IN THE SUPREME COURT OF FLORIDA

CHRISTIAN E. JACKSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC05-654

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

RONALD NAPOLITANO
Assistant Attorney General
Florida Bar No. 175130
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2367
(813)801-0600
Fax (813)873-4771

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Petitioner filed a *pro se* 3.800(a) motion to correct an illegal sentence (R1-5). He alleged in his *pro se* 3.800(a) motion that he was convicted by a jury in September of 1998 for the offense of robbery, a second degree felony and sentenced to twenty (20) years imprisonment with a ten (10) year minimum mandatory term followed by ten (10) years probation as habitual violent felony offender after rejecting plea offer initiated and repeated by the court at pre-trial conferences on July 6th and July 7th and on July 8th as jury selection was to start of twelve years (R/2-3). Relying upon the decision in Wilson v. State, 845 So. 2d 142 (Fla. 2003), he claimed the sentence was vindictive and should be reversed and he should be sentenced before a different judge (R2-4). The trial court entered a summary order dismissing the motion relying upon Boyd v. State, 880 So. 2d 726 (Fla. 2d DCA 2004) which held claims of vindictive sentencing cannot be raised in a rule 3.800(a) motion.

The Second District Court of appeals affirmed the decision of the trial court in a per curiam opinion citing to Boyd v. State, *id.* and certified conflict with the Fifth District in Johnson v. State, 877 So. 2d 795 (Fla. 5th DCA 2004). Petitioner filed a timely notice to invoke discretionary jurisdiction of this Court based upon certified conflict and also based upon

"express and express conflict" with the Fifth District in Johnson v. State.

This Court, in its order of April 27, 2005, postponed its decision on jurisdiction and ordered the parties to summit briefs.

SUMMARY OF THE ARGUMENT

I. This Court does not have jurisdiction based upon "certified direct conflict" under Article V., § 3(b)(4) between the decision of the Second District Court of Appeal in Jackson v. State, 895 So. 2d 1275 (Fla. 2d DCA 2005) and the Fifth District in Johnson v. State, 877 So. 2d 795 (Fla. 5th DCA 2004), nor does this Court have jurisdiction based upon "express and direct conflict", pursuant to Article V., § 3(b)3) between the Second District in Jackson, *supra.,* and the Third District in Smith v. State, 842 So. 2d 1047 (Fla. 2003). There is no ground for "certified direct conflict" or "direct and express conflict" because there is no conflict between the decision of Second District and those of the Fifth and Third District. Neither Johnson, *supra*., nor Smith, *supra.,* ever addressed the procedural bar issue that a vindictive sentencing claim cannot be brought under a rule 3.800(a) motion; both those cases rested on the merits of the vindictiveness claims themselves. Jackson, *supra*, never addresses the merits of the vindictive sentencing claim finding the claim is procedurally barred. Furthermore, both the Fifth District and the Third District have subsequently clarified and distinguished their decisions in Johnson, *supra.,* and Smith.,*supra*, respectively and held neither case addressed the procedural bar claim and have adopted the reasoning of the

Second District. This lends further support to the respondent's argument there is no basis for conflict jurisdiction.

Even if this Court were to determine it has conflict jurisdiction, it should not exercise its discretionary jurisdiction in this case based upon the fact the only district courts of appeal that have rendered decisions on this issue of whether a vindictive sentencing claim can be raised in rule 3.800(a), the Second, Third, Fourth and Fifth Districts are in agreement that such claims cannot be raised in a 3.800(a) motion.

II. A vindictive sentencing cannot be brought under a rule 3.800(a) motion because such a sentence itself not an "illegal sentence". "[a] sentence is 'illegal' if it 'imposes a kind of punishment that no judge under the entire sentencing body of sentencing statutes could possibly inflict under **any** set of factual circumstances Carter v. State,786 So. 2d 1173, 1181 (Fla. 2001) (bold emphasis added). Petitioner's sentence as a habitual violent felony offender of twenty years imprisonment with a ten year mandatory minimum term followed by ten years probation for the robbery, a second degree felony is a legal sentence. As the Second District reasoned in Judge v. State, 596 So. 2d 73, at 77 (Fla. 2d DCA 1991) (bold emphasis added) "Rule 3.800(a) is intended to provide relief for a narrow category of cases in which the sentence imposes a penalty that

is simply not authorized by law. It is concerned primarily with whether the terms and conditions of the punishment for a particular case are permissible as a matter of law. **It is not a vehicle designed to re-examine whether the procedure employed to impose the punishment comported with statutory law and due process**."

