IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

MICHAEL E. AKINS,

Respondent.

CASE NO. SC10-896
LT# 2D09-161; CRC-90-09582-CFANO

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

A. Federal Cases

B. Florida Constitution and Statutes

C. Florida Cases

D. Rules of Procedure

PRELIMINARY STATEMENT

Respondent, Michael E. Akins, was the defendant in the trial court and the Appellant below; this brief will refer to his as Respondent, Defendant, or by proper name. Petitioner, the STATE OF FLORIDA, was the prosecution below and the Appellee in the Second District; the brief will refer to Petitioner as such, the prosecution, or the State.

The record on appeal consists of two volumes, which will be referenced as V, the number of the volume, a dash, and any appropriate page number.

STATEMENT OF THE CASE AND FACTS

In 1975, Respondent committed the felony of grand theft. (V1-11). In 1984, Respondent committed a felony involving the sale of marijuana. (V1-11). In 1987, he again committed a felony of sale of marijuana. (V1-11).

In 1991, Respondent was found guilty of the 1990 sale of 0.03 grams of cocaine, a second-degree felony with a statutory maximum sentence of 15 years. (V1-11, 33, 186). Based on the prior felonies, the trial court found Respondent to be a habitual felony offender, elevating the maximum sentence to 30 years. ("HFO"). (V1-11, 187). The trial court sentenced Respondent to a true split sentence of 20 years in prison followed by 10 years suspended, ordering him to serve the 10 years on probation. (V1-11-12, 33, 187).

Due to gain time, Respondent was released from prison in 2001. (V1-11).

In 2003, Respondent violated his probation by testing positive for use of cocaine. (V1-11-12). Rather than revoke his probation, the trial court ordered him to serve further probation and also to complete a drug abuse program. (V1-12). Respondent completed the drug program. (V1-12). After release from the program, Respondent relapsed into addiction, failing a urinalysis test and admitting his relapse. (V1-12-13).

In response to the failed drug test, the State filed an affidavit of violation of probation, which Respondent did not contest. (V1-30-31, 33).

On November 19, 2004, the trial court held a sentencing hearing. Respondent's probation officer recommended continued supervision for two years under community control with renewed intensive drug treatment rather than a prison sentence. (V1-13-14). The trial judge reminded Respondent that, at the 2003 violation of probation hearing, he had told the Respondent that there "was [a] 10 [year sentence] hanging over your head," but that the Court had given him another chance. (V1-18). The trial court reminded Respondent that he had threatened him with a 10 year sentence if he returned to dabbling in drug abuse. (V1-18). Respondent spent 506 days in jail in regard to the two violations of probation. (V1-13). The trial court opted not to impose the promised suspended sentence, instead revoking Respondent's probation and sentencing Respondent to "five years. And I'm going to give you credit for the time that you've served on the charge of violation of probation." (V1-20, 33). That jail credit amounted to 239 days. (V1-22, 24). The trial court stated that the "only reason I didn't give you the 10 is because I know that that [Department of Corrections] is going to take some [gain] time away from you on that 20 years that you've already served." (V1-22). The trial judge noted that "out of the 10 years that you had, I've imposed five.... And we're just going to leave it go at that." (V1-23). The trial court specified that no further probation would follow the five year sentence. (V1-23). At that point, the Respondent denied that he had three felonies of sale and possession of drugs. (V1-23). The trial judge responded, "I never said that you had three

sales and possession. I said ...the last time that you were here in court...I told you it was your last chance." (V1-23).

On the same day, November 19, 2004, the trial court filed a Judgment adjudicating Appellant guilty of sale of cocaine, a second degree felony. (V1-27, 65).

On April 29, 2005, more than five months after the sentencing hearing, the trial court amended the written judgment to adjudicate Respondent as a habitual felony offender. (V1-28, 33, 39, 62).

Appellant appealed, but the Second District affirmed the conviction and sentence per curiam.

On January 16, 2007, Appellant filed a motion to vacate, set aside, or correct his sentence due to the trial court's illegal imposition of a HFO designation months after the sentencing hearing. (V1-39). On October 29, 2007, the trial court denied the motion. (V1-40). While the court acknowledged that it did not, at the sentencing hearing, "specifically announce that the Defendant's sentence was as an HFO, the fact that the Court acknowledged the Defendant's original HFO sentence and then sentenced him accordingly demonstrates the Court's intention to sentence the Defendant as an HFO." (V1-40).

On December 15, 2008, Respondent filed another Motion to Correct Sentence under Rule 3.800(a), Fla. R. Crim. P. (2008). (V1-3-6). In the motion, he argued that the circuit court's attempt to reimpose a HFO classification five months after the court imposed a five year sentence for violation of his probation violated the prohibition against double jeopardy.

(V1-3-6). Respondent further argued that his five year sentence was illegal, as, absent a legal reimposition of the HFO designation, any further incarceration was in excess of the 15-year minimum sentence in light of the 20 years already served. (V1-3-6).

On December 30, 2008, the trial court, in a one-page order, denied Respondent's motion, holding that the claim had already been denied by the circuit court and, on direct appeal, by the Second District Court of Appeal and was, thus, procedurally barred under both *res judicata* and law of the case doctrines. (V1-33).

On January 8, 2009, Respondent appealed the denial of his 3.800(a) motion. (V1-1, 41).

In Akins v. State, 35 Fla. L. Weekly D 43 (Fla. 2d DCA December 30, 2009), the Second District reversed the denial of the motion to correct illegal sentence, finding that the trial court was barred, under double jeopardy principles, from amending the judgment months after the sentencing hearing to add a habitual felony offender designation that it failed to impose orally at the sentencing hearing.

The State filed a motion for rehearing, arguing that the Second District had overlooked or ignored the procedural bars to the motion. (V1-81-89). The court denied the motion. (V2-242).

This Court accepted jurisdiction and requested only briefs on the merits.

SUMMARY OF ARGUMENT

This Court should either find that jurisdiction was improvidently granted or approve the Second District's decision.

First, jurisdiction was improvidently granted. The Second District's decision merely followed Evans and Ashley and applied long-standing law that a habitual felony offender ("HFO") designation cannot be applied by amending a defendant's judgment where the court failed to orally impose an HFO sentence and the defendant has already begun to serve his non-HFO sentence. Thus, there is no question of great public importance to be answered.

This Court should also refuse to entertain Petitioner's argument that Respondent's motion was procedurally barred. The Second District denied Petitioner's motion making this same argument below. The "procedural bar" argument was not part of the certified question; thus, this Court lacks jurisdiction to decide the case on that basis. Regardless, most of the jurisdictional bars discussed by Petitioner could not apply to a Rule 3.800(a) motion and the doctrine of collateral estoppel cannot apply where it would result in a manifest injustice. As the Second District already found that Respondent's sentence was "illegal," quashing the decision would result in the manifest injustice of allowing an illegal sentence to stand in violation of double jeopardy.

