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### Double Jeopardy: A Resentencing Game

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## Double Jeopardy: A Resentencing Game

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## DOUBLE JEOPARDY: A RESENTENCING GAME

### COURT OF APPEALS OF NEW YORK

People v. Brinson<sup>1</sup>  
(decided June 26, 2013)

Two defendants, in unrelated cases, claimed that resentencing to include the mandatory post-release supervision to their determinate sentences violated the Double Jeopardy Clause of the Fifth Amendment.<sup>2</sup> The defendants claimed that their multiple sentences must be measured separately from one another.<sup>3</sup> Therefore, at the time of resentencing, the defendants stated that they had “an expectation of finality” because they completed the determinate portion of their sentences that were subject to post-release supervision.<sup>4</sup> The New York Court of Appeals held that the defendants did not have a legitimate expectation of finality until their aggregated sentences were completed and, until then, resentencing in order to correct an illegal sentence did not violate the “Double Jeopardy Clause and the prohibition against ‘multiple punishments.’ ”<sup>5</sup>

#### I. BACKGROUND

On July 14, 2000, Christopher Brinson was sentenced to a determinate term of ten years for robbery in the second degree, an indeterminate term of three to six years for robbery in the third degree, and another indeterminate term of two to four years for grand larceny in the fourth degree.<sup>6</sup> The court ordered that the indeterminate terms to run concurrently, but the indeterminate terms to run consecutive to the determinate term.<sup>7</sup> Brinson was incarcerated for eleven years and

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<sup>1</sup> 995 N.E.2d 144 (N.Y. 2013).

<sup>2</sup> U.S. CONST. amend. V.

<sup>3</sup> *Brinson*, 995 N.E.2d at 147.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 148.

<sup>6</sup> *Id.* at 145.

<sup>7</sup> *Id.*

four months when he was resentenced to include five years of post-release supervision with his determinate sentence.<sup>8</sup>

In 2004, Lawrence Blankymsee was sentenced to a determinate term of five years on two counts of possession of a loaded firearm, an indeterminate sentence of three to six years on other weapons possession counts, an indeterminate sentence of eight to sixteen years on two felony possessions of a controlled substance counts, and a determinate sentence of one year on a misdemeanor drug possession count.<sup>9</sup> Blankymsee was resentenced after six years and five months in order to impose five years post-release supervision for his determinate sentences.<sup>10</sup>

Under New York Penal Law § 70.45, a determinate sentence not only includes a term of imprisonment, but it also imposes a period of post-release supervision to follow.<sup>11</sup> The statute, which was part of Jenna's Law, was adopted by the New York Legislature in 1998 with the intent to "abolish parole and institute determinate terms of imprisonment for certain felony offenses."<sup>12</sup> The New York Court of Appeals held that post-release supervision must be properly pronounced by the sentencing court and a failure to do so "results in an illegal sentence."<sup>13</sup> Additionally, these illegal sentences cannot be administratively corrected by the Department of Correctional Service ("DOCS") because it is outside of the department's jurisdiction and only a sentencing judge may impose post-release supervision.<sup>14</sup> In 2008, the Legislature enacted Correction Law § 601-d to be used as a device for the court to consider resentencing defendants who were serving determinate sentences but did not receive post-release supervision in their original sentence.<sup>15</sup> Additionally, this law was enacted to allow the DOCS to notify sentencing courts that post-release supervision was not included in the original sentence and that the defendant should be resentenced to include post-release supervision.<sup>16</sup>

In *People v. Brinson*, Brinson and Blankymsee challenged the

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<sup>8</sup> 995 N.E.2d at 145-46.

<sup>9</sup> *Id.* at 146.

<sup>10</sup> *Id.*

<sup>11</sup> N.Y. PENAL LAW § 70.45 (McKinney 2011).

<sup>12</sup> *People v. Williams*, 925 N.E.2d 878, 881 (N.Y. 2010).

<sup>13</sup> *Id.*

<sup>14</sup> *Matter of Garner v. New York State Dep't of Corr. Serv.*, 889 N.E.2d 467, 469-70 (N.Y. 2008).

<sup>15</sup> *Williams*, 925 N.E.2d at 881.

