Nos. 25-76 and 25-5168

# In the Supreme Court of the United States

CAROLYN JACKSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

JOHN E. JACKSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioners had an expectation of finality in their sentences under the Double Jeopardy or Due Process Clauses while a government appeal of those sentences remained pending.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a)[1] is reported at 132 F.4th 266. The opinion of the district court (Pet. App. 20a-36a) is unreported but is available at 2023 WL 5013677. Prior decisions of the court of appeals in petitioners' cases are available at 862 F.3d 365, 819 Fed. Appx. 97, and 2023 WL 2755578.

[1] References to the Pet. App. are to the appendix to the petition in *Carolyn Jackson* v. *United States*, No. 25-76.

## JURISDICTION

The judgment of the court of appeals was entered on March 21, 2025. On June 6, 2025, Justice Alito extended the time within which to file a petition for a writ of certiorari in No. 25-76 until July 19, 2025, and the petition was filed on July 18, 2025. On June 12, 2025, Justice Alito extended the time within which to file a petition for a writ of certiorari in No. 25-5168 until July 19, 2025, and the petition was filed on July 18, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted on one count of conspiring to endanger the welfare of a child, in violation of N.J. Stat. Ann. § 2C:5-2 (2009) and 18 U.S.C. 13; petitioner Carolyn Jackson was convicted on 11 counts of endangering the welfare of a child, in violation of N.J. Stat. Ann. § 2C:24-4a (2009) and 18 U.S.C. 13; and petitioner John Jackson was convicted on nine counts of endangering the welfare of a child, in violation of N.J. Stat. Ann. § 2C:24-4a (2009) and 18 U.S.C. 13. D. Ct. Doc. 410, at 1 (Dec. 23, 2015); D. Ct. Doc. 411, at 1 (Jan. 5, 2016). The district court sentenced Carolyn Jackson to 24 months of imprisonment, to be followed by three years of supervised release, D. Ct. Doc. 411, at 2-3, and it sentenced John Jackson to three years of probation, D. Ct. Doc. 410, at 2.

The court of appeals vacated the sentences and remanded for resentencing. 862 F.3d 365, 403. On remand, the district court sentenced Carolyn Jackson to 40 months of imprisonment, to be followed by three years of supervised release, D. Ct. Doc. 439, at 3-4 (Apr.

16, 2018), and it sentenced John Jackson to three years of probation, D. Ct. Doc. 440, at 3 (Apr. 16, 2018).

The court of appeals again vacated the sentences and remanded for resentencing. 819 Fed. Appx. 97, 102. On remand, the district court sentenced Carolyn Jackson to time served and one year of supervised release, D. Ct. Doc. 476, at 3-4 (Oct. 14, 2021), and it sentenced John Jackson to time served and 18 months of home confinement, D. Ct. Doc. 477, at 3-4 (Oct. 14, 2021).

The court of appeals again vacated the sentences and remanded for resentencing with instructions to reassign the case to a different judge. 2023 WL 2755578, at *5. On remand, the district court sentenced Carolyn Jackson to 140 months of imprisonment, to be followed by three years of supervised release, D. Ct. Doc. 527, at 3-4 (Oct. 31, 2023), and it sentenced John Jackson to 108 months of imprisonment, to be followed by three years of supervised release, D. Ct. Doc. 530, at 3-4 (Oct. 31, 2023). The court of appeals affirmed. Pet. App. 1a-19a.

1. Petitioners are a married couple who inflicted "horrific child abuse" on their three adopted children. Pet. App. 2a; see *id.* at 3a-4a; see also Gov't C.A. Br. 3-15 (sealed brief detailing petitioners' conduct). John Jackson, a major in the United States Army, and Carolyn Jackson, his wife, were the biological parents of three children, and they also became foster parents for, and eventually adopted, three young children: Joshua, J, and C. 862 F.3d at 368. The abuse occurred at Picatinny Arsenal Installation in Morris County, New Jersey. See *ibid.*

From 2005 to 2010, petitioners "physically assault[ed] all three" adopted children "with various objects and their hands"; withheld "adequate water from J and C and prohibit[ed] them from drinking water";

forced J and C to ingest hot sauce and red pepper flakes; forced J to ingest raw onion; and withheld "prompt and proper medical care for C's dehydration and elevated sodium levels." Pet. App. 22a. "In addition, the jury found Carolyn—but not John—guilty of withholding sufficient nourishment and food from Joshua * * * , and causing C to ingest excessive sodium and a sodium-laden substance while restricting C's fluid intake, causing C to suffer hypernatremia and dehydration, a life-threatening condition." *Ibid.* (quotations and alterations omitted). Joshua died in 2008. 862 F.3d at 368.

