IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANDRE ISAIAH DUNBAR,

Petitioner,

v. CASE NO. SC10-2296

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent agrees with Petitioner’s statement of the case and facts.

SUMMARY OF THE ARGUMENT

The correction of a sentence which improperly fails to include a minimum mandatory term required under the 10/20/Life statute is not barred by the principles of double jeopardy. Failure to include the mandatory term makes the defendant's sentence illegal. A defendant does not have a constitutionally protected interest in an unauthorized sentence. The Double Jeopardy Clause was never intended to allow a defendant to escape punishment altogether because a court committed an error in passing sentence.

Dunbar received due process in the instant case. He had constructive notice that the minimum mandatory term was a required term of any sentence for his offense. He was able to raise any concern regarding the application of the minimum mandatory term in his 3.800 motion, and his sentence was reviewed by the appellate court.

If this Court determines that Dunbar did not receive proper process, the matter can be remanded for a *de novo* resentencing hearing wherein Dunbar can be notified of the imposition of the legislatively required minimum mandatory term as applied to his sentence for robbery with a firearm.

ARGUMENT

DOUBLE JEOPARDY PRINCIPLES DO NOT PRECLUDE A TRIAL COURT FROM CORRECTING AN ERRONEOUS SENTENCE IN A NON-CAPITAL CASE EVEN IF SUCH CORRECTION RESULTS IN AN INCREASE TO THE DEFENDANT'S SENTENCE.

Dunbar was convicted of: robbery with a firearm (10/20/Life minimum mandatory); two counts of aggravated assault with a firearm (3-year minimum mandatory); and grand theft (third degree). The trial court's oral pronouncement of Dunbar's sentence was inconsistent with the written sentencing order entered later that day in that the court failed to orally pronounce the imposition of a minimum mandatory term on Dunbar's armed robbery offense, but the written sentencing documents provide for a minimum mandatory 10-year term, pursuant to the 10/20/Life statute. On direct appeal, Dunbar argued that the inclusion of the minimum mandatory term in his written sentence violated Double Jeopardy.

In an *en banc* opinion, the Fifth District held that no Double Jeopardy violation existed. In so holding, the Fifth District found that because the oral sentence did not include the mandatory term, it was an invalid sentence subject to correction. Dunbar v. State, 46 So. 3d 81, 83 (Fla. 5th DCA 2010)(*en banc*). Thus, the inclusion of the mandatory term in the written documents did not violate double jeopardy. Id. Now before this Court, Dunbar contends that the actions of the trial court violated double jeopardy principles as well as his due process rights. The State contends that a

correction to a sentence such as occurred in the instant case does not violate double jeopardy protections. Neither does the correction violate a defendant's due process rights.

Because the sentencing issue raised involves a pure question of law, this claim of error is subject to *de novo* review. Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002); State v. Moore, 19 So. 3d 408, 409 (Fla. 5th DCA 2009). "A double jeopardy claim based upon undisputed facts presents a pure question of law and is reviewed *de novo*." Pizzo v. State, 945 So. 2d 1203, 1206 (Fla. 2006). As the Fifth District properly noted in its *en banc* opinion, no dispute exists between the parties concerning the underlying facts of this appeal. Dunbar, 46 So. 3d at 82.

Double Jeopardy

There is a difference between the legal error of the written judgment not conforming to the trial court's oral pronouncement and the legal issue of whether double jeopardy precludes a correction of an erroneous sentence. Generally, a defendant's written judgment must conform to the trial court's oral pronouncement because the oral pronouncement is the sentence of the court. See Justice v. State, 674 So. 2d 123, 125 (Fla. 1996) (explaining that due process requires that the sentence be pronounced in open court so that a defendant will have notice of his sentence and an opportunity to object). In other words, a written sentence which differs from the trial court's oral pronouncement is normally not the sentence of

the court. However, whether double jeopardy precludes resentencing to include a minimum mandatory term which was erroneously omitted, and which has the concomitant effect of increasing a defendant's time in prison, poses a different legal issue. Double jeopardy is a complete bar; either correction of the sentence is barred, or it is not. When the sentence is capable of being corrected after appeal, then neither the federal nor state Double Jeopardy Clause is implicated.

