IN THE SUPREME COURT OF FLORIDA

COLUMBUS ASHLEY,

Petitioner,

v. **CASE NO. SC00-2586**

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

RULES

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REPLY BRIEF OF PETITIONER

I PRELIMINARY STATEMENT

This brief is submitted in reply to Respondent's Answer Brief. Respondent's brief will be referred to as "RB." All other references will be as designated in Petitioner's Merit Brief.

II ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT ERRED IN RESENTENCING PETITIONER AS AN HABITUAL VIOLENT FELONY OFFENDER THREE DAYS AFTER IT HAD IMPOSED A LAWFUL HABITUAL OFFENDER SENTENCE.

Although recognizing that a trial court cannot increase a sentence once a defendant begins serving his sentence, respondent argues that Ashley had no expectation of finality in his original sentence because it was the product of a "clerical-like error" (RB 7, 11, 12). The failure to sentence Ashley as a habitual violent offender and impose a mandatory term was not a clerical mistake. Furthermore, Ashley had a reasonable expectation in the finality of his sentence once jeopardy attached.

A clerical error is generally regarded as an accidental slip or omission in a written judgment, not a mistake in the substance of what is decided by a written order or judgment. See, e.g., Town of Hialeah Gardens v. Hendry, 376 So.2d 1162 (Fla. 1979)(failure to mail copy of appealable order to appellate counsel constituted a clerical mistake, and correction by vacation of order and issuance of identical order did not result in alteration of substance of the court's order). Trial courts have the inherent power to correct clerical errors. See Fla. R. Civ. P. 1.540(a), and see Navarette v. State, 707 So.2d 803 (Fla. 1st DCA 1998)(failure to include three year minimum mandatory sentence in the written order was merely an omission of a ministerial duty). There are clerical

errors, and there are substantive errors, but respondent has cited no authority that acknowledges a hybrid "clerical-like error".

The original habitual offender sentence imposed below was not a clerical error in the written judgment, but a judicial error in the pronouncement of the judgment. An oversight or mistake in failing to pronounce a habitual offender or habitual violent felony offender sentence is not a clerical error which can later be corrected. Evans v. State, 675 So.2d 1012 (Fla. 4th DCA 1996). In resentencing Ashley as a habitual violent felony offender and imposing a minimum mandatory term, the court did not merely amend or correct an error in the written judgment; rather, the court materially altered the substance of the sentence. See State Dept. of Revenue By and On Behalf of Thomas v. Thomas, 675 So.2d 1024 (Fla. 1st DCA 1996)(change in amount of child support due is a change in substance and not a clerical mistake); Peters v. Peters, 479 So.2d 840 (Fla. 1st DCA 1985)(same).

The instant case is distinguishable from Cheshire v. State, 568 So.2d 908 (Fla. 1990), which is cited in respondent's brief. Cheshire involved a mathematical error in the guidelines scoresheet. While recognizing that double jeopardy does not guarantee a defendant the benefit of a judge's good faith mathematical or clerical errors, Cheshire does not stand for the proposition that a judge can correct any lawful sentence which was imposed by mistake. This case does not involve an error in the

guidelines computation or the correction of a similar technical error. Here, the judge imposed a lawful sentence and then *sua sponte* amended it three days later by adding a habitual violent felony offender designation with a corresponding minimum mandatory term. This was a substantive change in the sentence, which cannot be characterized as a mathematic or clerical correction. See Knapp v. State, 741 So.2d 1150 (Fla. 2d DCA 1999)(double jeopardy barred imposition of minimum mandatory term after defendant began serving his sentence as a habitual violent felony offender); Evans v. State (resentencing defendant as a habitual offender violated double jeopardy even if court's failure to originally state that it was sentencing the defendant as a habitual offender was a mere oversight).

Respondent's reliance on Harris v. State, 645 So.2d 386 (Fla. 1994), is also misplaced. In Harris, the defendant was convicted of robbery while armed with a firearm and resisting an officer without violence. Although the State requested habitual offender sanctions, Harris convinced the trial court that habitual offender sanctions were not legally permissible for his convictions, and he was sentenced under the sentencing guidelines. Harris then appealed both his convictions and sentences, and the State cross-appealed the legal issue of whether the trial court had the legal authority to impose habitual offender sanctions. The district court affirmed Harris' convictions but held that the trial court erred in finding

that Harris was not subject to habitual offender sanctions and remanded for resentencing under the habitual offender statute. Harris then argued that his habitual offender sentence violated double jeopardy. In rejecting that argument, this Court held that the double jeopardy clause is not an absolute bar to the imposition of an increased sentence **on remand from an authorized appellate review of an issue of law concerning the original sentence.** The Court concluded:

> Harris had no expectation of finality regarding his sentence where he opened the door to the district courts appellate jurisdiction on an issue of law that was clarified while his case was still pending.

Id., at 388.