Petitioner's remedy was to raise the issue on vindictive sentencing on direct appeal or in a timely filed 3.850 motion and not raise the issue at any time under a 3.800(a) motion.

ARGUMENT

ISSUE I

WHETHER THIS COURT HAS JURISDICTION IN THIS CASE AND/OR WHETHER THIS COURT SHOULD EXERCISE JURISDICTION IN THIS CASE (RESTATED).

Initially, respondent takes the position this Court lacks jurisdiction to review the decision of the Second District in Jackson v. State, 895 So. 2d 1275 (Fla. 2d DCA 2005) based upon either certified conflict with Johnson v. State, 877 So. 2d 795 (Fla. 5th DCA 2004) pursuant to Art. V., § 3(b)(4) or Art. V., § 3(b)(3), Florida Constitution.

Under Art. V., § 3(b)(4), Florida Constitution, provides in pertinent part that the Florida Supreme Court:

> (3) May review any decision of a district court of appeal... that is certified by it to be in direct conflict with a decision of another district court of appeal.

There is no certifiable direct conflict between the decision of the Second District in Jackson v. State, 895 So. 2d 1275 and the Fifth District in Johnson v. State, 877 So. 2d 795. In Jackson, *supra*., a decision rendered on March 5, 2005, the Second District never reached the merits of appellant's claim of vindictive sentencing finding the claim was procedurally barred by holding "a claim of vindictive sentencing is not cognizable

in a motion to correct an illegal sentence filed pursuant to Florida Rule of Criminal Procedure 3.800(a)". In Johnson v. State, 877 So. 2d 795, a decision rendered by the Fifth District on July 2, 4004, the Fifth District never addressed this procedural bar claim with the four corners of the opinion. The cases are distinguishable and the decisions based upon different legal principles: Jackson, *supra*., on procedural bar and Johnson, *supra*., on the legal merits of the vindictive sentencing claim. *See* Reaves v. State, 485 So. 2d 829, 830 n. 3 (Fla. 1986):

> This case illustrates a common error made in preparing jurisdictional briefs based on alleges decisional conflict. **The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict....we are not permitted to base our conflict jurisdiction on review of the record** or on facts recited only in dissenting points. **Thus, it is pointless and misleading to comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here**. Similarly, voluminous appendices are normally not permitted.

More importantly, the decision by the Fifth District in Johnson v. State, 877 So. 2d 795, rendered by a panel consisting of Judges Sawaya, Peterson and Monaco, was explained and distinguished by another panel consisting of Judges Torpy, Griffin and Monaco in Bouno v. State, 900 So. 2d 672 (Fla. 5th

DCA 2005) rendered on April 8, 2005. In Bouno, *id*., the panel specifically held claims of vindictive sentencing are not cognizable under Florida Rule of Criminal Procedure 3.800(a) specifically relying upon the decisions of the Third District Court of Appeal in Reese v. State, 896 So. 2d 807 (Fla. 3d DCA 2005) and the Second District Court of Appeal in Boyd v. State, 880 So. 2d 727 (Fla. 2d DCA 2004), *review denied*, 888 So. 2d 621 (Fla. 2004). As the panel in Bouno, *id*., stated:

> In concluding as we have, we have not overlooked our recent opinion in *Johnson v. State*, 877 So. 2d 795 (Fla. 5th DCA 2004), wherein we remanded for further consideration a similar claim made pursuant to rule 3.800(a). A review of this court's file in that case, however, reveals that the state never raised the procedural objection that is the basis of our holding today, and that issue was not addressed in the panel opinion. Instead, the only issue addressed in *Johnson* was whether the lower court erred had correctly applied the law of the case doctrine. Therefore, our opinion today does not conflict with *Johnson*.

