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SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Certiorari to the Colorado Court of Appeals Case No. 2012CA1142	
Respondent THE PEOPLE OF THE STATE OF COLORADO v. Petitioner ZACHARIAH C. DOBLER	
Douglas K. Wilson, Colorado State Public Defender Ned R. Jaeckle, Deputy State Public Defender 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #10952	Case Number: 2015SC261
OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

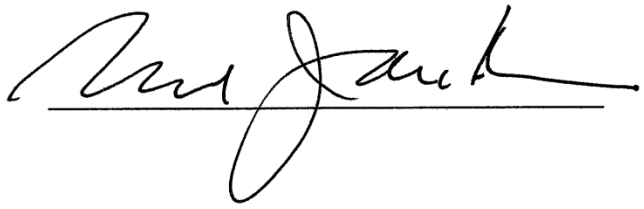
This brief complies with the applicable word limit set forth in C.A.R. 28(g).

> It contains 3,929 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

> For each issue raised by the Petitioner, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.



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ISSUE ANNOUNCED BY THE COURT

Whether the district court violated double jeopardy principles by resentencing petitioner to a period of incarceration exceeding his original prison sentence after he moved for a sentence reduction pursuant to Crim. P. 35(b), was placed on probation, and then violated the terms of his probation.

STATEMENT OF THE CASE AND FACTS

On January 5, 2009, Mr. Dobler pled guilty to a single count of second-degree burglary, a class four felony, and the court ordered a presentence report. (Tr. 1.5.2009 p1-10).

The court held a sentencing hearing on March 2, 2009. (Tr. 3.2.2009 p2-5). Although the pre-sentence report recommended probation and the prosecution concurred with that recommendation, the trial court sentenced Mr. Dobler to four years in the custody of the Department of Corrections. (Env.3 Presentence report, p9; Tr. 3.2.2009 p3, p5).

The judge also recommended that Mr. Dobler be placed in "boot camp". (*Id.*) (The DOC's Regimented Inmate Training Program, established under C.R.S. §17-27.7-101 et. seq.). Mr. Dobler immediately commenced serving his

prison sentence; eight months later the DOC put him in its "boot camp" program. (PR. Vol. I, p58).

Mr. Dobler successfully completed the program and on February 16, 2010 – after serving just under a year of his prison sentence – the court ordered he be released to intensive supervised probation. (Tr. 2.16.2010 p2-4)

Eighteen months later his probation was revoked because of a new law violation and on August 11, 2011 – over two and one-half years after he was originally sentenced – the court held a second sentencing proceeding. (Tr. 8.11.2011 p1-79). At this second proceeding, the court increased Mr. Dobler's sentence by two years, sentencing him to serve six years in the custody of the DOC. (Tr. 8.11.2011 p74-75).

Mr. Dobler appealed, arguing that increasing his sentence violated the state and federal prohibitions of double jeopardy. The Court of Appeals affirmed, relying on another division's opinion in *People v. Castellano* to hold that by being admitted to probation a year after his original sentencing, Mr. Dobler lacked a legitimate expectation of finality in his sentence and double jeopardy was therefore not violated. Slip op. at 2, *citing People v. Castellano*, 209 P.3d 1208 (Colo. App. 2009).

SUMMARY OF THE ARGUMENT

Once a defendant begins serving a legal sentence that has been lawfully imposed, the state and federal due process clauses prohibit increasing his sentence in a second proceeding when the defendant has a legitimate expectation of finality in his sentence.

After his guilty plea, the district court imposed a legal four-year prison sentence that was imposed in a lawful manner. Mr. Dobler immediately began serving the lawful sentence without appealing either his conviction or his sentence. He continued to serve his sentence for the next year. He therefore acquired a legitimate expectation that his sentence was final and could not be increased.

Nothing about the district court's decision to order probation based on Mr. Dobler's successful completion of boot camp – a decision made after Mr. Dobler had served a year of his sentence – defeated the expectation that his four-year sentence was final and could not be increased. Thus, later increasing Mr. Dobler's sentence, 2½ years after it was originally imposed, violated double jeopardy.

