**IN THE SUPREME COURT OF FLORIDA**

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

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

# INITIAL BRIEF OF PETITIONER ON THE MERITS


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## STATEMENT OF THE CASE AND FACTS

Michael Akins was found guilty after a jury trial of sale of and possession of cocaine. (V 1 R 181) On January 18, 1991, he was adjudicated guilty of the offense in accordance with the verdict and sentenced as a habitual felony offender to 30 years prison. After service of 20 years, the remaining portion of Akins' sentence was suspended, with the suspended portion to be served on probation. (V 1 R 187) Akins' judgment was affirmed on direct appeal on November 1, 1991. Akins v. State, 591 So. 2d 187 (Fla. 2d DCA 1991).

Subsequent to Akins' release from prison in 2001 (V 1 R 198), he twice violated the terms of his probation, testing positive for cocaine. (V 1 R 197, 199) On the first, Akins sought, and was allowed to be on, continued probation at a hearing in September, 2003. (R V 2 203) Upon admitting the second violation (V 1 R 181), sentence was set for November 19, 2004. During the sentencing proceedings, his trial counsel referred to Akins' habitual sentence on his sale of cocaine and the suspended portion thereof. (V 1 R 198) In seeking mitigation, his counsel stated, among other things: ". . . I spoke to Mr. Migliore [prosecutor] and he's going to ask for the maximum, 10 years . . . ." (V 1 R 200) Attributing Akins' situation to addiction, his counsel sought Akins' termination from supervision. Alternatively, his counsel pointed to the probation officer's

recommendation of two years community control. (V 2 R 201)

The prosecutor directed the state court's attention to the transcript of the hearing held September 26, 2003, on the prior violation of probation and the colloquy between the court and Akins. (V 1 R 146-147) Maintaining Akins had made a deal with the court, the prosecutor asked the court to enforce it. (V 1 R 148)

Before sentencing Akins on the second violation, the trial court addressed his representations, and the court's admonishments, at the previous hearing thus:

> THE COURT: You're familiar with the transcript of the last time that you were before the Court before you changed your plea?
>
> THE DEFENDANT: Yes, I do, sir.
>
> THE COURT: We acknowledged that you had been sentenced to 30 years. We acknowledged that you did 20.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. And then I said, "You are 50 years old."
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And I said, "You are too old for that."
>
> And you responded, "Yes, Sir."
>
> THE DEFENDANT: True.
>
> THE COURT: I said, "We are going to give you one last

chance."

You said, "Thank you, sir."

THE DEFENDANT: True.

THE COURT: I said, "Dabble in drugs and you are going to do the last 10." Do you remember that?

THE DEFENDANT: Yes, sir.

THE COURT: You answered, "Thank you, sir."

THE DEFENDANT: Yes, sir.

THE COURT: I asked this question on page 10, line 14: "Do you have any doubt that I will not impose that 10 years for you?"

You answered, "No."

I said, "I mean, you come back here on another dirty urine or I find out that you're doing something else unlawful, then we just say good-bye." right?

THE DEFENDANT: True, sir.

THE COURT: And you said, I appreciate it."

(V 1 R 148-150)

Thereafter, Akins acknowledged he had been given fair warning. (V 1 R 150) Nonetheless, the trial court chose not to sentence him to the full balance of the suspended portion of his original sentence based on Akins' admission, as well as anticipated forfeiture of gain time extended Akins previously:

I am going to take into consideration the fact that you've entered a plea.

. . . .

I'm also going to take into consideration that the Department of Corrections is probably going to take away some of the gain time that you might have got on that

> additional -- the first 20 years. They're probably going to take some time away that you thought you had earned.
>
> . . .
>
> THE COURT: So what I'm going to do is I'm going to sentence you 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 . . . .

(V 1 R 151)

Ascertaining that Akins was arrested June 11, 2004, on the second violation, the trial court indicated Akins would receive credit on the five-year prison term for time he served in the county jail since his arrest on the first violation. (V 1 R 152-53) The court in awarding jail credit to Akins, stated:

> THE COURT: 239 days credit Now, the only reason I didn't give you the 10 is because I know that the State is going to take some time away from you on that 20 years that you've already served. That's the way they work. And I don't control the Department of Corrections, so I'm trying to give you some equity here. But I'm also letting you know that you've had your last chance the last time. So you -- in effect, of 10 years that you had, I've imposed five.

(V 1 R 153-154) Thereafter, the court indicated Akins was receiving credit for all time served on both probation violations. (V 2 R 210)

Akins filed a motion seeking additionnal jail credit. (V 1 R 47) On February 24, 2005, Akins' judgment was amended to reflect he was entitled to 270 days, instead of 239 days of credit for time served. (V 1 R 192)

Subsequently, by order rendered April 27, 2005, the circuit

court amended Akins' written judgment to reflect that he was sentenced as a habitual offender.1 (V 1 R 193) The written judgment was amended to reflect the following:

> Mandatory/Minimum Provisions:
>
> The defendant is adjudicated a habitual felony offender and is sentenced to an extended term in accordance with the provision of 775.084(4)(a), Florida Statutes. *amended 4/29/05 per court order dated 4/22/05.