Respondent would first note that case law holds there is no difference between Florida's double jeopardy jurisprudence and federal double jeopardy law. Westerheide v. State, 831 So. 2d 93, 104 (Fla. 2002) (noting that Florida's Double Jeopardy Clause is almost identical in wording to that of the federal constitutional provisions and that the Florida Supreme Court has not construed the state constitutional provision in a manner different from its federal counterpart); Hall v. State, 823 So. 2d 757, 761 (Fla. 2002) (noting that the "scope of the Double Jeopardy Clause is the same in both the federal constitution and the Florida Constitution."); Trotter, 825 So. 2d at 365 (observing that the "scope of the Double Jeopardy Clause is the same in both the federal and Florida Constitutions"); Carawan v. State, 515 So. 2d 161, 164 (Fla. 1987), superseded on other grounds by § 775.021(4), Fla. Stat. (2001), (stating "our own Double Jeopardy Clause in article I, section 9, Florida Constitution, which has endured in

this state with only minor changes since the constitution of 1845, was intended to mirror this intention of those who framed the Double Jeopardy Clause of the fifth amendment.").

The federal proscription against double jeopardy provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Amend. V, U.S. Const. Similarly, Florida's proscription against double jeopardy provides: "No person shall be ... twice put in jeopardy for the same offense." Art. I, § 9, Fla. Const. Generally, both the federal and state proscriptions apply to criminal cases and provide three separate constitutional protections: (1) they protect against a second prosecution for the same offense after acquittal; (2) they protect against a second prosecution for the same offense after conviction; and (3) they protect against multiple punishments for the same offense. See Delemos v. State, 969 So. 2d 544, 546 (Fla. 2d DCA 2007) (citing United States v. DiFrancesco, 449 U.S. 117, 129 (1980)). However, as this Court stated in State v. Collins, 985 So. 2d 985, 992 (Fla. 2008), "[n]one of these protections is involved in a resentencing."

Over half a century ago, the United States Supreme Court in Bozza v. United States, 330 U.S. 160 (1947), held that double jeopardy did not preclude a district court from increasing a sentence when a minimum mandatory term was mistakenly omitted. Bozza was convicted of carrying on a distillery business with the intent to willfully defraud the United States of the tax on

spirits. The trial court originally sentenced Bozza to prison, but failed to impose the statutorily required fine of one hundred dollars. Five hours later, Bozza was returned to the courthouse from the local detention facility and the mandatory fine was imposed. Id. at 165. The Court rejected an interpretation of double jeopardy that allowed a defendant to "escape punishment altogether, because the court committed an error in passing sentence." The Court explained that sentencing is not "a game in which a wrong move by the judge means immunity for the prisoner." Id. at 166-167.

This is exactly what happened in this case. The judge mistakenly failed to orally impose a mandatory minimum term as to one of Dunbar's offenses, but did impose the mandatory term in Dunbar's written sentence. This "wrong move" by the judge in orally pronouncing the sentence should not result in immunity for Dunbar from the legislatively mandated term of imprisonment. Dunbar is attempting to do that which the United States Supreme Court in Bozza cautioned against - turning sentencing into a game.

The instant case involved an error of law in sentencing. Dunbar should not now be allowed to benefit from the court's mistake. The court should be allowed to correct without constitutional consequence a mistake of law and increase a sentence of a defendant imposed inadvertently below the mandatory term. Revising a sentence to impose a legislatively mandated term does not impose multiple punishments for the same offense in violation

of the Double Jeopardy Clause, but simply imposes the single punishment that was mandatory at the time of the defendant's original sentencing. See State v. Calmes, 632 N.W.2d 641, 639 (Minn. 2001) (sentence modification to include mandatory conditional release term did not violate double jeopardy rights).