In regard to the merits, this case involves only routine application of Ashley and Evans. Both the trial court and the Second District found that, possibly through oversight, the trial court neglected to sentence Respondent as an HFO when it

revoked his prior suspended sentence and sentenced him to five years in prison for violation of probation. There was no ambiguity or slip of the tongue involved in the oral pronouncement. The attempt to amend or clarify the sentence five months after the fact by adding an HFO designation to Respondent's punishment violates the "multiple punishments" aspect of double jeopardy.

Petitioner's argument that United States Supreme Court precedent holds that the prohibition against multiple punishments applies only to capital sentencing is patently incorrect. The cited case held only that a non-capital sentencing hearing did not constitute a "prosecution" for an "offense" so that, where an enhanced sentence was reversed for insufficient evidence, double jeopardy did not bar a state from attempting to prove, on remand, that the defendant still qualified for sentence enhancement. The bar against second prosecutions has nothing to do with the prohibition against multiple punishments. Neither Respondent's argument nor the Second District's opinion relied on the theory that amending Respondent's judgment constituted a "second prosecution."

Finally, the Second District's misgivings about its opinion were unfounded. An HFO designation is, without doubt, a part of the "sentence" and cannot be imposed after the sentencing hearing is over. The rule in Ashley is simple to understand and easy to apply. The rule was violated in the instant case. The Second District's decision should be approved.

ARGUMENT

I. WHETHER JURISDICTION WAS IMPROVIDENTLY GRANTED (Restated)[1]

This Court should determine that jurisdiction was improvidently granted because the district court's decision does not give rise to a matter of great public importance. The facts are simple: Respondent was initially sentenced as a habitual felony offender ("HFO") to a true split sentence of 20 years of incarceration and 10 years of probation. After serving the incarcerative portion of the sentence, he violated his probation. The trial court revoked his probation and sentenced him to 5 years in prison. The trial court, perhaps inadvertently, failed to orally sentence Respondent as an HFO and, five months later, amended the judgment to add an HFO designation to the five year sentence. The question of whether a trial court is obligated to orally reimpose an HFO designation following the revocation of probation and imposition of a new sentence is not a new question, nor is it one that has led to a split in Florida's district courts. The question has been decided. Also, the question of whether a court violates double jeopardy when it mistakenly fails to impose an HFO sentence and then, after a defendant begins serving the HFO sentence, amends the sentence to add an HFO designation is not new. That question has been answered in the affirmative by Florida's

[1] The Respondent declines to answer Issue I, "Background," as the "Background" section does not appear to present a legal issue and the Respondent cannot tell the difference between a "background" section and the required statement of case and facts.

courts. The sole reason that the Second District certified the question was that it had difficulty understanding that an HFO designation is part of a criminal sentence as opposed to part of the conviction or some hybrid of both. The Second District had difficulty seeing how this Court's decision in Ashley v. State, 850 So.2d 1265, 1267 (Fla. 2003) did not conflict with Mann v. State, 851 So.2d 901 (Fla. 3d DCA 2003). As explained more fully in the merits portion (Issue III) of this brief, the Mann case is easily distinguished from both Ashley and the instant case, as Ashley governs cases where a trial court fails to orally impose an HFO sentence and Mann merely held that orally imposing a "habitual offender" sentence, where the record showed that a "habitual violent felony offender" sentence was agreed to by the parties at the hearing, was sufficient to find that the habitual violent felony offender sentence was orally pronounced and that no "magic words" were required to impose the sentence. As the pending petition presents no legal question of import or first impression, Respondent urges this Court to discharge the petition by concluding that jurisdiction was improvidently granted.

II. WHETHER THIS COURT MAY DECIDE THE CASE ON THE GROUND THAT RESPONDENT'S MOTION IN THE CIRCUIT COURT WAS PROCEDURALLY BARRED AS SUCCESSIVE (Restated)

This Court should decline to analyze the Petitioner's claim regarding a procedural bar. First, this Court lacks jurisdiction to analyze that issue. Second, the Petitioner's argument is incorrect on the merits.

In regard to jurisdiction, this Court accepted jurisdiction based on a question certified by the Second District Court of Appeal as a question of great public importance. In both the opinion and the certified question, the Second District only discussed the **merits** of Respondent's claim of an illegal sentence and violation of double jeopardy. The issue of procedural bars, while raised in the circuit court's opinion and Petitioner's motion for rehearing in the Second District, was not mentioned anywhere in the opinion or the certified question. This Court is Florida's highest, but it is a court of limited jurisdiction. For most purposes, a direct criminal appeal to a district court in a non-capital case is meant to end that matter. Petitioner raised this issue below in its motion for rehearing. (V1-81-89). The district court considered and then denied the motion. (V2-242). While the Petitioner feels that the issue of a procedural bar is important, the district court denied that argument without certifying a question based on that argument.

> This Court does not have jurisdiction to review cases that a party deems to present an issue of great public importance. **This Court may only review questions of great public importance that are certified by a**

> **district court of appeal**. Art. V, § 3(b)(4), Fla. Const.

Allstate Ins. Co. v. Langston, 655 So. 2d 91, 93, ft. 1 (Fla. 1995)(emphasis supplied); Revitz v. Baya, 355 So.2d 1170, 1171 (Fla. 1977); Duggan v. Tomlinson, 174 So.2d 393 (Fla. 1965). The Petitioner cites State v. McBride, 848 So.2d 287 (Fla. 2003) in support of its argument, but, in that case, the certified question specifically referenced the issue of whether a successive rule 3.800(a) motion could be entertained. McBride, 848 So.2d at 288. In the instant case, the Second District did not certify any question regarding a procedural bar. Thus, this Court has no jurisdiction to decide the case on such grounds. This Court must either decide the case on the merits of the certified question or decide that jurisdiction was improvidently granted.

Also, the State's argument is incorrect on the merits. The appeal was not procedurally barred. The State is correct in noting that the Petitioner raised this argument in a previous motion to correct illegal sentence and that the Second District affirmed it on appeal. An "illegal sentence, however, may be corrected at any time [and] may be corrected even after it has been erroneously affirmed." Bedford v. State, 633 So.2d 12 (Fla. 1994).

