

IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA

PROVIDED TO
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SEP 17 2010
BA

BOBBY LEE AKIEN,
Petitioner/Appellant/Defendant,

S.Ct. Case No. SC10-
4DCA Case No.: 4D09-1224

v.

L.T. Case No. 50-2006-CF-012797-AXX

STATE OF FLORIDA,
Respondent/Appellee/Plaintiff.

FILED
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2010 SEP 22 PM 2:03
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PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal, Fourth District
State of Florida

Bobby Lee Akien, Pro-Se
Dc# 182209, F4-202L
Jackson Correctional Institution
5563 10th Street
Malone, Florida 32445-3144
850-569-5260
850-569-5996 (Fax)
www.DC.State.FL.US

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STATEMENT OF THE CASE AND FACTS

The Respondent State of Florida was the Prevailing Party in a Criminal Action to determine whether the Petitioner, **Bobby Lee Akien Defendant**, had committed the charged Amended Information filed in the 15th Judicial Circuit Palm Beach County, Florida of **Count 1, Burglary of a Dwelling, and in the course of committing the Burglary made and Assault or Battery upon Victim T.S., Count 2, Sexual Battery of Victim T.S., and Count 3, Unlawful Sexual Activity with a Minor, Victim T.S. on 9/23/2006 at ROA 121.**

The Ineffective Assistance of Defense Trial Counsel conceded the Guilt of Petitioner on Count 3, Unlawful Sexual Activity with a Minor F.S. 794.05 which established guilty verdicts on Counts 1 and 2 by the Jury T248-253 and R 49-50 and T 519. See Naidus v. State, 743 So.2d 132 (4 DCA 1999); Kormondy v. State, 938 So.2d 418 (Fla. 2007); Young v. Zant, 677 F.2d 792 (11th Cir. 1992); and Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992).

The Sentencing Hearing was held on 1/20/2009. T526-557. Petitioner was Scored 242 Total Sentence Points which resulted in a Lowest Permissible Sentence of 161.10 Months or 13½ years in prison. R58-59. The Trial Judge overruled Defense Counsel's Objections to Collateral Crime Evidence admitted at the Sentencing Hearing. T534-535, 552.

The Trial Judge Sentenced Petitioner to **Forty (40) years in Prison for Count 1, Burglary with a Battery with credit for all time served. R56; T556. Petitioner was also sentenced to concurrent terms of fifteen (15) years in prison for counts 2 and 3. R57; T556-557.** Following the Rendition of the Judgment on the merits, the Petitioner filed a Timely Notice of Appeal. R.64.

The Overruled Defense Counsel's Objection/Motion was argued in a Non-Evidentiary Hearing in the Circuit Court on 1/20/2009. At the Conclusion of the Sentencing Hearing the Trial Judge found that the Petitioner's Objections/Complaint did not present a complete absence of any justiciable issue, and rendered an Order/Ruling denying the Petitioner's Motion/Objection for relief. **"Fundamental Error Due Process Claim."**

An Appeal was filed by the Appellant (R64) to the Fourth District Court of Appeal to Review the Trial Court Judgment and Sentence on 1/20/2009, and the 4th District Court Affirmed on 8/11/2010 the Judgment and Sentence of the Trial Court. The 4th District Court held that the Petitioner was not entitled to reverse and remand/relief because "a substantial portion of this Criminal Appeal consisted of a legal controversy in which there was virtually a complete absence of a justiciable issue of either Law or Fact."

Rehearing under Rule 9.330(a) and 9.331(a) **"En Banc" "Non Panel Judges"** was denied on or about 9/11/2010, and the Petitioner's Notice To Invoke the Discretionary Jurisdiction of this Court was timely filed on or about 9/3 and 11/2010.

Petitioner shall incorporate by reference and rely on his Statement of the Case and Facts as found in the Initial Brief pages 3-5 dated 7/10/2009.