(V 1 R 191)

Among his various collateral applications, Akins sought review of a nonappealable Fla.R.Crim.P. 3.800(c) order, and during the appeal, he attempted to raise a double jeopardy claim regarding the amendment of his sentence which reflected his probation revocation sentence was as a habitual felony offender. The district court dismissed the improper appeal without prejudice to Akins' right, if any, to raise this issue in a motion pursuant to Fla.R.Crim.P. 3.800(a). Akins v. State, 926 So. 2d 412, 413 (Fla. 2d DCA 2006)

Akins through retained collateral counsel raised his ground in a motion to vacate, set aside or correct judgment and sen-

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1 Undersigned has ascertained that at a status hearing on April 22, 2005, it was brought to the circuit court's attention that the Department of Corrections had inquired if Akins was a habitual offender for purposes of the probation violation. The prosecutor indicated such inquiry was made to the clerk's office. Neither Akins nor his counsel were present at the hearing. The court indicated the sentence on the sale of cocaine was a habitual sentence.

tence on November 20, 2006. (V 1 R 117-133) An amended motion followed. (V 1 R 97, V 2 R 219) After securing a response from the state, the postconviction court held a non-evidentiary hearing October 5, 2007, at which Akins and his counsel were present. The postconviction indicated it would allow the state and Akins' retained counsel to present written arguments. (V 2 R 221-228) By order rendered October 30, 2007, Akins' rule 3.800(a) motion was denied. (V 1 R 184-185) In denying relief, the postconviction court held, in relevant part:

> In his motion the Defendant alleges that it was illegal to retroactively sentence him as an HFO because there was no oral pronouncement or written judgment made at his violation of probation sentencing designating the Defendant as an HFO. In addition, the Defendant argues that his Due Process Rights were violated because he was not present at this critical stage.
>
> In its response, the State contends in the particular circumstances of this case it is entirely possible to determine with certainty that this Court intended to impose an HFO sentence. The State argues that if the Court did not sentence the Defendant as an HFO on revocation of probation then the maximum sentence it could impose was no sentence because any sentence the Court imposed would have been in excess of the maximum guideline sentence of fifteen years.
>
> During the Defendant's sentencing his counsel acknowledged to the Court that the Defendant qualified as an HFO and listed the Defendant's prior felony convictions. See Exhibit D: Sentencing Transcript, pp. 5 and 7. Moreover, the Court reviewed the Defendant's original HFO sentence and the transcript of the colloquy at the Defendant's prior violation of probation hearing and stated "[we] acknowledged that you had been sentenced to 30 years. We acknowledged that you did 20…. We acknowledged that there was 10 hanging

> over your head." See Exhibit C: Sentencing Transcript, pp. 11-12. The Court took into consideration that the Department of Corrections would probably take away some of the Defendant's gain time, and sentenced him to five years in prison. See Exhibit C: Sentencing Transcript, pg. 14.
>
> While the Court did not 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.
>
> . . . .

(V 1 R 185)

Akins appealed the denial. On collateral appeal, his counsel argued Akins' sentence was illegal and that the habitual felony designation was added in violation of double jeopardy principles and must be deleted. (V 1 R 93-112) On Nov. 7, 2008, the Second District per curiam affirmed without written decision in case no. 2D07-5760. (V 2 R 231) Akins v. State, 996 So. 2d 860 (Fla. 2d DCA 2008)[table]. Akins filed a motion for clarification, which was denied on December 9, 2008. (V 2 R 233) The mandate issued January 15, 2009. (V 2 R 235)

Akins raised his claim again in a pro se rule 3.800(a) motion dated December 11, 2008. (V 1 R 3-6) By order rendered December 30, 2008, the postconviction court denied the rule 3.800(a) motion. Noting it has previously denied the identical claim, the postconviction court held that his claim was barred by res judicata and the law of the case doctrine. (V 1 R 39-40)

Akins appealed, and on December 30, 2009, the district court reversed the rule 3.800(a) order. Akins v. State, --- So.3d ----, 2009 WL 5125174 (Fla. 2d DCA Dec. 30, 2009).

Recognizing that Akins has filed more than thirty appeals, the district court nonetheless concluded his argument is supported by Ashley v. State, 850 So. 2d 1265 (Fla. 2003), and Evans v. State, 675 So. 2d 1012 (Fla. 4th DCA 1996), as well as by discussion in its opinion in Barron v. State, 827 So. 2d 1063 (Fla. 2d DCA 2002), and by the outcome in White v. State, 892 So.2d 541 (Fla. 1st DCA 2005). Noting its disagreement with at least part of the analysis in Evans, the district court recognized Evans was approved by the supreme court in Ashley. Unable to distinguish these cases, the district court held Mr. Akins' sentence is illegal because the trial judge inadvertently failed to announce that the sentence imposed on violation of probation remained a habitual offender sentence. Akins, supra, 2009 WL 512517.