In Crotts v. State, in response to the State's argument that Crotts was procedurally barred from bringing a successive challenge to his HFO status because he had "previously raised the same issue and had it decided against him," the Second

District held that the substantive aspects of the due process clause of the U.S. Constitution "requires that a patently illegal sentence be corrected despite the law-of-the-case doctrine." Crotts v. State, 795 So.2d 1020, 1021 (Fla. 2d DCA 2001)(citing Lawton v. State, 731 So.2d 60 (Fla. 2d DCA 1999). As the Second District below found the sentence to be "illegal," the exception to the procedural bar applies. Alternatively, even if the matter could be deemed procedurally barred, Respondent would qualify for the "manifest injustice" exception to res judicata, law of the case, and collateral estoppel noted in McBride, 848 So.2d at 291-92 because the Second District found that his sentence was indeed illegal in violation of double jeopardy. In McBride, there was no manifest injustice in declining to review the successive motion because McBride was serving concurrent sentences, meaning that granting him relief on the illegal sentence would not result in any benefit to McBride. See McBride, 848 So.2d at 292; see also Swain v. State, 911 So.2d 140, 144 (Fla. 3d DCA 2005)(noting that res judicata and law of the case shall not be applied where it would defeat the ends of justice)(citations omitted). In the instant case, Respondent's illegal sentence is the only sentence he is serving. His HFO designation makes him ineligible for gain time. See generally Vann v. State, 970 So.2d 878, 879 (Fla. 2d DCA 2007); Horton v. State, 682 So.2d 647, 648 (Fla. 1st DCA 1996)(finding manifest injustice related to HFO bar on gain time).

Regardless, the circuit court did not entertain the issue of collateral estoppel. Rather, the court incorrectly applied the doctrines of res judicata and law of the case, which would have required reversal on that basis alone. See Renfro v. State, 944 So.2d 1246 (Fla. 5th DCA)(reversing and remanding for consideration of collateral estoppel). Thus, this Court should not decide this case on the ground that it is procedurally barred.

III. WHETHER THE SECOND DISTRICT CORRECTLY HELD THAT THE CIRCUIT COURT VIOLATED DOUBLE JEOPARDY IN ADDING AN HFO DESIGNATION TO RESPONDENT'S SENTENCE MONTHS AFTER THE CONCLUSION OF THE SENTENCING HEARING (Restated)

Alternatively, if this Court does decide this case on the merits, this Court should not quash the Second District's decision because the decision was correct. Under this Court's clear precedent, the trial court's attempt to amend the judgment five months after the sentencing hearing by adding an HFO designation to the sentence was patently illegal and violative of the double jeopardy clause. Determining whether double jeopardy is violated based on undisputed facts is a purely legal determination, so the standard of review is *de novo*. State v. Florida, 894 So.2d 941, 945 (Fla. 2005).

The most important case relevant to this issue is Ashley v. State, 850 So.2d 1265 (Fla. 2003). That case recognized that once

> a sentence has been imposed and the person begins to serve the sentence, the sentence may not be increased without running afoul of double jeopardy principles.... To do so is a clear violation of the Double Jeopardy Clause, which prohibits multiple punishment for the same offense.

Ashley, 850 So.2d at 1267. Even prior to Ashley, Florida law was clear that a

> court's pronouncement of a sentence becomes final when the sentencing hearing ends. Comtois v. State, 891 So.2d 1130, 1131 (Fla. 5th DCA 2005); Troupe v. Rowe, 283 So.2d 857, 858 (Fla. 1973). "Once 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 v. State, 850 So.2d 1265, 1267 (Fla. 2003).

Migdal v. State, 970 So.2d 445, 448 (Fla. 4th DCA 2007)(reversing trial court's attempt to "correct" judgment where Migdal was sentenced to five years on second degree felony and 15 years on third degree felony by switching the sentences); Evans v. State, 675 So.2d 1012, 1014 (Fla. 4th DCA 1996)(once sentence is imposed, jeopardy attaches, and a defendant cannot be resentenced to a greater term of imprisonment).

The main question below was whether imposition of a habitual felony offender ("HFO") designation after the conclusion of a sentencing hearing violates double jeopardy. While the easy answer is "yes," the complicating factor in this case was that, in 1991, when Respondent was originally sentenced, the HFO designation was imposed. Thus, the question was whether, when that sentence was revoked due to a violation of probation and the trial court imposed a new five year sentence, the original HFO designation carried over to the new sentence, surviving the revocation despite the trial court's failure to orally reimpose it when imposing the new sentence. The answer to this more complicated question is that the HFO designation **does not** impliedly carry over from a prior sentence because it is entirely within a trial court's discretion whether to reimpose or decline to reimpose an HFO sentence when revoking probation and imposing a new sentence. All portions of the sentence, HFO designations included, must be orally imposed at the sentencing

hearing and they cannot be belatedly added to the sentence after the sentencing hearing is complete without violating double jeopardy.

As the Second District below recognized, Evans is almost identical to the instant case. In Evans, Evans entered into a written plea agreement for aggravated battery and possession of cocaine. Evans, 675 So.2d at 1013. The parties negotiated Evans' plea to three years of probation and the written plea specified that if Evans violated his probation, he agreed that he qualified as an HFO and that he would be sentenced as an HFO. Id. The trial court accepted the plea, imposed a special condition that Evans complete a drug abuse program, **and pronounced Evans to be an HFO**. Id. Evans failed to complete the drug program and, in response, the trial court sentenced him to consecutive 30 and 10 year sentences **as an HFO**, but then suspended the sentences and placed Evans on probation for five years with a renewed special condition to complete a drug abuse program. Evans again failed to complete the drug program and the trial court, in response, revoked his probation and sentenced him to consecutive 15 and 5 year sentences with credit for all time served. Id. It is important to note that the two sentences were the statutory maximum sentences and that the overall sentence of 20 years fell within the permitted sentencing range of 12 to 27 years. Id. In other words, Evans

is not limited to cases where the HFO designation was used to enhance the sentence above the statutory maximum. Unlike the prior two sentencing hearings, the trial court, at the third sentencing, had failed to orally state that Evans was again being sentenced as an HFO. Evans, 675 So.2d at 1014. Two days later, the State filed a motion to clarify Evans' sentence to reflect an HFO designation. Id. Evans objected that to add the HFO designation after he had begun to serve the sentence would violate double jeopardy. Id. The trial judge, granting the State's motion to clarify and adding the HFO designation to the judgment, noted that the previously entered HFO designation had not been "set aside," and stated that he had entered the sentence from the "standpoint" that Evans was an HFO. Id. On appeal, the Fourth District held that "[r]esentencing a defendant to an habitual offender term of imprisonment subsequent to the entry of a jurisdictionally permissible term is unequivocally a violation of double jeopardy rights which cannot be constitutionally justified." Id. Despite the fact that the 20 year sentence was not increased, despite the fact that the sentence was not in excess of the statutory maximum and, in fact, fell within the recommended guidelines, and despite the fact that the only change to the sentence was to call Evans an HFO, the Evans court held that the tardy imposition of the HFO designation constituted a "greater term of

