No. _____

In the Supreme Court of the United States

NEW YORK, PETITIONER

v.

DARRELL WILLIAMS, EFRAIN HERNANDEZ, CRAIG LEWIS, AND EDWIN RODRIGUEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF *CERTIORARI*

CYRUS R. VANCE, JR.
District Attorney
CAITLIN J. HALLIGAN*
General Counsel
HILARY HASSLER
Chief of Appeals
DAVID M. COHN
Senior Appellate Counsel
MARTIN J. FONCELLO
TIMOTHY C. STONE
DAVID P. STROMES
Assistant District Attorneys

New York County District Attorney's Office
One Hogan Place
New York, New York 10013
(212) 335-9775
halliganc@dany.nyc.gov

* Counsel of Record for Petitioner

Blank Page

QUESTION PRESENTED

Does the Double Jeopardy Clause prohibit a court from correcting a sentence that, as originally pronounced, lacked a required component or was otherwise illegally lenient?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS

STATE STATUTES

In The
SUPREME COURT OF THE UNITED STATES

NEW YORK,

Petitioner,

v.

DARRELL WILLIAMS, EFRAIN HERNANDEZ, CRAIG LEWIS and EDWIN RODRIGUEZ,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

The State of New York respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals in these cases.

INTRODUCTION

New York law requires that violent felons serve mandatory terms of post-release supervision ("PRS") following their release from prison. In each of the cases below, the trial courts omitted the required PRS terms from the original sentencing pronouncements. After the trial courts subsequently corrected respondents' sentences by pronouncing their mandatory PRS terms at new sentencing proceedings, the New York Court of Appeals held that the federal Double Jeopardy Clause barred those new pronouncements, and that the sentences

must stand as originally pronounced, even though they did not comport with state law.

The decision below deepens a split on whether the Double Jeopardy Clause bars correction of a sentence that lacks a required component or is otherwise illegally lenient. Every federal circuit and most state courts to consider the question have held that double jeopardy poses no obstacle to such resentencing. Indeed, some federal and state courts have held more broadly that the Double Jeopardy Clause has no application whatsoever to non-capital sentencing proceedings, unless the defendant has completely served a *lawful* sentence. To the extent that, in an extreme case, resentencing might be inconsistent with fundamental fairness, some courts have held that due process might operate as an independent check, but that issue is not presented here.

In sharp contrast, the New York Court of Appeals joined a number of other state courts in holding that correction of an invalid sentence implicates the Double Jeopardy Clause. While acknowledging that respondents were on notice of their required PRS terms, the Court of Appeals concluded that the Double Jeopardy Clause bars adjustment of a sentence once a defendant has been released from prison.

A grant of certiorari is independently warranted because the decision below conflicts with key precedents of this Court. More than forty years ago, this Court held that the Double Jeopardy

Clause does not "restrict[] the imposition of an otherwise lawful single punishment for the offense in question." *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969). The Court has specifically declined to apply the double jeopardy protection as a bar to the correction of a sentence that lacked a required component, *see Bozza v. United States*, 330 U.S. 160, 165-67 (1947), and to renewed sentencing proceedings in non-capital cases, *see Monge v. California*, 524 U.S. 721, 726-34 (1998). In addition, this Court has declared that the Double Jeopardy Clause does not render even a lawful sentence final at any particular point in time. *See United States v. DiFrancesco*, 449 U.S. 117, 137 (1980). The bright-line limit imposed by the court below cannot be reconciled with these rulings.

If left undisturbed, the decision of the New York Court of Appeals will threaten public safety. The state has a compelling interest in ensuring that criminal defendants serve the full punishment for their offenses that has been mandated by the legislature, which includes PRS. Each of the respondents committed a violent crime, including assault during the course of an attempted robbery (Williams) and home-invasion burglaries (Hernandez, Lewis, and Rodriguez). Violent felons such as these pose real dangers if released into the general population without transitional supervision. In Manhattan alone, post-release supervision of approximately 300 violent felons has already been terminated as a result of the Court of Appeals' decision, and the New York State Department of Correctional Services estimates that the PRS terms

of as many as 30,000 criminal defendants might be affected by this ruling. Accordingly, this Court should grant certiorari to review the decision below.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 14 N.Y.3d 198 and is reproduced in the Appendix at pages 1a-44a. The opinions of the New York Appellate Division, First Department, are reproduced on pages 45a-53a of the Appendix and are reported as follows: *People v. Williams*, 59 A.D.3d 172 (N.Y. App. Div. 1st Dept. 2009); *People v. Hernandez*, 59 A.D.3d 180 (N.Y. App. Div. 1st Dept. 2009); *People v. Lewis*, 60 A.D.3d 425 (N.Y. App. Div. 1st Dept. 2009); *People v. Rodriguez*, 60 A.D.3d 452 (N.Y. App. Div. 1st Dept. 2009). The decisions of the trial courts (New York Supreme Court, County of New York) are reproduced on pages 54a-83a of the Appendix.