SUMMARY OF THE ARGUMENT

In this Case, the 4TH District Court of Appeal held that a Prevailing Party can be entitled Reversal/Reverse and Remand, New Trial or Relief if only a part of the controversy was frivolous. The Decision of the 4TH District Court cannot be reconciled with the previous Decision of this Court in **all cited Cases or Case Law** of any justiciable issue. Thus, the Petitioner

contends that the Decision of the District Court was Erroneous, Faulty and Bogus.

Petitioner shall incorporate by reference and rely on his Argument in Point 1, 2, and 3 on pages 8-21 as found in the Initial Brief dated 7/10/2009.

Petitioner shall incorporate by reference and rely on his Summary of the Argument in Point 1, 2, and 3 on pages 6-7 as found in the Initial Brief dated 7/10/2009.

There exist Fundamental Error-Due Process Violations by Trial Judge at Criminal Sentencing Hearing (Point 3). See Consolidated and Modified Argument of this Jurisdictional Brief pages 4 thru 7.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has Discretionary Jurisdiction to Review a Decision of a District Court of Appeal that Expressly and Directly Conflicts with a Decision of the Supreme Court or another District Court of Appeal on the same Point of Law. Art. V, §3(b)(3) Fla. Const. (1980); Art. V, §4(b)(1) Fla. Const.; Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103 (Fla. 1996); *Leach v. State*, 914 So.2d 519 (4DCA 2005); *State v. Jefferson*, 758 So.2d 661 (Fla. 2000); *Fla. R. App. P. 9.140(b)(1)*, and Section 924.06, Florida Statutes.

The Florida Supreme Court has Discretionary Jurisdiction to review a Final Judgment Adjudicating Guilt and or an Unlawful or Illegal Sentence.

CONSOLIDATED AND MODIFIED ARGUMENT

**THE DECISION OF THE DISTRICT COURT OF
APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY
CONFLICTS WITH THE DECISION OF THIS COURT**

**IN CASTOR V. STATE, 365 So.2d 701, 703 (Fla. 1978) AND
DAVIS V. STATE, 661 So.2d 1193 (FLA. 1995) AND
CARDENAS V. STATE, 867 So.2d 384 (FLA. 2004) AND
OTHER CASES AS STIPULATED HEREIN.**

The “**Contemporaneous Objection Rule**” requires an Objection in the Trial Court at or about the time of the alleged error placing the Judge of the Lower Court, Tribunal “on Notice that an error may have been committed and provides him an opportunity to correct it at an early stage of the Proceedings. See Section 924.051(b), F.S.

The Objection must be based on a Specific Legal Ground as stated in the Summary of the Argument and Argument in Point 1, 2 and 3 of Initial Brief dated 7/10/2009 and Point 3 of the Sentencing Hearing.

In Jackson v. State, 451 So.2d 458 (Fla. 1984), this Court held that an Objection made during the Examination of a Witness met the requirements of the **Contemporaneous Objection Rule**... an Objection need not always be made at the moment an Examination enters impermissible areas of inquiry.

The **Contemporaneous Objection Rule** applies to the Admission or Exclusion of Evidence, during Proffer, before start of trial or during trial, etc...

A Motion in Limine is not always sufficient to preserve an issue for Appellate Review. Section 90.104(1) of the Florida Evidence Code “FEC”...

The **Contemporaneous Objection Rule** applies to the Arguments of Counsel. See Brazill v. State, 845 So.2d 282 (4 DCA 2003). A Defendant need not request a Curative Instruction to preserve for Review an Argument Prosecutor/State Attorney made an Improper Argument. Counsel may conclude that an instruction will not cure the error.

A **Fundamental Error** in a Criminal Case can be corrected on Appeal even if the issue had not been preserved for Review by a timely Motion or Objection in the Trial Court and Appellate Courts, **4 DCA** have/has **Authority to correct Fundamental Error** even in the absence of a **Contemporaneous Objection**. **“Doctrine of Fundamental Error”** **“Jurisdictional Error”** protects the interest of Justice itself and a particular Party as in *Bain*, 730 So.2d 302 (2DCA 1999) Foundation of the Case, an error that deprives the Defendant, Appellant, or Petitioner of **“Due Process of Law”** as stipulated in the Sentencing Hearing Point 3 on 1/20/2009.

