IN THE SUPREME COURT OF FLORIDA

BRIEN ALLEN, :

Petitioner, :

v. : Fla. S. Ct. Case No. 87,941

STATE OF FLORIDA, :

Respondent. :

_____/

INITIAL BRIEF OF PETITIONER

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

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INITIAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

The Record on Appeal consists of one volume of record with two separately bound transcripts of the plea and sentencing proceedings, and two volumes of supplemental record. Although the clerk of court listed the plea transcript as pp.111-125 in the record, the clerk did not properly number those pages accordingly. Therefore, pages in the record will be referred to as "(R-#)", with the exception of the plea proceeding, which will be referred to as "(Plea Tr-#)", by the transcript page number assigned by the court reporter at the top of each page. Pages in the separately bound supplemental volumes shall be referred to respectively as "(Supp. I-#)" and "(Supp. II-#)".

STATEMENT OF THE CASE

This case is here on discretionary review of a decision of the First District Court of Appeal, which affirmed the convictions and adult sentences of petitioner Brien Allen, a juvenile. The District Court's decision, entered on April 9, 1996, passed upon the following question certified to be of great public importance:

> WHETHER APPELLANTS MAY BE SEPARATELY CONVICTED AND SENTENCED FOR ARMED BURGLARY, ARMED ROBBERY, AND ARMED KIDNAPPING WHERE EACH OFFENSE IS PART OF THE SAME CRIMINAL EPISODE?

Allen v. State, 671 So. 2d 233, 234 (Fla. 1st DCA 1996).

This Court has jurisdiction to review the decision below under the authority of article V, section 3(b)(3) of the Florida Constitution, and Florida Rules of Appellate Procedure 9.030(a)(2)(A)(v) and 9.120. Proper notice having been timely filed, this Court entered an Order on May 10, 1996, postponing jurisdiction and ordering the petitioner to submit a brief on the merits.

STATEMENT OF THE FACTS

This case evolved from charges filed in two separate criminal cases, Circuit Court case nos. 93-2686 and 93-2765. Both were disposed of together before the Honorable J. Lewis Hall Jr., Second Judicial Circuit, Leon County, Florida. The present

proceedings most directly concern the disposition and sentence in case no. 93-2765.[1]

In case no. 93-2765, a grand jury returned an indictment on September 22, 1993, charging Allen with: (Count I) armed burglary of a dwelling with a firearm (R-46); (Count II) armed kidnapping with a firearm (R-47); and (Count III) armed robbery with a firearm (R-47). Those charges stem from acts allegedly committed in a single incident at 2009 Bradford Court against Cindy Gandy, on December 6, 1991. (R-46-47). At the time of the indicted offenses, Allen was fifteen years old. (R-46, 48, 50). The youth initially pleaded not guilty. (R-49).

On April 21, 1994, Allen executed a written Plea and Acknowledgment of Rights, agreeing to plead no contest to all the charges. The no contest pleas were entered "straight up" without any sentencing agreement or plea bargain. The judge conducted a brief colloquy and accepted the pleas. (R-11-12, 55-56; Plea Tr-7-14).

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[1] In Circuit Court case no. 93-2686, the State charged Allen with an attempted burglary of a structure when he was seventeen years old, facts unrelated to the facts addressed in the main body of this brief. (R-1). Allen initially pleaded not guilty. (R-4). He changed his plea to no contest in conjunction with the no contest pleas entered as to the indicted charges in Circuit Court case no. 93-2765. (R-11-12, 55-56; Plea Tr-7-14). The judge adjudicated the youth guilty as charged, (R-13-14), and sentenced him to five years' imprisonment with 245 days credit, (R-13-18, 179), to run concurrent to the sentences imposed in case no. 93-2765, (R-72-80, 179-180). A timely notice of appeal was filed on June 14, 1994. (R-100).