That errors in sentencing can and do occur is a recognized reality in Florida jurisprudence. Florida Rule of Appellate Procedure 9.140(c)(1)(M) permits the State to appeal an unlawful or illegal sentence or a sentence outside the range permitted by the sentencing guidelines. Subsection (N) provides that the State may appeal an order imposing a sentence outside the range recommended by the sentencing guidelines. Thus, the State could have appealed the trial court's uncorrected sentencing order which failed to include Dunbar's minimum mandatory 10-year term. If the appellate court had agreed with the State's position on appeal, the matter would have been remanded for resentencing to include the missing minimum mandatory term. See e.g., State v. Rogers, 2 So. 3d 1112 (Fla. 3d DCA 2009); State v. Gretz, 972 So. 2d 212 (Fla. 5th DCA 2007). Since correction after appeal is permitted, double jeopardy principles are not implicated and correction of a defendant's sentence to include a statutorily mandated term is not prohibited on this basis.

In Monge v. California, 524 U.S. 721, 728 (1998), the United States Supreme Court explained that double jeopardy does not apply

to non-capital sentencing, only capital sentencing. The Court observed that "[h]istorically, we have found double jeopardy protections inapplicable to sentencing proceedings" "because the determinations at issue do not place a defendant in jeopardy for an 'offense'" Id. The Monge Court noted that capital sentencing proceedings have a federal constitutional foundation, whereas non-capital sentencing proceedings, which are based on state sentencing statutes, do not. Id. at 734. While Monge involved different facts, the fact on which the Court's decision turned was that a non-capital sentencing was involved.[1]

In fact, Monge involved a situation where the State failed to prove a sentencing factor at the first sentencing and sought a second sentencing hearing and thereby a second chance to prove what it had failed to prove the first time. The core principle of double jeopardy is that it protects a defendant from the State re-trying him after the prosecution failed to prove its case in the first instance. In colloquial terms, the Double Jeopardy Clause prevents a "do over." That is, however, exactly what the State in Monge was seeking - and it is exactly what the United State Supreme Court allowed. The only way the Supreme Court could allow the second

[1]More recently, the United States Supreme Court reaffirmed that double jeopardy does not apply to non-capital resentencings. Sattazahn v. Pennsylvania, 537 U.S. 101, 107 (2003) (explaining that it is an "acquittal" at a trial-like sentencing phase, rather than the mere imposition of a life sentence, that is required to give rise to double jeopardy protections even in capital resentencings).

sentencing to be conducted was to hold exactly as it did in Monge - that the Double Jeopardy Clause does not apply to non-capital resentencings. On a continuum, the Monge facts are at the more extreme end of the spectrum than the failure to pronounce a mandatory term of a defendant's sentence that is involved here. Thus, if the Double Jeopardy Clause did not apply in Monge, it should not apply here.

This Court explicitly adopted Monge in Collins, 985 So. 2d at 993. In Collins, this Court held that "the Double Jeopardy Clause does not preclude granting the State a second opportunity to demonstrate that Collins meets the criteria for habitualization." At issue in Collins, was the sufficiency of the State's proof that Collins' prior convictions met the "separately sentenced" requirement to support his habitualization. Id. The State conceded that its initial proof was insufficient, but sought a second opportunity to present sufficient evidence. Id.

In holding that the State should be given just such an opportunity, this Court stated that "because resentencing is a *de novo* proceeding, on remand the State may present additional evidence to prove that the defendant qualifies for habitual felony offender sentencing." Collins, 985 So. 2d at 988. This Court further stated that the "decision does not implicate double jeopardy concerns." Collins, 985 So. 2d at 989.