<sup>16</sup> *Id.* at 884.

constitutionality of resentencing that imposed post-release supervision to their determinate sentences as a violation of the Double Jeopardy Clause of the Fifth Amendment.<sup>17</sup> The defendants asserted that they had an expectation of finality because they had completed their determinate sentences at the time of resentencing and, thus, the resentencing violated the prohibition against multiple punishments.<sup>18</sup>

The New York Court of Appeals concluded that the resentencing did not violate the Double Jeopardy Clause because the defendants did not have a “legitimate expectation of finality until they completed their aggregate sentences.”<sup>19</sup> The court stated, the “defendants were resentenced because the sentencing court failed to impose P[ost] R[elease] S[upervision] as part of the original sentence,”<sup>20</sup> and courts have an inherent authority to correct illegal sentences.<sup>21</sup> Under New York Criminal Procedure Law § 440.40, a court may set aside an illegal sentence and resentence the defendant.<sup>22</sup> The time limit to resentence is reached when a defendant has completed the sentence and an appeal, or the time to appeal, has run out.<sup>23</sup>

The court rejected the defendants’ argument that their indeterminate and determinate sentences must be considered separately.<sup>24</sup> The court found that under Penal Law § 70.30, consecutive and concurrent sentences are aggregated and “thus made into one.”<sup>25</sup> Additionally, the court stated, “a legitimate expectation of finality turns on the completion of a sentence. Where multiple sentences are properly aggregated into a single sentence, that expectation arises upon completion of that sentence.”<sup>26</sup> Therefore, the defendants could not have had a legitimate expectation of finality because they were still incarcerated and serving their aggregate sentences.<sup>27</sup> The court stated that

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<sup>17</sup> *Brinson*, 995 N.E.2d at 144.

<sup>18</sup> *Id.* at 145.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (citing *People v. Sparber*, 889 N.E.2d 459, 464-65 (N.Y. 2008) (holding that a judge must pronounce a defendant’s PRS sentence in open court and a court’s failure to impose PRS as part of the original sentence requires resentencing of the defendant to correct the error)).

<sup>21</sup> *Id.* at 146 (citing *People v. Richardson*, 799 N.E.2d 607, 610-11 (N.Y. 2003)).

<sup>22</sup> N.Y. CRIM. PROC. § 440.40 (McKinney 1970).

<sup>23</sup> *Brinson*, 995 N.E.2d at 146.

<sup>24</sup> *Id.* at 147.

<sup>25</sup> *Id.* (citing *People v. Buss*, 900 N.E.2d 964, 966 (N.Y. 2008)).

<sup>26</sup> *Id.* at 148.

<sup>27</sup> *Id.*

it must presume that the defendants knew their determinate sentences were illegal and that they understood their multiple sentences were subject to aggregation.<sup>28</sup>

The court discussed the case *People v. Lingle*.<sup>29</sup> In *Lingle*, the defendants believed that they had a legitimate expectation of finality because they served a “substantial” portion of their original sentences.<sup>30</sup> The court in *Lingle* rejected the defendants’ arguments and held that defendants cannot create a legitimate expectation of finality if they have served any time less than the entire sentence.<sup>31</sup> Furthermore, “defendants are ‘presumed to be aware that a determinate prison sentence without a term of PRS is illegal’ and subject to correction, and therefore, ‘cannot claim a legitimate expectation that the originally-imposed, improper sentence is final for all purposes.’”<sup>32</sup>

The court in *Brinson* also referred to *People v. Williams*<sup>33</sup> in its decision. The five defendants in *Williams* received determinate sentences, completed their incarceration, and were released.<sup>34</sup> They were then resentenced to impose terms of post-release supervision.<sup>35</sup> The New York Court of Appeals in *Williams* stated that the prohibition against multiple punishments “prevents a sentence from being increased once the defendant has a legitimate expectation of finality of the sentence.”<sup>36</sup> Moreover, there is a time limit when correcting an illegal sentence.<sup>37</sup> The court stated in *Williams*, “there must be a temporal limitation on a court’s ability to resentence a defendant.”<sup>38</sup> The court held that under the Double Jeopardy Clause, expectation of finality occurs when the defendant completes the sentence and has been released from custody.<sup>39</sup> Therefore, the court could not impose the post-release supervision on the defendants in *Williams*, as they had already been released.<sup>40</sup>

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<sup>28</sup> *Brinson*, 995 N.E.2d at 147; see *People v. Lingle*, 949 N.E.2d 952 (N.Y. 2011) (stating that the defendants are charged with knowledge of the law).

<sup>29</sup> 949 N.E.2d 952 (N.Y. 2011).

<sup>30</sup> *Id.* at 955.

<sup>31</sup> *Id.* at 956-57.

<sup>32</sup> *Id.* at 955-56.

<sup>33</sup> 925 N.E.2d 878 (N.Y. 2010).