ARGUMENT

1. When a defendant begins serving a legal and lawfully imposed sentence, the Double Jeopardy Clauses of the state and federal constitutions prohibit increasing it in a subsequent proceeding if the defendant has acquired a legitimate expectation of finality in the sentence originally imposed.

The Double Jeopardy Clause of the Fifth Amendment states 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.[1] The parallel provision in the Colorado Constitution states, in relevant part, that "nor shall any person be twice put in jeopardy for the same offense." COLO. CONST. art. II, § 18.

Along with two types of protections not relevant here, both Clauses afford a third protection: prohibiting punishing a defendant twice for the same offense. *Witte v. United States*, 515 U.S. 389 (1995); *People v. Porter*, 348 P.3d 922, 924 (Colo. 2015). This third category of double jeopardy protection – referred to as the "multiple punishments doctrine" – has several components, one of which is relevant here. The relevant component of this doctrine prohibits increasing a defendant's punishment after he has begun serving it. *E.g. State v. Fonder*, 469

[1] The fourteenth amendment applies the protections afforded by the federal double jeopardy clause to the states. U.S. CONST. amend. XIV; *Benton v. Maryland*, 395 U.S. 784, 789 (1969); *People v. Morgan*, 785 P.2d 1294, 1296 fn.5 (Colo. 1990).

N.W.2d 591, 605 (Wis. App. 1991)(Sundby, J. concurring) *citing* Note, *A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple Punishment Prohibition*, 90 Yale L.J. 632, 637 (1981). This Court, as well, recognizes this component of the "multiple punishment doctrine." *Romero v. People*, 179 P.3d 984, 989-990 (Colo. 2007) ("Under some circumstances, increasing a lawful sentence after a defendant has begun to serve it violates the double jeopardy protection against multiple punishments for the same offense.").

This component of the multiple punishment doctrine has long been recognized by the Supreme Court, originating in *Ex Parte Lange,* 85 U.S. 163 (1873) (court that initially imposed fine *and* imprisonment where statute authorized only fine *or* imprisonment violated double jeopardy by re-sentencing defendant to only imprisonment after he had paid the fine). More recently in *United States v. DiFrancesco* the Court suggested that if a defendant begins serving his sentence and has an expectation of finality in it, double jeopardy prohibits thereafter increasing his sentence. *United States v. DiFrancesco*, 449 U.S. 117 (1980). But in *DiFrancesco*, because the applicable statute specifically authorized the prosecution's sentence appeal double jeopardy did not prohibit an increase in sentence even though the defendant had begun serving it. *Id.*

Then in *Jones*, both the majority and dissent of the sharply divided Court acknowledged that a defendant's "legitimate expectation of finality" is an interest protected by the double jeopardy clause and, thus, double jeopardy could bar any increase in sentence after the defendant has begun serving it. *Jones v. Thomas*, 491 U.S. 376 (1989). The *Jones* majority did not disagree with the dissent's contention that "the Double Jeopardy Clause protects not only against punishment in excess of legislative intent, but also against additions to a sentence in a subsequent proceeding that upset a legitimate expectation of finality." *Jones v. Thomas*, 491 U.S. at 385, *citing* Scalia, J. dissenting[2] at 393-394 ("...[O]ur cases establish that the relevant double jeopardy criterion is not only whether the total punishment authorized by the legislature has been exceeded, but also whether the addition upsets the defendant's legitimate expectation of finality in the original sentence..."); see also 6 Wayne R. LaFave et al., *Criminal Procedure* § 26.7(c), at 846 (3d ed. 2007) ("While neither the *Jones* Court nor the *DiFrancesco* Court found a violation of defendant's legitimate expectation of finality in a sentence, both opinions indicate that double jeopardy would protect such an interest."). As the *Jones* dissent explained, double

[2] Justices Stevens, Brennan and Marshall joined in Justice Scalia's dissent.