Despite Collins, the district courts of appeal differ

regarding resolution of this issue. See Gardner v. State, 30 So. 3d 629 (Fla. 2d DCA 2010); Delemos, supra; Dunbar, supra; Allen v. State, 853 So. 2d 533 (Fla. 5th DCA 2003). In Allen, the Fifth District held there was no double jeopardy violation where the trial court, upon the defendant's post-appeal motion for modification, changed Allen's three-year mandatory term to the legally required ten-year mandatory term. Allen, 853 So. 2d 536. The Fifth District relied, *inter alia*, on Bozza in reaching this decision. The Fifth District also distinguished Ashley v. State, 850 So. 2d 1265 (Fla. 2003), noting that Allen's original sentence was illegal, unlike the original sentence in Ashley which was legal. The Third District appears to agree with the Fifth District. State v. Scanes, 973 So. 2d 659, 661 (Fla. 3d DCA 2008) (remanding for either withdrawing the plea or imposition of a minimum mandatory where the trial court imposed an "illegal" three-year minimum mandatory term on the kidnapping with a firearm count rather than the ten-year statutorily required minimum mandatory term citing Allen).

In contrast, the Second District held that the trial court violated double jeopardy principles by first sentencing the defendant to eight years and then, recognizing its mistake in failing to impose the statutorily required minimum mandatory sentence, bringing Gardner back after lunch and resentencing him to the statutorily required ten-year minimum mandatory term. Gardner,

30 So. 2d at 630. The court, however, did not cite, discuss, or distinguish Monge or Collins, neither did it cite the current relevant case law. Rather, the Second District cited to Ashley, a pre-Collins case.

This Court's decision in Collins appears to conflict with a prior statement of the Court in Ashley, to the effect that "[o]nce a sentence has been imposed and the person begins to serve the sentence, that sentence may not be increased without running afoul of double jeopardy principles." Ashley, 850 So. 2d at 1267. Collins similarly appears to conflict with this Court's prior holding in Fasenmyer v. State, 457 So. 2d 1361, 1365 (Fla. 1984), that "once a defendant has been sentenced, double jeopardy attaches and a court may not thereafter on its own motion increase the severity of the sentence."[2] However, Monge and Collins changed the legal landscape. Monge was decided in 1998 and adopted by this Court in 2008, years after Ashley was decided in 2003. Furthermore, the Second District's opinion in Gardner appears to have failed to take into account the United State Supreme Court's opinion in Monge. There are currently no cases discussing the relationship of Ashley and Collins, or the effect of Monge on cases such as Fasenmyer. This includes this Court's recent case involving double jeopardy State

[2] Citing Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973) (once a sentence has been imposed, the sentencing hearing has ended, and the defendant has begun to serve his sentence, the sentence may not thereafter be made more onerous, such as by extending the term of imprisonment).

v. Akins, 36 Fla. L. Weekly S215 (Fla. May, 26, 2011).[3]

The stumbling block for all the courts appears to be a determination of when a defendant has a reasonable expectation of finality in his sentence. This language apparently stems from the United States Supreme Court's opinion in United States v. DiFrancesco, 449 U.S. 117 (1980), but viewing this language as a type of legal indicator the point at which double jeopardy principles attach is an over reading of DiFrancesco. While DiFrancesco acknowledges that a defendant may perceive 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, the Court acknowledged that the source of the dictum indicated no such principle, and the argument was proven unsupportable based upon the fact that the sentence was subject to appeal. Id. at 138-139. Under such circumstances, the Court found, there could be no legitimate expectation of finality in the original sentence. Id. at 139.

Respondent would also note that the prohibition of resentencings that increase a defendant's sentence, when such resentencings correct illegal sentences which fail to impose

[3] In Akins, this Court found that the trial court's designation of Akins as an habitual felony offender in the written violation of probation judgment and sentence was barred by double jeopardy based upon the failure of the court to orally re-designate Akins as an habitual felony offender at the sentencing hearing regarding the violation. Id. at S219. Akins, like Ashley, can be distinguished by the fact that the trial court's "mistake" still resulted in a legal