The Bouno, *id*., opinion lends further support to respondent. There is no certifiable direct conflict between the decision in the Second District in Jackson v. State, 895 So. 2d 1275 and the Fifth District in Johnson v. State, 877 So. 2d 795, because the procedural bar issue was never raised in appellate pleadings or discussed in the opinion. The Bouno, *supra*, procedural bar decision being the being the more recent decision out of the

Fifth District takes precedence over Johnson v. State, *supra* and negates any conflict with the Second District in Jackson v. State, *supra. Cf.* State v. Walker, 593 So. 2d 1049 (Fla. 1992). The Fourth District in Walker held life felonies were not subject to enhancement under the habitual offender statute. Walker sought conflict jurisdiction relying upon a panel decision of the First District in Watson v. State, 504 So. 2d 1267 (Fla. 1st DCA 1986) which came to the opposite conclusion. This Court, the Florida Supreme Court, noted in 1990 another panel decision of the First District in Johnson v. State, 568 So. 2d 519 (Fla. 1st DCA 1990) agreed with the holding in Walker. This Court then rejected conflict jurisdiction stating:

> Consequently, the cited decisions present no direct and express conflict as required by article V, section 3(b)(3) of the Florida Constitution. See *Little v. State*, 206 So. 2d 9, 10 (Fla. 1968) (holding that in the result of intradistrict conflict, the decision later in overrules the former as the decisional law in the district).

The Fourth District Court of Appeal in the cases Baker v. State, 2005 Fla. App. LEXIS 7269; 30 Fla. L. Weekly D1268 (Fla. 4th DCA May 18, 2005) and Benedetto v. State, 895 So. 2d (4th DCA 2005), has rendered per curiam opinions holding claims of vindictive sentencing cannot be raised in a 3.800(a) motion relying upon the case of Boyd v. State, 880 So. 2d 726 (Fla. 2d

DCA 2004) *review denied* Boyd v. State, 888 So. 2d 621 (Fla. 2004).

Although the Third District Court of Appeal has certified conflict with the Fifth District's decision in Johnson v. State, 877 So. 2d 795 in the cases cited by the petitioner: Gonzalez v. State, 897 So. 2d 551 (Fla. 3d DCA 2005) *notice of direct conflict filed* SC05-593, Taylor v. State, 897 So. 2d 495 (Fla. 3d DCA 2005), *notice of certified conflict filed* SC05-420, Reese v. State, 896 So. 2d 807 (Fla. 3d DCA 2005), *notice of certified conflict filed* SC05-612, Satahoo v. State, 895 So. 2d 1195 (Fla. 3d DCA 2005), *notice of certified conflict filed* SC05-388, Luma v. State, 895 So. 2d 1202 (Fla. 3d DCA 2005), *notice of certified conflict filed* SC05-389, Galindez v. State, 892 So. 2d 1231 (Fla. 3d DCA 2005), *notice of certified conflict filed* SC05-513, and Wright v. State, 891 So. 2d 618 (Fla. 3d DCA 2005), *notice of certified conflict filed* SC05-232, the Third District has also held in each of these cases a claim of vindictive sentencing cannot be raised in a 3.800(a) motion to correct illegal sentence. More importantly, the Third District in Taylor, *supra*., Reese, *supra*., and Wright, *supra*, explained and distinguished previous cases wherein other panels of the Third District in Ortiz v. State, 884 So. 2d 1086 (Fla. 3d DCA 2004) and Smith v. State, 842 So. 2d 1047 (Fla. 3d DCA 2003)

where the court reached the reached the legal merits of vindictive sentencing claims raised in 3.800(a) motion:

> We comment briefly on two recent cases from this court which addressed the vindictive sentencing claims which had been brought under *Rule 3.800(a).* Both cases are distinguishable:
>
> In *Ortiz v. State*, 884 So. 2d 1086 (Fla. 3d DCA 2004), this court issued an opinion denying a claim of vindictive sentencing which had been brought under *Rule 3.800(a)*. There is no indication that any procedural objection was raised to the use of *Rule 3.800(a)* in that case, and the procedural issue was not discussed in the Ortiz opinion.
>
> In *Smith v. State*, 842 So. 2d 1047 (Fla. 3d DCA 2003), this court issued an opinion which granted relief on a vindictive sentencing claim which had been brought under *Rule 3.800(a).* Again, there is no indication that any procedural objection was raised to the use of *Rule 3.800(a)* in that case, and the panel opinion did not discuss the procedural issue. A review of this court's file in Smith indicates that the *Rule* 3.800(a) motion was filed within the two-year time limit for a motion under *Florida Rule of Criminal Procedure 3.850*. Since the *Rule 3.800(a)* motion could have been treated as a timely *Rule 3.850* motion, the procedural error had no practical significance in that case.