Section 924.051, Florida Statutes, incorporates the Fundamental Error exception in Criminal Appeals, and Subsection 3 of the Statute provides:

“An Appeal may not be taken from a Judgment or Order of a Trial Court unless a **“Prejudicial Error”** is alleged and is properly preserved, or if not properly preserved would constitute **“Fundamental Error”**...

Some **Constitutional Error/Issues** are regularly classified as **“Fundamental Error”**. This Case Defense is based on **Double Jeopardy** that serves as a basis for the reversal of the Criminal Conviction notwithstanding the lack of a Motion to Dismiss in the Trial Court. A Violation of the Prohibition against **Double Jeopardy** is **Fundamental Error** and a violation of **Due Process of Law** can be corrected on Appeal in the absence of an Objection. **Contemporaneous Objection Rule** does not prohibit the presentation of a Double Jeopardy Defense for the First Time on Appeal. See *Herrera v. State*, 879 So.2d 38 94 DCA 2004).

“Prejudicial Error” means an error in the Trial Court that harmfully affected the Judgment and Sentence. See Section 924.051(3):

“A Judgment or Sentence may be reversed on Appeal only when an Appellate Court “4DCA” determines after a Review of the complete record that **Prejudicial Error** occurred and was

properly preserved in the Trial Court, or, if not properly preserved, would constitute **Fundamental Error.**”

Fundamental Error is not subject to a Harmless Error Test or Analysis, since, by its nature, Fundamental Error is considered **harmful**. See Reed v. State, 837 So.2d 366 (Fla. 2002).

The Petitioner has demonstrated his burden that **Prejudicial Error** occurred in the Trial Court, Judgment or Sentence in accordance with Section 924.051(7), F.S. See **Initial Brief dated 7/10/2009 pages 1-23**.

The Scope of Review on Appeal is flawed and the 4 DCA or Appellate Court will Review the entire Case in the Trial Court, including all issues preserved for Review during the Trial and Pretrial Proceedings Rule 9.140(i), Fla. R. App. P., and Review all Rulings and Orders appealed in the record necessary to pass upon the Grounds of an Appeal. The Trial Judge committed a **“Palpable Abuse of Discretion”** resulting in undue hardship and prejudice to the Defendant.

The proper standard of Appellate Review for an Order Granting or Denying a Motion for New Trial in a Criminal Case is the **Abuse of Discretion Standard**. See Stephens v. State, 787 So.2d 747 (Fla. 2001) and State v. Burnett, 881 So.2d 693 (1 DCA 2004); State v. Dunnaway, 778 So.2d 378 (4 DCA 2001).

The Trial Court erred and misapplied the incorrect Rule of Law and the Evidence was insufficient to support its Decision. There was no Legal basis to depart from the Guideline CPC Sentence of 161.10 Months or 13½ years in Prison (R58-59) an **Abuse of Discretion Standard Error**. The Trial Court erred and failed to determine whether there was a valid legal basis to depart and whether that departure basis was supported by the Convictions/Evidence, Non Pending Charges or Untried Charges.

The Judicial Discretion of the Trial Judge was improper where the Trial Judge imposing it is mistaken as to the extent of his discretion Berezovsky v. State, 350 So.2d 80 (Fla. 1977).

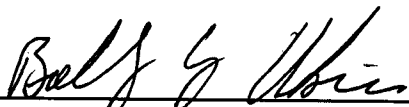
The Determination of the Sentence is within the discretion of the Trial Judge, however, a Sentence may be improper where the Trial Judge imposing it is mistaken as to the extent of his or her discretion.

When imposing a Sentence, a Trial Court must act within the bounds of the discretion granted by the Legislature. State v. Ayers, 901 So.2d 942 (2DCA 2005).

The Trial Court cannot impose harsher Sentence upon Defendant who exercise his constitutional right to a Jury Trial, for maintaining his innocence, or for failing to show remorse. U.S. Const. Amend. 5; Aliyev v. State, 835 So.2d 1232 (4DCA 2003).