imprisonment" that could not be allowed under the double jeopardy clause. Id. The Evans court recognized that the trial court's failure to pronounce Evans as an HFO for a third time was possibly a mere "oversight[2]," but found that adding the designation under the guise of "clarification" after Evans began serving the sentence resulted in error. Evans, 675 So.2d at 1014-15. The court's only remedy was to reverse and remand the sentence for deletion of the HFO designation. Evans, 675 So.2d at 1013; Young v. State, 699 So.2d 624 (Fla. 1997)(remedy: HFO designation struck from sentence may not be reimposed on remand); Smith v. State, 844 So.2d 755 (Fla. 1st DCA 2003)(same); Greene v. State, 853 So.2d 1114 (Fla. 1st DCA 2003)(same). The Second District correctly held, in the opinion on review, that Evans was indistinguishable from the instant case. Akins, 35 Fla. L. Weekly D 43 at 6. In 1991, Respondent was found guilty of the 1990 sale of 0.03 grams of cocaine, a second-degree felony with a statutory maximum sentence of 15 years. (V1-11, 33, 186). Based on prior felonies, the trial court found Respondent to be an HFO, elevating the maximum sentence to 30 years. (V1-11, 187). The trial court sentenced Respondent to a true split sentence of 20 years in prison

[2] The oversight was not truly the judge's. A judge may not initiate the procedure for declaring a defendant to be an HFO; only the prosecutor may do that. Young v. State, 699 So.2d 624 (Fla. 1997).

followed by a suspended 10 year sentence with probation. (V1-11-12, 33, 187). Due to gain time, Respondent was released from prison in 2001. (V1-11). In 2003, Respondent violated his probation by testing positive for use of cocaine. (V1-11-12). Rather than revoke his probation, the trial court ordered him to serve further probation and also to complete a drug abuse program. (V1-12). Respondent completed the drug program. (V1-12). After release from the program, Respondent relapsed into addiction, failing a urinalysis test and admitting his relapse. (V1-12-13). In response to the failed drug test, the State filed an affidavit of violation of probation, which Respondent did not contest. (V1-30-31, 33). On November 19, 2004, the trial court held a sentencing hearing, found that Respondent had violated his probation, and, rather than impose the suspended 10 year suspended sentence, revoked the probation and sentenced Respondent to five years in prison without orally reimposing the HFO designation. (V1-23). While the failure to reimpose the HFO status was possibly an oversight, the trial court's attempt to clarify the sentence months later violated double jeopardy. Petitioner's only response to the holding of Evans is that this Court should "disapprove of such reasoning." (IB-31).

This Court has not disapproved of Evans, however. Rather, this Court has adopted and approved Evans. In 2003, in Ashley, 850 So.2d 1265, this Court expressly approved of Evans and held

that a trial court could not impose an HFO sentence after the original sentencing hearing ended and the defendant began to serve his sentence. See Ashley, 850 So.2d at 1266-67. In Ashley, the prosecutor argued that Ashley qualified as a habitual violent felony offender ("HVFO"), but the trial court failed to orally impose an HVFO designation during the sentencing hearing. See Ashley, 850 So.2d at 1266. The Court did, however, orally sentence him as an HFO. See Ashley, 850 So.2d at 1266. The written judgment, however, stated that Ashley had been sentenced as an HVFO, not an HFO. Id. On appeal, the First District held that the mistake did not violate double jeopardy, as the trial court had intended to sentence Ashley as an HVFO, not merely an HFO. See Ashley, 850 So.2d at 1266-67. This Court took jurisdiction of the case and, while recognizing that "the trial court's failure to state during its oral pronouncement of sentence that it was sentencing Ashley as a habitual violent felony offender may have been a simple mistake," this Court quashed the First District's opinion and embraced the holding of Evans, holding that once "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" that prohibit "multiple punishment for the same offense." Ashley, 850 So.2d at 1267-68 (citations omitted). This Court recognized the good policy preventing trial courts

from turning sentencing orders into “a work in progress” that could be amended at any time, citing a need for finality in sentencing. Ashley, 850 So.2d at 1268. This Court also noted that an oral pronouncement must control over the written judgment. Id (citations omitted). The Second District, in the opinion on review, correctly noted that it could not distinguish the facts of Ashley from the facts of this case. See Akins v. State, 35 Fla. L. Weekly D 43 at 1. Ashley’s holding has been consistently applied in Florida even where a sentencing court has inadvertently failed to impose a legally required minimum mandatory sentence. See also Delemos v. State, 969 So.2d 544 (Fla. 2d DCA 2007); Oliver v. State, 727 So.2d 271 (Fla. 4th DCA 1999)(same); Pate v. State, 908 So.2d 613, 614 (Fla. 2d DCA 2005)(finding that sentence may not be increased after defendant starts serving it "even if the original sentence was illegal"); Macias v. State, 572 So.2d 22, 23 (Fla. 4th DCA 1990)(failure, by “oversight,” to impose even minimum mandatory sentence cannot be corrected or clarified after sentencing hearing has concluded); Figueroa v. State, 3 So.3d 428, 429 (Fla. 2d DCA 2009)(same); Gardner v. State, 30 So.3d 629, 632 (Fla. 2d DCA 2010)(same)[3]. Because it is evident that the trial court in this

[3] The one case that appears to depart from the common wisdom is Allen v. State, 853 So.2d 533 (Fla. 4th DCA 2003). While the case appears, to Respondent, to be wrongly decided, the case is certainly distinguishable because the post-sentencing

case imposed the HFO designation five months after conclusion of the sentencing hearing, the Second District correctly held that Ashley was controlling.

Petitioner's response to the holding of Ashley is that the case is distinguishable because "the trial court in Akins' case did not change the type of designation under the habitual offender statute. Nor did Akins' sentence add a mandatory prison term." (IB-30-31). The first point makes little sense. This Court, in Ashley, found a double jeopardy violation when the trial court belatedly amended Ashley's judgment to impose an HVFO sentence where it had only orally pronounced an HFO sentence. This is case worse, not better, for the State because, as in Evans, the trial court completely neglected to orally impose any form of enhancement and then attempted to amend the judgment to include one. Ashley cannot be reasonably interpreted to mean that it only applies where a trial court imposed some form of enhancement. The rule in Ashley is simple: a defendant's punishment cannot be increased after the sentencing hearing is over. Increasing a sentence from an HFO sentence to an HVFO sentence is an increase in punishment; so,

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modification was done when Allen himself opened the door by moving for a change to his sentence, whereas here, the trial court imposed the HFO designation on its own at a hearing where Respondent was not present.

too, is adding an HFO designation to a sentence that did not include it.

