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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

WILLIE HARRIS,

Petitioner,

vs. CASE NO. 82,165

STATE OF FLORIDA,

Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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SUMMARY OF THE ARGUMENT

The guarantee against Double Jeopardy has been said to consist of three separate constitutional protections: (1) against a second prosecution for the same offense after acquittal; (2) against a second prosecution for the same offense after conviction; and, (3) against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). The decision below does not violate the integrity of a final judgment; nor, has Mr. Harris been subjected to oppression by Florida.

At bar, the trial judge's sentence was reversed on the cross-appeal of the prosecution. See, Harris v. State, 593 So.2d 301 (Fla. 2d DCA 1992), review dismissed, Harris v. State, 599 So.2d 656 (Fla. 1992) [Table Opinion]. On remand, the trial judge had two hearings before resentencing Mr. Harris in compliance with the mandate of the court below. (R 45-80; 81-97) See, Harris v. State, 624 So.2d 279 (Fla. 2d DCA 1993). Most simply, the trial judge was then informed of the legal deficiency in his original sentence by the Second District; and, the sentence has, as a matter of law, been altered to the prejudice of Mr. Harris. But, there has never been a reversal of Mr. Harris' underlying conviction. This is not a reprosecution which has resulted in greater punishment. At bar, the trial court reconsidered legal precedent as a basis for the habitualization; wherein, the trial court never reconsidered or reweighed newly discovered factual matters as a basis for habitualization. And,

is this not the crux as to why there has been no Double Jeopardy violation?

Again, Mr. Harris prosecuted a direct appeal; and, immediately, the prosecution instituted its cross-appeal. Thus, when Mr. Harris filed his notice of appeal, in this non-capital case, he had no expectation of finality as to his sentence. The "State" has a constitutional entitlement to one fair opportunity to sentence Willie Harris pursuant to the laws of Florida; and, the "State" was not afforded that "one fair opportunity" at the Harris I sentencing proceeding. However, the "State" was afforded that "one fair opportunity" to have Mr. Harris sentenced pursuant to Florida law at the Harris II proceeding. There has been no Double Jeopardy deprivation in the sentencing of Willie Harris.

ARGUMENT

ISSUE I

WHETHER THE IMPOSITION OF A HABITUAL OFFENDER SENTENCE IMPOSED AFTER REMAND VIOLATES DOUBLE JEOPARDY WHEN THE ORIGINAL SENTENCE WAS LEGAL WHEN IMPOSED AND DID NOT CONTAIN HABITUAL SANCTIONS.

(As Stated By Petitioner)

At first blush, the question is asked: Isn't this case a violation of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L. Ed. 2d 656 (1966)[1]? It is not. Why? Because in Pearce, the Court determined that there is a federal constitutional limitation upon the imposition of a more severe punishment following conviction for the same offense. There, Clifton Pearce had been retried after his prior conviction had been set aside and a new trial ordered. Mr. Pearce had been convicted in the state court of North Carolina of assault with intent to commit rape. Years passed and Mr. Pearce eventually secured a new trial. The Supreme Court of North Carolina found that an involuntary confession had been admitted in evidence against him. Mr. Pearce was retried; convicted; and, sentenced by the state trial court to an eight-year prison term which amounted to a longer total sentence than originally imposed. Mr.

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[1] The initial appeal is reported as Harris v. State, 593 So.2d 301 (Fla. 2d DCA 1992), review dismissed, Harris v. State, 599 So.2d 656 (Fla. 1992)[Table Opinion] and is hereinafter referred to as Harris I. The second appeal [which is the subject of this discretionary review] is reported as Harris v. State, 624 So.2d 279 (Fla. 2d DCA 1993) and is hereinafter referred to as Harris II.