This Court has long recognized that double jeopardy is not violated by a retrial after a defendant moves for a mistrial or appeals a conviction. See, e.g., Brown v. State, 367 So.2d 616, 621 (Fla. 1979)(individual's double jeopardy rights not violated "where first prosecution is nullified by the affirmative act of a defendant, such as a motion for mistrial or an appeal of a conviction"). Likewise, the prohibition against double jeopardy is not implicated where a defendant is resentenced following an appeal of a conviction and sentence. Harris was resentenced following an appeal from his conviction and sentence. Ashley did not open the door to resentencing. He was resentenced three days after his original sentence was imposed and three days before his notice of

appeal was filed (RI, 58). Harris is factually distinguishable from the instant case and is not controlling.

Ashley agrees that a defendant who challenges his sentence on appeal has no expectation of finality in that sentence, but Ashley did not challenge his sentence on appeal and the state had no right to seek review of Ashley's lawful sentence. See Fla. R. App. P. 9.140(c)(1)(J)(the state may appeal an order imposing an unlawful or illegal sentence), and Fla. R. Crim. P. 3.800(b)(state may file motion to correct sentencing error only if the correction of the sentencing error would benefit the defendant or to correct a scrivener's error). In United States v. DiFrancesco, 449 U.S. 117 (1980), the Court considered whether a federal statue authorizing the government to appeal a sentence violated the double jeopardy clause. The Court concluded that double jeopardy was not violated because the statutory right to appeal gave the defendant no expectation of finality in his sentence.

> Although it might be argued that the defendant perceives 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, as in the dangerous special offender statute, **Congress has specifically provided that the sentence is subject to appeal. Under such circumstances there can be no expectation of finality in the original sentence.**

449 U.S. at 139 [emphasis added].

DiFrancesco and Harris are clearly limited to those sentences which are subject to statutorily authorized appellate review. The

state had no right to seek review of Ashley's sentence. Therefore, Ashley had a reasonable expectation that his sentence was final.

Respondent attempts to remove this case from Troupe v. Rowe, 283 So.2d 857 (Fla. 1973), arguing that the trial court in Troupe reversed its discretionary ruling in withholding adjudication of guilt whereas here the court's imposition of a habitual offender sentence rather than a habitual violent offender sentence was not a discretionary ruling. This is a distinction without a difference. Sentencing a defendant as a habitual offender or habitual violent offender, including the imposition of a mandatory minimum term, is permissive, not mandatory. Hudson v. State, 698 So.2d 831 (Fla. 1997). More importantly, Troupe v. Rowe stands for the basic proposition that once the court pronounces a final sentence and the proceeding is concluded, jeopardy has attached and the sentence may not thereafter be increased. The significance of the holding in Troupe is not whether a court has discretion to impose a certain sentence but whether and when has jeopardy attached. The Court unmistakably held that a sentence may not be altered or increased once it is imposed and the hearing is concluded.

There is no question here that the hearing had concluded and Ashley had begun serving his sentence on July 9, 1999. The hearing on July 12, 1999, was not a resumption of a continued hearing, but

a new proceeding. This squarely falls under the double jeopardy prohibition recognized by this Court in Troupe v. Rowe.

Finally, respondent contends that Ashley's sentence was not increased and that the imposition of the habitual violent felony sentence and 10 year mandatory term did not violate double jeopardy since Ashley has to serve 85 percent of his sentence, which exceeds the minimum mandatory. In effect, respondent is urging this Court to find that the double jeopardy violation constitutes harmless error.

Double jeopardy prohibits an increase in the actual sentence imposed, without regard to the amount of time an inmate may actually serve. The focus is on whether the process violated a defendant's constitutional rights, not on the effect on gain time, credit for time served or other factors which effect the length of time a defendant serves. In Troupe v. Rowe, the issue was whether a trial court could adjudicate a defendant guilty or vacate a plea after imposing a sentence and withholding adjudication of guilt. In Evans v. State, the court found a double jeopardy when the trial judge clarified the sentence to reflect that the defendant was sentenced as a habitual offender, even though the actual length of the sentence was not increased. In Harris v. State, this Court noted that while Harris's new sentence as a habitual offender was the same number of years as the original guidelines sentence, "there is no dispute that Harris will be subject to a longer period

of incarceration under the habitual offender sentence than he would have served otherwise." 645 So.2d at 387.

The stigma of an adjudication of guilt, the designation as a habitual felony offender, or the imposition of a mandatory term all have a substantive effect on the sentence even though the length of the total sentence may not be increased. Double jeopardy is not limited by the amount of time a defendant serves in prison. It is measured in principle, not in days or years.

It is patently clear under Florida law that Ashley's resentencing violated double jeopardy. The sentence imposed on July 12, 1999, must be vacated and the original sentence reinstated.

III CONCLUSION

Based on the foregoing argument, as well as that in Petitioner's Brief on the Merits, Ashley requests that this Court vacate the sentence imposed on July 12, 1999, and remand to the trial court with directions to reinstate the original sentence imposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Trisha E. Meggs, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to appellant, on this ____ day of July, 2001.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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