In regard to Petitioner's second point, that Ashley involved imposition of a minimum sentence, this statement is deceptive. The elevation from an HFO to HVFO sentence by the trial court, in Ashley, did not result in imposition of a greater sentence. Rather, both the orally imposed HFO sentence and the attempted amendment to the sentence, as an HVFO, were for 25 years. Ashley, 850 So.2d at 1266. No years were added. Petitioner's argument does raise an interesting question, however. The typical claim involving an "illegal sentence" is one where the enhancement is used to elevate the sentence above the statutory maximum. For purposes of this appeal, Respondent does not dispute that the trial court had the right to sentence him up to 10 years on the original suspended sentence[4] and that 5 years was within that limitation. Respondent only argues that the 5 year sentence should be a non-HFO sentence because the trial court failed to impose that designation upon him when it revoked the prior sentence and imposed the five year sentence. Florida case law confirms that imposition of the HFO designation itself is an increase in punishment regardless of the fact that the incarceration was not extended or extended above the statutory

[4] Respondent does not concede that jail credit was properly awarded, but concedes that jail credit is not sufficiently at issue.

maximum as a result of the amendment to the judgment. Florida law is clear that, regardless of the length of the sentence, the designation as an HFO, after a defendant has begun to serve his sentence, is itself illegal. See Hopping v. State, 708 So.2d 263, 265 (Fla. 1998)("[W]here it can be determined without an evidentiary hearing that a sentence has been unconstitutionally enhanced in violation of the double jeopardy clause, the sentence is illegal and can be reached at any time under rule 3.800.")See Mack v. State, 823 So.2d 746, 751 (Fla. 2002)(reaffirming Hopping's holding that HFO sentence enhancement imposed in violation of double jeopardy, even where the resulting sentence "did not exceed the statutory maximum, constitute[s] an illegal sentence."); Wright v. State, 911 So.2d 81, 82 (Fla. 2005)(reaffirming Mack and Hopping); Carter v. State, 786 So.2d 1173 (Fla. 2001)(finding improperly imposed HFO designation to be an "illegal sentence" even where it was not used to elevate the 40-year sentence for a life felony above the statutory maximum); Williams v. State, 957 So.2d 600, 604 (Fla. 2007)(resolving conflict between districts, holding that any allegation of a discrepancy between the oral pronouncement and written judgment is cognizable under Rule 3.800(a)). It is worth noting that where a sentence is not lengthened in terms of years, designating a defendant as an HFO does indeed still have the effect that the defendant is "subjected to a longer period

of incarceration...than he otherwise would have served" due to statutes prohibiting parole and some forms of gain time for HFOs. Trotter v. State, 825 So.2d 362, 366 (Fla. 2002). Thus, adding the HFO designation to the 5-year sentence was both a legal and practical increase in punishment that violated double jeopardy. The Second District, below, properly accepted that the violation of double jeopardy resulted in an illegal sentence cognizable under Rule 3.800(a).

Petitioner argues that this Court, despite the fact that Evans and Ashley are settled law, should interpret Mann v. State, 851 So.2d 901 (Fla. 3d DCA 2003) to allow the trial court, in this case, to amend the judgment by adding a belated HFO designation. (IB-31-32). In Mann, Mann was sentenced to probation as an habitual violent felony offender ("HVFO"). Mann, 851 So.2d at 902. He violated probation and, at the sentencing for the violation, both parties acknowledged that Mann would be sentenced as an HVFO. Id. The judge orally announced that he was sentencing Mann "as an habitual offender" without stating whether he meant a habitual felony offender or a habitual violent felony offender. In light of the discussion at the hearing, the oral pronouncement of a "habitual offender" sentence, and the concession at the hearing by both parties that the HVFO sentence was appropriate, the Mann court, on appeal, found that Ashley was not controlling and held that the judge's

failure to say the words habitual "violent felony" offender constituted a "mere slip of the tongue which did not give rise to a double jeopardy issue.... The sentence was not increased after it was imposed, and thus there was no double jeopardy violation such as occurred in Ashley." Mann, 851 So.2d at 903. Petitioner also cites Scanes v. State, 876 So.2d 1238 (Fla. 4th DCA 2004) for a similar point. (IB-34). In Scanes, the defendant argued that Ashley barred the trial court from imposing an HFO sentence because, while Scanes admitted that the trial court, at the sentencing hearing, "held him to be a habitual felony offender," he argued that the trial court did not state that it was sentencing him "as" an HFO. The Fourth District, quite rightly, held that there was no distinction and that "magic words" were not required to impose an HFO sentence. Scanes v. State, 876 So.2d 1239-40. Neither Mann nor Scanes are on point. In the instant case, the trial court did not merely misspeak by announcing a "habitual offender" sentence or omit the word "as." While the Second District, in the opinion on review, stated that, but for the holdings of Evans and Ashley, it would be tempted to follow Mann, the key point in Mann was that the judge orally imposed a "habitual offender" sentence, which could have referred to an HFO or HVFO sentence. Reference to the record confirmed that the HVFO designation was agreed to and discussed at the sentencing hearing. In other words, a

habitual offender sentence of some sort was orally imposed and the appellate court resorted to the record to determine, with certainty, that an HVFO sentence, not an HFO, was the sentence referred to by the phrase "habitual offender." This is distinguishable from Ashley, where the trial court imposed an HFO sentence (which was not ambiguous, like the vague statement regarding a "habitual offender" sentence), but later tried to elevate it to an HVFO designation. It is certainly distinguishable from Evans, where the trial court failed to reimpose an HFO designation that it had imposed at two prior sentencings when it sentenced Evans for a violation of probation and then attempted to add the HFO sentence to the judgment after the sentencing hearing had concluded. In the instant case, as in Evans, the trial court, in this case, **completely** neglected to orally pronounce the HFO sentence or expressly designate Respondent as an HFO in any way. (V1-40). The parties did not agree to an HFO sentence during the hearing and the trial court did not use any language indicating that an HFO sentence was being imposed. Respondent even denied, during the hearing, that he had the necessary predicate offenses for an HFO sentence and the judge responded that he was not making a finding that Respondent had the necessary predicate sentences. (V1-23). Thus, Ashley and Evans, not Mann or Scanes, are on point.