CONCLUSION

This Court has Discretionary Jurisdiction to Review the Decision below, and the Court should exercise that Jurisdiction to consider the merits of the Petitioner's Argument.

S/ 

Bobby Lee Akien

Dc# 182209, F4-202L

Jackson Correctional Institution

5563 10th Street

Malone, Florida 32445-3144

850-569-5260

850-569-5996 (Fax)

www.DC.State.FL.US

[HTTP://DCWEB/ACTIVE_INMATES/DETAIL.ASP](http://DCWEB/ACTIVE_INMATES/DETAIL.ASP)

VERIFICATION AND JURAT

THE STATE OF FLORIDA)
COUNTY OF JACKSON)

Before me, the undersigned authority, this day personally appeared **Bobby Lee Akien Dc# 182209**, who has first been Duly Sworn, says that he is the **Appellant/Movant/Affiant, Defendant-Petitioner**, in the above styled cause, that he has read the foregoing Document and has personal knowledge of the facts and matters therein set forth and alleged, and that each and all of these facts and matters are true and correct.

S/ *Bobby Lee Akien*

Bobby Lee Akien

Dc# 182209, F4202L

Jackson Correctional Institution

5563 10th Street

Malone, Florida 32445-3144

850-569-5260

850-569-5996 (Fax)

www.DC.State.FL.US

[HTTP://DCWEB/ACTIVE INMATES/DETAIL.ASP](http://DCWEB/ACTIVE_INMATES/DETAIL.ASP)

Sworn to and subscribed before me this 17th day of September 2010 by **Bobby Lee Akien Dc# 182209** who has produced his Florida Department of Corrections I.D. as identification, and who did take the oath.

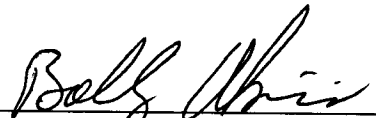


JANE M. HAMILTON
MY COMMISSION # DD 930802
EXPIRES: October 6, 2013
Bonded Thru Budget Notary Services

Jane M Hamilton
Notary Public
State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing **Jurisdictional Brief 9.210(a)(5) and 9.120(b)** was hand delivered by Me to the Department of Corrections Mailroom Personnel at Jackson Correctional Institution Main Unit No. 104 for Service By U.S. Mail Delivery to the following parties or has been furnished to: **Thomas D. Hall, Clerk; Office of the Clerk of The Supreme Court, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925; www.FLORIDASUPREMECOURT.org; Phone # 850-488-0125; Clerk of the Court, 4DCA (www.4DCA.org) Marilyn N. Beuttenmuller, District Court of Appeal – Fourth District – Office of the Clerk of Court, P.O. Box 3315, West Palm Beach, FL 33402 or 1525 Palm Beach Lakes Boulevard, West Palm Beach, FL 33401; The Honorable Bill McCollum, Attorney General, Office of the Attorney General – 1515 N. Flagler Avenue/Drive, Suite 900, 9th Floor, West Palm Beach, FL 33401-2299; and Honorable Carey Haughwout, Public Defender, Criminal Justice Building, 421 Third Street, West Palm Beach, FL 33401-4297 www.Jud14.FL.Courts.org;** by placing this document into the hands of Institutional Mailroom Staff, Postage pre-paid for further deliver by U.S. Mail, on this 21th day of September, 2010.

S/ 

Bobby Lee Akfen

Dc# 182209, F4-202L

Jackson Correctional Institution

5563 10th Street

Malone, Florida 32445-3144

850-569-5260

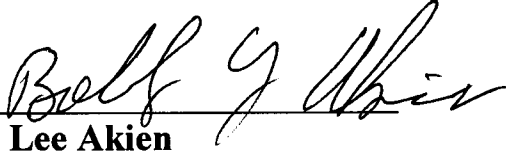
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, that this Brief complies with the Font Requirements of Rule 9.210(a)(2) of Florida Rules of Appellate Procedure.

S/ 

Bobby Lee Akien

Dc# 182209, F4-202L

Jackson Correctional Institution

5563 10th Street

Malone, Florida 32445-3144

850-569-5260

850-569-5996 (Fax)

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