<sup>34</sup> *Id.* at 886.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 888 (citing *United States v. DiFrancesco*, 449 U.S. 117, 135-36 (1980)).

<sup>37</sup> *Brinson*, 995 N.E.2d at 146.

<sup>38</sup> *Williams*, 925 N.E.2d at 890.

<sup>39</sup> *Id.* at 891.

<sup>40</sup> *Id.*

## II. FEDERAL APPROACH

### A. Supreme Court

In *United States v. Bozza*,<sup>41</sup> the Court addressed the resentencing issue under the Double Jeopardy Clause.<sup>42</sup> The defendant's conviction consisted of fines and imprisonment.<sup>43</sup> However, when the sentence was announced, the trial judge only mentioned imprisonment.<sup>44</sup> Five hours later, the judge recalled the defendant and advised him that the judge failed to impose mandatory fines, and he was, therefore, including them at that time for the record.<sup>45</sup> The Court stated that just because the defendant was before the judge twice in one day for sentencing, Double Jeopardy was not invoked.<sup>46</sup> The defendant argued that the trial court cannot correct the sentence because it would increase his punishment.<sup>47</sup> The Court held that when a defendant is convicted based on a verdict, the defendant should not be able to escape punishment because the trial court committed an error during sentencing.<sup>48</sup> Additionally, the Court recognized 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."<sup>49</sup> The Court was only doing what the law required upon conviction, and it " 'set aside what it had no authority to do.' "<sup>50</sup> The Court held that the defendant was not put in jeopardy two times for the same offense because the corrected sentence "impose[d] a valid punishment for an offense instead of an invalid punishment for that offense."<sup>51</sup>

In 1980, *United States v. DiFrancesco*<sup>52</sup> was decided. In this case, the defendant was sentenced to eight years for damaging federal property and five years for conspiracy, which were to be served con-

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<sup>41</sup> 330 U.S. 160 (1947).

<sup>42</sup> *Id.* at 166.

<sup>43</sup> *Id.* at 165.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Bozza*, 330 U.S. at 166.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 166-67.

<sup>50</sup> *Id.* at 167.

<sup>51</sup> *Bozza*, 330 U.S. at 167.

<sup>52</sup> 449 U.S. 117 (1980).

currently, as well as one year for unlawful storage, which was to be served consecutively with the other sentences.<sup>53</sup> The defendant was sentenced a month later to two ten year terms for racketeering; those terms were to be served concurrently to each other, as well as with the previous sentences, thus, resulting in only a one year addition to the previous sentences.<sup>54</sup> The United States appealed, challenging the District Court's decision to only impose one additional year onto the defendant's sentence as an abuse of discretion.<sup>55</sup> The issue before the Court was whether the announcement of a sentence created finality and conclusiveness.<sup>56</sup> The Court found, "[D]ouble [J]eopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence."<sup>57</sup> The Court reasoned that the purpose of the Double Jeopardy Clause was to prevent multiple attempts to convict.<sup>58</sup> Additionally, the defendant had no expectation of finality until the appeal was completed or the time to appeal had run out.<sup>59</sup>

*DiFrancesco* provided that resentencing was not limited to the facts of *Bozza*, where resentencing occurred on the same day as the original sentencing, in order to correct the sentence.<sup>60</sup> The court in *DiFrancesco* expanded *Bozza* by holding that "[t]he 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."<sup>61</sup>

## B. Second Circuit Court of Appeals

The Second Circuit addressed the issue of expectation of finality in *King v. Cuomo*.<sup>62</sup> In *King*, twenty-eight defendants were sentenced to determinate terms of imprisonment but post-release supervision was not imposed during sentencing.<sup>63</sup> The court held that there was no reasonable expectation of finality until the defendants

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<sup>53</sup> *Id.* at 122.

<sup>54</sup> *Id.* at 122-23.

<sup>55</sup> *Id.* at 125.

<sup>56</sup> *Id.* at 132.

<sup>57</sup> *DiFrancesco*, 449 U.S. at 136.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 137.

<sup>61</sup> *Id.*

<sup>62</sup> *King v. Cuomo*, 465 F. App'x 42 (2d Cir. 2012).