jeopardy is violated because the defendant is subjected to additional punishment in a second proceeding. *Id.* at 394 ("It is clear from *DiFrancesco* and *Goldhammer* that when a sentence is increased in a second proceeding the application of the double jeopardy clause turns on the extent and legitimacy of a defendant's expectation of finality in that sentence. If a defendant has a legitimate expectation of finality, then an increase in that sentence is prohibited.") quoting, in part *United States v. Fogel*, 829 F.2d 77, 87 (D.C. Cir. 1987)(internal quotation marks omitted). Thus, the Supreme Court has made clear that "[t]he double jeopardy clause prohibits additions to criminal sentences in a subsequent proceeding where the legitimate expectation of finality has attached to the sentence." *Stone v. Godbehere*, 894 F.2d 1131, 1135 (9th Cir. 1990). And, as stated, this Court recognizes the same principle. *Romero v. People*, 179 P.3d 984, 989 (Colo. 2007) ("...[I]ncreasing a lawful sentence after a defendant has begun to serve it violates the double jeopardy protection ...).

Accordingly, the question here is whether imposition of a four-year prison sentence on March 2, 2009 and the defendant's partial serving of it gave him a legitimate expectation that his four-year sentence was final and could not be increased. If Mr. Dobler acquired an expectation of finality in his sentence,

increasing his sentence in a separate proceeding violated double jeopardy. *Romero v. People*, 179 P.3d at 989 (Colo. 2007) ("[I]ncreasing a lawful sentence after a defendant has begun to serve it violates the double jeopardy protection ... [h]owever, double jeopardy does not bar the imposition of an increased sentence if the defendant lacked a legitimate expectation of finality in the sentence.").

2. After the period for appeal lapsed, Mr. Dobler acquired a legitimate expectation that his four-year sentence could not be increased.

Under the facts and circumstances here, Mr. Dobler acquired an expectation that his four-year sentence was final and could not be increased. And he did so well before the proceeding some two and one-half years later when the court in a separate proceeding increased it.

First, unlike in *DiFrancesco*, there is no Colorado statute or procedure authorizing the prosecution to appeal and an appellate court to increase the sentence that the court imposed on March 2, 2009. *C.f., DiFrancesco*, 449 U.S. at 139 (no expectation of finality in sentence where federal statute specifically provides that sentence is subject to prosecutorial appeal and increase to correct legal error). Nothing in the second-degree burglary statute (the offense to which Mr. Dobler plead guilty) nor in the statute specifying the sentencing range for

this class four felony provided for such an appeal or increase. § 18-4-203, C.R.S.; § 18-1.3-401, C.R.S.

And although Mr. Dobler could have sought appellate review of his sentence within forty-five days after it was imposed and, either on Mr. Dobler's motion or on the court's own initiative, his sentence could have been reconsidered within 120 days, neither occurred here.[3] § 18-1-409 (1)(2), C.R.S. (2009) (entitling defendant to appellate review of felony sentence if filed within 45 days); Crim. P. 35 (b) (providing courts with authority to reduce a sentence upon motion or on its own initiative within the appropriate time limits). Mr. Dobler began serving his four-year sentence immediately after sentencing on March 2, 2009. Thus, the time for altering that sentence under the former provision lapsed 45 days later. § 18-1-409 (2), C.R.S. (2009) ("No appellate court shall review any sentence which is imposed unless, within forty-five days from the date of the imposition of sentence, a written notice is filed in the trial court to the effect that review of the sentence will be sought...").

And even the time for altering that sentence under the latter provision lapsed 120 days after his sentencing. Crim.P. 35(b) (2009) (motion must be filed

[3] Mr. Dobler did not directly appeal from the plea disposition and sentence, nor did he file a motion for reduction of sentence within 120 days of sentencing.

within 120 days after sentence imposed, case remanded, or judgment affirmed). But more importantly under the latter provision the court would have no authority to increase Mr. Dobler's sentence. *Downing v. People*, 895 P2d 1046, 1049 (Colo. 1995) ("[Crim.P. 35 (b)] authorizes a trial court to reduce and offender's original sentence. It does not authorize a trial court to increase such sentence unless the original sentence was erroneously imposed or is void."). Thus, even the availability of a *reduction* of his sentence under 35(b) has no bearing on the legitimacy of his expectation of his four-year sentence's finality and that it could not be *increased*.