STATEMENT OF JURISDICTION

The New York Court of Appeals issued its opinion reversing the judgments on February 23, 2010. App. 1a-44a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part, "nor shall

any person be subject for the same offence to be twice put in jeopardy of life or limb."[1]

STATEMENT OF THE CASE

A. Statutory Framework

Under New York law, most violent felons must be sentenced to "determinate" prison terms; that is, incarceration for a set term of years. *See* N.Y. Penal Law §§ 70.02, 70.04. State law further requires that every determinate prison sentence be followed by a period of post-release supervision. *See* N.Y. Penal Law § 70.45(1).[2]

In light of that unequivocal statutory mandate, each of New York's intermediate appellate courts held that a mandatory PRS term applied automatically following every "determinate" prison

---

[1] The Double Jeopardy Clause is made applicable to the states by the Fourteenth Amendment. *See Bobby v. Bies*, 129 S. Ct. 2145, 2151 (2009).

[2] At the time respondents were sentenced, § 70.45(1) of the New York Penal Law provided that "[e]ach determinate sentence also includes, as a part thereof, an additional period of post-release supervision." In 2008, that provision was amended to direct that "[w]hen a court imposes a determinate sentence it shall in each case state not only the term of imprisonment, but also an additional period of post-release supervision as determined pursuant to this article." The purpose of the amendment was to retain the mandatory PRS requirement and conform the statute to *People v. Sparber*, 10 N.Y.3d 457 (2008), which held that the sentencing court must orally pronounce a mandatory PRS term.

sentence, regardless of whether it had been separately pronounced. *See, e.g., People ex rel. Johnson v. Warden*, 16 A.D.3d 183, 183 (N.Y. App. Div. 1st Dept. 2005); *People v. Miller*, 1 A.D.3d 613, 613 (N.Y. App. Div. 2d Dept. 2003); *People v. Boyce*, 12 A.D.3d 728, 729 (N.Y. App. Div. 3d Dept. 2004); *People v. Crump*, 302 A.D.2d 901, 902 (N.Y. App. Div. 4th Dept. 2003).

B. Respondents' Sentencing Proceedings

1. The Original Sentence Pronouncements and Commencement of Respondents' PRS Terms

In each of the cases below, the sentencing court pronounced the respondent's prison term but did not separately pronounce the legally-required period of PRS. None of the respondents complained initially about the lack of an oral pronouncement. To the contrary, both of the respondents who pursued direct appeals after the original sentence was imposed forthrightly acknowledged their PRS terms.[3]

Each of the respondents obtained conditional (*i.e.*, early) release for good behavior after serving six-sevenths of his prison term, and each began serving PRS immediately upon release. Under New

---

[3] *See People v. Darrell Williams*, Appellant's Brief to the New York Appellate Division, First Department, p. 3 (filed October 2005); *People v. Craig Lewis*, Notice of Appeal (dated April 28, 2002). The above-referenced documents were included in the state court record in each appeal.

York law, an inmate who obtains conditional release is placed on PRS immediately thereafter, and state law requires the New York State Department of Correctional Services ("DOCS") to inform all defendants about the intertwined concepts of conditional release and PRS upon their intake into state prison.[4]

In order to gain conditional release, each defendant accepted, in writing, the terms and conditions of PRS, as they were required to do under state law.[5] None of the respondents either

---

[4] The New York Correction Law provides that an inmate becomes eligible for conditional release upon completing six-sevenths of his prison term, *see* N.Y. Correction Law § 803(1)(a), (c), after which he is placed on PRS, with the remaining one-seventh of the prison term "held in abeyance," *see* N.Y. Penal Law § 70.45(5)(a)-(b). The Department of Corrections is required, "[u]pon commencement" of a sentence, to provide each inmate with a copy of Section 803 and to "fully explain[]" its import. N.Y. Correction Law § 803(6).

[5] N.Y. Penal Law § 70.45(3) provides that, "[u]pon release from the underlying term of imprisonment, the person shall be furnished with a written statement setting forth the conditions of [PRS] in sufficient detail to provide for the person's conduct and supervision." Similarly, N.Y. Executive Law § 259-g(2) states that "[n]o person shall be . . . conditionally released unless the applicant has agreed in writing to the conditions of release." DOCS and Probation Department regulations reiterate those requirements. *See* 9 N.Y.C.R.R. § 361.4 (probation officer must "make every effort to ensure the individual understands the order of conditions of release," "has been provided with a copy of his order," and "has agreed to the conditions and has signed the order"); 9 N.Y.C.R.R. § 8003.1(c) ("conditional release will not be granted

(Continued...)

complained at the time about being released to PRS or alleged that his mandatory PRS term had come as a surprise.

