agree would have resulted in significant restraints on his liberty interests. Those restraints on his liberty interests were simply not present here.

Despite the discussion of the potential time that Jepsen might have spent in a residential treatment facility, there is nothing in the record to show that Jepsen ever spent time in a residential treatment facility where he might have been subject to the conditions and surveillance of such a facility. If Jepsen had spent time in such a facility, we would be looking at a different situation. *See* Iowa Code § 907.3(3) (2017) ("[A] person committed to an alternate jail facility or community correctional residential treatment facility who has probation revoked shall be given credit for time served in the facility."); *State v. Allensworth*, 823 N.W.2d 411, 413 (Iowa 2012) (noting the legislature enacted an amendment to Iowa Code section 907.3(3) in 2012 that limits credit for time on supervised probation to that time spent in an alternate jail facility or community correctional residential treatment facility). Accordingly, the legislature has already enacted legislation to address the potential issue before us here.

More specifically, we should examine Jepsen's liberty interests that were affected when he was placed on probation. The conditions of his probation included completing a cognitive empathy course, maintaining consistent employment, and participating in any rehabilitative programs

that his probation officer deemed necessary. Yet the record shows that Jepsen was able to live at home, get married, start a family, and have most of the freedoms that we all enjoy. This would not have been possible if he had been incarcerated or in a residential treatment facility. Moreover, in prison or a residential treatment facility, Jepsen would not have been able to access Facebook and email websites, which ultimately allowed him to create fake accounts to contact girls in order for them to exchange naked photographs with him. Nor would he have had access to the cellphone application, which he used to download, view, and distribute pornographic images of children.

Not only are the liberty restraints drastically different between serving probation in the relative freedom of one's home and serving time in prison, but the purposes and penological justifications for probation and imprisonment differ as well. In Iowa, "[t]he purposes of probation are to provide maximum opportunity for the rehabilitation of the defendant and to protect the community from further offenses by the defendant and others." Iowa Code § 907.7(3); *see also State v. Valin*, 724 N.W.2d 440, 445–46 & n.4 (Iowa 2006). Thus, the core purposes that probation serves fall within the penological justifications of rehabilitation and deterrence. *See State v. Oliver*, 812 N.W.2d 636, 646 (Iowa 2012) (explaining legitimate penological justifications).

In contrast, imprisonment serves different penological justifications, as imprisonment is inappropriate "for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." *Tapia v. United States*, 564 U.S. 319, 326–27, 131 S. Ct. 2382, 2388–89 (2011) (quoting 28 U.S.C. § 994(k) (2006)) (noting the U.S. Code instructs courts to acknowledge that imprisonment is an

inappropriate method to promote rehabilitation). While the majority correctly notes we have previously held that lifetime parole constitutes punishment, we only did so where the statute imposing lifetime parole on certain sex offenders imposed it upon the defendant "for the underlying criminal offense without any showing that the offender pose[d] a safety risk." *State v. Lathrop*, 781 N.W.2d 288, 296–97 (Iowa 2010). Lifetime parole in that context bears no rational similarity to the probation granted to Jepsen. Accordingly, I would find Jepsen was not subjected to an unconstitutional second punishment in violation of his constitutional right to be free from double jeopardy. Thus, in my opinion, Jepsen is not entitled to receive any credit for the time he spent on probation.

This result seems especially compelling under the circumstances before us here. Jepsen received a legal sentence of ten years in prison for one of his offenses. Then, the district court mistakenly placed Jepsen on probation for an offense in which probation was not legally permitted. While this was clearly an illegal sentence, it was not the type of illegal sentence that was detrimental to Jepsen. Rather, the illegality of putting him on probation was a tremendous benefit to him: he did not go to prison for almost five years ago. This is not the type of judicial error that should result in a windfall to Jepsen. In this case, the judicial error gave him the opportunity to live a relatively free life in which he was able to live at home, get married, start a family, and resume the same predatory behaviors he engaged in prior to his conviction.

Finally, it is worth noting how this matter would have been resolved had there been no illegal sentence, one that I have noted benefitted Jepsen greatly. At the same time that the district court was considering its correction of the illegal sentence, there was also a pending application to revoke Jepsen's probation due to the flagrant

violations of his terms of probation. Had his probation simply been revoked instead of the court resentencing him due to a judicial error, he unquestionably could have had his original prison sentence imposed as punishment, and there would have been no discussion of whether or how much credit he should receive for the time he spent on probation. *See* Iowa Code § 908.11(4) ("If the [probation] violation is established, the court may . . . revoke the probation . . . and require the defendant to serve the sentence imposed or any lesser sentence, and, if imposition of sentence was deferred, may impose any sentence which might originally have been imposed.").

Jepsen's constitutional right to be free from double jeopardy was not violated in this case. As such, Jepsen is not entitled to any credit for the time he was allowed to be mistakenly placed on probation. I would affirm the corrected sentencing order of the district court and deny any claim for the ineffective assistance of counsel.