On May 19, 1994, the judge held a sentencing hearing at which various witnesses testified. (R-129-181). Gandy described the incident of December 6, 1991. (R-134-148). After leaving work sometime after 5 p.m., she came home to her apartment and locked the door when she discovered a masked male in the bedroom pointing a gun at her head. (R-136-38). The gun was her weapon that the intruder found in the house. (R-47, 59, 148; Plea Tr.-10-11). She could not identify him. (R-138). She started screaming and ran toward the front door to get out. (R-139). Before she could finish unlocking the door, he grabbed her and started cursing, calling her a bitch and telling her to stop screaming or he would kill her. (R-140). They moved three or four feet, her arms constrained as he pulled her away from the door. (R-140). She stopped struggling, and when she quieted down, he told her to drop her purse and keys and then said "no, Cindy, come back to the bedroom with me." (R-140). She refused and started screaming and fighting, striking him with her elbows and head. (R-140). She got back to the door and slung it open. (R-141). He grabbed her dress. (R-141). She then got out of the apartment and he ran away. (R-141).

The judge adjudicated the youth guilty as charged. (R-72-73). The judge imposed a sentence on count I of 15 years' imprisonment, concurrent to the sentence in count II and including a 3-year minimum mandatory term for use of a firearm; 18 years' imprisonment on count II; and 18 years' imprisonment on

count III concurrent to the sentences in counts I and II. Allen was given credit for 239 days of jail time. (R-72-80, 179-180).

The undersigned counsel asked the District Court to relinquish jurisdiction to enable Allen to pursue a motion under Florida Rule of Criminal Procedure 3.850, but the District Court refused. Counsel then submitted an Initial Brief to the District Court pursuant to the dictates of Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and its progeny. Allen submitted a pro se brief in which he argued that the multiple enhancement of his convictions and sentences based on the use of the same firearm in a single incident violates the multiple punishments prohibition of the constitutional guarantee against double jeopardy. Upon review, the District Court issued an Order on December 20, 1995, on the authority of State v. Causey, 503 So. 2d 321 (Fla. 1987) and In Re: Order of First District Court of Appeal, 556 So. 2d 1114 (Fla. 1990), instructing the undersigned counsel to submit a brief arguing

> whether appellant's convictions and sentences for the offenses of armed burglary, armed kidnapping, and armed robbery, all of which he committed with the same firearm during the same criminal episode, constitute an impermissible multiple punishment for the same offense. The public defender's office should address the issue in light of the supreme court's holding in State v. Stearns, 645 So. 2d 417 (Fla. 1994), and this court's opinions in Brown v. State, No. 95-669, filed December 18, 1995 [], and A.J.H. v. State, 652 So. 2d 1279 (Fla. 1st DCA 1995).

Allen v. State, No. 94-1905 (Order of December 20, 1995).

The undersigned counsel submitted a brief on the merits on behalf of the petitioner. The brief argued that because the unlawful act of using a firearm in the commission of a felony is necessarily subsumed within each of the three convicted offenses, all of which involved a single firearm in a single brief incident with a single victim, double jeopardy required the court both to reverse the armed portion of his burglary and robbery convictions and to order resentencing. The District Court affirmed the convictions and sentences, certifying the question quoted above.

SUMMARY OF THE ARGUMENT

The pleas entered in this case did not result from a bargained for agreement, therefore making the double jeopardy claim cognizable on appellate review. Novaton v. State. A defendant cannot be convicted and sentenced for two crimes involving a firearm that arose out of the same criminal episode under Florida law. State v. Stearns. It was error for the District Court to allow the trial court to punish this youth three times for the single use of one firearm on one victim at one time in one place in one brief incident by reclassifying each crime. No legislative intent to apply three reclassifications in one case based on one fact is unequivocally demonstrated in the statutes, so no intent can be read into the statutes unfavorable to the accused. Sirmons v. State; Cleveland v. State; Hale v. State; Daniels v. State; Perkins v. State. The multiple punishments violations must be remedied by reducing the

convictions, not just the sentences, and by giving Allen leave to withdraw his pleas. Novaton v. State; Sirmons v. State.

ARGUMENT

PETITIONER'S CONVICTIONS AND SENTENCES FOR THE OFFENSES OF ARMED BURGLARY, ARMED KIDNAPPING, AND ARMED ROBBERY CONSTITUTE IMPERMISSIBLE MULTIPLE PUNISHMENTS IN THAT ALL THREE CRIMES WERE RECLASSIFIED DUE TO THE USE OF A SINGLE FIREARM IN A SINGLE BRIEF CONTINUING CRIMINAL INCIDENT INVOLVING A SINGLE VICTIM

The three charges of armed burglary of a dwelling, armed kidnapping, and armed robbery all arose from the use of a single firearm in one location involving one victim in a single continuing episode that lasted merely seconds. Each offense charged and sentenced thereby effectively enhanced petitioner Brien Allen's punishment for the single use of the same firearm. To the extent that each conviction and sentence constitutes greater crime and punishment due to use of a single firearm in one incident, the judgment and sentences violate this youth's constitutional protection against multiple punishments guaranteed by the double jeopardy and due process clauses of the Florida and federal constitutions. U.S. Const. amends. V, XIV; Art. I, § 9, Fla. Const.