<sup>63</sup> *Id.* at 43.



had “completed their determinate terms and been released from custody.”<sup>64</sup>

In *Williams v. Travis*,<sup>65</sup> the defendant pled guilty to burglary in the second degree and he was sentenced to a three and a half to seven year term of imprisonment.<sup>66</sup> However, the sentence was illegal because the maximum sentence was double the minimum.<sup>67</sup> The defendant claimed that the resentencing violated the Double Jeopardy Clause.<sup>68</sup> The court held that the defendant did not have a legitimate expectation of finality because his original sentence was illegal, and thus, the defendant’s Double Jeopardy rights were not violated.<sup>69</sup> Furthermore, a legitimate expectation of finality could not be achieved because there was still a right to appeal.<sup>70</sup>

The Second Circuit also discussed the correction of illegal sentences in *United States ex rel. Ferrari v. Henderson*.<sup>71</sup> The defendant was sentenced to a five to fifteen year term of imprisonment, as a second felony offender, and a fifteen to thirty year term for first degree burglary.<sup>72</sup> The sentence was suspended on the remaining two counts.<sup>73</sup> The prosecutor moved for resentencing on the grounds that the indictment was illegal because a conviction for a felony committed with a weapon may not be suspended.<sup>74</sup> The defendant argued that his resentencing violated the Double Jeopardy Clause.<sup>75</sup> The court held that there was no “[D]ouble [J]eopardy problem here since the correction of an illegal sentence by the imposition of a legal sentence, even when this increases punishment, cannot be considered as multiple punishment for the same offense.”<sup>76</sup>

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<sup>64</sup> *Id.* at 45.

<sup>65</sup> 143 F.3d 98 (2d Cir. 1998).

<sup>66</sup> *Id.* at 98.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 99.

<sup>69</sup> *Id.*

<sup>70</sup> *Travis*, 143 F.3d at 99.

<sup>71</sup> 474 F.2d 510 (2d Cir. 1973).

<sup>72</sup> *Id.* at 511.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 513.

<sup>76</sup> *Henderson*, 474 F.2d at 513.

### C. Other Circuit Court of Appeals

Although the case of *United States v. Welch*<sup>77</sup> is not binding on the Second Circuit, it does have persuasive value. The defendant was convicted and sentenced on four counts of possession of stolen mail.<sup>78</sup> He was sentenced to four years imprisonment on count one, to run consecutively with three year terms for counts two, three and four which were to run concurrent with each other.<sup>79</sup> On appeal, the defendant's sentence was modified to one conviction and remanded for resentencing.<sup>80</sup> Then, the defendant was resentenced to five years imprisonment.<sup>81</sup> The defendant claimed that his Double Jeopardy rights were violated when the court imposed a sentence that was larger than the maximum imposed for a single count at the initial sentencing.<sup>82</sup> The Tenth Circuit Court of Appeals held that the defendant did not have a legitimate expectation of finality because his original sentence was illegal.<sup>83</sup> Therefore, the defendant's Double Jeopardy rights were not violated.<sup>84</sup>

Furthermore, the Sixth Circuit Court of Appeals provides persuasive authority in *United States v. Warner*.<sup>85</sup> At sentencing, the court failed to impose a special parole term that was required "when-ever a defendant with a prior conviction is sentenced to a term of imprisonment."<sup>86</sup> The court held that there was no Double Jeopardy claim because an amended sentence adding a mandatory parole term is not prohibited by the Double Jeopardy Clause.<sup>87</sup>

### D. United States District Courts

In *Johnson v. New York*,<sup>88</sup> the defendant was sentenced in 1999 to a term of five and a half to eleven years for criminal possession of a controlled substance and a one year term for resisting arrest,

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<sup>77</sup> 928 F.2d 915 (10th Cir. 1991).

<sup>78</sup> *Id.* at 915.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 916.

<sup>82</sup> *Welch*, 928 F.2d at 916.

<sup>83</sup> *Id.* at 917.

<sup>84</sup> *Id.*

<sup>85</sup> 690 F.2d 545 (6th Cir. 1982).

<sup>86</sup> *Id.* at 555.

<sup>87</sup> *Id.*

<sup>88</sup> 851 F. Supp. 2d 713 (S.D.N.Y. 2012).

which were to run concurrently.<sup>89</sup> Additionally, the defendant had a prior undischarged sentence for a parole violation of twenty-four months, but the court did not specify whether this sentence was to run concurrently or consecutively.<sup>90</sup> The DOCS administered the defendant's 1999 sentence to run concurrently with the undischarged sentence.<sup>91</sup> However, the initial calculation of the DOCS was invalid because, according to the statute, the defendant's 1999 sentence was required to run consecutively with his undischarged sentence.<sup>92</sup> The defendant was resentenced to serve his 1999 sentence and his undischarged sentence consecutively.<sup>93</sup> The defendant claimed that he had a legitimate expectation of finality of his sentences running concurrently and the resentencing enhanced his sentence and violated his Double Jeopardy rights.<sup>94</sup> The court rejected the defendant's argument because the court did not enhance or lengthen his original sentence.<sup>95</sup> The court held that "the Trial Court imposed the *same* sentence that, under New York law, it was deemed to have imposed at his original sentencing."<sup>96</sup>