2. The Corrected Sentencing Pronouncements

In 2008, the New York Court of Appeals held that under a state procedural rule requiring pronouncement of sentence, *see* N.Y. Crim. Proc. Law § 380.20, a PRS term could not be enforced if the trial judge had failed to pronounce the term orally at the defendant's sentencing hearing. *See People v. Sparber*, 10 N.Y.3d 457, 469-72 (2008); *see also Garner v. New York State Dept. of Correctional Services*, 10 N.Y.3d 358, 362-63 (2008). The Court of Appeals noted, however, that the lack of an oral pronouncement amounted to nothing more than a clerical or procedural error, which could be easily remedied by resentencing. *See Sparber*, 10 N.Y.3d at 472; *cf. Garner*, 10 N.Y.3d at 363 n.4.

Sparber and *Garner* had widespread effect. Because the intermediate appellate courts had not previously required an oral pronouncement of PRS, thousands of violent offenders had to be resentenced. Two months after *Sparber* and *Garner* issued, the New York legislature enacted a new statute to provide for the identification and orderly

---

(...Continued)
to any individual unless he states in writing, in the presence of a witness, that he has read and understood the conditions of release").

resentencing of all defendants whose PRS terms had not been pronounced orally. *See* N.Y. Correction Law § 601-d. This provision designated as persons eligible for resentencing any inmates currently in prison, and any releasees currently under supervision, whose PRS terms had not been imposed in a procedurally appropriate manner. *See id.* § 601-d(2).

In accordance with *Sparber* and § 601-d of the Correction Law, all four respondents -- each of whom was serving PRS at the time -- were returned to court for correction of their sentences.[6] At the new hearings, the trial judges orally pronounced respondents' PRS terms, rejecting, among other claims, double jeopardy challenges to resentencing. *See* App. 54a-83a. Significantly, none of the respondents alleged at resentencing that he had been unaware of the PRS requirement at the time of the original sentencing. *See* App. 35a, 40a-41a, 54a-83a.

C. The Decisions Below

Respondents appealed from their resentencings, and the intermediate state appellate court rejected their double jeopardy claims. In each case, the appellate court focused on the fact that respondents had no legitimate expectation of finality

---

[6] Williams was resentenced after *Sparber* and prior to the enactment of § 601-d. The other respondents were resentenced shortly after the enactment of § 601-d.

in sentences without PRS. *See People v. Hernandez*, App. 49a ("defendant had no legitimate expectation of finality" in a sentence without the mandatory PRS component, as a sentence without PRS was "manifestly contrary to law"; defendant "[c]learly . . . understood that PRS was a component of his sentence"); *People v. Lewis*, App. 51a (rejecting double jeopardy claim for reasons stated in *Hernandez*); *People v. Williams*, App. 45a (same); *People v. Rodriguez*, App. 52a-53a (rejecting double jeopardy claim for lack of preservation and for reasons stated in *Hernandez*).

The New York Court of Appeals reversed, on the sole ground that the federal Double Jeopardy Clause barred correction of respondents' sentences. The court recognized that state law permitted an adjustment of respondents' sentences. *See* App. 13a-16a. It also acknowledged that defendants "are presumed to be aware that a determinate prison sentence without a term of PRS is illegal and, thus, may be corrected by the sentencing court at some point in the future." App. 22a. And the court noted that at the time of their conditional release from prison, respondents had executed "written acknowledgments . . . regarding [the] PRS requirements." App. 24a (*citing* N.Y. Penal Law § 70.45(3); N.Y. Executive Law § 259-g(2); 9 N.Y.C.R.R. § 8003.1(c)).

The Court of Appeals nonetheless concluded that "there must be a temporal limitation on a court's ability to resentence a defendant." App. 23a. Even when a sentence is "illegal under the Penal

Law," the court declared, it becomes "final" for purposes of the federal Double Jeopardy Clause once the defendant "is released from custody and returns to the community . . . and the time to appeal the sentence has expired or the appeal has been finally determined." App. 26a-27a.

Two of the court's seven judges dissented, pointing out that the majority had misunderstood and misapplied U.S. Supreme Court precedent. One of the dissenters explained that this Court had identified only one double jeopardy limitation on sentences: "'a defendant may not receive a greater sentence than the legislature has authorized.'" App. 33a (*quoting DiFrancesco*, 449 U.S. at 139). While acknowledging that due process may constrain a court's resentencing power, the first dissenter concluded that these cases were "easy" under a due process standard, as respondents had expected to serve PRS all along. App. 34a-35a. The second dissent underscored that "a defendant has no legitimate expectation of finality in an unlawful sentence," App. 37a (citing *Bozza*, 330 U.S. at 167), and reiterated that defendants are "charged with knowledge that their sentences, if illegally imposed, are subject to correction." App. 39a (citing *DiFrancesco*, 449 U.S. at 136, 139).[7]

---

[7] Although respondent Williams completed his PRS term during the pendency of the proceeding before the New York Court of Appeals, the state's certiorari petition is not moot as to him. Given the length of the appellate process, which sometimes takes years, and the relatively brief duration of

(Continued...)