The Third District, respondent submits the Second District erred in certifying conflict with the Fifth District in Johnson v. State, 877 So. 2d 795 because there is not direct conflict. In Gonzalez, Taylor, Reese, Satahoo, Luma, Galindez, and Wright,

supra, the Third District never reached the merits of the appellant's claim of vindictive sentencing finding the claim was procedurally barred by holding a claim of vindictive sentencing is not cognizable in a motion to correct an illegal sentence filed pursuant to Florida Rule of Criminal Procedure 3.800(a). In Johnson v. State, 877 So. 2d 795, a decision rendered by the Fifth District on July 2, 4004, the Fifth District never addressed this procedural bar claim with the four corners of the opinion. *See* Reaves v. State, 485 So. 2d 829, 830 n. 3 (Fla. 1986).

Additionally, just as the Fifth District's decision in Johnson v. State, 877 So. 2d 795, was later explained and distinguished in Bouno, *supra*, so also the Third District in Taylor, *supra*., Reese, *supra*., and Wright, *supra*, explained and distinguished previous cases wherein other panels of the Third District in Ortiz v. State, 884 So. 2d 1086 (Fla. 3d DCA 2004) and Smith v. State, 842 So. 2d 1047 (Fla. 3d DCA 2003) where the court reached the legal merits of vindictive sentencing claims raised in 3.800(a) motion.

Petitioner then makes an alternative jurisdictional argument stating even if this Court were to determine certified conflict jurisdiction was incorrect, nevertheless, this Court has jurisdiction based upon "express and direct conflict", under Article V., § 3(b)(3), Florida Constitution (The supreme court

"may review any decision of a district court of appeal....that expressly and directly conflicts with a decision of another district court of appeal..."). Petitioner argues the decision of the Second District in Jackson, *supra*., is in direct and express conflict with the Third District in Smith v. State, 842 So. 2d 1047 (Fla. 3d DCA 2003). Petitioner again makes the argument that decision of the Third District in Smith, *id*., "expressly and directly " conflicts with the Second District in Jackson., *supra.*

Respondent must disagree. There is no express and direct conflict. Respondent reiterates its argument made earlier regarding conflict alleged with the Fifth District in Johnson, *supra.* There is no direct and express conflict between the two decisions. The decision in Smith, *supra.,* never addressed this procedural bar claim with the four corners of the opinion. The cases are distinguishable and the decisions based upon different legal principles: Jackson, *supra*., on procedural bar and Smith, *supra*., on the legal merits of the vindictive sentencing claim. *See* Reaves v. State, 485 So. 2d 829, 830 n. 3 (Fla. 1986).

Petitioner acknowledges the Third District in decisions subsequent to Smith, *supra*. Indeed, as the respondent explained above, the Third District in Taylor, *supra*., Reese, *supra*., and Wright, *supra*, explained and distinguished previous cases wherein other panels of the Third District in Ortiz v. State,

884 So. 2d 1086 (Fla. 3d DCA 2004) and Smith v. State, 842 So. 2d 1047 (Fla. 3d DCA 2003) where the court reached the reached the legal merits of vindictive sentencing claims raised in 3.800(a) motion from Taylor, *supra*., Reese, *supra*., and Wright, *supra*, which were based on procedural bar. The Taylor, *supra*., Reese, *supra*., and Wright, *supra*, procedural bar decisions being the being the more recent decision out of the Third District takes precedence over Smith v. State, *supra* and negates any conflict with the Second District in Jackson v. State, *supra. Cf.* State v. Walker, 593 So. 2d 1049 (Fla. 1992).

Finally, even if this Court should determine it has discretionary jurisdiction based upon either certified conflict or express and direct conflict, respondent submits this Court deny discretionary review, because as a result of subsequent decisions out of the Fifth District in Bouno, *supra*., and the Third District in Taylor, *supra*., Reese, *supra*., and Wright, *supra,* there is no conflict between the Second District in Jackson, *supra*, and the Third and Fifth District courts of appeal who now agree with the Second District that claims of vindictive sentencing cannot be brought under a rule 3.800(a) motion.