2. On the military installation where petitioners lived, New Jersey law is assimilated into federal law pursuant to the Assimilative Crimes Act, 18 U.S.C. 13. See Pet. App. 3a n.2. A federal grand jury in the District of New Jersey returned a superseding indictment charging petitioners with conspiring to endanger the welfare of a child, in violation of N.J. Stat. Ann. § 2C:5-2 (2009); 12 counts of endangering the welfare of a child, in violation of N.J. Stat. Ann. § 2C:24-4a (2009); and two counts of federal assault, in violation of 18 U.S.C. 113(a). Superseding Indictment 1-19.

In 2015, the case proceeded to a trial that lasted for 39 days. 862 F.3d at 369. At the close of the government's case, the district court granted a motion for judgment of acquittal on the two federal assault charges. *Ibid.* The jury found petitioners guilty on the conspiracy count, and it found them not guilty of one child-abuse count that involved withholding prompt medical care for a fracture of C's humerus. *Ibid.*; see Superseding Indictment 19. It found Carolyn Jackson guilty of all other substantive child-abuse counts. 862 F.3d at 369. It found John Jackson not guilty of two

substantive child-abuse counts, but guilty on all remaining child abuse counts. *Ibid.*; Pet. App. 22a.

The Probation Office's presentence report used the offense guidelines for assault and aggravated assault, and it calculated a Guidelines range of 210 to 262 months. 862 F.3d at 370. But the district court took the view that no guideline range was sufficiently analogous to apply to petitioner's assimilated crimes, and declined to adopt any guidelines range. See *id.* at 368. The court sentenced Carolyn Jackson to 24 months of imprisonment, to be followed by three years of supervised release, D. Ct. Doc. 411, at 2-3, and it sentenced John Jackson to three years of probation, D. Ct. Doc. 410, at 2.

The government appealed, and the court of appeals vacated the sentences and remanded for resentencing. 862 F.3d at 403. The court determined that (1) the assault guideline was sufficiently analogous to petitioners' offenses of conviction; (2) the district court failed to make necessary factual findings under the Sentencing Guidelines; and (3) the district court "simply went too far in this case by focusing on state sentencing practices to the exclusion of federal sentencing principles." *Id.* at 368; see *id.* at 371-393.

2. On remand, the district court conducted a new sentencing hearing and sentenced Carolyn Jackson to 40 months of imprisonment, to be followed by three years of supervised release, D. Ct. Doc. 439, at 3-4, and sentenced John Jackson to three years of probation and 400 hours of community service, D. Ct. Doc. 440, at 3.

The government appealed, and the court of appeals again vacated the sentences and remanded for resentencing. 819 Fed. Appx. at 102. The court of appeals explained that the district court's factfinding had

"turned the preponderance of the evidence standard on its head," *id.* at 100, and that the court's factual findings that several of the children's injuries were not caused by petitioners were clearly erroneous, see *id.* at 101 & n.8. The court of appeals also found that the district court had clearly erred by failing to impose an obstruction-of-justice enhancement. *Id.* at 102. While the appeal was pending, the district court allowed John Jackson's probation to expire even though he had completed only 217.5 hours of his community service obligation. D. Ct. Doc. 450, at 2 (Sept. 5, 2019).

3. After another resentencing hearing, the district court sentenced Carolyn Jackson to 40 months of imprisonment, which the court deemed "time served," and one year of supervised release. D. Ct. Doc. 476, at 3-4, It sentenced John Jackson to time served and 18 months of home confinement. D. Ct. Doc. 477, at 3.

The government again appealed. In October 2022, while the case was awaiting oral argument, Carolyn Jackson completed her term of supervised release. Pet. App. 24a. In April 2023, the court of appeals again vacated petitioners' sentences and remanded for resentencing with instructions to reassign the case to a different district judge. 2023 WL 2755578, at *5.

4. On remand, the district court sentenced Carolyn Jackson to 140 months of imprisonment, to be followed by three years of supervised release, D. Ct. Doc. 527, at 3-4, and it sentenced John Jackson to 108 months of imprisonment, to be followed by three years of supervised release, D. Ct. Doc. 530, at 3-4. The court rejected petitioners' argument that the resentencing violated their rights under the Double Jeopardy and Due Process Clauses. Pet. App. 20a-36a.