On January 14, 2010, the state filed a timely motion for rehearing, with attachments. (V 2 R 201-235) Included was the brief of Akins' collateral counsel and the record in the prior rule 3.800(a) appeal. (V 1 R 90-200, V 2 235) Akins responded. (V 2 R 236-241) On April 22, 2010, the district court denied rehearing without elaboration. (V 2 R 242) On May 19, 2010, the Second District granted the state's motion to stay mandate to

the extent the mandate was stayed and shall not issue until July 15, 2010, in order to give the parties an opportunity to address the matter of a stay in this Honorable Court. On May 10, 2010, the state filed a timely notice to invoke this Honorable Court's discretionary jurisdiction. On June 10, 2010, this Honorable Court granted the state's motion to stay the mandate pending disposition of the petition for review.

## SUMMARY OF THE ARGUMENT

Michael Akins' claim of an illegal sentence is barred by the law of the case doctrine and collateral estoppel. Through collateral counsel, he raised the same claim in a previous Fla.R.Crim.P. 3.800(a) motion and argued such on appeal. The ensuing affirmance forecloses review of his decided claim.

To the extent these procedural bars are subject to the "manifest injustice" exception, the exception is inapplicable here. Under this Court's decision in State v. McBride, a manifest injustice does not occur because Akins' total prison time would not be reduced absent the correction to his judgment. Akins' sentence was not increased after it was imposed, and there was no double jeopardy violation such as found by this Court in Ashley v. State. Akins' offense of sale of cocaine was removed from the sentencing guidelines when he was sentenced as a habitual offender in 1991. No additional pronouncement of habitualization was required upon sentencing him for violating probation on the same offense.

Additionally, the trial court's oral statements in revoking Akins' probation sufficed to pronounce a habitual felony offender sentence. Not meeting an exception to the procedural bars, Akins is left with the outfall of his prior litigation on his claim in the postconviction and district courts, that is: his imprisonment on the suspended portion of his habitual felony

sentence which the trial court chose to impose upon the revocation of Akin’s probation.

## ARGUMENT

On review is Akins v. State, 2009 WL 5125174 (Fla. 2d DCA Dec. 30, 2009), in which the district court of appeal certified the following question of great public importance:

> **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?**

In certifying the question of great public importance, the district court reached the merits of Michael Akins' claim of an illegal sentence, brought in a successive Fla.R.Crim.P. 3.800(a) motion. The district court held that Akins' sentence is illegal because the trial judge inadvertently failed to announce that the sentence imposed on violation of probation remained a habitual offender sentence. Akins v. State, 2009 WL 5125174 (Fla. 2d DCA Dec. 30, 2009).

The applicable procedural bars of law of the case and collateral estoppel, however, foreclose the relief Akins seeks because he raised the identical claim in a prior rule 3.800(a) motion and garnered review of the adverse ruling thereon by the district court. As shown herein, he meets no exception to the bars.

The legal issue presented by the certified question is a

pure question of law, subject to de novo review. See State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001) ("If the ruling consists of a pure question of law, the ruling is subject to de novo review."). Whether Respondent is barred from raising his claim again is subject to de novo review. See State v. McBride, 848 So. 2d 287, 289 (Fla. 2003)(reviewing de novo the question of whether defendant was procedurally barred from seeking rule 3.800(a) relief).

## I. Background

In 1991, Michael Akins was designated a habitual felony offender and sentenced as such after he was found guilty by a jury of sale of cocaine. The sentence imposed on this second degree felony was a true split sentence of thirty years, suspended after twenty years, with ten years to be served on probation. See Poore v. State, 531 So. 2d 161 (Fla. 1988) (describing a "true split sentence" as "consisting of a total period of confinement with a portion of the confinement period suspended and the defendant placed on probation for that suspended portion). Akins' habitual sentence was within the maximum penalty of thirty years imprisonment,2 and was affirmed on direct appeal. Akins v. State, 591 So. 2d 187 (Fla. 2d DCA 1991)[table].

Among his various collateral attacks, Akins sought review

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2 See § 775.084(4)(a)(2), § 893.13 (Fla. Stat. 1989).

of a nonappealable Fla.R.Crim.P. 3.800(c) order. While on appeal, he attempted to raise a double jeopardy claim regarding the amendment of his sentence which reflected his probation revocation sentence was as a habitual felony offender. The district court dismissed the improper appeal without prejudice to Akins' right, if any, to raise this issue in a motion pursuant to Fla.R.Crim.P. 3.800(a). Akins v. State, 926 So. 2d 412, 413 (Fla. 2d DCA 2006).

Availing himself of the opportunity to raise such in a Fla.R.Crim.P. 3.800(a), Akins retained collateral counsel, who filed a rule 3.800(a) motion. The postconviction court addressed his claim, and on appeal, his collateral counsel briefed his claim with specific argument thereon. The district court affirmed per curiam without written decision. Akins v. State, 996 So. 2d 860 (Fla. 2d DCA 2008)[table].

In a subsequent pro se rule 3.800(a) motion, Akins again raised his claim. The postconviction court found the claim barred by res judicata and law of the case doctrines. On appeal, however, the district court reversed and certified the question before this Court.

