No. 09-1425

In the Supreme Court of the United States

NEW YORK,

PETITIONER,

v.

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

RESPONDENTS.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In opposing certiorari, respondents assert that there is no division among lower courts over whether the Double Jeopardy Clause limits a court's authority to correct an illegally-lenient sentence. Rather, they claim, the Clause is universally understood to bar correction of any sentence, including an illegal one, following the defendant's release from prison and the expiration of the government's time to appeal. *See* Br. in Opp. 7-15. Respondents also claim that the Court of Appeals

merely applied the rule of *United States v. DiFrancesco*, 449 U.S. 117 (1980), to the facts at hand, *see* Br. in Opp. 15-26, and that the decision below provides a poor vehicle to resolve the Double Jeopardy Clause's application to correcting an illegal sentence, *see* Br. in Opp. 26-30.

Respondents are wrong on all counts. A plain reading of federal circuit and state court opinions demonstrates an obvious divide. Respondents simply disregard the unqualified language of the "majority view" opinions.

Further, this Court's decision in *DiFrancesco* did not dictate the result below. If anything, this Court's precedents, including *DiFrancesco, Bozza v. United States*, 330 U.S. 160 (1947), *North Carolina v. Pearce*, 395 U.S. 711 (1969), and *Monge v. California*, 524 U.S. 721 (1998), suggest that the Double Jeopardy Clause poses no bar to the correction of an illegally-lenient sentence.

Finally, the decision below squarely presents a significant constitutional question that has divided courts across the country. A grant of certiorari at this juncture is warranted to resolve this important issue.

I. Courts nationwide are in fact divided over whether the Double Jeopardy Clause limits a court's authority to correct an illegally-lenient sentence.

Respondents contend that all courts nationwide follow a single standard: that no "sentence -- illegal or otherwise -- can be increased after its completion and after the time to appeal has expired." Br. in Opp. 7. The lower courts' decisions, however, demonstrate an obvious divide.

As detailed on pages 13-14 of the petition for certiorari, the majority of jurisdictions have declared that the correction of an illegally-lenient sentence does not implicate the Double Jeopardy Clause. These decisions make no distinctions related to the defendant's incarceration status or expiration of the time to appeal. *See, e.g., Breest v. Helgemoe*, 579 F.2d 95, 100-01 (1st Cir. 1978) ("the double jeopardy clause does not preclude the court from bringing the sentence and the manner of its imposition into compliance with statutory requirements"); *United States v. Hawthorne*, 806 F.2d 493, 501 (3d Cir. 1986) ("it is well settled that correction of an illegal sentence by resentencing does not implicate double jeopardy rights") (internal quotations omitted); *United States v. Kenyon*, 519 F.2d 1229, 1232 (9th Cir. 1975) ("correction of an invalid sentence by addition of the [mandatory] special parole [term] . . . does not subject the defendant to double jeopardy"); *State v. Powers*, 742 P.2d 792, 796 (Ariz. 1987) ("a trial court constitutionally may increase a sentence that it has imposed in contravention of its statutory

authority"); *State v. Calmes*, 632 N.W.2d 641, 649 (Minn. 2001) ("the double jeopardy guarantees are generally not violated when a district court corrects an unauthorized sentence, even if the sentence is increased") (internal quotations omitted).[1] In fact, several courts have stated -- consistent with this Court's language in *Monge* -- that the Double Jeopardy Clause has no application whatsoever to non-capital sentencing determinations. *See* Pet. 15-16.

By contrast, a minority of jurisdictions have found it relevant to the double jeopardy analysis whether the government's time to appeal has expired, whether the defendant has been released from custody, or whether the defendant has

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[1] Even the handful of "majority view" decisions that mention the government's right to appeal have made similar, sweeping declarations regarding the scope of the Double Jeopardy Clause. *See, e.g., United States v. Fogel*, 829 F.2d 77, 87 (D.C. Cir. 1987) (observing that while the expiration of the time to appeal might preclude amendment of a *lawful* sentence, "the Court in *DiFrancesco* left undisturbed the principle announced in *Bozza* that a court may permissibly increase a sentence if necessary to comply with a statute"); *City of Chicago v. Roman*, 705 N.E.2d 81, 86 (Ill. 1998) ("It is settled that there is no double jeopardy prohibition against resentencing a defendant to correct an illegal sentence.") (internal quotations omitted); *Commonwealth v. Jones*, 554 A.2d 50, 52 (Pa. 1989) (overruling prior Pennsylvania precedent and holding that "an illegal sentence is a legal nullity, and sentencing courts must have the authority to correct such a sentence even if that means increasing the sentence").