REASONS FOR GRANTING THE WRIT

I. Courts nationwide are divided over whether the Double Jeopardy Clause limits a court's authority to correct a sentence that lacks a required provision or is otherwise illegally lenient.

A split of authority exists over whether the Double Jeopardy Clause limits a court's power to correct a sentence that lacks a required provision or is otherwise illegally lenient. This Court should grant certiorari to clear up the "varied and conflicting interpretations" in this important area of law. *United States v. Fogel*, 829 F.2d 77, 86 n.10 (D.C. Cir. 1987).

(...Continued)
PRS, a challenge to the Court of Appeals' bright-line rule is capable of repetition and can evade review. *See generally Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). In addition, the decision below, if left intact, is likely to have civil litigation consequences. *See Edgar v. MITE Corp.*, 457 U.S. 624, 630 (1982) (constitutional claim not moot in light of potential for civil and criminal liability).

In any event, live controversies remain as to respondents Hernandez, Lewis and Rodriguez. Those three individuals were released from PRS prior to the completion of their terms, following the decision of the Court of Appeals and this Court's denial of a stay. Their remaining PRS time will be reinstated if this Court reverses the decision of the Court of Appeals.

A. Majority view: the Double Jeopardy Clause does not bar correction of an illegally-lenient sentence.

Applying this Court's decisions in *Bozza*, *DiFrancesco* and *Pearce*, the majority of jurisdictions recognize that the Double Jeopardy Clause does not prevent the correction of sentences that lack required provisions or are otherwise illegally lenient. Those jurisdictions include the First, Third, Fifth, Sixth, Ninth, and District of Columbia Circuits; the highest courts of Arizona, California, Hawaii, Illinois, Iowa, Louisiana, Minnesota, Nebraska, North Dakota, Oklahoma, Oregon, Pennsylvania, Utah and the District of Columbia; and state intermediate appellate courts in Alabama, Georgia and Michigan. *See, e.g., Breest v. Helgemoe*, 579 F.2d 95, 98-100 (1st Cir. 1978); *United States v. Hawthorne*, 806 F.2d 493, 501 (3d Cir. 1986); *Caille v. United States*, 487 F.2d 614, 615-16 (5th Cir. 1973); *United States v. Strozier*, 940 F.2d 985, 987 (6th Cir. 1991); *United States v. Kenyon*, 519 F.2d 1229, 1232-33 (9th Cir. 1975); *United States v. Fogel*, 829 F.2d 77, 90 (D.C. Cir. 1987);[8] *State v. Powers*, 742 P.2d 792, 796 (Ariz. 1987); *People v. Hernandez*, 968 P.2d

---

[8] In *Fogel*, the District of Columbia Circuit held that after the defendant had begun serving an illegally-lenient sentence, correction of the sentence was permissible, but only to the extent necessary to conform it to the law. *See Fogel*, 829 F.2d at 90; *see also Miranda v. State*, 956 P.2d 1377, 1377-78 (Nev. 1998) (correction improperly went beyond conforming the sentence to legal requirements).

465, 466-70 (Cal. 1998); *Barrow v. United States*, 295 F. 949, 949 (D.C. Ct. App. 1924); *State v. Delmondo*, 696 P.2d 344, 345-46 (Haw. 1985); *City of Chicago v. Roman*, 705 N.E.2d 81, 86 (Ill. 1998); *State v. Allen*, 601 N.W.2d 689, 690 (Iowa 1999); *State v. Williams*, 800 So.2d 790, 798-800 (La. 2001); *State v. Calmes*, 632 N.W.2d 641, 644, 649 (Minn. 2001); *State v. Wilcox*, 479 N.W.2d 134, 136-37 (Neb. 1992); *State v. Wika*, 574 N.W.2d 831, 833 (N.D. 1998); *Stafford v. State*, 800 P.2d 738, 740 (Okla. Crim. App. 1990); *Froembling v. Gladden*, 417 P.2d 1020, 1021-22 (Or. 1966); *Commonwealth v. Jones*, 554 A.2d 50, 52 (Pa. 1989); *State v. Babbel*, 813 P.2d 86, 88-89 (Utah 1991); *Cline v. State*, 571 So.2d 368, 369-70 (Ala. Crim. App. 1990); *Strickland v. State*, 687 S.E.2d 221, 222-23 (Ga. App. 2009); *People v. Brown*, 2001 WL 682439, *2-*5 (Mich. App. 2001); *see also United States v. Rico*, 902 F.2d 1065, 1068-69 (2d Cir. 1990) (rejecting double jeopardy challenge to correction of illegally-lenient sentence where government's time to appeal had not expired).[9]