A. The multiple punishment issue is properly before this Court because petitioner's pleas and sentences did not result from a bargain or agreement.

The no contest pleas were entered "straight up" and did not result from any plea or sentencing agreement between Allen and

the State. In Novaton v. State, 634 So. 2d 607 (Fla. 1994), this Court held that a multiple punishments claim may be raised on appeal as long as the defendant did not bargain away the right to pursue the claim in a plea agreement. See also, e.g., Brown v. State, 670 So. 2d 965 (Fla. 1st DCA 1995). Novaton applies to the present facts and compels this Court to address the multiple punishments issue on its merits.

B. The trial court impermissibly applied multiple reclassifications for the single use of a single firearm in a single, brief, continuing criminal episode, contrary to double jeopardy principles and decisions of this Court.

The use of a single firearm, which petitioner found in the dwelling, in one brief continuing criminal incident, was employed multiple times by the State and the court to punish Brien Allen. First, in Count I, he was convicted of armed burglary of a dwelling under section 810.02(2)(b), Florida Statutes (1991), a first-degree felony punishable by a term of years not exceeding life imprisonment. That crime would have been either a first-degree felony of armed burglary under section 810.02(2)(a), Florida Statutes (1991), or a second-degree felony of unarmed burglary chargeable under section 810.02(3), Florida Statutes (1991), but for the use of a firearm alleged here.[2] Thus, the

[2] The use of a firearm in the commission of the burglary was an essential element of the charged crime under subsection (2)(b). Cf. Lamont v. State, 610 So. 2d 435, 439 (Fla. 1992). While the State may have been able to charge petitioner instead with the first-degree felony PBL of unarmed burglary with an assault or battery under section 810.02(2)(a), Florida Statutes

armed portion of the charge was strictly a statutory reclassification.

Second, the Court found him guilty of the life felony of armed kidnapping with a firearm. Section 775.087, Florida Statutes (1991), expressly reclassifies kidnapping from a first-degree felony punishable by a term of years not exceeding life imprisonment, section 787.01(2), Florida Statutes (1991), to a life felony.

Third, the court convicted the youth in Count III of armed robbery with a firearm, a first-degree felony punishable by a term of years not exceeding life imprisonment, section 812.13(2)(a), Florida Statutes (1991). Subsection (2)(a) expressly reclassifies the crime based on the use of a firearm. State v. Brown, 633 So. 2d 1059, 1060 (Fla. 1994) (McDonald, J., concurring) (use of a firearm enhanced the degree of robbery in an armed robbery charge, thus punishing the defendant for the firearm's use).[3] (R-72-83).

(1991), it did not do so, choosing to proceed against petitioner strictly on the theory of armed burglary with a firearm under subsection (2)(b). Subsection (2)(a) is an alternative theory, not a lesser included offense, and is thus unavailable to the State now.

[3] The way not to impose multiple punishment for the use of the firearm is by reducing the conviction to the second-degree felony of robbery, section 812.13(2)(c), Florida Statutes (1991). The State cannot now seek to resort to the first-degree felony of armed robbery under section 812.13(2)(b), Florida Statutes (1991). Allen was not charged under that theory. (R-47). Also, it would be taking legal fiction too far to base a conviction under subsection (2)(b) for the use of a weapon when that

This Court made clear in State v. Stearns, 645 So. 2d 417, 418 (Fla. 1994), that a person can "not be convicted and sentenced for two crimes involving a firearm that arose out of the same criminal episode." Contrary to this Court's directive in Stearns, the District Court held it proper to punish this youth three times for the use of one firearm on one victim at one time in one place in one brief incident.