In *Warren v. Rock*,<sup>97</sup> the defendant's original sentence did not include the mandatory post-release supervision.<sup>98</sup> When the court discovered the error, it resentenced the defendant in order to correct the sentence.<sup>99</sup> The court held that although resentencing occurred more than seven years after the original sentencing, it did not violate the Double Jeopardy Clause.<sup>100</sup> The court reasoned that "[t]he Double Jeopardy Clause prohibits altering a previously imposed sentence if the defendant had a legitimate expectation of finality in his original sentence . . . but where no such expectation exists, [D]ouble [J]eopardy does not bar a court from modifying a sentence."<sup>101</sup> The court in *Warren* cited *Williams* for the proposition that "defendants

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<sup>89</sup> *Id.* at 717.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Johnson*, 851 F. Supp. 2d at 718.

<sup>94</sup> *Id.* at 723.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> No. 12-CV-3101, 2012 WL 2421916 (E.D.N.Y. June 27, 2012).

<sup>98</sup> *Id.* at \*2.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

who have not yet completed their imposed sentences ‘cannot acquire a legitimate expectation of finality in a sentence which is illegal, because such a sentence remains subject to modification.’ ”<sup>102</sup> The court found that the defendant did not have a legitimate expectation of finality in his illegal original sentence because at the time of resentencing when the post-release supervision was added he was still incarcerated.<sup>103</sup> “[T]hus the re-sentencing to correct the sentencing judge’s original oversight did not violate Warren’s double jeopardy rights.”<sup>104</sup>

### III. STATE APPROACH

The New York Constitution states in Article 1, § 6, that “[n]o person shall be subject to be twice put in jeopardy for the same offense.”<sup>105</sup> Until 2010, when the New York Court of Appeals decided *Williams*, New York courts followed the precedent established in *DiFrancesco* to resolve the issue of Double Jeopardy in resentencing cases.<sup>106</sup> Since 2010, New York courts have followed the precedent set forth in *Williams* to analyze expectation of finality for the purpose of resentencing.<sup>107</sup> The New York Court of Appeals believed the ruling in *Williams* “promotes clarity, certainty and fairness.”<sup>108</sup>

#### A. New York Court of Appeals

In *People v. Minaya*,<sup>109</sup> the defendant agreed to a plea bargain of an eight year sentence for attempted robbery in the first degree.<sup>110</sup> During sentencing, the court announced that it would follow the plea bargain.<sup>111</sup> However, when the sentence was pronounced, the court stated that the defendant’s maximum term was three years instead of

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<sup>102</sup> *Warren*, 2012 WL 2421916, at \*2.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> N.Y. CONST. art. I, § 6.

<sup>106</sup> *See, e.g.,* *People v. Minaya*, 429 N.E.2d 1161, 1163 (N.Y. 1981); *Williams*, 925 N.E.2d at 888 (stating that the court in *DiFrancesco* “held that the protection against multiple punishments prevents a sentence from being increased once the defendant has a legitimate expectation of finality of the sentence.”).

<sup>107</sup> *See, e.g.,* *Lingle*, 949 N.E.2d at 955-56; *Brinson*, 995 N.E.2d at 146.

<sup>108</sup> *Lingle*, 949 N.E.2d at 956.

<sup>109</sup> 429 N.E.2d 1161 (N.Y. 1981).

<sup>110</sup> *Id.* at 1162.

<sup>111</sup> *Id.*

eight years.<sup>112</sup> The error was noticed when the prosecutor discussed pleas with the codefendants.<sup>113</sup> At an informal hearing, the court concluded that the pronouncement of the three year sentence was erroneous and stated, “the sentence is now corrected.”<sup>114</sup> The Appellate Division reversed the correction on appeal and reinstated the three year sentence.<sup>115</sup> The decision noted that courts have the inherent power to correct sentences; however, the defendant’s sentence in this case was not correctable because the “imposition of judgment enlarging the time to be served by defendant is a matter of substance not form.”<sup>116</sup> The Court of Appeals reversed the Appellate Division and stated that the court’s inherent power to correct statements or even formal pronouncements permits the court to correct an error such as the one in this case.<sup>117</sup> The court held, “there is no basis for concluding that the [D]ouble [J]eopardy [C]lause posed any impediment to the court’s power to correct the error in the sentence.”<sup>118</sup>