---

[9] Federal Rule of Criminal Procedure 36, which allows a court to correct, "at any time," a "clerical" error in the imposition of sentence, or an error arising from an "oversight or omission," appears to give federal courts authority to correct sentences where a mandatory or negotiated provision has been inadvertently omitted, but not where a court omitted a discretionary provision. *Compare United States v. Bennett*, 423 F.3d 271, 277-82 (3d Cir. 2005) (correction of negotiated forfeiture order); *Strozier*, 940 F.2d at 987 (omission of mandatory supervised release term); *United States v. DeLuca*, 692 F.2d 1277, 1286 (9th Cir. 1982) (failure to impose sentence on a count); *with United States v. Robinson*, 368 F.3d 653, 655-

(Continued...)

Significantly, several of these jurisdictions have approved the correction of invalid sentences even where the defendant has already been released from custody. *See, e.g., Calmes*, 632 N.W.2d at 644, 649 (mandatory conditional release term added after defendant's placement on supervised release); *Abram v. State*, 574 So.2d 986, 987-88 (Ala. Crim. App. 1990) (defendant returned to custody following correction of invalid "split" sentence); *see also Rico*, 902 F.2d at 1068-69 (invalid sentence properly increased even though defendant had completed originally-imposed prison term and was on supervised release); *State v. Pascal*, 736 P.2d 1065, 1069-71 (Wash. 1987) (state properly appealed illegal sentence after defendant completed serving it); *Grajczyk v. State*, 666 N.W.2d 472, 474-76 (S.D. 2003) (defendant returned to custody after being prematurely released due to error in calculation of sentence).

The Fourth Circuit, along with the high courts of Arizona and California, have gone even further. The Supreme Courts of Arizona and California have stated broadly that the Double Jeopardy Clause does not apply to non-capital sentencing determinations. *Powers*, *supra*, 742 P.2d at 796; *Hernandez*, *supra*, 968 P.2d at 466-70; *see also State v. Marshburn*, 620

(...Continued)
57 (6th Cir. 2004) (court's unexpressed intention to impose discretionary term of supervise release); *United States v. Kaye*, 739 F.2d 488, 490-92 (9th Cir. 1984) (discretionary imposition of consecutive sentences).

S.E.2d 282, 284 (N.C. App. 2005). Likewise, the Fourth Circuit has opined that the Double Jeopardy Clause does not apply to sentencing determinations, unless the defendant has fully suffered a lawful punishment for his crime. *See United States v. Lundien*, 769 F.2d 981, 984-86 (4th Cir. 1985).[10]

In addition, in cases not involving double jeopardy claims, the Second and Eighth Circuits have declared that sentences can and should be corrected to conform to the law. *See Earley v. Murray*, 451 F.3d 71, 77 (2d Cir. 2006) (although PRS term could not be enforced because it had not

---

[10] This case does not squarely present the question whether the Double Jeopardy Clause sets a temporal limit on the amendment of a *lawful* sentence. Several federal circuit courts have indicated that an expectation of finality arises after complete service of a lawful sentence. *See, e.g., United States v. Silvers*, 90 F.3d 95, 101 (4th Cir. 1996); *United States v. Kinsey*, 994 F.2d 699, 702-03 (9th Cir. 1993); *United States v. Arrellano-Rios*, 799 F.2d 520, 523-24 (9th Cir. 1986); *cf. Oksanen v. United States*, 362 F.2d 74, 80 (8th Cir. 1966). Several other courts have gone further and deemed lawful sentences final at some earlier point in time, absent a legislative provision permitting review. *See Snell v. State*, 723 So.2d 105, 108 (Ala. Crim. App. 1998) (lawful sentence final after imposition); *State v. Wheeler*, 498 P.2d 205, 208 (Ariz. 1972) (same); *United States v. Rosario*, 386 F.3d 166, 169-71 (2d Cir. 2004) (lawful sentence final after commencement); *United States v. Earley*, 816 F.2d 1428, 1434 (10th Cir. 1987) (same); *Ethridge v. State*, 800 So.2d 1221, 1225 (Miss. App. 2001) (same); *State v. Ryan*, 429 A.2d 332, 337-38 (N.J. 1981) (same); *United States v. Daddino*, 5 F.3d 262, 265 (7th Cir. 1993) (lawful sentence final after release from custody); *State ex rel. Hill v. Parsons*, 461 S.E.2d 194, 198 (W. Va. 1995) (same).

been pronounced orally or otherwise entered on the court records, this did not "preclude the state from moving in the New York courts to modify Earley's sentence to include the mandatory PRS term");[11] *Phillips v. Biddle*, 15 F.2d 40, 40 (8th Cir. 1926) ("It is wrong that where there is statutory authority for the total sentence which the court clearly intended to impose, and where the case can be returned for resentence, that the prisoner should escape part of the just punishment due him through a mistake in the form of the sentence.").