Stearns said an accused cannot be found guilty of carrying a firearm during commission of grand theft when he received an enhanced sentence for burglary of a structure while armed. The principle applies here as well. Once the core fact of use of the firearm was relied on by the court to enhance punishment by reclassifying a crime, it could not be used again for a second and then a third reclassification for the same act. See Cleveland v. State, 587 So. 2d 1145 (Fla. 1991) (after reclassifying attempted robbery from second-degree felony to first-degree felony because of use of firearm, a court cannot, under double jeopardy, impose second punishment for use of same firearm while committing a felony in same act); Sirmons v. State, 634 So. 2d 153 (Fla. 1994) (multiple punishments prohibited when they arise from same core conduct).

The District Court attempted to distinguish this Court's precedent by saying

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subsection necessarily excludes firearms from its breadth and when the only weapon allegedly used in the case was a firearm.

> each of the crimes contain elements that are separate and distinct, and none of the offenses are criminal only as a result of the defendant possessing or concealing a firearm. Gaber v. State, 662 So. 2d 422 (Fla. 3d DCA 1995).

Allen, 671 So. 2d at 234. However, that distinction makes little sense when applied to the situation in this case, which solely deals with multiple felony reclassifications for the same act.

In Missouri v. Hunter, 459 U.S. 359, 366, 103 S. Ct. 673, 678, 74 L. Ed. 2d 535 (1983), the United States Supreme Court held that the double jeopardy clause prohibits "the sentencing court from prescribing greater punishment than the legislature intended." Accordingly, before reaching the question of any possible constitutional violation, the law requires the Court to examine legislative intent. E.g. State v. Smith, 547 So. 2d 613, 614 (Fla. 1989). If the intent is not clear, the Florida Statutes and due process require the statutes to be strictly construed favorably to the accused. E.g. Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991) ("One of the fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter."); § 775.021(1), Fla. Stat. (1991). Nothing in the Florida Statutes clearly expresses the Legislature's intent to apply multiple reclassifications in one brief episode when each reclassification involves a single core fact.

Because such clear legislative intent is not apparent, this case should follow the decision in Hale v. State, 630 So. 2d 521, 525 (Fla. 1993), cert. denied, 115 S. Ct. 278, 130 L. Ed. 2d 195 (1994), where the Court concluded that the trial court was not authorized to "both enhance Hale's sentence as a habitual offender and make each of the enhanced habitual offender sentences for the possession and the sale of the same identical piece of cocaine consecutive, without specific legislative authorization in the habitual offender statute." (Emphasis supplied). See also Daniels v. State, 595 So. 2d 952 (Fla. 1992) (in absence of clear legislative intent, trial court was not permitted to sentence defendant to consecutive minimum mandatory sentences). This situation is unlike Gayman v. State, 616 So. 2d 17 (Fla. 1993), where a single statutory reclassification statute was permissibly merged with a penalty enhancement statute (the habitual offender statute) to increase an accused's sentence for a single offense. Only one statutory reclassification took place there, as opposed to three reclassifications in this case.

For the reasons stated above, this Court should answer the certified question in the negative as applied to the facts in this case.

C. The multiple punishment violation applies to both the convictions and the sentences.

Some cases in the First[4] and Third[5] Districts have held that a double jeopardy violation is remedied only by a reduction of the sentence when no specific double jeopardy allegation had been made at trial as to the unconstitutional convictions. This Court's decisions, however, demonstrate that those lower court decisions were wrong, and the multiple punishments violation demonstrated above must be remedied by reducing the convictions and ordering resentencing.

The rationale in Novaton v. State, 634 So. 2d 607 (Fla. 1994) compels the conclusion that a double jeopardy violation applies to both the convictions and the sentences. Neither Novaton nor the cases it construed distinguished the preservation of double jeopardy claims made as to convictions from those made as to sentences. To the contrary, Novaton approved the double

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[4] E.g., Graham v. State, 631 So. 2d 388 (Fla. 1st DCA 1994); Salgat v. State, 630 So. 2d 1143 (Fla. 1st DCA 1993), review denied, 652 So. 2d 815 (Fla. 1995); Kio v. State, 624 So. 2d 744 (Fla. 1st DCA 1993), review denied, 634 So. 2d 627 (Fla. 1994); Perrin v. State, 599 So. 2d 1365 (Fla. 1st DCA 1992); Wright v. State, 573 So. 2d 998 (Fla. 1st DCA 1991). But see Brown v. State, 670 So. 2d 965 (Fla. 1st DCA 1995); Maxwell v. State, 666 So. 2d 951 (Fla. 1st DCA), review granted, 673 So. 2d 30 (Fla. 1996); A.J.H. v. State, 652 So. 2d 1279 (Fla. 1st DCA 1995).