The district court observed that in *United States* v. *DiFrancesco*, 449 U.S. 117 (1980), this Court held that the Double Jeopardy Clause does not prohibit review of a sentence on appeal, and that a defendant has "no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired." Pet. App. 27a-28a (quoting *DiFrancesco*, 449 U.S. at 136). The district court declined to recognize an exception to *DiFrancesco* for defendants, like petitioners, who finish serving their sentences while an appeal is pending, noting that such a rule would create a windfall for defendants who received erroneously low sentences that expire before the appellate court has ruled. *Id.* at 28a-29a.

The district court rejected petitioners' due process argument on similar grounds. Pet. App. 30a-34a. It explained that criminal defendants lack a "true expectation of finality in cases where, as here, the government timely exercises its statutorily granted right to file a direct appeal of an erroneous sentence." *Id.* at 33a.

The court of appeals affirmed. Pet. App. 1a-19a. Like the district court, the court of appeals rejected petitioners' argument that they had a legitimate expectation of finality for purposes of the Double Jeopardy Clause once they completed the sentences initially imposed on them. *Id.* at 8a-9a. The court of appeals explained that "[d]espite the vast number of cases [petitioners] cite, all support the proposition that a defendant has no legitimate expectation of finality in [his] sentence while that sentence is under appeal." *Id.* at 10a. And for the same reason, the court rejected petitioners' argument that the fourth resentencing violated their due process rights. *Id.* at 11a-12a.

## ARGUMENT

Petitioners renew their contention (25-76 Pet. 9-25; 25-5168 Pet. 4) that the Double Jeopardy and Due Process Clauses precluded them from being resentenced because they had already served their sentences. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court, another court of appeals, or a state court of last resort. No further review is warranted.

1. a. The Double Jeopardy Clause provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. In addition to prohibiting successive trials for the same offense, the Clause also "protects against multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969); see *Monge* v. *California*, 524 U.S. 721, 728 (1998); *Jones* v. *Thomas*, 491 U.S. 376, 380-381 (1989).

In *United States* v. *DiFrancesco*, 449 U.S. 117 (1980), this Court recognized that where "Congress has specifically provided that [a defendant's] sentence is subject to appeal[,] * * * there can be no expectation of finality in the original sentence" and no double jeopardy violation in increasing it as a result of the appeal. *Id.* at 139; see *id.* at 136-137. The Court explained that although a defendant might "perceive[] the length of his sentence as finally determined when he begins to serve it, and that the trial judge should be prohibited from thereafter increasing the sentence, that argument has no force where * * * Congress has specifically provided that the sentence is subject to appeal." *Id.* at 139.

Contrary to petitioners' contention (25-76 Pet. 9), that principle is not subject to an exception in cases in which an originally imposed sentence was so short that

it concludes before the appeal is decided. *DiFrancesco* reasoned that "the basic design of the double jeopardy provision, that is, as a bar against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent," has "no significant application to the prosecution's statutorily granted right to review a sentence," which "does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence." 449 U.S. at 136.

That reasoning applies with equal force both to defendants who are incarcerated (or otherwise restrained) during the full pendency of the appeal as well as those who receive the benefit of a reprieve (loosely analogous to release pending appeal) before the appeal is resolved. In either case, "[t]he defendant, of course, is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired." *DiFrancesco*, 449 U.S. at 136. Just like a defendant has no expectation of finality when the government appeals "the dismissal of an indictment or information," *ibid.*, even though that makes the entire prosecution go away, petitioners had no expectation the appealed orders setting their sentences were final.

Petitioners' view would also produce unjustifiable results. If, for example, a district court were to impose a flatly unlawful prison term of one day (with credit for time served) on a defendant subject to a mandatory life term, see, *e.g.*, 18 U.S.C. 3559(c) (mandatory life imprisonment for certain violent felons), that prison term would be entirely unreviewable. The ability to review an unlawful sentence of a *longer* length (say, three

years) would only increase the illogic of petitioner's approach.