In *People v. Sparber*,<sup>119</sup> there were five defendants: Sparber, Thomas, Lingle, Rodriguez and Ware.<sup>120</sup> Defendant Sparber pled guilty to first degree assault for a fifteen year sentence and was adjudicated as a second violent felony offender.<sup>121</sup> At sentencing, the court pronounced the determinate term of fifteen years but did not mention the mandatory five year post-release supervision term.<sup>122</sup> Defendant Thomas was sentenced to a fifteen year aggregate term as a second violent felony offender for aggravated assault on a police officer and sex crimes involving a minor, but the court failed to pronounce post-release supervision at sentencing.<sup>123</sup> Defendant Lingle was sentenced to a determinate sentence of fourteen years as a second violent felony offender for arson and an indeterminate sentence of three and a half years to seven years to run concurrent with the de-

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Minaya*, 429 N.E.2d at 1162.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1163.

<sup>118</sup> *Id.* at 1164.

<sup>119</sup> 889 N.E.2d 459 (N.Y. 2008).

<sup>120</sup> *Id.* at 461.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 462.

terminate sentence for reckless endangerment.<sup>124</sup> At sentencing, mandatory post-release supervision was not pronounced.<sup>125</sup> Defendant Rodriguez was sentenced to the maximum of twenty five years for gang assault in the first degree.<sup>126</sup> The last defendant, Ware, was sentenced to three determinate terms of fourteen years to run concurrently for attempted robbery in the first degree, attempted assault in the first degree and criminal possession of a weapon in the second degree, for which a term of post-release supervision was not imposed.<sup>127</sup> In all five defendants' cases, although the mandatory post-release supervision term was not imposed at sentencing, it was included on the court worksheet.<sup>128</sup> The court stated that the error of the sentencing court "can be remedied through resentencing. Nothing more is required."<sup>129</sup> The court recognized that notes on a worksheet recorded outside of the defendants' presence cannot satisfy the mandate of post-release supervision and errors can only be corrected when the defendant was present.<sup>130</sup> Additionally, the court found that "the sole remedy for a procedural error as this is to vacate the sentence and remit for a resentencing hearing so that the trial judge can make the required pronouncement."<sup>131</sup> Thus, only a procedural error is made when the required sentence is not pronounced, and it can easily be remedied by remitting the case back to the sentencing court in order to pronounce the post-release supervision term.<sup>132</sup>

In 2010, *Williams* was decided by the New York Court of Appeals. As previously stated, the defendants completed their determinate sentences, and they were released.<sup>133</sup> Thereafter, they were resentenced to impose post-release supervision terms.<sup>134</sup> In *Williams*, the New York Court of Appeals defined when a defendant has a legitimate expectation of finality.<sup>135</sup> The court held:

once a defendant is released from custody and returns

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<sup>124</sup> *Sparber*, 889 N.E.2d at 462-63.

<sup>125</sup> *Id.* at 463.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 461, 463.

<sup>129</sup> *Sparber*, 889 N.E.2d at 464.

<sup>130</sup> *Id.* at 465.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 466.

<sup>133</sup> *Williams*, 925 N.E.2d at 886.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 891.

to the community after serving the period of incarceration that was ordered by the sentencing court . . . there is a legitimate expectation that the sentence, although illegal under the Penal Law, is final and the Double Jeopardy Clause prevents a court from modifying the sentence to include a period of post[-]release supervision.<sup>136</sup>

One year later, when *Lingle* was before of the New York Court of Appeals, the court employed its holding in *Williams* to determine whether the defendants had a legitimate expectation of finality.<sup>137</sup> The defendants served “substantial” portions of their originally imposed sentences.<sup>138</sup> The court held consistently with its decision in *Williams* and rejected the defendants’ argument that completing a “substantial” portion of their sentences was a basis for a legitimate expectation of finality.<sup>139</sup>

### B. New York Appellate Division

In *People v. Smith*,<sup>140</sup> the defendant was sentenced in 2000 to determinate terms of eleven years for robbery in the second degree on each of two counts, two years for grand larceny in the fourth degree, and one year for criminal possession of stolen property in the fifth degree, which were to run concurrently with each other.<sup>141</sup> Post-release supervision was not pronounced by the sentencing court.<sup>142</sup> The defendant, while incarcerated in 2005, was sentenced to an indeterminate term of two to four years for promoting prison contraband in the first degree, which was to run consecutively with his previous sentences.<sup>143</sup> Then, in 2010, the defendant was sentenced to another one and a half to three years for promoting prison contraband, which was to run consecutively with his other sentences.<sup>144</sup> The defendant was incarcerated for eleven years when he was resentenced for his

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<sup>136</sup> *Id.*

<sup>137</sup> *Lingle*, 949 N.E.2d at 955-56.