## II. APPLICABLE PROCEDURAL BARRIERS

Although the district court felt compelled to reach the merits of Akins' claim, he had litigated his ground in his prior rule 3.800(a) motion and secured a decision on appeal. Having

done so, Akins is barred by the law of the case doctrine from obtaining review again of his decided claim.

### A. The law of the case doctrine bars review since the ground was decided on appeal.

"[T]he law of the case doctrine ... requires that 'questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." State v. McBride, 848 So. 2d 287, 290 (Fla. 2003). Law-of-the-case principles do not apply unless the issues are decided on appeal. Id., citing Kelly v. State, 739 So. 2d 1164 (Fla. 5th DCA 1999) (holding that "[s]uccessive 3.800(a) motions re-addressing issues previously considered and rejected on the merits and reviewed on appeal are barred by the doctrine of law of the case").

Akins through collateral counsel appealed the rule 3.800(a) order on his illegal sentence claim in his prior postconviction appeal. His counsel argued the April, 2005, amendment to Akins' sentence violated double jeopardy. (V 1 R 92-112) In advancing his argument, Akins' counsel relied on this Court's decision in Ashley v. State, 850 So. 2d 1265, 1267 (Fla. 2003), the Fourth District's decision in Evans v. State, 675 So. 2d 1012 (Fla. 4th DCA 1996), and the First District's decision in White v. State, 892 So. 2d 541, 542 (Fla. 1st 2005). The Second District affirmed on Akins' arguments and issued its mandate.

Nevertheless, the Second District, on review of Akins' successive rule 3.800(a) motion raising the same claim, found his arguments were supported by Evans and Ashley, and the outcome in White. Akins, supra, 2009 WL 5125174. As the state maintained below, the law of the case doctrine bars review of Akins' claim. (V 1 R 82-83)

**B. Collateral estoppel/issue preclusion bars review of the same claim in a successive rule 3.800(a) motion.**

Additionally, as the state asserted in its motion for rehearing, Akins is collaterally stopped to relitigate his ground. (V 1 R 82-83) Under Florida law, collateral estoppel, or issue preclusion, applies when "the identical issue has been litigated between the same parties or their privies." McBride, 848 So. 2d at 291, citing Gentile v. Bauder, 718 So. 2d 781, 783 (Fla. 1998). The particular matter must be fully litigated and determined in a contest that results in a final decision of a court of competent jurisdiction. Id., citing Department of Health and Rehabilitative Services v. B.J.M., 656 So. 2d 906, 910 (Fla. 1995); City of Oldsmar v. State, 790 So. 2d 1042, 1046 n. 4 (Fla. 2001).

Although collateral estoppel generally precludes relitigation of an issue in a subsequent but separate cause of action, its intent, which is to prevent parties from rearguing the same issues that have been decided between them, applies in the post-

conviction context. McBride, 848 So. 2d at 291. More specifically, collateral estoppel precludes a defendant from rearguing in a successive rule 3.800 motion the same issues argued in a prior motion. Id. This is precisely what Akins has improperly endeavoured to do in his current rule 3.800(a) motion. See also, Marek v. State, 8 So. 3d 1123, 1129, n.3 (Fla. 2009)(noting Supreme Court's decision in Cone v. Bell, ---U.S. ---, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009), has no impact on the Florida courts' policy of not allowing defendants to relitigate claims in state court that have been adjudicated previously on their merits).

**C. Manifest injustice exception is inapplicable.**

In Akins' latest rule 3.800(a) motion, he did not deny that he had raised his ground in a prior rule 3.800(a) motion. Instead, he faulted his counsel for failing to show how and when the "increase judgment" in "violation of double jeopardy" took place and claimed the trial court lacked authority to increase his sentence. (V 1 R 47)

In McBride, this Court held that collateral estoppel will not be invoked to bar relief where its application would result in a manifest injustice. McBride, 848 So. 2d at 292. In McBride, the defendant maintained that under the applicable version of the habitual offender statute, he should not have been habitualized for the offense of attempted first-degree murder.

Id., 848 So. 2d at 288. However, he had been properly habitualized on two other counts, and was serving concurrent habitual offender sentences of the same length. Id. at 292. On those facts, this Honorable Court held that the manifest injustice exception was not satisfied and affirmed the denial of relief.

**D. Habitual offender sentencing removed the offense from the sentencing guidelines, and imposition of the portion suspended is not pursuant to the guidelines.**

To the extent the procedural bar of collateral estoppel is subject to the "manifest injustice" exception, the exception is inapplicable here. Akins' sentence upon revocation of his probation constitutes a habitual offender sentence, even if the proposed relief were granted.

When a trial court imposes a suspended prison sentence and places the defendant on probation, upon revocation of probation, the trial court can only sentence the defendant at most to the suspended portion of the sentence. See Poore, 531 So. 2d at 164. Clearly, here, Akins' probation revocation prison sanction was proper, even absent the correction. In Akins' case, only five of the ten years which was suspended originally was imposed when his probation was revoked.

Of equal importance, the amendment of his judgment to reflect his sentence was as a habitual offender was unnecessary and amounts to mere surplusage. This is because his offense was removed from the guidelines when he was originally sentenced.