Because the appeals in this case were statutorily authorized, see 18 U.S.C. 3742(b), petitioners had "no expectation of finality in [their] sentence[s] until the appeal[s] * * * concluded." *DiFrancesco*, 449 U.S. at 136; see also *Monge*, 524 U.S. at 730 ("[I]t is a 'well-established part of our constitutional jurisprudence' that the guarantee against double jeopardy neither prevents the prosecution from seeking review of a sentence nor restricts the length of a sentence imposed upon retrial after a defendant's successful appeal.") (quoting *DiFrancesco*, 449 U.S. at 135). The court of appeals therefore correctly found that double jeopardy did not bar petitioners' resentencing.

b. None of the Court's cases on which petitioners rely (25-76 Pet. 9-12) are to the contrary. In *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874), a habeas petitioner was granted relief because his original sentence—a $200 fine *and* one year in prison—exceeded the punishment allowed by statute, which was a fine *or* a prison term, and the trial court then resentenced him to one year in prison. *Id.* at 174-175. The Court reasoned that, because the prisoner had already paid the fine and the money could not be returned to him, he was entitled to immediate release so that he would not be "put to actual punishment twice for the same thing." *Id.* at 175; see *Jones*, 491 U.S. at 383 ("*Lange* * * * stands for the uncontested proposition that the Double Jeopardy Clause prohibits punishment in excess of that authorized by the legislature."); *In re Bradley*, 318 U.S. 50, 52 & n.3 (1943) (holding that a district court violated double jeopardy principles under *Lange* by attempting to return a fine

and require the defendant to serve a term of imprisonment instead).

That decision does not support petitioners' position here, where the sentences they challenge in no way exceed the statutory maximum for their offenses. Petitioners' passing reference to *In re Bradley* (25-76 Pet. 10) is likewise unhelpful to their position. This Court has explained that *In re Bradley* is about the double jeopardy implications of trying to remedy a sentence that imposes two punishments that were meant by the legislature as alternatives where the defendant has satisfied one. See *Jones*, 491 U.S. at 383-385. It does not speak to whether double jeopardy bars resentencing where the government has exercised its right to appeal.

Petitioners cite *United States* v. *Benz*, 282 U.S. 304, 307 (1931), for the proposition that a court may decrease a sentence but not increase it without violating the Double Jeopardy Clause. 25-76 Pet. 10-11. But *DiFrancesco* limited the import of that language from *Benz*. *DiFrancesco*, 449 U.S. at 138 (describing that language as dicta unsupported by precedent). Indeed, petitioners' claim (25-76 Pet. 12) that *Lange* and *Benz* apply here is belied by *DiFrancesco*, which expressly confined *Lange*'s holding—"and thus the dictum in *Benz*"—"to *Lange*'s specific context." *DiFrancesco*, 449 U.S. at 139.

Nor can petitioners find meaningful support in references (25-76 Pet. 11) to statutes of repose or the Ex Post Facto Clause. The Court's statement in *CTS Corporation* v. *Waldburger*, 573 U.S. 1, 9 (2014), that "the Double Jeopardy Clause has been described as 'a statute of repose' because it in part embodies the idea that at some point a defendant should be able to put past events behind him" is at most a loose analogy, and does

not identify a "point" at which an improper sentence that has been appealed can no longer be addressed. For similar reasons, this case is unlike the revival of a time-barred prosecution at issue in *Stogner* v. *California*, 539 U.S. 607, 618 (2003). While the direct appeal is still pending, petitioners lack a finality interest in their sentence, Pet. App. 11a, because they are not "safe from" an increase in their sentence, *Stogner*, 539 U.S. at 611.

c. The court of appeals and state-court decisions cited by petitioners (25-76 Pet. 12-22) are likewise inapposite. None precluded resentencing in a case like this one.

In *United States* v. *Arrellano-Rios*, 799 F.2d 520 (1986), the Ninth Circuit concluded that the government could not as *appellee* seek remand for the district court to consider whether to increase completed sentences on undisturbed counts. *Id.* at 523. In doing so, the court distinguished prior precedent similar to this case where the government had appealed decisions to enter a conviction and to sentence defendants "under a subsequently passed statute that made the conduct in question a misdemeanor instead of" the felony charged in the indictments. *Id.* at 524 (citation omitted) (discussing *United States* v. *Edmonson*, 792 F.2d 1492 (9th Cir. 1986), cert denied, 479 U.S. 1037 (1987)). Even though the defendants "had served part or all of their sentences," there was no double jeopardy issue because there was "no expectation of finality"; the sentences at issue were "illegal and," like here, "under challenge by the government from the moment the district court judges suggested the sentences they proposed to impose." *Ibid.*; accord *United States* v. *Foumai*, 910 F.2d 617, 620 (9th Cir. 1990) ("No expectation of finality can

attach during the period in which either party may appeal.").