Several courts have suggested that while the Double Jeopardy Clause cannot render an invalid sentence final, in an extreme case a defendant may find redress under the Due Process Clause, to the extent that upsetting an illegal sentence would be "inconsistent with fundamental notions of fairness." *DeWitt v. Ventetoulo*, 6 F.3d 32, 35 (1st Cir. 1993); *see also, e.g., United States v. Davis*, 112 F.3d 118, 123 (3d Cir. 1997); *Lundien*, 769 F.2d at 986; *Breest*, 579 F.2d at 101; *Wells v. United States*, 802 A.2d 352,

---

[11] On remand in *Earley*, the District Court stayed habeas corpus relief "to permit the [state] sentencing court to exercise its power to conform the sentence to the mandate of New York law." *Earley v. Murray*, 2007 WL 1288031, *3 (E.D.N.Y. May 1, 2007). The District Court did so despite the fact that the petitioner had not been informed of PRS at the plea hearing, *see Earley*, 451 F.3d at 72, and despite the fact that he had completed his prison term, *Earley*, 2007 WL 1288031, *3. The District Court explained that, in light of the petitioner's crime and history, he was "a defendant who needs supervised release." *Id.*

354-55 (D.C. Ct. App. 2002); *Hanson v. State*, 718 A.2d 572, 573-74 (Me. 1998); *Grajczyk*, 666 N.W.2d at 476; *Calmes*, 632 N.W.2d at 645-49. The Due Process Clause is not implicated here, however, because respondents expected to serve PRS all along and were in fact serving it when their sentences were corrected. Nothing fundamentally unfair occurred, as the resentencings merely remedied procedural errors and conformed the pronouncements to the legitimate expectations of all parties.

B. Minority view: the Double Jeopardy Clause imposes a bright-line temporal limit on the court's power to correct an illegally-lenient sentence.

In contrast to the prevailing view, a number of jurisdictions have squarely held that the Double Jeopardy Clause renders illegally-lenient sentences final at some point in time. *See State v. Pina*, 440 A.2d 962, 965-67 (Conn. 1981) (Double Jeopardy Clause bars correction of an illegal sentence after the state's statutory time limit to seek review expires); *Maybin v. State*, 884 So.2d 1174, 1175 (Fla. App. 2d Dist. 2004) (court may not correct illegal sentence after its completion); *Sneed v. State*, 749 So.2d 545, 546 (Fla. App. 4th Dist. 2000) (same). Along those same lines, the Supreme Courts of Ohio and Washington have suggested that an expectation of finality might arise following the defendant's completion of an unlawful sentence. *See State v. Simkins*, 884 N.E.2d 568, 576-78 (Ohio 2008) (permitting correction of sentence to include

mandatory period of post-release control, but noting that correction may not be permissible following the defendant's release from prison); *State v. Hardesty*, 915 P.2d 1080, 1086 (Wash. 1996) (permitting correction of sentence procured by fraud, but noting that a defendant might acquire a finality interest in a merely "erroneous" sentence after fully serving it). In addition, while not addressing the amendment of a facially-invalid sentence, the New Mexico Supreme Court has held that a trial court may not seek a sentencing enhancement following a defendant's release from custody. *See March v. State*, 782 P.2d 82, 83-84 (N.M. 1989).

The decision of the New York Court of Appeals deepened the split on this significant question of criminal law. Its determination that an illegally-lenient sentence cannot be corrected once a defendant has been released from prison and the state's time to appeal has lapsed confirms that this issue is unlikely to resolve itself absent intervention by this Court.

Contrary to the conclusion of the Court of Appeals, *see* App. 20a-22a, federal circuit courts have not held that the Double Jeopardy Clause bars correction of an illegally-lenient sentence following a defendant's release from prison. The federal cases upon which the court below relied either addressed the amendment of facially-valid sentences,[12] opined that a defendant's punishment may not be increased

[12] *See Daddino*, 5 F.3d at 265.

following complete service of a *lawful* sentence,[13] or intimated that due process might prohibit amendment of a sentence in an unusual case.[14] None of these issues are presented here.[15]

The decision below illustrates the unfortunate results that can flow from the minority view on this issue of law. First, conditional release, which all of the respondents obtained, is a benefit given for good behavior, after which the defendant *must* complete PRS. *See* N.Y. Penal Law § 70.45(5)(a)-(b); *cf.* N.Y. Correction Law § 803. No prior precedent suggests that double jeopardy prohibits the state from enforcing the mandatory conditions attached to that release. Second, New York Court of Appeals' ruling grants respondents a windfall: respondents availed themselves of a change in the law regarding whether a PRS term must be orally pronounced, and then claimed that double jeopardy barred the state from seeking resentencing to comply with this new rule.