No uncoupling could be had by Akins of his offense from said habitualization thereon, either through the passage of time or by any claimed lapse on the part of the trial court in not specifically reciting that the five-year prison term was as a habitual felony offender status upon revocation of his probation.

As the United States Supreme Court explained the sentence is the judgment in a criminal case. Burton v. Stewart, 549 U.S. 147, 156, 127 S.Ct. 793, 798,166 L.Ed.2d 628 (2007) (noting that the "final judgment in a criminal case means the sentence. The sentence is the judgment" quoting Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 82 L.Ed. 204 (1937)). In the case of a revocation of probation, the judgment entered is the sentence on the original offense to which a defendant has entered a guilty or nolo contendere plea, or on which he has been found guilty after a jury (or nonjury) trial. It is not a judgment on a different offense.

Upon revocation of probation or community control, a trial court cannot habitualize a defendant if it did not, at the time of the original sentencing, have the option of imposing a habitual offender sentence. See King v. State, 681 So. 2d 1136 (Fla. 1996) (defendant cannot be sentenced as a habitual felony offender upon revocation of probation after serving the incarceration part of a split sentence if not declared to be a habitual offender at initial sentencing); see also, Snead v. State, 616

So. 2d 964 (Fla. 1993). Once a defendant has been adjudicated a habitual offender on an offense, however, said offense is removed from the guidelines. As this Court has recognized, "in enacting subsection (4)(e) [§ 775.084(4)(e), Fla. Stat. (Supp. 1988)] in 1988 the legislature was attempting to sever application of the habitual offender statute from the sentencing guidelines." State v. Matthews, 891 So. 2d 479, 489 (Fla. 2004), quoting Burdick v. State, 594 So. 2d 267, 270 (Fla. 1992); and citing, inter alia, Daniels v. State, 591 So. 2d 1103, 1104 (Fla. 5th DCA 1992) (noting that once a defendant is adjudicated a habitual offender with regard to an offense, that offense is removed from sentencing guidelines consideration).

In Akins' case, he was originally sentenced pursuant to the habitual offender statute. Because he was properly sentenced originally as a habitual felony offender and upon revocation of his probation, could be sentenced to the suspended portion of his habitual sentence, it is of no moment that the trial court did not specifically orally state his five-year prison term was as habitual felony offender. His habitual offender status on his sale of cocaine offense remained intact since 1991, and thus, even absent the later amendment, his five-year prison term must be served as a habitual offender. Not meeting the manifest injustice exception, Akins is barred by collateral estoppel from raising his claim again in his successive rule 3.800(a) motion.

See also, Marek v. State, 8 So. 3d 1123, 1129, n.3 (Fla. 2009)(noting the United States Supreme Court's decision in Cone v. Bell, ---U.S. ---, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009), has no impact on the Florida courts' policy of not allowing defendants to relitigate claims in state court that have been adjudicated previously on their merits).

## III. DOUBLE JEOPARDY and SENTENCE CLARIFICATION

Alternatively, even if, arguendo, this Court were to find no procedural bar, nevertheless the posture of Akins' claim does not improve on review of the certified question. Not only does he fail to meet the manifest injustice exception, Akins cannot show any constitutional violation of double jeopardy principles in the amendment of his judgment at issue.

### A. State proscription mirrors the federal prohibition.

The Fifth Amendment to the United States Constitution provides: . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . Likewise, Article I, Section § 9 of the Florida Constitution provides: "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself." Id. In Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), the Court held that the Double Jeopardy Clause of the Fifth Amendment is made appli-

cable to the States by the Fourteenth Amendment Due Process Clause.

This Honorable Court has repeatedly observed that Florida's state constitutional prohibition on double jeopardy exactly mirrors the federal constitutional prohibition. See 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 v. State, 825 So. 2d 362, 365 (Fla. 2002)(observing that the "scope of the Double Jeopardy Clause is the same in both the federal and Florida Constitutions" citing Carawan v. State, 515 So. 2d 161, 164 (Fla. 1987) ("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."), superseded on other grounds by § 775.021(4), Fla. Stat. (2001); see also Westerheide v. State, 831 So. 2d 93, 104 (Fla. 2002)(noting that the Florida 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).

**B. Monge and Collins guide that sentence correction in a noncapital case does not implicate double jeopardy.**

Both the United States Supreme Court and this Court have held that double jeopardy does not apply to noncapital resentencing. Because we read our state's proscription in tandem with the federal prohibition, double jeopardy is not implicated by a re-sentencing in a noncapital case in Florida. Pursuant to United Supreme Court precedent and also this Honorable Court's precedent following same, discussed infra, the circuit court in Akins' case was not precluded by the proscription against double jeopardy from amending his probation revocation sentence to reflect such was as a habitual offender.

In Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998), the Supreme Court explained that double jeopardy does not apply to noncapital sentencing; it applies only to capital sentencing. Monge was convicted by a jury of using a minor to sell marijuana, the sale or transportation of marijuana, and the possession of marijuana for sale. Under California's three-strikes law, a defendant who has one prior serious felony conviction receives double the normal prison sentence. Monge, 524 U.S. at 724, 118 S.Ct. at 2248. At the sentencing hearing, the State introduced evidence of a prior conviction for an assault with a deadly weapon but not evidence of personal use of a deadly weapon. Monge argued that the weapon

used was not a deadly weapon. The trial court found that prior conviction counted as a strike and doubled the sentence as required under the three-strike provision. Accordingly, Monge was sentenced to ten rather than five years.

On appeal to the California Court of Appeal, the state conceded that the proof of the prior conviction was insufficient but requested a second opportunity at a new sentencing proceedings to prove the facts of the prior conviction. The intermediate appellate court determined that retrying the prior serious felony allegation would violate double jeopardy. The California Supreme Court reversed, concluding that the state and federal prohibitions against double jeopardy did not apply to sentencing proceedings in noncapital cases to determine the truth of a prior conviction allegation. Three Justices of the California Supreme Court dissented, asserting that, under Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), double jeopardy precluded the State from successive efforts to prove the required prior conviction. The United States Supreme Court affirmed the California Supreme Court's conclusion.

The Supreme Court in Monge concluded that "the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context." The Court explained that double jeopardy is limited to capital sentencing and 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.'" Monge, 524 U.S. at 728, 118 S.Ct. at 2250.

The Monge Court explained that Bullington was confined to capital cases. Bullington created a "narrow" exception for capital cases to the general rule that the Double Jeopardy Clause does not apply to sentencing proceedings. Monge, 524 U.S. at 730, 118 S.Ct. at 2251. Most importantly, the Monge Court noted that a jury's deliberations in a capital sentencing proceeding bear the "hallmarks of the trial on guilt or innocence." Monge, 524 U.S. at 726, 730,118 S.Ct. at 2251. In a capital penalty phase, evidence is required to be introduced in a separate proceeding that formally resembles a trial. At a penalty phase, the prosecution is required to establish certain facts beyond a reasonable doubt. There are extensive jury instructions and the jury must consider all mitigation presented. These features distinguish capital from noncapital sentencings.

The Monge Court also noted that capital sentencing proceedings have a federal constitutional foundation; whereas, noncapital sentencing proceedings, which are based on state sentencing statutes, do not. Moreover, the factual determinations in capital sentencing proceedings are different from the simpler factual determinations made in noncapital sentencing proceedings. In addition, the Monge Court noted the much greater financial

and emotional burden placed on capital defendants than noncapital defendants. The "embarrassment, expense and ordeal" as well as the "anxiety and insecurity" that a capital defendant faces is "at least equivalent to that faced by any defendant at the guilt phase of a criminal trial" but that observation is not equally true of a noncapital defendant. Monge, 524 U.S. at 731,118 S.Ct. at 2251.

For those reasons, the Monge Court held that double jeopardy does not apply to sentencings outside the capital sentencing context. The Court concluded "Bullington's rationale is confined to the unique circumstances of capital sentencing and that the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context." Monge, 524 U.S. at 734,118 S.Ct. at 2253.3

This Honorable Court has also recognized that double jeop-

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3Monge was a 5-4 opinion, but several of the dissenting justices dissented on other grounds. Justice Scalia, joined by Justices Souter and Ginsburg, dissented. That dissent, however, starts with the statements: "I agree with the Court's determination that Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), should not be extended, and its conclusion that the Double Jeopardy Clause does not apply to noncapital sentencing proceedings. I do not, however, agree with the Court's assumption that only a sentencing proceeding was at issue here." Monge, 524 U.S. at 737, 118 S.Ct. at 2255 (Scalia, J., dissenting on other grounds). Only Justice Souter disagreed on the double jeopardy aspect of the case. Monge, 524 U.S. at 734, 118 S.Ct. at 2253 (Souter, J., dissenting on double jeopardy grounds). Thus, Monge represents a 8-1 opinion regarding double jeopardy.

ardy does not apply to noncapital re-sentencing in State v. Collins, 985 So. 2d 985 (Fla. 2008). There, 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." Id., at 993.

Collins pled no contest to robbery, and the State sought to sentence Collins as a habitual offender. At sentencing, the prosecutor presented evidence of several prior felony convictions. Collins, 985 So. 2d at 986. Collins' counsel objected on grounds there was no evidence that the prior convictions were "separately sentenced" as the habitual offender statute requires. The trial court overruled the objection and sentenced Collins to 20 years imprisonment as a habitual offender. Collins, 985 So. 2d at 987.

On appeal, the state conceded that the evidence below was insufficient to establish the prior convictions occurred at separate sentencing proceedings. Nonetheless, the state requested a remand to allow the state a second opportunity to prove the required timing for habitual offender sentencing. The Second District, concluding the state presented insufficient evidence establishing the prior convictions, remanded for resentencing under the Criminal Punishment Code. Collins v. State, 893 So. 2d 592 (Fla. 2d DCA 2004). Relying on its prior precedent, the Second District declined the state a second opportu-

nity to prove the necessary facts at a second sentencing proceeding, Id., 893 So. 2d at 594, but certified conflict with decisions in the First, Fourth and Fifth Districts.