<sup>138</sup> *Id.* at 955.

<sup>139</sup> *Id.*

<sup>140</sup> 955 N.Y.S.2d 373 (App. Div. 2d Dep’t 2012).

<sup>141</sup> *Id.* at 374.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

robbery in the second degree convictions to include a term of post-release supervision.<sup>145</sup> The court held that the resentencing did not violate the Double Jeopardy Clause.<sup>146</sup> It used the reasoning from the court in *Williams* stating “[s]ince the defendant was still serving this single, combined sentence at the time of the resentencing, and had not yet been released from prison, he did not have a legitimate expectation of finality.”<sup>147</sup>

Furthermore, in *People v. Scott*,<sup>148</sup> the defendant was sentenced to determinate terms of ten years for attempted rape in the first degree and seven years for assault in the second degree, which were to run concurrently.<sup>149</sup> However, the required post-release supervision was not imposed by the sentencing court.<sup>150</sup> The court held that, in accordance with the decision in *Williams*, resentencing the defendant to include the post-release supervision term did not put him in Double Jeopardy because he had not been released from incarceration of his original sentence.<sup>151</sup>

### C. New York Supreme Court

The Supreme Court of New York, Queens County faced the issue of resentencing a defendant in order to impose the mandatory post-release supervision to the original sentence in *People v. Wells*.<sup>152</sup> The defendant was a second felony offender who was sentenced to three determinate terms of ten years for one count of robbery in the first degree and two counts of robbery in the second degree, which were to run concurrently.<sup>153</sup> Additionally, the defendant was sentenced to indeterminate terms of three and a half to seven years for criminal possession of stolen property in the third degree and one and a half to three years for criminal possession of stolen property in the fourth degree, which were to run concurrently, as well as a one year determinate sentence for unauthorized use of a motor vehicle.<sup>154</sup>

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<sup>145</sup> *Smith*, 955 N.Y.S.2d at 374.

<sup>146</sup> *Id.* at 374-75.

<sup>147</sup> *Id.* at 375.

<sup>148</sup> 917 N.Y.S.2d 293 (App. Div. 2d Dep’t 2011).

<sup>149</sup> *Id.* at 294.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> 903 N.Y.S.2d 703 (Sup. Ct. 2010).

<sup>153</sup> *Id.* at 704.

<sup>154</sup> *Id.*



When the defendant was originally sentenced, the court did not impose a term of post-release supervision for the determinate sentences.<sup>155</sup> In October of 2009, the defendant was supposed to be resentenced.<sup>156</sup> The defendant filed a motion opposing the resentencing because he claimed that he had a legitimate expectation of finality and resentencing to impose post-release supervision violated his Double Jeopardy rights.<sup>157</sup> The defendant was conditionally released from incarceration in November of 2009, and his maximum expiration date would have been in April of 2011.<sup>158</sup> In December of 2009, the court denied the defendant's motion and held that he "did not have a legitimate expectation of finality in the original sentence" because "PRS [post-release supervision] is a mandatory component of all determinate prison sentences, a sentence imposed without PRS would be unauthorized [and] illegal; hence, a defendant could not have a legitimate expectation of finality in an illegal sentence."<sup>159</sup> The court resentenced the defendant and imposed the post-release supervision term of five years.<sup>160</sup> The defendant moved for the order to be vacated.<sup>161</sup>

The court distinguished *Wells* from *Williams*.<sup>162</sup> In *Williams*, the defendants were beyond the maximum expiration dates of their original sentences when they were resentenced; whereas, in this case, the defendant was resentenced in December of 2009, and his maximum expiration date was not until April of 2011.<sup>163</sup> The court stated that there were no decisions from the Appellate Division regarding imposition of post-release supervision on a defendant who was conditionally released from prison, served his initial sentence, completed the direct appeal and the time for appeal has expired, but the maximum expiration date of the originally imposed sentence was not reached.<sup>164</sup> The court held, in accordance with the *Williams* decision, that the defendant's Double Jeopardy rights attached on the date in which the defendant was conditionally released in November of

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Wells*, 903 N.Y.S.2d at 704.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 703.