Thus, Mr. Dobler acquired an expectation of finality in the sentence the court imposed on March 2, 2009. The sentence was a legal one, and it was imposed in a lawful manner. He had begun serving it. And the period of time for any review that could have resulted in an increase had lapsed.[4] Accordingly, Mr. Dobler acquired a legitimate expectation that his four-year sentence was

[4] § 18-1-409 (3), C.R.S. allows for the possibility a sentence increase *if* an appellate review of sentence is conducted *and* the case is remanded for further proceedings *and* "matters of aggravation" are brought to its attention at the hearing held on remand *and* these matters were unknown to the sentencing court at the time of original sentencing. Undersigned counsel believes this to be the only circumstance where a Colorado statute authorizes the court to increase a legal prison sentence that was imposed in a lawful manner.

final and would not be increased. And by increasing his sentence in a separate proceeding held over two years later, the court violated Mr. Dobler's protection against double jeopardy.

3. Assuming *arguendo* that *People v. Castellano* was correctly decided, the Court of Appeals reliance on *Castellano*'s reasoning is misplaced because of the significant temporal and procedural differences with Mr. Dobler's case.

Even if *Castellano* was correctly decided (and for reasons stated later, Mr. Dobler contends it was not) the Court of Appeals reliance on that opinion in the circumstances of this case is misplaced. Slip op. at 2, citing *People v. Castellano*, 209 P.3d 1208 (Colo. App. 2009). Unlike here, in *Castellano* the defendant filed a motion for reduction of sentence within the 120-day time limit provided by Crim. P. 35(b). Based on this Court's decisions suggesting that during the 120 day period, the "finality of the original sentence" is "suspend[ed]", the Court of Appeals concluded the defendant's sentence was "subject to further review." *Castellano*, 209 P.3d at 1209-1210, citing *People v. Fuqua*, 764 P.2d 56, 59 (Colo. 1988) and *Ghrist v. People*, 897 P.2d 809, 812 (Colo. 1995). Therefore, the *Castellano* division concluded, the defendant had not acquired a legitimate expectation of finality in his original sentence and the subsequent increase, after a probation violation did not violate the Double Jeopardy Clause. *Id.* at 1210.

That is not the case here. Even if *Castellano* was correct in holding that a defendant cannot acquire an expectation of finality in his sentence during the 120-day period following imposition of sentence, here, no motion for a sentence reduction was filed within that 120-day period, nor did the court on its own volition reduce or otherwise modify Mr. Dobler's sentence within that period.[5] Thus, even if *Castellano* was correctly decided, its reasoning does not apply here. *See also Keller v. People*, 29 P.3d 290, 292-93 (Colo. 2000) (bootcamp statute's procedure for seeking reduction of sentence is separate and distinct from reconsideration under Crim. P. 35(b)).

Moreover, nothing about the court merely recommending that Mr. Dobler be placed in boot camp suggests he did not acquire a legitimate expectation of finality in his four-year sentence after he began serving it. Although the court recommended he be placed in the DOC's "boot camp" program, the decision of whether to assign an eligible inmate to boot camp lies exclusively with the DOC's executive director. § 17-27.7-103 (1), C.R.S. Indeed, Mr. Dobler had

[5] Mr. Dobler did write a letter to the judge asking for reconsideration because he had not been placed in boot camp, but that letter was sent to the court after the 120-day time for filing a 35(b) motion had run, and, in any event, the court denied his request. (vol. I p57)

served over eight months of his sentence before the DOC decided to place him in the boot camp program. (PR. Vol. I, p58).