Pearce's conviction and sentence were affirmed on direct appeal. As his state remedies were exhausted, he sought 28 USC §2254 relief in the United States District Court. The federal habeas court held the longer sentence imposed upon retrial was "unconstitutional and void". This determination was affirmed in Pearce v. North Carolina, 397 F.2d 253 (4th Cir. 1968). On certiorari, the United States Supreme Court affirmed Mr. Pearson's judgment; but, in an opinion delivered by Justice Stewart, the Court held that the state of North Carolina was required to fully credit Mr. Pearce with the punishment already extracted when imposing sentence on the new conviction for the same offense.[2] See, North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L. Ed. 2d 656 (1969). Justice Stewart, in expressing the unanimous view of the Court, held that the equal protection clause of the Fourteenth Amendment does not impose an

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[2] Justice Stewart quoted Ex Parte Lange, 18 Wall 163, 168, 21 L.Ed 872, 876 (1874) for the controlling constitutional principle: "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And . . . there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence." See, Pearce, 23 L.Ed. 2d at 665 (1969). In Ex parte Lange, the petitioner had been sentenced to one-year imprisonment and $200.00 in fines, under a federal statute providing for maximum penalty of one-year imprisonment or $200.00. Habeas relief issued five days later when the trial court realized the error. However, the trial judge did not give five (5) days credit for the time already served when Edward Lange was resentenced. The United States Supreme Court on certiorari ordered Mr. Lange discharged. Why? Because Mr. Lange had already paid his $200.00 fine--thus, he had suffered complete punishment for his crime and could not be subjected to further sentencing.

absolute bar to a more severe sentence upon reconviction. And, most significantly, he then turned to the broader problem of what constitutional limitations are levied on the general power of a trial judge to impose upon reconviction a longer prison sentence than the defendant originally received. Of course, no prisoner is to be more severely punished for having successfully prosecuting his Florida statutory right to appeal or having prevailed on a Fla. R. Crim. Pr. 3.850 or state habeas corpus attack. And, was not the Second District most careful in Harris II to point out that Mr. Harris' resentencing did not punish him for exercising his right to review. Justice Stewart writes:

> **Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appear or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.**
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> **(Text of 23 L.Ed.2d at 669)**

In footnote 20 of the opinion, Judge Stewart republishes a letter from a prisoner to a North Carolina state trial judge where the prisoner was terrified of a new trial because the prosecution was seeking a greater sentence; and, the prisoner, pro se, asked the state trial judge to prohibit retrial. The case sub judice in no way reflects those facts or those circumstances.

Justice Stewart then set forth the federal constitutional standard which a trial court must follow in resentencing a prisoner to a more severe sentence:

> **In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so much affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.**
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> **(Text of 23 L.Ed.2d at 670)**

Respondent submits that neither the state trial judge nor the court below in the direct review of Harris II has disposed of Mr. Harris' case in disregard of the above federal constitutional considerations. Has not the prosecution in the trial court tendered both reason and justification for Mr. Harris habitualized sentence? This is why, in Harris I, the prosecution litigated a cross-appeal.

Subsequently, the Court again addressed Double Jeopardy in United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). Under 18 U.S.C. §3575 [a provision of the federal Organized Crime Control Act] the government is permitted to seek direct review of an sentence imposed on a "dangerous special offender". Eugene DiFrancesco was convicted of racketeering in the United States District Court of New York.

Mr. DiFrancesco was sentenced to two concurrent 10-year prison terms as a "dangerous special offender". The Code authorized the imposition of an increased sentence upon a convicted felon who fell within the Code's definition. The federal trial court also specified that these two concurrent 10-year sentences were to be served concurrently with a 9-year sentence which had been imposed on Mr. DiFrancesco the preceding month. The government objected and submitted that the "dangerous special offender" sentence was, in reality, a sentence with an added term of one year. A direct appeal was prosecuted by DiFrancesco; and, not unlike the case at bar, the government sought review of Mr. DiFrancesco's sentence in its own appeal. The appeal by the government was dismissed. There, the federal appellate court determined Mr. DiFrancesco made no "voluntary choice" which subjected him to jeopardy for a second time.[3] See, DiFrancesco v. United States, 604 Fed. 2d 769, 779-789 (2nd Cir. 1979) [dismissal of government appeal of sentence on Double Jeopardy grounds]. The government sought certiorari review in the United States Supreme Court which was granted. See, United States v. DiFrancesco, 449 U.S. 117, 101

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[3] At the trial level, the government instituted its own independent appeal which was consolidated with Mr. DiFrancesco's appeal. In Harris I, the prosecution filed a cross-appeal. When an individual in Florida prosecutes a direct appeal, the door is opened to cross-review as a matter of state law. See, Fla.R.App.Pr. 9.140((c)(1)(H)-(I). Did not Mr. Harris file his notice of appeal for review of his judgment of conviction? And, was not the initial sentencing of Mr. Harris subject to review as either a "ruling on a question of law" or as an "illegal sentence"? And, did not the trial judge initially misperceive the law as to habitualization in Mr. Harris' initial sentencing? Thus, there is no suggestion of vindictiveness in resentencing.