statutorily required terms, creates a separation of powers issue. It is the Legislature which possesses the power to prescribe punishment for criminal offenses along with the power to establish minimum mandatory sentences. State v. Cotton, 769 So. 2d 345 (Fla. 2000) (rejecting a separation of powers challenge to the minimum mandatory sentencing contained in the PRR statue); State v. Coban, 520 So. 2d 40, 41 (Fla. 1988) (explaining that the "plenary power of the legislature to prescribe punishment for criminal offenses cannot be abrogated by the courts in the guise of fashioning an equitable sentence outside the statutory provisions."); Woods v. State, 740 So. 2d 20 (Fla. 1st DCA 1999) (rejecting a separation of powers challenge to the minimum mandatory sentencing contained in the PRR statute because "the plenary power to prescribe the punishment for criminal offenses lies with the legislature, not the courts."). A trial court's error, inadvertent or otherwise, could prevent the legislatively mandated sentence from being imposed. Similarly, an appellate court's striking of a mandated minimum mandatory term violates this same separation of power. The misapplication of double jeopardy law to prevent the correction of such an error would amount to a judicial override of the legislatively mandated term.

Petitioner takes issue with the statement of the Fifth District in Dunbar wherein the court indicated that an alternate

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sentence for the defendant.

holding could create a "potential loophole which could allow a trial court to avoid the imposition of a mandatory minimum sentence by simply failing to announce the mandatory minimum provision at sentencing." Dunbar, 46 So. 3d at 83. While Petitioner frames this statement as an accusation against the judiciary, Respondent contends it is a statement which acknowledges the separation of powers issue which would be created by viewing double jeopardy as prohibiting the correction of an illegal sentence.

Almost thirty years ago, an Ohio appellate court found that the Double Jeopardy Clause did not preclude the imposition of a mandatory prison term upon vacation of a sentence of a fine. State v. Vaughn, 462 N.E.2d 444, (Ohio 1st DCA 1983). As that court concisely reasoned:

> Under the Double Jeopardy Clause, a defendant has a shield against sentences that exceed the legislative enactment, but this cannot be used as a sword to cut down his penalty to less than that which the legislature has clearly and unmistakably imposed on the offense of which he stands guilty. The defendant's interest in the finality of his sentence is, in this instance, outweighed by society's interest in enforcing the law and meting out what has been duly designated as just desserts.

Id. at 447-448. Likewise, Dunbar's interest in the finality of his sentence is outweighed by society's interest in the uniform application and enforcement of a law that is intended to punish offenders who use and possess firearms to the fullest extent of the law. See § 775.087(2)(d), Fla. Stat.

Due Process

The imposition of a minimum mandatory term is a non-discretionary duty of the trial court when the record indicates that a defendant qualifies for such sentencing. The minimum mandatory term applicable in the instant case was set forth by the Legislature in section 775.087(2). The statute sets forth the terms and conditions under which a defendant must receive the mandatory minimum term. The statute contains no provision permitting trial courts to exercise discretion in imposing minimum mandatory sentences once a defendant is convicted of certain enumerated felonies.[4] Failure to impose the mandatory term would be inconsistent with the "legislative intent behind the sentencing discretion of trial courts for certain enumerated crimes with mandatory minimum penalties." Dunbar, 46 So. 3d at 83. Moreover, publication in the Florida Statutes is presumed to give all citizens constructive notice of the consequences of their actions. State v. Beasley, 580 So. 2d 139, 142 (Fla. 1991). Thus, despite the fact that the trial court failed to orally pronounce the minimum mandatory term, Dunbar was, as are all defendants, on notice that such a mandatory term was required based upon the offense for which he was adjudicated.

The State acknowledges that a defendant has a due process

[4]Discretion is statutorily placed only with the executive branch, specifically with each state attorney. See §§ 27.366(1) and 775.087(5), Fla. Stat.

right to be present at any sentencing or resentencing hearing at which judicial discretion will be exercised. See, e.g., Griffin v. State, 517 So. 2d 669, 670 (Fla. 1987). Here, however, while Dunbar was not "present" when the trial court issued the written order denoting the imposition of the minimum mandatory term, the court was not exercising its discretion at that time. The imposition of a mandatory term is not the product of judicial decision-making.