---

[13] *See Silvers*, 90 F.3d at 101; *Arrellano-Rios*, 799 F.2d at 523-24; *Oksanen*, 362 F.2d at 80.

[14] *See DeWitt*, 6 F.3d at 35; *Lundien*, 769 F.2d at 986; *Breest*, 579 F.2d at 101; *United States v. Cook*, 890 F.2d 672, 675 (4th Cir. 1989).

[15] The Court of Appeals also relied on one case that rejected a double jeopardy claim, *see Rico*, 902 F.2d at 1068-69 (rejecting double jeopardy challenge to correction of illegally-lenient sentence where government's time to appeal had not expired), and another that was later vacated on rehearing, *see Hernandez v. Quarterman*, 340 Fed. Appx. 210 (5th Cir. 2009) (unpublished opinion), *vacated on reh'g sub nom. Hernandez v. Thaler*, 2010 WL 608865 (5th Cir. 2010) (unpublished opinion).

Finally, the New York Court of Appeals' decision underscores a fundamental paradox in the minority view: that a sentence correction might be legally required and reasonable under the circumstances yet still be barred by the Double Jeopardy Clause. That position is incoherent. To remedy the great confusion on this question, and to ensure that the double jeopardy protection is not stretched so far beyond its proper scope, this Court should grant certiorari.

II. The decision of the Court of Appeals conflicts with this Court's precedents.

Not only does the decision below deepen the split on whether the Double Jeopardy Clause constrains a court's authority to correct an illegal sentence, but it also conflicts with prior rulings of this Court. The New York Court of Appeals' conclusion that double jeopardy imposes a bright-line temporal limit on sentence correction cannot be squared with precedents that define the scope of the double jeopardy protection.

This Court has held that the Double Jeopardy Clause does not bar correction of an illegal sentence, even where it increases punishment. *See Bozza*, 330 U.S. 160. In *Bozza*, the crime for which the defendant was convicted carried a minimum penalty of a $100 fine and imprisonment, but the judge mistakenly imposed imprisonment only. *See id.* at 165. Several hours later, after the defendant had already been taken to a detention center, the judge ordered the defendant back to court and corrected

the sentence to include the mandatory fine. *See id.* at 165-66. This Court rejected the defendant's double jeopardy claim, cautioning that "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Id.* at 166-67. Correcting an invalid sentence to make it lawful "[does] not twice put petitioner in jeopardy for the same offense." *Id.* at 167. Likewise, amending respondents' sentences here to include their statutorily-mandated PRS terms did not put them twice in jeopardy for a single offense.[16]

In addition, while this Court need not consider here whether the Double Jeopardy Clause sets a temporal limit on a court's authority to amend a *lawful* sentence, the Court has indicated that such an amendment is permissible, provided that it is

---

[16] Other decisions of this Court recognize similar limits on the Double Jeopardy Clause. *See Jones v. Thomas*, 491 U.S. 376, 384-85 (1989) (rejecting double jeopardy claim where defendant's sentence fell within the "plain[]" legislative intent); *Pollard v. United States*, 352 U.S. 354, 357-61 (1957) (where court had neglected to pronounce original probationary sentence, court properly substituted prison term two years later after defendant was returned to court for alleged violation of invalid probation order); *Miller v. Aderhold*, 288 U.S. 206, 209-11 (1933) (where court had issued void order permanently suspending sentence, lawful sentence was properly imposed at succeeding term); *In Re Bonner*, 151 U.S. 242, 254-62 (1894) (granting writ of *habeas corpus*, without prejudice to government's right to seek imposition of lawful sentence, where court had issued void order committing defendant to state penitentiary).

authorized by the legislature. In affirming the increase of a sentence upon a statutorily-authorized appeal by the prosecutor, this Court observed that for purposes of the Double Jeopardy Clause, "a sentence does not have the qualities of constitutional finality that attend an acquittal." *United States v. DiFrancesco*, 449 U.S. 117, 134 (1980); *see also id.* at 137-38 ("the Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase").

For similar reasons, the Double Jeopardy Clause does not bar the imposition of a stiffer sentence following retrial after a defendant's successful appeal. *See North Carolina v. Pearce*, 395 U.S. 711, 721 (1969) (the Double Jeopardy Clause "does not restrict[] the imposition of an otherwise lawful single punishment for the offense in question"). Applying this "well established part of our constitutional jurisprudence," *see DiFrancesco*, 449 U.S. at 135 (quoting *Pearce*, 395 U.S. at 720), this Court held that a lawful increase in a sentence simply does not constitute a multiple punishment or otherwise implicate a defendant's interest in finality. "If any rule of finality had applied to the pronouncement of a sentence, the original sentence in *Pearce* would have served as a ceiling on the one imposed at retrial." *DiFrancesco*, 449 U.S. at 135; *see also Pennsylvania v. Goldhammer*, 474 U.S. 28 (1985) (double jeopardy did not bar resentencing on remaining counts after several other counts were vacated on appeal).