"completed" the illegally-lenient sentence. *See* Pet. 18-21.

Respondents try to obfuscate this split by ignoring the unqualified language of the "majority view" opinions. Instead, they point to various facts which, in their view, distinguish those cases from the decision below. *See* Br. in Opp. 13 n.8 (courts increased sentences on defendants' appeals); 13 n.9 (government's time to appeal had not expired); 13 n.10 (defendants still incarcerated). In none of those decisions, however, did the courts suggest that the scope of the Double Jeopardy Clause was somehow tied to these facts.

In short, courts have arrived at "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). The decision below deepens this split and merits immediate attention from this Court.

II. The decision below cannot be squared with this Court's precedents defining the scope of the Double Jeopardy Clause.

Respondents claim that the New York Court of Appeals "did no more than apply" *DiFrancesco*. Br. in Opp. 20. However, *DiFrancesco* does not address the precise question presented here: whether the Double Jeopardy Clause limits a court's power to correct an illegally-lenient sentence.

In *DiFrancesco*, the defendant received a sentence within the statutory range, but the government appealed under a provision (18 U.S.C. § 3576) authorizing an appellate court to impose an increased sentence for "dangerous special offenders." *See DiFrancesco*, 449 U.S. at 118-26. After the Second Circuit dismissed the government's appeal on double jeopardy grounds, *see id.* at 126, this Court reversed. This Court declared that sentences do not "have the qualities of constitutional finality that attend an acquittal," *id.* at 134, and that a defendant does not have "the right to know at any specific moment in time what the exact limit of his punishment will turn out to be," *id.* at 137. Moreover, this Court observed, the defendant was "charged with knowledge" of the dangerous special offender statute and its appeal provisions. *Id.* at 136. Hence, this Court concluded that the defendant had no "expectation of finality" in his original sentence. *Id.*

Respondents argue that *DiFrancesco* required the outcome reached by the court below, because "once a defendant accrues a legitimate expectation that his sentence is final, any subsequent increase or enhancement of that sentence effects forbidden multiple or successive punishment." Br. in Opp. 18. But that statement is a tautology: while a sentence may not be enhanced once a legitimate expectation of finality has accrued, respondents' formulation begs the question of when, if ever, a defendant can acquire a "legitimate expectation of finality" in an illegally-lenient sentence.

If anything, *DiFrancesco* suggests that the Double Jeopardy Clause poses no bar to the correction of illegally-lenient sentences. There, this Court recognized that a defendant has a diminished finality interest in a sentence (as opposed to an acquittal) and that he is "charged with knowledge" of sentencing statutes. Given *DiFrancesco*'s ruling that a valid sentence may be increased on appeal where authorized by statute, surely a defendant who receives a sentence below the statutory minimum (or one lacking a required provision) cannot expect the error to stand uncorrected, regardless of whether the sentence has been fully served.[2] Any potential limits on the power to correct such a sentence would arise under the Due Process Clause, not the Double Jeopardy Clause. *See* Pet. 17-18.

Further, respondents' attempts to distinguish *Bozza*, *Pearce*, and *Monge* fall flat. Respondents contend that, in *Bozza*, this Court held only that "a sentence was subject to change after its commencement." Br. in Opp. 21. To be sure, in approving the correction of Bozza's sentence, this Court held that the sentence did not become final after its commencement. *See Bozza*, 330 U.S. at 166. This Court, however, did not stop there, stating more broadly that the trial court did not "twice put petitioner in jeopardy for the same offense" by

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[2] In fact, even in dissent, Justice Brennan noted that this Court has "always allowed" the "correction of a technically improper sentence." *DiFrancesco*, 449 U.S. at 146 n.4 (Brennan, J., dissenting) (citing *Bozza*, 330 U.S. at 165-67).

correcting his sentence to "impose[] a valid punishment for an offense instead of an invalid punishment for that offense." *Bozza*, 330 U.S. at 167. Bozza, this Court observed, "had not suffered any lawful punishment until the court had announced the full mandatory sentence." *Id.* at 167 n.2.