Petitioner also cites O'Neal v. State, 862 So.2d 91 (Fla. 2d DCA 2003) for the proposition that "magic words" are not required to impose an HFO sentence. (IB-34). While Respondent does not quarrel with that basic proposition, agreeing wholeheartedly with holdings like Scanes, the Second District's decision in O'Neal is both wrongly decided and not on point. During the sentencing hearing in that case, the trial court "discussed O'Neal's prior record and found that he qualified as a habitual offender." The Second District did not follow this up by adding that it was imposing the HFO designation, but the O'Neal court held that, once the trial court orally noted that O'Neal "qualified" as an HFO, it did not need to expressly impose the HFO designation. Id. The Second District held this way for a specific reason: the HFO statute had been amended with respect to offenses committed on or after October 1, 1995, specifying that once a court declared that a defendant qualified as an HFO, it was required to impose an HFO sentence unless it made specific findings that it was not going to impose an HFO sentence on the basis that the defendant was not a danger to the public. O'Neal, 862 So.2d at 92-93. The O'Neal court held, then, that because the trial court declared, during the sentencing hearing, that O'Neal "qualified" as an HFO and then failed to make findings that the court was *declining* to impose an HFO sentence, that the HFO designation was implied. The

O'Neal court held that by failing to state that it was not declaring him to be a HFO, "the trial court necessarily makes th[e] determination [that he is an HFO] by virtue of the fact that it did not make a finding that a habitual offender sentence was unnecessary for the protection of the public." O'Neal, 862 So.2d at 92-93. First, O'Neal was wrongly decided. As noted above, the great weight of authority in Florida's appellate courts stands for the proposition that even where a **minimum mandatory sentence** is **required by law** and a sentence without it is **illegal**, a trial court's failure to impose the mandatory sentence orally at the sentencing hearing, absent an appeal by the State, bars the court, under double jeopardy principles, from amending the sentence to conform with the minimum mandatory. See Delemos, 969 So.2d 544; Pate, 908 So.2d at 614; Oliver, 727 So.2d 271; Gardner, 30 So.3d at 632; Figueroa, 3 So.3d at 429; Linnon v. State, 988 So.2d 70, 73 (Fla. 2d DCA 2008). If a trial court violates double jeopardy even by reopening a sentencing to add a **legally mandatory minimum sentence**—meaning that such sentence, though mandatory, was not "implied" by the facts presented at the sentencing hearing—then it makes no sense to say that an HFO sentence, which is preferred but not mandatory under the post-1995 HFO statute, is implied simply because a defendant "qualifies" for HFO sentencing. The defendants in Delemos, Pate, Oliver, Gardner,

and Figueroa all had minimum mandatory sentences "implied" by their convictions, but an "implied" sentence was insufficient. Those courts held that a sentence must be expressly orally imposed, not merely implied. Thus, if it comes before this court, O'Neal's holding that an HFO sentence can be implied without being pronounced should be rejected by this Court, as it conflicts with Ashley and all of its progeny. That said, O'Neal is not relevant to the instant case. By its own terms, O'Neal found that the HFO sentence was implied only because (1) the trial court orally stated that O'Neal qualified as an HFO during the sentencing hearing and (2) because the post-1995 HFO statute required a trial court to impose the HFO sentence if a defendant qualified for it or, alternatively, to affirmatively make findings as to why an HFO sentence was not being imposed. In the instant case, the trial court never noted, at the sentencing hearing, that Respondent qualified as an HFO. In fact, during the hearing, Respondent told the judge that he did not have predicate three felonies of sale and possession of drugs. (V1-23). The trial judge responded, "I never said that you had three sales and possession. I said ...the last time that you were here in court...I told you it was your last chance." (V1-23). Thus, the Court did not make a finding that Respondent qualified as an HFO. Even if the Court had made such a remark, however, the 1990 version of the HFO statute did not, like the

post-1995 statute analyzed in O'Neal, require that a trial court make findings if it was declining to impose an HFO sentence. The version of the statute governing Respondent's case, section 775.084(4)(c), Fla. Stat. (1990), allowed courts to decline to sentence qualifying defendants as HFOs without making any additional findings justifying the failure to impose an HFO sentence. The entire basis, then, for O'Neal's statutory interpretation, the 1995 amendment to the statute, is inapplicable to the instant case. The 1990 statute actually required that a trial court "make [a] determination" if it appeared that the defendant was an HFO. In the instant case, the trial court failed to do so until five months after the sentencing hearing when it amended his sentence by adding the HFO sentence. Pre-1995 law, as explained in Arnold v. State, 754 So.2d 149, 150 (Fla. 2d DCA 2000), applies to this case. Ashley and Evans also apply.

Petitioner also argues that the trial court's failure to impose orally impose the HFO designation at Respondent's sentencing was "a mere slip of the tongue which did not give rise to a double jeopardy issue." (IB-32). Petitioner cites McCray v. State, 838 So.2d 1213 (Fla. 3d DCA 2003) for this proposition. (IB-32). McCray is not on point. In that case, the State, at the sentencing hearing, asked that McCray be sentenced as a habitual violent felony offender ("HVFO").

McCray, 838 So.2d at 1214. The trial court, at sentencing, announced that the crime was violent and heinous and that "I'm going to sentence Mr. McCray as a habitual violent felony offender...." Id. The transcript contained a scrivener's error that exchanged the orally pronounced life sentence with the words "provided with." Recognizing that there was no failure to orally pronounce McCray's life sentence and that the only error was one by the court reporter, the McCray court denied McCray's claim that his written judgment imposing a life sentence departed from the orally imposed sentence. Id. In the instant case, there is no allegation of an incorrect transcript. There is no hint that the trial court expressly imposed an HFO designation at the sentencing. While the trial judge in the instant case opined that he intended to sentence Respondent as an HFO when imposing the 5-year sentence, the judge candidly admitted that he had failed to "specifically announce that the Defendant's sentence was as an HFO...." (V1-40). Thus, McCray is not on point. Mistakenly forgetting to impose an HFO designation is legally distinguishable from a transcription error or a classic "slip of the tongue," where a word is mispronounced.

Petitioner goes on to argue, in the alternative, that the amended sentence in this case was necessary to correct an "ambiguity" in the original oral pronouncement. (IB-34-35).