On review in this Honorable Court, the State again conceded at oral argument that the evidence was insufficient to establish that the prior convictions were separately sentenced. Collins, 985 So. 2d at 987, n.2. Even so, this Court held "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. The Court held that its decision does not implicate double jeopardy concerns. Id., 985 So. 2d at 989, and explained that none of the three separate constitutional protections that constitute double jeopardy are "involved in a resentencing." Collins, 985 So.2d at 992-993. Stating resentencings are not a second prosecution, the Court noted that in "almost identical circumstances, the United States Supreme Court has held that allowing the introduction of additional evidence at resentencing does not implicate double jeopardy concerns" Id., 985 So. 2d at 992 citing Monge, supra. The Court quoted the Monge Court distinguishing between an acquittal and a sentence by noting the "pronouncement of sentence simply does not have the qualities of constitutional finality that attend an acquittal." The Court then found, like the United States Supreme Court, "that the Dou-

ble Jeopardy Clause does not preclude granting the State a second opportunity to demonstrate that Collins meets the criteria for habitualization." The Court noted that it had held in other contexts that a resentencing following a reversal on a sentencing issue does not implicate double jeopardy concerns and then concluded that the same was true of this type of resentencing. Id., 985 So. 2d at 993.

Sub judice, the trial court was not precluded by the prohibition against double jeopardy from clarifying on the judgment in this noncapital case that the sentence was as a habitual offender. Moreover, there was no increase. The clarification was merely consistent with the original adjudication, as well as the sentence orally pronounced upon revocation of Akins' probation.

**C. Ashley and Evans do not control correction of the judgment which does not increase the sentence.**

In Ashley, the state at Ashley's sentence requested the trial court adjudicate him as a habitual violent offender, while the defense argued there was discretion to impose a lesser sanction. At sentencing, the court sentenced Ashley as a habitual felony offender to twenty-five years in prison. No mandatory minimum sentence was imposed. Id., 850 So. 2d at 1266. The trial court had intended, however, to designate the defendant a habitual violent felony offender rather than merely a habitual offender. Three days later, Ashley was brought back to court,

and his sentence was increased. The trial court changed the sentence to reflect he was adjudicated a habitual violent offender adjudication and added a ten-year mandatory minimum term. This Court concluded this amounted to an increase of Ashley's sentence after he had begun to serve the sentence which violated double jeopardy principles. Ashley v. State, 850 So. 2d 1265, 1267 (Fla. 2003). The Court explained:

> We recognize 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. However, based on the prior precedent from this Court, we must approve the Fourth District's opinion in Evans [v. State, 675 So. 2d 1012 (Fla. 4th DCA 1996)] and disapprove the First District's decision in Ashley [v. State, 772 So. 2d 42 (Fla. 1st DCA 2000)], because the oral pronouncement of sentencing controls. To hold otherwise does serious harm to the double jeopardy principles which have guided our courts for centuries.

Id., 850 So. 2d at 1268-69.

Ashley predates Collins. The state submits that the Ashley result is not required in light of Collins, which followed Monge. But, even aside from this point, Ashley does not require the relief the district court in Akins' case felt compelled to grant.

Unlike Ashley, 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. Because his offense was removed from the guidelines when he was

sentenced as a habitual felony offender, Akins' status remained as such. Thus, the pronouncements upon revoking his probation required no restating of his habitual status.

The district court wrestled with Ashley's acceptance of Evans. There, when the defendant was sentenced to the suspended portion of his true split sentence which was originally imposed as a habitual offender, the trial court did not announce the sentence was as a habitual offender. The First District concluded it was a violation of double jeopardy to clarify that the sentence was imposed as a habitual offender. Id., 675 So. 2d at 1014.

The Evans court, however, did not account for the divesture of the defendant's offense from the sentencing guidelines by his sentencing originally as a habitual offender. To the extent that Evans stands for the proposition that a habitual status must be re-pronounced upon sentencing a previously sentenced habitual offender to a suspended portion of said sentence on the same offense, this Court should disapprove of such reasoning.

The better reasoning is that in Mann v. State, 851 So. 2d 901 (Fla. 3rd DCA 2003). There, the defendant was sentenced as a habitual violent offender, and when he violated his probation, the court omitted the term "violent" in pronouncing sentence. Id. The Third District found that Ashley was not applicable. It is clear that in saying the sentence was as a habitual of-

fender, rather than an HVO, this was a mere slip of the tongue which did not give rise to a double jeopardy issue, id., citing McCray v. State, 838 So. 2d 1213 (Fla. 3d DCA 2003). The Mann court reasoned that 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.

Likewise, here, there was no increase in sentence after Akins commenced service thereon. The trial court's oral statements sufficed to impose a habitual felony sentence even absent an explicit recitation that such was as a habitual felony offender.