Petitioners also cite (25-76 Pet. 13, 16 n.5, 17 n.6) one Fourth Circuit and several state decisions involving scenarios in which a defendant obtains appellate or post-conviction vacatur of one or more counts of conviction, and double-jeopardy principles are applied to preclude resentencing on intact convictions for which the sentences have already been completed. See *United States* v. *Silvers*, 90 F.3d 95, 101 (4th Cir. 1996); *Commonwealth* v. *Parrillo*, 14 N.E.3d 919, 921-922 (Mass. 2014); *March* v. *State*, 782 P.2d 82, 84 (N.M. 1989); *Commonwealth* v. *Scott*, 22 N.E.3d 171, 175 & n.8 (Mass. App. Ct. 2015). Those decisions have, at most, limited application here. Even if resentencing were sometimes barred when the *defendant* has successfully obtained relief, that does not speak to a situation, like the one here, where the government timely appeals an unlawfully short sentence that runs its course while the government appeal is vindicated. Indeed, the "nearly uniform" view of the circuits—including the Fourth Circuit—is that the Double Jeopardy Clause does *not* preclude resentencing after a defendant has completely served his sentence on some counts if the vacated sentence was part of a sentencing package. *United States* v. *Brown*, 26 F.4th 48, 61 (1st Cir.), cert. denied, 143 S. Ct. 238 (2022) (collecting cases); see *United States* v. *Smith*, 115 F.3d 241, 245-248 (4th Cir.), cert. denied, 522 U.S. 922 (1997); see also *United States* v. *Radmall*, 340 F.3d 798, 801 (9th Cir. 2003); *United States* v. *McClain*, 133 F.3d 1191, 1193-1194 (9th Cir.), cert. denied, 524 U.S. 960 (1998).

The Eighth Circuit's decision in *Oksanen* v. *United States*, 362 F.2d 74 (1966), is similarly inapposite. The

defendant in that case had pleaded guilty to a crime with the assistance of counsel, but counsel was not present for sentencing. *Id.* at 77. Years later, the defendant sought to set aside his guilty plea and sentence based on the absence of counsel. *Id.* at 76. The district court set aside the sentence but not the guilty plea and, despite the defendant having already completed the sentence imposed at the hearing where he lacked counsel, resentenced him to three more years of probation, *id.* at 80, which the court of appeals determined violated the Double Jeopardy Clause, *ibid.* Again, the application of the Clause where the defendant's argument was vindicated does not suggest anything about the finality of a sentence that the government timely appealed.

In *United States* v. *Daddino*, 5 F.3d 262 (7th Cir. 1993) (per curiam), the district court entered an order to correct an ambiguity in its judgment and stated that the defendant must pay the cost of his incarceration and supervision. *Id.* at 264. The court of appeals determined that the district court lacked authority to increase the defendant's sentence because the defendant had already completed his term of imprisonment, had paid all fines and restitution, and the time for either the government or the defendant to appeal had elapsed. *Id.* at 265. In petitioners' cases, in contrast, the direct appeals were ongoing, and petitioners' sentences were not yet final.

Petitioners also cite state-court cases that arise from state-law rules that allow sentencing courts to correct sentences "at any time"—in some cases years after their imposition. *Lanier* v. *State*, 270 So. 3d 304, 308 (Ala. Crim. App. 2018) (emphasis omitted); see, *e.g.*, *State* v. *Lehman*, 427 P.3d 840, 843 (Kan. 2018); *State* v. *Schubert*, 53 A.3d 1210, 1213, 1218 (N.J. 2012); *State* v.

*Heyward*, 207 A.2d 730, 730-731 (Conn. 1965); *State* v. *Laird*, 135 A.2d 859, 864 (N.J. 1957); cf. *State* v. *Brown*, 479 S.W.3d 200, 211 (Tenn. 2015); *State* v. *Holdcroft*, 1 N.E.3d 382, 386-387 (Ohio 2013), overruled in other part by *State* v. *Harper*, 159 N.E.3d 248 (Ohio 2020). None of them involved a situation where the government had appealed an erroneous sentence and the appeal remained pending. Indeed, many of them recognized that a legitimate expectation of finality is possible only after "the time to appeal the sentence has expired or the appeal has been finally determined." *People* v. *Williams*, 925 N.E.2d 878, 891 (N.Y.), cert. denied, 562 U.S. 947 (2010); see *Lehman*, 427 P.3d at 845; *Lanier*, 270 So. 3d at 310; *Holdcroft*, 1 N.E.3d at 388-389; *Schubert*, 53 A.3d at 1219; see also *State* v. *Brasher*, 218 N.E.3d 899, 907 (Ohio 2022) (indicating a sentence "became final" when there was no "timely appeal by the victims or the prosecutor").