S.Ct. 426, 66 L.Ed.2d 328 (1980). The Court held that government review of Mr. DiFrancesco's sentence for a "dangerous special offender, is not in itself an offense to Double Jeopardy principles just because if the government prevails -- Mr. DiFrancesco is deprived of the benefit of a more lenient sentence. Additionally, the Court held that since the punishment authorized under 18 USC §§3575 & 3576 is clear and specific, the increase of the sentence on appeal under the Code does not violate the guarantee against multiple punishment in the Double Jeopardy clause.[4]

It is most important to recognize that the capital sentencing cases are distinguishable because the initial sentence of Willie Harris was not based on trial-type fact finding. In Schiro v. Farley, ___ U.S. ___, 54 Cr L 2070, 62 USLW 4064, 1994 WL 9939 (No. 92-7549)(Opinion filed January 19, 1994), the Court has rejected Mr. Schiro's argument that the sentencing phase [Phase II] of a single capital proceeding should be treated as a "successive prosecution" for Double Jeopardy purposes. Mr. Schiro had been charged with three (3) counts of murder: [1]

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[4] There is a dissent by Justice Brennan, in which he is joined by Justices White, Marshall, and Stevens. Justice Brennan was of a view that the enhancement of a sentence purusant to the Code constituted an unconstitutional multiple punishment. Why? Because he states there is no difference between the finality of acquittals and the finality of sentences. In other words, Justice Brennan believed that the majority misperceived the appropriate degree of finality to be accorded the imposition of sentence by a federal trial judge; wherein, he states that the majority reaches the erroneous conclusion that enhancement of a sentence is not an unconstitutional multiple punishment.

"knowingly" killing Laura Luebbehusen; [2] killing Laura Luebbehusen while committing the crime of rape; and, [3] killing Laura Luebbehusen while committing criminal deviate conduct. Indiana sought the death penalty for the second and third counts. There, an Indiana jury returned a guilty verdict on killing Laura Luebbehusen while committing the crime of rape. A sentencing proceeding followed; and, the jury recommended against a death penalty. Under Indiana law, to obtain the death penalty, the prosecution must establish beyond a reasonable doubt the existence of at least one of nine state statutory aggravating factors. The "aggravating factor" relied on by the prosecution is: "[T]he defendant committed the murder by intentionally killing the victim while committing or attempting to commit ... rape" or another enumerated felony. The Indiana state trial judge overrode the jury recommendation. While on direct appeal, the Supreme Court of Indiana relinquished jurisdiction of the case to the state trial court so that written findings of fact might be published as to mitigation and aggravation. Mr. Schiro based his Double Jeopardy argument on the jury's failure to return a verdict on the intentional murder count; and, the state trial judge's subsequent imposition of the death penalty. Justice O'Connor distinguished the case from Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). There, the Petitioner was convicted of capital murder; and, at the first death penalty sentencing proceeding, the jury rejected the death penalty and sentenced him to a term of years [the

Missouri trial judge is not the sentencer--the Missouri jury is the sentencer]. The conviction was overturned; and, on resentencing, Missouri again sought the death penalty. There, the Petitioner was forced to run the gauntlet twice as the Missouri capital sentencing proceeding "was itself a trial on the issue of punishment". In other words, Mr. Bullington was being required to submit to a second, identical proceeding which was tantamount to permitting a second prosecution of an acquitted defendant. The Schiro jury override was not a successive prosecution for Double Jeopardy purposes.

The "State" would also point to Bohlen v. Caspari, 979 F.2d 109 (8th Cir. 1992), Rehearing En Banc Denied Dec. 8, 1992, the Eighth Circuit on a collateral review from the denial of Christopher Bohlen's 28 U.S.C. §2254 application for habeas relief, extended the Bullington principle to a state trial judge's determination on persistent and/or habitual offenders. There, Mr. Bohlen had been found guilty of three (3) counts of first-degree robbery in the Missouri state court and he was sentenced as a "persistent offender" to three consecutive 15-year sentences. The Missouri prosectuion failed to establish his prior convictions; but, the state trial court sentenced him as a persistent offender. On direct appeal, the judgment was affirmed; but, the case was remanded so that the prior convictions might be established for enhancement. This was accomplished as the prosecution introducted evidence of four prior felony convictions. The state trial court determined that

Mr. Bohlen was a "persistent offender" and again sentenced him to three (3) consecutive fifteen-year terms of imprisonment. On direct review of the second sentencing, the Missouri Court of Appeals affirmed holding that the question of Double Jeopardy was not involved because Double Jeopardy protections do not apply to sentencing.