The oral pronouncement was not ambiguous; it merely made no mention of designating Respondent as an HFO. The trial judge noted that "out of the 10 years that you had, I've imposed five.... And we're just going to leave it go at that." (V1-23). The ambiguity cases cited by Respondent are not on point. See Coleman v. State, 898 So.2d 997 (Fla. 2d DCA 2005)(record left no doubt that judge made slip of the tongue when orally applying HFO sentence to sale of cocaine conviction when the judge meant to apply it to the possession of cocaine); Chapman v. State, 14 So.3d 273 (Fla. 5th DCA 2009)(ambiguity arose from fact that judge allowed Chapman to choose between a short prison sentence followed by probation or a longer prison sentence followed by no probation and when Chapman chose the former, the judge forgot to impose the orally promised probationary period following the incarcerative period); Franklin v. State, 969 So.2d 399 (Fla. 4th DCA 2007)(judge said he was imposing multiple probations but orally pronounced only one while suspending all other sentences). This case is more like Shepard v. State, 940 So.2d 545, 547 (Fla. 5th DCA 2006), where the trial judge imposed concurrent sentences and then, 50 minutes later, stated that he meant to impose consecutive sentences. See also Brown v. State, 965 So.2d 1235 (Fla. 5th DCA 2007)(finding no ambiguity, finding double jeopardy violation, and following Ashley when court inadvertently sentenced Brown to 14 years on a third degree

felony and five years on a second degree felony when judge perhaps meant to do the opposite; amendment switching the two sentences to make the 14 year sentence within the statutory maximum was impermissible). Ambiguity exists only where there are **two inconsistent statements**. In cases such as these, there must be a variance between the oral pronouncement and the written judgment. Migdal, 970 SO.2d at 448-49. Until it was amended five months later, there was no variance, in the instant case, between the oral pronouncement of a five year sentence and the written judgment of a five year sentence. The Second District found, in the opinion on review, that the trial court "did not orally announce that" Respondent "qualified and would be sentenced as a habitual offender...." Akins, 35 Fla. L. Weekly D 43 at 3. The Court also found that when "the sentence on revocation was reduced to writing it did not indicate that Mr. Akins was serving his sentence as a felony offender." Akins, 35 Fla. L. Weekly D 43 at 4. The record shows that the trial court orally sentenced Respondent to "five years. And I'm going to give you credit for the time that you've served on the charge of violation of probation." (V1-20, 33). That jail credit amounted to 239 days. (V1-22, 24). The trial court stated that the "only reason I didn't give you the 10 is because I know that that [Department of Corrections] is going to take some [gain] time away from you on that 20 years that you've

already served." (V1-22). The trial judge noted that "out of the 10 years that you had, I've imposed five.... And we're just going to leave it go at that." (V1-23). The trial court specified that no further probation would follow the five year sentence. (V1-23). At that point, the Respondent denied that he had three felonies of sale and possession of drugs. (V1-23). The trial judge responded, "I never said that you had three sales and possession. I said ...the last time that you were here in court...I told you it was your last chance." (V1-23). The trial court referenced the prior sentence, but did not impose the suspended 10-year sentence and did not orally reimpose the HFO designation after revoking the probation. Id. He stated that he would "leave it go at that." His decision, five months later, to add an HFO designation to the sentence did not create an ambiguity, it created an *addition*, an addition that violated double jeopardy.

Petitioner's argument also fails because it is premised on the fact that Respondent was "being sentenced...on the portion of his habitual sentence which had been suspended." (IB-35). That is not, however, accurate. The suspended portion of Respondent's "true split sentence" was a 10 year sentence. The trial judge abandoned that suspended sentence in favor of imposing a brand new sentence of 5 years. The Second District noted that the old HFO probationary sentence was revoked. Akins,

35 Fla. L. Weekly D 43 at 4. Thus, nothing of the original suspended 10 year HFO sentence survived.

In addition to its arguments as to the interpretation of Florida's application of double jeopardy, Petitioner also argues that Monge v. California, 524 U.S. 721 (1998) has effected a sea change in double jeopardy law and that, following that decision, double jeopardy "does not apply to noncapital sentencing; it applies only to capital sentencing." (IB-23). In other words, Petitioner argues that a trial court can, at any time, increase a sentence that does not involve death without violating double jeopardy. Petitioner argues that, under Monge, cases like Evans should be recognized by this Court as overruled or as "bad law." Petitioner's reading of Monge is incorrect. Monge is a case about sentencing **proceedings**, not multiple punishments, which are still prohibited by the double jeopardy clause.

Petitioner's confusion appears to stem from the fact that the double jeopardy clause has more than a single purpose or application.

> The Fifth Amendment 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." North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnotes omitted), overruled on other grounds by Alabama v. Smith, 490 U.S. 794 (1989); see also State v. Wilson, 680 So.2d 411, 413 (Fla. 1996).

Capron v. State, 948 So.2d 954, 957-58 (Fla. 5th DCA 2007)(emphasis supplied). Monge dealt only with the "second prosecution" aspect of double jeopardy, not the "multiple punishments" aspect. See Monge, 524 U.S. 727-28. Monge was concerned with whether a prosecutor, under the double jeopardy clause, could present new evidence pertaining to sentencing at a second hearing or whether the prosecution was bound by evidence presented at the first sentencing hearing because a new hearing on remand, on remand, would constitute a second "prosecution" for the same "offense." Id. As Petitioner has noted, the facts of Monge were that California's state courts enhanced Monge's sentence based on insufficient evidence supporting a "three-strikes" sentencing enhancement. Monge, 524 U.S. 725-26. The California Court of Appeal reversed the "three-strikes" designation for lack of sufficient evidence and also found that the double jeopardy clause barred California from attempting, on remand, to again prove that Monge qualified as a "three-strikes" offender by presenting new evidence. Id. The California Supreme Court reversed the appellate court's holding, finding that double jeopardy did not bar California from retrying Monge on remand and attempting, a second time, to prove that he was a "three-strikes" offender. Monge, 524 U.S. 726. The U.S. Supreme Court agreed, holding that double jeopardy did not bar a retrial on sentencing elements on remand. Monge, 524 U.S. 728-31. An attempt to prove Monge's qualification as a "three-strikes" offender was not a "second prosecution" because the sentencing enhancement was a sentencing factor, not an element

of the offense. Monge, 524 U.S. 728-29. Florida courts came to this conclusion prior to Monge. See Trotter v. State, 825 So.2d 362, 365 (Fla. 2002)(citing Harris v. State, 645 So.2d 386 (Fla. 1994) for the proposition that "double jeopardy is not implicated in the context of a resentencing following an appeal of a sentencing issue."). The Monge court did make an exception for capital cases because the constitutionally-required bifurcated penalty phase trial was more like a trial than it was a sentencing hearing and was, thus, enough like a "prosecution" that the State could only have one bite at that particular proverbial apple. The Monge decision did not, in any way, do what Petitioner says it did. The decision did not hold that double jeopardy, under a "multiple punishments" analysis, does not prevent a State court from increasing punishment after a defendant begins serving a sentence. While Petitioner argues that Monge impliedly ends all double jeopardy questions related to non-capital sentencing, Monge, by its own terms, held only that resentencing after a reversal for insufficient evidence of a sentencing factor was not a second "prosecution" for an "offense." This case does not involve an allegation of a successive prosecution; rather, this is a "multiple punishments" case. Monge does not have the effect of converting Ashley into "bad law."