Next, respondents note that in *Pearce*, this Court held that if a defendant's sentence is amended, the Double Jeopardy Clause requires that he be given credit for time already served, even if such credit is not mandated by state law. *See* Br. in Opp. 24 and n.14; *Pearce*, 395 U.S. at 716-19. Contrary to respondents' contention, however, this holding does not demonstrate that the Double Jeopardy Clause bars the correction of an illegal sentence. *See* Br. in Opp. 24-25. In *Pearce*, this Court did not require the state to impose a sentence that was below the statutory minimum or that lacked a required provision. Instead, this Court merely held that if the defendant did not receive credit for time served, he would quite literally be subjected to multiple punishments for the same offense. That holding was obviously correct and is not disputed here.

Finally, respondents argue that *Monge* involved a different type of renewed sentencing proceeding (a retrial on a prior-conviction allegation) than the renewed proceedings at issue here. *See* Br. in Opp. 22-23. However, nothing in *Monge* suggests that this Court's broad declaration about the scope of the Double Jeopardy Clause turned on that factual

distinction. Further, respondents incorrectly assert that the renewed proceeding in *Monge* did not increase the defendant's sentence. *See* Br. in Opp. 22-23. To the contrary, the defendant was subject to a significantly enhanced prison term if sentenced under the "three strikes" law. *See Monge*, 524 U.S. at 725-26.

III. The decision below provides an excellent opportunity for this Court to resolve the application of the Double Jeopardy Clause to illegally-lenient sentences.

The decision below provides an excellent opportunity for this Court to resolve a nationwide split on an important issue. The Court of Appeals rested its holding solely on federal double jeopardy grounds, *see* App. 16a-27a, and the dissents took issue with the majority's interpretations of this Court's precedents, *see* App. 31a-44a. The constitutional issue was thus fully joined below and is squarely presented for this Court's review.

Respondents assert that New York's "*sui generis* common law sentence-correction landscape" makes this issue unlikely to recur elsewhere. *See* Br. in Opp. 27. Even standing alone, the decision below would warrant review, because it will preclude supervision of countless violent felons upon their release from prison.[3] But the issue is not unique to

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[3] As detailed in the State's previously-filed stay application, Docket No. 09-A-839, the PRS terms of as many as

(Continued...)

New York; similar disputes have arisen across the country and will continue to arise until this Court intervenes. *See* Pet. 12-21. Moreover, there is nothing particularly "unique" about New York's "sentence-correction landscape"; many states permit illegal sentences to be corrected at any time.[4] Indeed, courts nationwide continue to debate the scope of two key precedents, *Bozza* and *DiFrancesco*,

(...Continued)
30,000 violent felons were not properly pronounced, and those offenders will not be subject to post-release supervision unless their sentences can be corrected. *See* State's Reply Brief in Support of Stay Application at 5-6; State's Supplemental Appendix in Support of Stay Application at 10-11 ¶ 37. Respondents dispute that number. *See* Br. in Opp. 28 n.15. Of course, the removal of even respondent's estimate of 1,000 violent felons from supervision presents a grave threat to public safety. In any event, that estimate encompasses only those affected defendants who have been identified *so far*. The potential impact of Court of Appeals' decision is much greater, as even respondents recognized in their opposition to the state's request for a stay. *See* Br. in Opp. to Stay Application at 11.

[4] Respondents argue that Rule 35 of the Federal Rules of Criminal Procedure sets a strict time limit on a court's authority to correct a sentence. *See* Br. in Opp. 9-10 n.7, 28-29. At least some federal courts, however, have held that a separate rule -- Rule 36 -- permits a court, "at any time," to correct a sentence where a mandatory or negotiated provision has been inadvertently omitted. *See* Pet. 14-15 n.9 (collecting cases). Respondents fail to acknowledge those precedents in their opposition papers. In fact, this Court recently held that even statutory deadlines for the pronouncement of sentence are not intractable. *See Dolan v. United States*, 130 S. Ct. 2533 (2010) (trial court properly entered restitution order following expiration of statutory 90-day deadline).

which were decided decades ago. The time is ripe for further guidance.

CONCLUSION

Petitioner respectfully requests that this Court grant certiorari on the question presented.

Respectfully submitted,

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