More recently, in *Monge v. California*, 524 U.S. 721 (1998), this Court declared that the Double Jeopardy Clause does not even "extend[] to noncapital sentencing proceedings." *See id.* at 724. After the state had failed to prove one of the defendant's prior convictions at an initial sentencing proceeding under a "three strikes" law, the California Supreme Court allowed the state a second opportunity to present its proof at a subsequent sentencing proceeding. *See id.* at 725-27. This Court affirmed, distinguishing between a sentencing determination and an acquittal. *See id.* at 729 (*citing DiFrancesco*, 449 U.S. at 134). "Historically," this Court noted, "we have found double jeopardy protections inapplicable to sentencing proceedings, because the determinations at issue do not place a defendant in jeopardy for an 'offense.'" *Id.* at 728 (internal citation omitted).[17]

Indeed, this Court has applied the Double Jeopardy Clause to non-capital sentencing in only one circumstance: where the defendant has fully suffered a lawful punishment for his crime. In *Ex Parte Lange*, 85 U.S. 163 (1874), the trial court sentenced the defendant to imprisonment *and* a fine, even though the statute permitted only imprisonment *or* a fine. The defendant paid the fine, which was committed to the treasury and could not

---

[17] By contrast, double jeopardy protections may attach in a capital sentencing proceeding, given the "unique circumstances of capital cases." *Id.* at 726; *see also Bullington v. Missouri*, 451 U.S. 430, 445-46 (1981).

be returned. *See id.* at 174-75. This Court held that the Double Jeopardy Clause barred subsequent correction of the sentence to include imprisonment. *See id.* at 175. Once the defendant "had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone." *Id.* at 176; *see also In re Bradley*, 318 U.S. 50, 51-52 (1943) (sentence could not be corrected after defendant fully paid fine, which by itself constituted a lawful punishment for the offense).

Critically, the holding of *Ex Parte Lange* is "confine[d]" to its "specific context" and is "not susceptible of general application." *DiFrancesco*, 449 U.S. at 139; *see also id.* at 138-39 (rejecting *dicta* from a prior case suggesting that a sentence might become final after its commencement). *Lange* merely prohibits a court from increasing a sentence after the defendant has suffered a full and lawful punishment, not from correcting an illegally-lenient sentence. *See id.* at 139 ("[n]o double jeopardy problem would have been presented in *Ex Parte Lange* if Congress had provided that the offense there was punishable by both fine and imprisonment"); *see also Bozza*, 330 U.S. at 167 n.2 (defendant "had not suffered any lawful punishment until the court had announced the full mandatory sentence").[18]

---

[18] Several Justices of this Court have criticized even the limited rule of *Ex Parte Lange*, arguing that the Double (Continued...)

Finally, this Court's precedent suggests that even if double jeopardy had some application to sentence correction, there is no fixed point at which a court loses its authority to conform a sentence to the law. "The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." *DiFrancesco*, 449 U.S. at 137.[19] And, in any event, respondents themselves knew all along that their punishment included a PRS term; they accepted that obligation, without complaint, as a condition of early release from prison, and they never claimed to have been unaware of this mandated component of their sentences. *See* App. 35a, 40a-41a, 54a-83a.

(...Continued)
Jeopardy Clause applies to sentencing only if the state conducts multiple proceedings to punish the defendant *and* the punishment exceeds legislative limits. *See, e.g., Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 798-808 (1994) (Scalia, J., dissenting, joined by Thomas, J.); *Bradley*, 318 U.S. at 53-54 (Stone, C.J., dissenting); *see also Witte v. United States*, 515 U.S. 389, 406-08 (1995) (Scalia, J., concurring, joined by Thomas, J.); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 555-56 (1943) (Frankfurter, J., concurring).

[19] To the extent that double jeopardy confers some expectation of finality in a lawful sentence at some undefined point in time, *Bozza* suggests that a defendant can never have such an expectation of finality in an illegally-lenient sentence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CYRUS R. VANCE, JR.
District Attorney
New York County, NY

CAITLIN J. HALLIGAN*
General Counsel
HILARY HASSLER
Chief of Appeals
DAVID M. COHN
Senior Appellate Counsel
MARTIN J. FONCELLO
TIMOTHY C. STONE
DAVID P. STROMES
Assistant District Attorneys

*Counsel of Record for Petitioner

May 21, 2010

Blank Page