Moving beyond Petitioner's arguments in the Initial Brief, Respondent wishes to address the Second District's concerns, expressed in its opinion, as to whether its holding in Respondent's favor was legally correct. The Second District

recognized that Evans and Ashley required it to hold in Respondent's favor, but the Court admitted that it did not fully understand the decisions. Respectfully, neither Evans or Ashley are unclear or confusing. This Court should not be swayed to overturn all of the decisions cited in this brief and adopt the Second District's confusing suggested interpretation of the law, where an HFO designation is not truly part of a sentence, where an HFO designation is implied from prior sentencing proceedings even though a court could decline to reimpose it, and where defendants are not entitled to notice about reimposition of such an important thing as an HFO designation, which often results in doubling one's sentence. Ashley provides a clear and concise rule: trial courts are to orally pronounce all the terms of a sentence at each sentencing hearing and are not to increase such terms once the sentencing hearing is over. It is simple rule, easily applied.

The Second District's difficultly in understanding its own holding in this case appeared to result from the fact that the Second District struggled with the question of whether an HFO designation was more like a part of the conviction or a part of a sentence, stating that it

> seems to this court that the determination of a status such as habitual felony offender, in many ways, is not a portion of either the proceedings resulting in an adjudication of guilt or the proceedings resulting in a sentence. Although this status determination often occurs at the hearing scheduled for sentencing, it is a predicate decision based on fact and law that is distinct from either the adjudication or the sentence.... [W]e do not entirely understand why the

> trial court violates double jeopardy when it relies on [a prior] determination [that a defendant is an HFO] without repeating it at a sentencing on revocation of probation.

Akins, 35 Fla. L. Weekly D 43 at 11. While Respondent is heartened that the Second District, in spite of its difficulty in understanding this Court's precedents, followed the law and found a double jeopardy violation, Respondent is unsure of the basis for the Second District's lack of understanding of the issue. The Second District is entirely incorrect when it muses that imposition of an HFO status is some hybrid concept that falls between a conviction and a sentence, sharing attributes of both. An HFO designation is, without a doubt, a factor of sentencing. Almendarez-Torres v. United States, 523 U.S. 224, 230 (1998)(recidivism "is as typical a sentencing factor as one might imagine"). That is why, in spite of the Constitutional right to a jury trial, HFO status can be determined by a judge rather than a jury—because it is part of the sentence, not an element of the conviction. See generally Calloway v. State, 914 So.2d 12, 14 (Fla. 2d DCA 2005)(citation omitted). That is why imposing an HFO sentence, after a conclusion of a sentencing hearing, violates double jeopardy—because it constitutes an increased sentence, a multiple punishment.

The Second District's lack of understanding that an HFO designation is part of a sentence resulted in a confusing certified question. This Court asked:

> **IF A DEFENDANT HAS BEEN DECLARED TO BE A HABITUAL OFFENDER BEFORE THE IMPOSITION OF HIS INITIAL SPLIT SENTENCE, WHEN THE DEFENDANT LATER VIOLATES PROBATION**

AND HAS HIS PROBATION REVOKED, DOES THE DEFENDANT LOSE HIS STATUS AS A HABITUAL OFFENDER IF THE TRIAL COURT DOES NOT REPEAT THIS STATUS AT THE SENTENCING HEARING ON VIOLATION OF PROBATION?

Thus, the Second District struggled with the question of when and how Akins "lost" his status as an HFO, as the HFO designation was imposed in 1991 at his original sentencing. It is not a matter of a defendant "losing his status" as an HFO. The HFO probationary sentence was "revoked." The Second District's lack of understanding that the HFO designation was **part of the sentence** that was revoked led to its confusion, but when one understands that the HFO designation was part of the sentence that was revoked, one immediately understands how Respondent "lost" his HFO designation and understands why, if it was to be reimposed, it had to be orally reimposed at the violation-of-probation sentencing hearing. This concept is not new in Florida law. Florida courts recognize that an HFO designation does not travel with a defendant through probation revocations and resentencings unless it is orally pronounced at each sentencing hearing. "To effectuate a habitual felony offender sentence upon revocation of probation, a trial court must orally pronounce habitual felony offender status, even when the [defend]ant was initially sentenced as a habitual felony offender for the substantive offense and the designation has not been set aside." White v. State, 892 So.2d 541, 542 (Fla. 1st DCA 2005); Barron v. State, 827 So. 2d 1063, 1064 (Fla. 2d DCA 2002)(same). This is partly because even where a defendant meets the qualifications of an HFO, sentencing as an HFO is not

implied or mandatory; rather, it is permissive[5]. See Allen v. State, 599 So.2d 996 (Fla. 1992). Trial courts have the important freedom and discretion to sentence defendants as HFOs or non-HFOs depending on the facts of the case. From a policy standpoint, this discretion is a positive thing for all concerned. Trial courts get to enjoy discretion in sentencing, prosecutors enjoy their own discretion in deciding whether to pursue an HFO designation, defendants occasionally get to enjoy the leniency of a trial judge where the facts of the case indicate that a lesser sentence is called for, and Florida's overburdened appellate courts are able to quickly affirm sentences based on a lack of abuse of discretion instead of reviewing for legal error in sentencing. Petitioner asks this Court to tear up the proverbial carpeting in regard to double jeopardy in the State of Florida with the only practical effect being that Respondent would enjoy less gain time and trial courts would be encouraged to neglect to orally impose HFO designations at sentencing hearings. The law as it stands—requiring trial courts to do nothing more than orally impose a defendant's sentence—is a clear and concise rule that leads to predictable results on appeal and to fair notice to defendants of their punishment. This Court should approve the Second District's decision.

[5] Though, as recognized above, even if the HFO sentence was a legally required minimum mandatory, not a permissive enhancement, the Delemos line of cases would still bar tardy imposition of the HFO designation if the court failed, at the sentencing hearing, to orally impose it.

CONCLUSION

Based on the foregoing discussions, Respondent respectfully requests this Honorable Court decline jurisdiction as improvidently granted or approve the Second District’s decision.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Patricia McCarthy, Office of the Attorney General, Concourse Ctr 4, Ste. 200 2507 E. Frontage Rd., Tampa, FL 33067 by U.S. mail on October 11, 2010.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Rule 9.210, Fla. R. App. P. (2008).

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