The United States District Court denied Mr. Bohlen's application for 28 U.S.C. §2254 relief and held that that Double Jeopardy did not attach at the first sentencing hearing because the hearing lacked the hallmarks of an adversarial trial. The Eighth Circuit reversed holding that Missouri's "persistent offender" scheme was sufficiently like a trial on the question of whether Mr. Bohlen was a "persistent offender." In other words, the Eighth Circuit held that Missouri's failure to prove its case the first time bars, under Double Jeopardy principles, a second bite of the "persistent offender" apple.

Subsequently, the Supreme Court of the United States granted certiorari to review Bullington's applicability to non-capital sentencing. See, Caspari v. Bohlen, ___ U.S. ___, 113 S.Ct. 2958, 125 L.Ed.2d 660 (No. 92-1500)(Cert. granted June 14, 1993). The Court heard argument this past December 6, 1993; and, the case is now submitted awaiting decision; and, the Court's decision will impact successive non-capital sentence enhancement proceedings.

Against this federal background, discretionary review has been granted as apparent conflict has been established with three

holdings: (1) Davis v. State, 587 So.2d 580 (Fla. 1st DCA 1991); (2) Grimes v. State, 616 So.2d 996 (Fla. 1st DCA 1992), As Corrected on Grant of Clarification February 5, 1993, review dismissed, Grimes v. State, 617 So.2d 319 (Fla. 1993) [Table Opinion]; and, Williams v. State, 595 So.2d 936 (Fla. 1992), Rehearing Denied April 7, 1992.

In Davis v. State, 587 So. 2d 580 (Fla. 1st DCA 1991), Roosevelt Davis was charged with the crime of possession of a firearm by a convicted felon; and, he was re-sentenced by the trial court as a habitual offender. On February 2, 1990, the trial court considered sentencing Mr. Davis as a habitual offender but, for whatever reason, declined to do so. Three weeks later, on February 27, 1990, the trial court reconvened the parties and sua sponte set aside the former sentence and declared Mr. Davis to be an habitual offender and sentenced him as same. Obviously, the trial judge at the February 2, 1990, hearing presided over a full habitualization proceeding and declined to habitualize Mr. Davis. At that hearing, the trial judge believed that twenty-two years of incarceration was the upper limit of the permitted guidelines range and the trial court declined to habitualize Mr. Davis. There is no question but that at the former hearing, the trial court considered habitualization and, as a matter of law, acquitted him of habitualization. Thus, at the latter hearing, that former decision not to impose a habitual offender sentence operates as an acquittal for Double Jeopardy purposes. There was a perception of a constitutional

deprivation; and, the First District has reversed and remanded for resentencing as the initial sentence was legal. Double Jeopardy barred the trial court from increasing Roosevelt Davis' sentence.

The state public defender also relies on this Court's decision in Williams v. State, 595 So. 2d 936 (Fla. 1992). There, Horace Williams had been found guilty of first-degree murder. The trial court permitted Mr. Williams to waive the jury for Phase II consideration; but, there was no consent of the state. See, Williams v. State, 573 So. 2d 875, 876 (Fla. 4th DCA 1990). The prosecution objects and cross-appeals after the jury had been dismissed and Mr. Williams had been sentenced to life imprisonment. But, this Court determined that the Fourth District overlooked and failed to consider Double Jeopardy principles in its decision. Justice Overton points out that the jury had been dismissed and Mr. Williams had been sentenced to life imprisonment by the trial judge prior to the State filing its cross-appeal. In capital cases, it is the most narrow case which is remanded for resentencing proceedings which could result in the imposition of the death penalty. In other words, the Double Jeopardy clause prevents a new penalty phase proceeding before a new jury that could subject him to an increased penalty.