[5] E.g., Laines v. State, 662 So. 2d 1248 (Fla. 3d DCA 1995), review denied, 670 So. 2d 940 (Fla. 1996); Irizarry v. State, 578 So. 2d 711 (Fla. 3d DCA 1990), disapproved on other grounds, Williams v. State, 594 So. 2d 273 (Fla. 1992); Sands v. State, 403 So. 2d 1090 (Fla. 3d DCA 1981); Hines v. State, 401 So. 2d 878 (Fla. 3d DCA 1981).

jeopardy decision in Arnold v. State, 578 So. 2d 515 (Fla. 4th DCA 1991), in which the court vacated one of the unconstitutional convictions as well as the corresponding sentence even though Arnold had done nothing in he trial court to expressly raise the double jeopardy claim as to his conviction: He "did not waive the right to challenge his convictions or sentences by entering a plea of nolo contendere without reserving his right to appeal." 578 So. 2d at 517 (emphasis supplied). Likewise, no double jeopardy claim was preserved as to the conviction in Sirmons v. State, 634 So. 2d 153 (Fla. 1994), yet that double jeopardy decision necessarily resulted in vacating a conviction, not just the sentence. Sirmons v. State, 636 So. 2d 899 (Fla. 5th DCA 1994) (vacating conviction and sentence on remand from Supreme Court).

Convictions and sentences are inextricably intertwined. A defendant who has on his record a conviction that violated double jeopardy may be made to suffer untold consequences in the present or future cases, such as additional points under the sentencing guidelines, qualification for habitual offender or violent habitual offender sentencing, etc. The striking of a sentence for violating double jeopardy is inadequate relief when the violation and harm arise from an unconstitutional conviction. An unconstitutional conviction also must be struck or reduced to remedy a constitutional violation. Moreover, judicial labor would be spared because courts would have no need to revisit the

double jeopardy issue in the event that an unconstitutional conviction is later sought to be used to calculate a sentence in a future case. Cf. Johnson v. Mississippi, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988) (court cannot sentence based on improperly obtained prior conviction); Rivera v. Dugger, 629 So. 2d 105 (Fla. 1993) (same).

Judge Benton of the First District recently addressed this issue in Brown v. State, 670 So. 2d 965 (Fla. 1st DCA 1995), and his analysis fully supports petitioner Allen. Judge Benton said:

> I write separately to explain why I concur in concluding that the double jeopardy question is cognizable not only as to appellant's sentences, but also as to his convictions. Although appellant and the prosecutor struck a plea bargain, which was reduced to writing by filling in a form plea agreement, the form plea agreement was later amended by striking through the handwritten provisions as to sentencing and adding the words "straight up plea." Both the original and the amended versions are of record. The plea colloquy makes clear that the original plea bargain was rescinded by agreement of both parties. The convictions all arise from a single transaction: on this point there is no factual dispute.
>
> In holding that a convict appealing denial of a motion filed under Florida Rule of Criminal Procedure 3.850 could raise a double jeopardy claim never previously presented, the court in State v. Johnson, 483 So. 2d 420, 421 (Fla. 1986) posed the question
>
> > Does a defendant waive his right to assert double jeopardy when he fails to raise it before the trial court at the time he is again placed in jeopardy?

The court answered this question "in the negative with the qualification that there may be limited circumstances when the assertion of the double jeopardy defense may be knowingly waived." Id. Here the record demonstrates no knowing waiver.