<sup>162</sup> *Wells*, 903 N.Y.S.2d at 705.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

2009.<sup>165</sup> Thus, it was improper to resentence the defendant to impose post-release supervision in December of 2009.<sup>166</sup> The court reasoned that the defendant was “entitled to the same constitutional rights as other defendants whose maximum expiration dates have passed.”<sup>167</sup>

#### IV. CONCLUSION

After evaluating the federal approach and the New York State approach on resentencing under the Double Jeopardy Clause, it is reasonable to conclude that the court in *Brinson* followed the proper precedent when determining whether resentencing a defendant to impose a term of mandatory post-release supervision to the original illegal determinate sentence violated the Double Jeopardy Clause of the Fifth Amendment. *Brinson* was not a case of first impression. There were several questions in which the court in *Brinson* looked to both federal courts and state courts for answers. The *Brinson* case is important because the court sets out the precedent for resentencing defendants who were serving illegal determinate sentences that did not include a period of post-release supervision in New York.

The defendants in *Brinson* were resented because the sentencing court failed to include a term of post-release supervision with their original illegal determinate sentences.<sup>168</sup> The court cited *Sparber* as authority to conclude that when a required sentence is not pronounced during sentencing, the error can be corrected by pronouncing it in the presence of the defendant at resentencing.<sup>169</sup> The court in *Brinson* also “presume[d] [the] defendants knew that their determinate sentences were illegal, and that they knew they were subject to resentencing until such time as they completed their respective sentences,” which was in accordance with *Lingle*.<sup>170</sup> The court in this case, unlike *Williams*, took into consideration that the originally imposed sentences were illegal and the defendants were presumed to know of the illegality.<sup>171</sup>

Furthermore, the court in *Brinson* followed *Richardson* and

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 705-06.

<sup>167</sup> *Wells*, 903 N.Y.S.2d at 706.

<sup>168</sup> *Brinson*, 995 N.E.2d 145.

<sup>169</sup> *Sparber*, 889 N.E.2d at 464-66.

<sup>170</sup> *Lingle*, 949 N.E.2d at 955-57.

<sup>171</sup> *Id.*

stated “courts have an inherent authority to correct illegal sentences.”<sup>172</sup> *Richardson* cited the Supreme Court’s decision in *Bozza* for their authority for correcting illegal sentences.<sup>173</sup> Other courts have continuously followed the precedent set in *Bozza*. The court in *Henderson* stated that correcting an illegal sentence by imposing a legal one is not a multiple punishment for the same offense.<sup>174</sup> The New York Court of Appeals stayed consistent with the federal precedent in *Minaya*. Even though the facts of *Minaya* are slightly different in which the resentencing of the defendant increased his sentence, the court still came to the same conclusion that the court’s power to correct an error does not violate the Double Jeopardy Clause.<sup>175</sup>

The final and most important issue in *Brinson* was whether the defendants had a legitimate expectation of finality. The court used *Williams*’ reasoning that a legitimate expectation of finality cannot be achieved unless the defendant has completed the imposed sentence.<sup>176</sup> Many other courts have used this reasoning to determine when a legitimate expectation of finality has been achieved. The Second Circuit answered the issue in *King*. The facts of *King* are analogous to *Brinson* and the courts both held the defendants would not have a reasonable expectation of finality until they had completed their determinate terms and had been released.<sup>177</sup> Additionally, the New York Appellate Division, in *Smith* and *Scott*, also ruled on the issue of legitimate expectation of finality. The court’s holding in *Brinson* was consistent with the holdings in *Smith* and *Scott*.<sup>178</sup> These cases establish that the courts consistently apply the same test to determine legitimate expectation consistently.

Even though the United States Supreme Court has not ruled on whether a defendant has a legitimate expectation of finality when he or she is still serving the originally imposed illegal sentence, there is consistency among the federal and the state courts. Ultimately, the New York Court of Appeals decision in *Brinson* applied the proper precedent and found the defendants’ Double Jeopardy rights were not violated.

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<sup>172</sup> *Brinson*, 995 N.E.2d at 145-46.

<sup>173</sup> *Bozza*, 330 U.S. at 166-67.

<sup>174</sup> *Henderson*, 474 F.2d at 513.

<sup>175</sup> *Minaya*, 429 N.E.2d at 1162-64.

<sup>176</sup> *Brinson*, 995 N.E.2d at 148.

<sup>177</sup> *Id.* at 145; *King*, 465 F. App’x at 45.

<sup>178</sup> *Brinson*, 995 N.E.2d at 145; *Smith*, 955 N.Y.S.2d at 374-75; *Scott*, 917 N.Y.S.2d at 294.

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