IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, **PETITIONER,** **v.** **MICHAEL EUGENE AKINS,** **RESPONDENT.**	**Case No. SC10-896** **L.T. Nos: 2D09-161,** **CRC90-09582CFANO**

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

REPLY BRIEF OF PETITIONER ON THE MERITS

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SUMMARY OF THE ARGUMENT

The proscription against double jeopardy does not shield a defendant such as Akins from correction of a sentence to rectify a wrong move on the part of the trial judge in passing sentence. Because a defendant upon revocation of his probation may be sentenced to the suspended portion of a split sentence imposed prior to the revocation, a trial court may correct a misstep, oversight, or error in passing sentence within the boundaries of the original sentence and applicable maximum penalty without violating double jeopardy.

ARGUMENT

Akins argues this Court does not have jurisdiction to address the state's arguments regarding applicable procedural bars. He is, respectfully, mistaken. Having granted jurisdiction, this Court may examine all issues raised and argued before the lower court. See Russell v. State, 982 So.2d 642, 645 (Fla. 2008), citing Savoie v. State, 422 So.2d 308, 310 (Fla. 1982). The postconviction court applied the law of the case doctrine, and the state addressed the procedural bars in the district court in a motion for rehearing.

Double Jeopardy and Sentence Correction

In Bozza v. United States, 330 U.S. 160, 67 S.Ct. 645, 91 L.Ed. 818 (1947), the United States Supreme Court held that double jeopardy did not preclude a 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 federal district court originally sentenced Bozza to prison but did not impose the statutorily required fine of one hundred dollars. Five hours later, the trial court, noting that it was called to his attention he had failed to impose the required fine, returned Bozza to the courthouse from the local detention facility and imposed the fine. The Supreme 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.” Bozza, 330 U.S. at 166-67, 67 S.Ct. at 649.

Here, the trial judge did not re-pronounce Akins a habitual offender when passing sentence upon revocation of his probation. Even if, arguendo, such was required again in order to accomplish a sentence to a suspended portion of his split sentence, nonetheless, any lapse in such regard would amount to no more than a “wrong move by the judge” which should not result in “immunity” from habitualization for Akins. Akins is attempting to do that which the Supreme Court in Bozza forbids: turning sentencing into a game.

Akins attempts to distinguish Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998), on the basis that it is a successive prosecution case, and not a multiple punishments case. (Answer Brief at pgs. 35-36) This is, respectfully, an inaccurate characterization of Monge.

Monge is both a successive prosecution and a multiple punishment case. This is borne out by the Monge Court’s discussion of the Double Jeopardy Clause. The Supreme Court stated:

The Double Jeopardy Clause of the Fifth Amendment,

> applicable to the States through the Fourteenth Amendment, provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." We have previously held that it protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense. Historically, 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,". Nor have sentence enhancements been construed as additional punishment for the previous offense; rather, they act to increase a sentence "because of the manner in which [the defendant] committed the crime of conviction." An enhanced sentence imposed on a persistent offender thus "is not to be viewed as either a new jeopardy **or** additional penalty for the earlier crimes" but as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."

Monge, 524 U.S. at 727-728, 118 S.Ct. at 2250 (citations omitted)(emphasis added). From such explanation, it can be seen that Monge is, indeed, a multiple punishment case. Moreover, courts have applied Monge to deny "pure" multiple punishment claims, that is, those which do not also raise a successive prosecution for the same offense. See e.g., Mims v. State, 2010 WL 780176, 5 (Tex. App. Ct. 2010) (rejecting a claim of an "increased punishment" based on a prior conviction where the prior conviction was used to enhance two subsequent convictions based on Monge).

Furthermore, the false distinction offered by Akins ignores the holding and reasoning of Bozza. Bozza was a "pure" multiple punishment case. Bozza did not involve additional proof or

sentencing factors versus elements or any of the other distinctions Akins attempts to draw.

Additionally, this Honorable Court in State v. Collins, 985 So. 2d 985 (Fla. 2008), discussed the three separate constitutional protections of double jeopardy including multiple punishments and made clear one of these protections is involved in a resentencing. In Collins, also a multiple punishments case, the Court stated:

> Our decision does not implicate double jeopardy concerns either. We have noted that "[t]he guarantee against double jeopardy consists of three separate constitutional protections: 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. None of these protections is involved in a resentencing.

Collins, 985 So.2d at 992 (citations omitted)(emphasis added).

Akins suggests the trial court could impose a lesser sentence than that originally imposed when revoking probation by his assertion that the trial court abandoned the suspended sentence. There would, however, be no prison sentence that could be imposed in his case absent employment of his original designation in such regard, and there is no evidence in the record that the trial court ever intended for Akins to receive a nonhabitual sanction. Stated otherwise, imposition of a prison term up to the suspended portion of his true split sentence

would be authorized only if the sentence handed Akins for violating his probation was as a habitual offender. By imposing a five-year prison term such that the prison terms in the aggregate exceeded the statutory maximum, the trial court chose not to relieve Akins of the aspect of his original sentence which subjected him to extended penalties under our habitual offender statute.

Moreover, a court may always correct an illegal sentence by imposing all or part of the sentence that might originally have been imposed. United States v. Olarte-Morales, 1993 WL 118902, 3 (10th Cir. 1993) (unpublished) [992 F.2d 1223 (10th Cir. 1993)(table)]. The risk of judicial vindictiveness is reduced where an illegal sentence follows an original sentence and the modified sentence does not exceed the original sentence, since the modified sentence is consistent with the sentencing judge's initial intentions as evidenced by the original sentencing scheme. Id. at n. 12.

When Akins' probation was revoked, he could be properly imprisoned for the suspended portion of his original habitual offender sentence. To allow Akins to escape a lawful sentence because the trial court did not re-pronounce the existing designation as a habitual offender in imposing the probation revocation sentence would merely compound judicial error. The scoring of such an outcome for Akins is one not contemplated,

nor mandated, by the proscriptions against double jeopardy. To the extent Ashley v. State, 850 So. 2d 1265 (Fla. 2003), is construed to so require, this Honorable Court should recede from Ashley and hold that the mere fact a sentence is corrected or amended to reflect an aspect not orally pronounced does not, standing alone, establish a violation of double jeopardy. In the context of a probation revocation, this Honorable Court should make clear that a misstep, oversight, or error may be corrected within the boundaries of the original sentence and the applicable maximum penalty without violating double jeopardy.

CONCLUSION

Petitioner respectfully requests this Honorable Court vacate the district court's decision and affirm the order denying the rule 3.800(a) motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Mr. Terry P. Roberts, Esq., Law Office of Terry P. Roberts, P.O. Box 12366, Tallahassee, FL 32308 this 1st day of November, 2010.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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