**D. The oral statements of the trial court sufficed to pronounce a habitual offender sentence.**

At sentencing, the trial court addressed the habitual offender sentence, and in particular, the suspended portion with Akins, as the following colloquy bears out:

> THE COURT: You're familiar with the transcript of the last time that you were before the Court before you changed your plea?
>
> THE DEFENDANT: Yes, I do, sir.
>
> THE COURT: We acknowledged that you had been sentenced to 30 years. We acknowledged that you did 20.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. And then I said, "You are 50

years old."

THE DEFENDANT: Yes, sir.

THE COURT: And I said, "You are too old for that."

And you responded, "Yes, Sir."

THE DEFENDANT: True.

THE COURT: I said, "We are going to give you one last chance."

You said, "Thank you, sir."

THE DEFENDANT: True.

THE COURT: I said, "Dabble in drugs and you are going to do the last 10." Do you remember that?

THE DEFENDANT: Yes, sir.

THE COURT: You answered, "Thank you, sir."

THE DEFENDANT: Yes, sir.

THE COURT: I asked this question on page 10, line 14: "Do you have any doubt that I will not impose that 10 years for you?"

You answered, "No."

I said, "I mean, you come back here on another dirty urine or I find out that you're doing something else unlawful, then we just say good-bye." right?

THE DEFENDANT: True, sir.

THE COURT: And you said, I appreciate it."

(V 1 R 148-150) The Court further referred to the prison portion of his split sentence, and in so doing, imposed a portion of the balance which had been suspended:

I'm also going to take into consideration that the De-

> partment of Corrections is probably going to take away some of the gain time that you might have got on that additional -- the first 20 years. They're probably going to take some time away that you thought you had earned.
>
> . . .
>
> THE COURT: So what I'm going to do is I'm going to sentence you 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 . . .

(V 1 R 151) From the statements of the trial court, it is sufficiently clear, absent further elaboration, that the sentence pronounced was as a habitual offender. See Scanes v. State, 876 So. 2d 1238, 1239-40 (Fla. 4th DCA)("Magic words" are not necessary to establish what the sentencing court intended), rev. denied, 892 So.2d 1014 (Fla. 2004) (citing, inter alia, O'Neal v. State, 862 So. 2d 91, 92 (Fla. 2d DCA 2003).

Further and alternatively, any ambiguity in the court's pronouncements could be properly corrected without offending double jeopardy principles in this case. This is because not only is it evident the intent was to pronounce a habitual sentence, it can also be seen that the amendment did not change his sentence.

In Ashley, a trial court orally pronounced a legal and unambiguous sentence. Where there is an ambiguity in the oral pronouncement, however, the proper remedy is for the trial court to clarify the sentence imposed. Chapman v. State, 14 So. 3d 273, 274 (Fla. 5th DCA 2009), citing Franklin v. State, 969 So.

2d 399 (Fla. 4th DCA 2007) (where record demonstrates that during oral pronouncement of sentence, trial court made inconsistent statements, matter must be remanded to clarify sentence imposed and enter such corrected sentencing orders as may be appropriate); and Coleman v. State, 898 So. 2d 997 (Fla. 2d DCA 2005).

Here, the trial court in sentencing Akins on his probation violation simply, and properly, imposed a portion of his habitual sentence which had been suspended in 1991. That the trial court did not explicitly recite Akins' habitual status again does not mean a nonhabitual sentence was imposed. To so conclude would require a finding the trial court imposed an unambiguous guidelines sentence. On this record, however, such a conclusion cannot be reached. The parties and trial court undeniably understood that Akins faced, and was being sentenced, on the portion of his habitual sentence which had been suspended. As the postconviction court recognized in its prior order of Akins' claim (V 1 R 40), the repeated references by the trial court to the suspended portion of Akins' habitual offender sentence bear out the revocation court's intent to sentence Akins as a habitual offender. The later amendment simply comported with the sentence which was orally imposed.

The partial suspension in 1991 did not divest Akins of his habitual offender adjudication and sentencing to an extended

prison sentence. His release on the prison portion of his split sentence to serve his probation did not do so either.

Nor does an inadvertent misstep by the trial court in pronouncing the probation revocation sentence require, on double jeopardy grounds, the conclusion that the offense was released to the protective embrace of the sentencing guidelines. If and to the extent Ashley requires any such conclusion, this Court should recede from Ashley. As Judge Altenbernd has explained, simple human errors are inevitable, and the constitutional doctrine of double jeopardy was never intended to make sentencing a game. Gardner v. State, 30 So.3d 629, 634 (Fla. 2d DCA 2010) (Altenbernd, J., dissenting) (quoting Bozza v. United States, 330 U.S. 160, 166-67, 67 S.Ct. 645, 91 L.Ed. 818 (1947), for the principle that "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner").

In conclusion, Akins' ground is procedurally barred. Alternatively, should this Court reach Akins' ground, it should answer the certified question in the negative. Having been declared a habitual offender, a defendant such as Akins does not lose his habitual offender status if not restated by the trial court upon sentencing him for violation of probation. Proper habitual offender sentencing on an offense is not shed when the suspended portion is later imposed.

## 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 Terry P. Roberts, Esq., of the Law Office of Terry P. Roberts, P.O. Box 12355, Tallahassee, FL 32308 this 12th day of July, 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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