For example, if the judge imposes a thirty-year sentence, and fails to announce that a ten-year portion of that sentence is mandatory, the judicially determined sentence is still thirty years in prison. The judge has not exercised his discretion to "increase" the sentence by then including in the written sentencing documents the legislatively mandated minimum term for the offense. Under this circumstance, if the defendant had orally received a term of thirty years, correcting the sentence to properly reflect the imposition of the legislatively mandated, non-discretionary minimum mandatory term will not result in a sentence of more than thirty years, and does not "increase" the sentence. Rather, the correction simply ensures that the defendant will serve the sentence judicially imposed as well as the serve the legislatively mandated minimum term. The end result may require more actual days of the defendant being housed in prison, but that is a product of his original offense, not of the judiciary increasing his actual sentence. The failure to include the mandatory term would grant a defendant the

benefit of an improper sentence to which the defendant is not legally entitled.

Dunbar's procedural due process rights were adequately protected when he raised his concern about the trial court's imposition of the ten-year minimum mandatory term in his written sentence by the timely filing of his 3.800(b) motion. See Grubb v. State, 922 So. 2d 1002 (Fla. 5th DCA 2006) (procedural due process concerns about unpronounced probation conditions adequately protected by timely 3.800(b) motion). Dunbar had the opportunity to raise his substantive objection to the trial court's failure to orally pronounce the ten-year minimum mandatory term in his 3.800(b) motion. Because Dunbar's objection to the imposition of this mandatory term was procedural only, i.e., failure of the trial court to orally pronounce the mandatory term, and he raised no substantive basis upon which to strike the condition, the Fifth District's affirmance of Dunbar's sentence was proper - no due process or double jeopardy violation existed.

However, even if this Court finds that a defendant's fundamental due process right to be present at sentencing is violated by the trial court's action in noting the mandatory term in writing without a corresponding oral pronouncement, the principles of double jeopardy would not prevent the correction of the trial court's error. The end of the sentencing hearing should not, and does not, mean that a defendant's sentence is final.

Rather, all parties have a legitimate expectation that a defendant will be sentenced in accordance with the applicable law.

As Judge Altenbernd recently suggested, Florida law on the issue of when a sentence becomes final for purposes of double jeopardy may be "overly restrictive." Gardner, 30 So. 3d at 633. (Altenbernd, J., dissenting). In his dissent, Judge Altenbernd observed that Florida law "does not reflect the extent to which simple human error is inevitable in oral pronouncements and that the constitutional doctrine of double jeopardy was never intended to make sentencing a game in which mental errors by judges and attorneys are irreparable even when the error is discovered minutes later." Id. at 634. Given that the job of sentencing a defendant has become more complex over the years as sentencing laws have proliferated, human error is inevitable. Neither the United States Constitution nor the Florida Constitution was intended to grant immunity to a defendant who, by such error, received an erroneous sentence which happened to be in his favor. Moreover, neither fairness nor public policy entitles a defendant to the benefit of a legal mistake by a sentencing judge.

A defendant cannot, and should not, be allowed to have a legitimate expectation of finality in an erroneous sentence. Based upon the State's ability to appeal and statutory notice, a defendant has constructive knowledge that his sentence is not final until, at a minimum, mandate has issued in a direct appeal, or the

time for filing for such an appeal has expired. In the case of an illegal sentence, the court can correct such a sentence at any time. Fla. R. Crim. P. 3.800(a). The language used in this rule contemplates that there can be no reasonable or legitimate expectation of finality in an illegal sentence.

Dunbar's double jeopardy rights, either state or federal, have not been violated. His sentence, which was unauthorized by statute, was brought into compliance with Florida Statutes. If this Court finds that the manner in which the mistake was corrected was incorrect or insufficient, and that any error in the process was not cured by Dunbar's 3.800(b) motion and subsequent appellate review, the matter may be remanded for a *de novo* resentencing hearing.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this Honorable Court find that correction of the trial court's failure to orally pronounce the 10/20/Life minimum mandatory term was not barred by double jeopardy or due process.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief of Respondent has been furnished by interoffice delivery to counsel for Petitioner, David Morgan, Assistant Public Defender, at 444 Seabreeze Boulevard, Suite 210, Daytona Beach, Florida 32118, this 8th day of June, 2011.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was typed in 12 point Courier New as required by Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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