And even after an offender is placed in boot camp, there is no promise or guarantee that the department will ever recommend to the court that the offender will be placed on probation or that his sentence will be modified in any manner. § 17-27.7-104 (2)(b) (department shall submit a report concerning offender's performance in the program and "such report *may* recommend that the offender be placed in a specialized probation or community corrections program.") (emphasis added). Moreover, even if the Department makes such a recommendation, the court is under no obligation to follow it. *Id.* (court must consider all pertinent information and thereafter, "[t]he court *may* issue an order modifying the offender's sentence and placing the offender on probation or in a community corrections facility.")(emphasis added). Thus, nothing about the mere possibility at the original sentencing proceeding that Mr. Dobler might someday be able to participate in the DOC's boot camp program suggests he should not legitimately expect that his four-year sentence was final.

And even that possibility of boot camp does nothing to suggest he should realize that his four-year sentence was not final and could someday thereafter be

increased. After all, nothing in the boot camp statute authorizes the court to *increase* an offender's sentence. § 17.27.7-101 et. seq., C.R.S.

Thus, nothing about the several contingencies that came to pass in Mr. Dobler's case suggest that he did not acquire a legitimate expectation that the four-year sentence that the court imposed on March 2, 2009 was final and could not be increased.

4. Ordering Mr. Dobler to be put on probation one year into his four-year sentence after he successfully completed boot camp did not negate his legitimate expectation that his sentence was final and could not be increased.

Finally, the fact that a year after imposing sentence, the court ordered probation, and then a year and a half later revoked probation does not negate the double jeopardy violation. Contrary to the Court of Appeals' conclusion, when Mr. Dobler filed a motion for *reduction of sentence* because he successfully completed boot camp, he still had a legitimate expectation that his sentence would never exceed the original four-year sentence that he had served for a year.

The Court of Appeals here and the *Castellano* division fail to recognize the difference between original sentences to probation or community corrections and sentences, like here, in which a defendant has been originally sentenced to

prison and then is granted probation or community corrections because of successful completion of boot camp.

Section 16-11-206(5), C.R.S. 2008 (probation), and section 18-1.3-301(1)(e), (h), C.R.S. 2008 (community corrections), which allow imposition of any sentence "which might originally have been imposed" following a probation or community corrections revocation, contemplate situations in which a defendant is originally sentenced to probation or community corrections. *See* § 18-1.3-301(1)(h), C.R.S. ("The sentencing court shall have the authority to modify the sentence of an offender who has been *directly sentenced* to a community corrections program in the same manner as if the offender had been placed on probation.") (emphasis added); *Romero v. People*, 179 P.3d 984, 987 (Colo. 2007) ("had Romero been placed on probation, the sentencing court could have modified his sentence by increasing it"). They do not contemplate situations like this one where the defendant is originally sentenced to prison, serves almost a full year and is then placed on probation because he successfully completes bootcamp. A defendant who is directly sentenced to probation is aware at sentencing that his probation may be revoked and thus, has no legitimate expectation of finality in his sentence. *United States v. Fogel*, 829 F.2d at 87. A

defendant like Mr. Dobler who begins serving a legal prison sentence has no expectation that he will ever be *on* probation, much less that he will someday attain probation and that probation may thereafter be revoked and his sentence increased. Unlike the former defendant, the latter has a legitimate expectation of finality of the sentence is serving. Other state supreme courts have recognized this distinction. *State v. Draper*, 573 N.E.2d 602, 604 (Ohio 1991) (unlike defendant originally sentenced to probation, defendant who began serving sentence but was thereafter released on probation upon reconsideration had expectation of finality in original sentence such that imposing more severe sentence when probation revoked violated double jeopardy); *State v. Ryan*, 429 A.2d 332, 335-36 (N.J. 1981) (same); *Commonwealth v. Cumming*, 995 N.E.2d 1094, 1099 (Mass. 2013) (same)