Although petitioners identify no conflict with "another United States court of appeals" or "state court of last resort," Sup. Ct. R. 10(a) and (b), they assert (25-76 Pet. 17-18) a decision by an intermediate appellate court in Pennsylvania—*Commonwealth* v. *Hind*, 304 A.3d 413 (Super. Ct. 2023)—supports their approach. See also 25-76 Pet. 18 (citing *Commonwealth* v. *Sholar*, 335 A.3d 345 (Pa. Super. Ct. 2025) (Tbl.) (following *Hind*)). But the court in *Hind* limited its holding to "the unique and limited circumstances" of that case, in which the defendant's completed sentence had been lawful when imposed, but the law had changed during the appeal. 304 A.3d at 421. The court recognized that the general rule—consistent with the result here—"states that there is no expectation of the finality of sentence for double jeopardy purposes in cases where the

[government] has the statutory right to appeal from the judgment of sentence." *Id.* at 422.

2. Petitioners' argument (25-76 Pet. 22-25) that the Court should review their due process claims is likewise mistaken. This Court has "decline[d] [the] invitation to hold that the Due Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause." *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 116 (2003). Petitioners provide no sound reason for the Court to accept that proposition here. Accordingly, their due process argument is meritless for the same reason their double jeopardy argument is meritless.

Petitioners also err in asserting (25-76 Pet. 23-24) a circuit conflict on the application of the Due Process Clause to cases like theirs. Two cases petitioners cite do not involve a due process claim. The Second Circuit's decision in *United States* v. *Rico*, 902 F.2d 1065, cert. denied, 498 U.S. 943 (1990), involved a double jeopardy claim, rejected it, and observed, consistent with the court of appeals here, that where "a sentence can be increased on appeal, [a] defendant has no expectation of its finality." *Id.* at 1068. The First Circuit's decision in *Breest* v. *Helgemoe*, 579 F.2d 95, cert. denied 439 U.S. 933 (1978), also rejected a double jeopardy challenge to a state court's correction of an invalid sentence, while positing potential due process limits on fixing invalid sentences "[a]fter a substantial period of time" has passed from the sentencing. *Id.* at 101. Neither decision suggests that either circuit would grant relief under the Due Process Clause in the circumstances here.

Of the cases petitioners cite that include a due process claim, three—like the decision below, see Pet. App. 11a-12a—found no due process violation. See *United States* v. *Davis*, 329 F.3d 1250, 1255 (11th Cir.), cert.

denied, 540 U.S. 925 (2003) (per curiam); *United States* v. *Davis*, 112 F.3d 118, 124 (3d Cir.), cert. denied, 522 U.S. 888 (1997); *United States* v. *Lundien*, 769 F.2d 981, 987 (4th Cir. 1985), cert. denied, 474 U.S. 1064 (1986). And the two decisions petitioners cite that did perceive a due process violation (one of which is unpublished) involved a "fact-bound inquiry * * * requir[ing] a nuanced and case-specific analysis," *United States* v. *Mayes*, 162 F.3d 1162, 1998 WL 552673, at *5 (6th Cir. 1998) (Tbl.), with "the result [turning on] the combined weight of the elements" present in each case, *DeWitt* v. *Ventetoulo*, 6 F.3d 32, 36 (1st Cir. 1993), cert. denied, 511 U.S. 1032 (1994). And a key fact present in both cases—a lack of government diligence either in seeking to fix an unlawfully short sentence, see *id.* at 35 ("[I]n deciding what is fundamentally unfair we cannot ignore the fact that with due diligence the state could have challenged the suspension long before DeWitt's release."), or in taking steps to effectuate a sentence, see *Mayes*, 1998 WL 552673, at *4 (pointing out the clerk failed to notify the defendant that he had to report to a halfway house)—is absent here.

**CONCLUSION**

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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