Mr. Harris, pro se, relied on Grimes v. State, 616 So. 2d 996 (Fla. 1st DCA 1992), review dismissed, Grimes v. State, 617 So. 2d 319 (Fla. 1993)[Table Opinion]. There, Ural Grimes was convicted of (1) eights counts of armed robbery; (2) one count of

dealing in stolen property; and, (3) one count of stealing an automobile. Mr. Grimes was habitualized on the latter two offenses; and, he was given a non-habitual sentence on the armed robbery offense. On direct appeal, the First District concluded that there was a failure of proof to habitualize Mr. Grimes. Further, the First District held that when the written sentences were corrected to comply with the oral pronouncement on the non-habitualized offenses, the trial court was barred from reconsideration of habitualizing him. Why? Because the trial court's initial decision not to find Mr. Grimes a habitual offender was an acquittal on that charge. And, because there had been a full hearing on habitualization and the trial court had declined to habitualize, the prosecution was barred from seeking habitual offender status for Mr. Grimes as to the eight first-degree felonies punishable by life. As the trial court had failed to make the written findings for habitualization, the sentencing was not to be reopened on remand.

The Harris II decision is not an exception to basic Double Jeopardy protection; and, the sentence imposed by the trial court can be tolerated under Double Jeopardy. The Harris opinion is reconciled with both Davis and Grimes. In Davis, the trial court had sua sponte increased sentencing by subsequent habitualization; and, in Grimes, the trial court had not made written findings in support of habitualization. Neither of these two judicial acts is present in this case. In Harris II, the trial court complied with the mandate of a superior court. Thus,

how is Harris II to be reconciled with Williams? Death is different as recognized by both this Court and the Supreme Court of the United States. Procedurally, the Williams cases are mirror images of the Harris cases. Horace Williams had been found guilty of first-degree murder. At Phase II, the trial court announced that he would not impose the death penalty. As a consequence, Mr. Williams was permitted [over the State's objection] to waive the jury for its recommendation. Horace Williams was given a mandatory 25-year term of imprisonment. Horace Williams then prosecuted a direct appeal and the State prosecuted a cross-appeal. The Fourth District determined that the trial court had erred in barring the State from presenting its penalty evidence to the advisory jury. See, State v. Ferguson, 556 So.2d 462 (Fla. 2d DCA 1990) [there the record was not clear as to whether Eddie Ferguson had waived a Phase II proceeding; and, on common law certiorari review--Eddie Ferguson had not been sentenced]. Justice Overton pointed out that the inferior Williams decision did not address the Double Jeopardy ramifications of its holding. In finding the Phase II proceeding inapplicable, the trial judge had invaded the province of the jury and made a factual determination before the prosecution and defense could present evidence. This is not the case in Harris II. Why? The trial judge, at the initial sentencing, never made a factual determination that Willie Harris was not qualified for habitualization. The trial court declared an incorrect principle of law in his initial sentencing of Willie Harris. There was a

misapplication of law to the specific facts of the Harris case when the trial court articulated that habitualization was not available. That misapplication of law did not involve factual matters. In other words, the trial court's declination to initially habitualize Willie Harris was a pure, unadulterated legal decision on the applicability of the habitualization statute to the crimes for which Willie Harris had been convicted. This was not a factual decision on the propriety of habitualization under the circumstances of the case. This deprived the State of its entitlement to "one fair opportunity" to have Willie Harris sentenced pursuant to the applicable laws of Florida.

And, death continues to remain different. For non-capital cases, how can an individual expect finality in sentencing when he opens the door to an examination of sentencing by prosecuting a direct appeal; and, when appeals are sought, the People have a right to a cross-appeal. The Second District, in Harris II, has correctly determined that there was no vindictiveness in the resentencing of Willie Harris. The constitutional principles announced in North Carolina v. Pearce, supra have been followed. The "State" would request this Court to defer to the Second District's affirmation of the trial court's application of Double Jeopardy principles and approve Harris II.

CONCLUSION

WHEREFORE, based upon the foregoing facts, arguments and authorities, Respondent would pray that this Court would file an opinion approving the decision from below as no state or federal Double Jeopardy violation transpired in the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Andrea Norgard, Assistant Public Defender, P.O. Box 9000--Drawer PD, Bartow, FL 33830 and Willie Harris, pro se, 3189 Little Silver Road, Crestview, FL 32536 on this 1st day of ~~January~~ February, 1994.

COUNSEL FOR RESPONDENT