Five years after Johnson, citing not Johnson but a ten-year-old district court decision, Hines v. State, 401 So. 2d 878 (Fla. 3d DCA 1981), we held that "the failure to raise . . . [a double jeopardy] issue in the trial court, with regard to multiple convictions, precludes consideration of the issue on appeal." Wright v. State, 573 So. 2d 998, 1000 (Fla. 1st DCA 1991). We followed Wright in Perrin v. State, 599 So. 2d 1365 (Fla. 1st DCA 1992), Kio v. State, 624 So. 2d 744 (Fla. 1st DCA 1993)[, review denied, 634 So. 2d 627 (Fla. 1994)], Salgat v. State, 630 So. 2d 1143 (Fla. 1st DCA 1993) [, review denied, 652 So. 2d 815 (Fla. 1995)], and Graham v. State, 631 So. 2d 388 (Fla. 1st DCA 1994), allowing double jeopardy challenges to sentences but not to convictions. Accord Laines v. State, 662 So. 2d 1248 (Fla. 3d DCA 1995), [20 Fla. L. Weekly] D2515 (reh. den. Nov. 15, 1995); Irizarry v. State, 578 So. 2d 711 (Fla. 3d DCA 1990), disapproved on other grounds, Williams v. State, 594 So. 2d 273 (Fla. 1992); Sands v. State, 403 So. 2d 1090 (Fla. 3d DCA 1981). But see, e.g., Sirmons v. State, 634 So. 2d 153 (Fla. 1994); Kurtz v. State, 564 So. 2d 519, 521 (Fla. 2d DCA 1990) ("Nothing in the statute suggests that the legislature intends the judiciary to convict defendants of offenses for which no sentence can be imposed"), disapproved on other grounds, Novaton v. State, 634 So. 2d 607 (Fla. 1994).

By itself silence does not demonstrate a free and knowing waiver of a double jeopardy claim either as to conviction or as to sentence. Arnold v. State, 578 So.2d 515 (Fla. 4th DCA 1991) (nolo plea without reservation did not waive right to challenge conviction, as well as sentence, on double

jeopardy grounds), disapproved on other grounds, Novaton. To the extent that the decisions in Graham, Salgat, Kio, Perrin, and Wright held otherwise, they were in error. Last year our supreme court spoke to the question:

> The general rule is that a plea of guilty and subsequent and adjudication of guilt precludes a later double jeopardy attack on the conviction and sentence. United States v. Broce, 488 U.S. 563, 569, 109 S. Ct. 757, 762, 102 L. Ed. 2d 927 (1989). There is an exception to this general rule when (a) the plead is a general plea as distinguished from a plea bargain; (b) the double jeopardy violation is apparent from the record; and (c) there is nothing in the record to indicate a waiver of he double jeopardy violation.

Novaton, 634 So. 2d at 609. The exception applies here. While rejecting the proposition "that a plea does not [ever] constitute a waiver," id., the supreme court subsequently implied that a guilty plea does not waive a claim of double jeopardy as to a resulting conviction and sentence where the defendant has not "bargained with the State and specifically agreed to plead to each charge and specifically accepted each sentence in exchange for reduced [punishment.]" Melvin v. State, 645 So. 2d 448, 449 n.1 (Fla. 1994). Any waiver that might have occurred here was rendered ineffective upon rescission of the plea bargain, the amended plea agreement notwithstanding. See Menna v. New York, 423 U.S. 61, 63 n.2, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975).

Brown, 670 So. 2d at 966-67 (Benton, J., concurring).

Brien Allen was prejudiced by the unconstitutionally imposed multiple punishments in that he now has on his record convictions

for offenses greater than which the law allows. Thus he has been and may continue to be subjected to untold consequences, including but not limited to, additional points under the sentencing guidelines in the present or future cases. It is also apparent from the record that the judge dealt very harshly with this juvenile who was merely 15 years of age at the time of the incident. Certainly some of the judge's harsh treatment, in both case nos. 93-2686 and 93-2765, was based on the judge's mistaken belief that he could punish Allen multiple times for a single violation of law. Thus, in addition to requiring reduction of the charges and resentencing, Allen should be given the opportunity on remand to withdraw his pleas in both cases so that he can stand trial or negotiate pleas and sentences on constitutionally permissible charges.

CONCLUSION

For the reasons stated above, this Court should answer the certified question in the negative as applied to the facts in this case, quash the decision under review, and remand with instructions to grant Allen leave to withdraw his pleas, or to reduce the convictions and resentence him on all charges.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by delivery to Amelia L. Beisner, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by mail to petitioner Brien Allen, on this 23d day of July, 1996.

Respectfully submitted,

NANCY A. DANIELS
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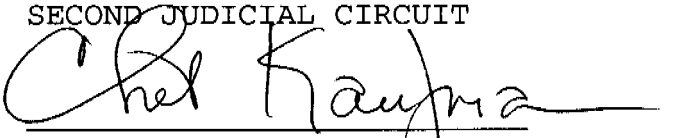

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