Unlike offenders originally sentenced to probation or community corrections, Mr. Dobler acquired a legitimate expectation that his legally authorized and lawfully imposed four year prison sentence could not be increased. Nothing about the court's mere recommendation for placement in bootcamp, nor about Mr. Dobler's eventual placement in bootcamp suggests otherwise. Indeed, the bootcamp statute itself informs the successful participant

that he is applying only for a possible *reduction* of sentence, not exposing himself to a possible *increase*. § 17-27.7-104 (2)(a) ("If an offender successfully completes a regimented inmate training program, such offender ... shall automatically be referred to the sentencing court so that the offender may make a motion for *reduction* of sentence...") (emphasis added) Where, as here, after serving a significant portion of his sentence an offender subsequently receives a sentence beyond that originally announced and the increase is not made pursuant to an initially announced procedure, this Court should hold – as Professor LaFave has suggested – that double jeopardy bars the increase.

> Accordingly, double jeopardy could bar resentencing ... where the modification of a sentence after [the sentence's] original imposition results in punishment beyond that originally announced (in contrast to *Jones*) and is not made pursuant to an initially announced procedure for review and subsequent modification (in contrast to *DiFrancesco*). ... It seems likely ... that the modification could present constitutional difficulties even though the time span [between the original sentence and the proceeding in which the sentence is increased] is not as extreme as that in the hypothetical offered by the *Jones* dissenters...[6]

[6] The hypothetical in the *Jones* dissent was of a sentence increase after the defendant served the fifteen years originally imposed. The dissent stated that an increase in that circumstance would surely be barred by double jeopardy:

> If, for example, a judge imposed only a 15-year sentence under a statute that permitted 15 years to life,

6 Wayne R. LaFave, et. al., *Criminal Procedure*, § 26.7(c) at 846 (3rd ed. 2007).

Mr. Dobler was given a four-year sentence. He was not sentenced directly to probation. As a result of his successful completion of bootcamp after serving one year of the sentence, the court ordered him released on probation. Nothing in the bootcamp statute informed him that by successfully completing the program he was somehow exposing himself to an increase of the sentence that he was serving and in which he had acquired an expectation of finality. Nor did the court inform him of any such exposure when it ordered him released on probation. *United States v. Fogel*, 829 F.2d at 88 (primary purpose of double jeopardy clause is to protect the finality of judgments and to free the defendant from "being compelled to live in a continuing state of anxiety and insecurity" thus, it follows "that a defendant has, barring any awareness to the contrary, an

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> he could-as far as the Court's understanding of the Double Jeopardy Clause is concerned-have second thoughts after the defendant has served that time, and add on another 10 years. I am sure that cannot be done, because the Double Jeopardy Clause is a statute of repose for sentences as well as for proceedings. Done is done.

Jones v. Thomas, 491 U.S. at 392 (Scalia, J., *dissenting* joined by Stevens, Brennan, and Marshall, JJ.)

expectation of finality in the severity of a sentence that is protected by the double jeopardy clause.") *quoting in part Green v. United States*, 355 U.S. 184, 187 (1957). Accordingly, the district court violated the prohibition of double jeopardy by increasing Mr. Dobler's sentence.

CONCLUSION

This Court should reverse the Court of Appeals and order it to vacate Mr. Dobler's six-year sentence with instructions to remand for reinstatement of his four-year sentence.

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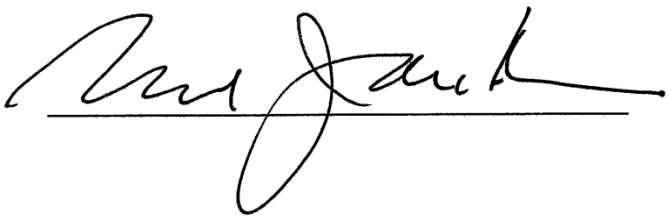

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CERTIFICATE OF SERVICE

I certify that, on December 4, 2015, a copy of this Opening Brief was electronically served through ICCES on Michael D. McMaster of the Attorney General's Office.