ISSUE II

WHETHER A CLAIM OF VINDICTIVE SENTENCING WHICH IT IS ALLEGED APPEARS ON THE FACE OF THE RECORD CAN BE RAISED AT ANY TIME IN A RULE 3.800(A) MOTION TO VACATE AN ILLEGAL SENTENCE (RESTATED).

The standard of review is de novo since the issue involved is a question of legal procedure.

Respondent submits a claim of vindictive sentencing even if it is alleged is apparent on the face of the record cannot be raised in rule 3.800(a) motion. As this Court reasoned in Carter v. State, 786 So. 2d 1173, 1177-1178, 1181 (Fla. 2001):

> ...Both the Third and Fourth Districts have expressed concern that defining an illegal sentence as one that "patently fails to comport with statutory or constitutional limitations" is too expansive because it encompasses all patent sentencing errors. *See Bover v. State*, 732 So. 2d at 1193; *Blakely v. State*, 746 So. 2d 1182, 1186 (Fla. 4th DCA 1999). The Third District has lamented:
>
> > Rule 3.800(a) motions now routinely rely on the statement in *State v. Mancino*, 714 So. 2d 429, 433 (Fla. 1998), that "[a] sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.'" Although not intended, the statement is being interpreted as saying that any setnencing error which can be gleaned from the face of the record renders a sentence illegal, and may be raised at any time.
>
> *Bover,* 732 So.2d at 1163; *See Kelly v. State*, 739 So. 2d 1164, 1165 (Fla. 5th DCA

> 1999). (Observing that "[r]ule 3.800(a) motions now routinely rely on the language in *Mancino* which has been interpreted to allow review of any sentencing error discernable from the face of the record")....
>
> ...{A]ttempting to formulate a more workable definition of "illegal sentence", Judge Farmer has explained:
>
> > To be illegal within the meaning of rule 3.800(a), *the sentence must impose a kind of punishment that no judge under the entire body of sentencing statutes could possibly impose under any set of factual circumstances.* On the other hand, if it is possible under all the sentencing statutes - given a specific set of facts - to impose a particular sentence, then the setnece will not be illegal within ruule 3.800(a) even though the judge erred in imposing it.
>
> *Blakely,* 786 So. 2d So.2d 1186-87 (emphasis supplied).
>
> * * * *
>
> ...[w]e approve of Judge Farmer's definition in *Blakely* - that a sentence is "illegal" if it "imposes a kind of punishment that no judge under the entire sentencing body of sentencing statutes could possibly inflict under any set of factual circumstances - because it comes close to formulating a workable definition of "illegal" sentence. 786 So.2d ast 1187.

The Second District Court of Appeal in Jackson, *supra*., in it per curiam opinion holding a claim of vindictive sentencing cannot be raised in a 3.800(a) motion cited to its prior recision in Boyd v. State, 880 So. 2d 726 (Fla. 2d DCA 2004),

review denied 888 So.2d 621 (Fla. 2004). The Second District in Boyd, *id.*, relied upon this Court's definition of what constitutes an "illegal" sentence in Carter, *supra.* Mr. Boyd argued the trial court punished him for going to trial by giving him a greater sentence (seventeen years) then was offered to him if pled (seven years) for the offense of attempted second degree murder with a deadly weapon a first degree felony. The Second District reasoned:

> Mr. Boyd's claim of vindictive sentencing is not cognizable in a motion to correct illegal sentence failed pursuant to Florida Rule of Criminal Procedure 3.800(a). A sentence is illegal for purposes of Rule 3.800(a) if it imposes punishment that no judge could possibly impose under the entire body of sentencing statutes without regard to underlying factual circumstances. *See Carter*, 786 So. 2d at 1181. In 1994, attempted second degree murder with a deadly weapon was a first degree felony that allowed the trial judge to impose a sentence well in excess of seventeen years imprisonment...Thus, Mr. Boyd's sentence is not illegal for purposes of a rule 3.800(a) even if the trial court's actions were vindictive.
>
> In *Wilson v. State*, 845 So. 2d 142 (Fla. 2003), the Florida Supreme Court recently clarified the test to consider when determining on direct appeal whether a sentence may be vindictive because the trial judge participated in pretrial plea negotiations. Certain conduct by the trial judge creates a presumption of vindictiveness. When a defendant establishes the existence of this presumption, the burden then shifts to the State to rebut the presumption with

> "affirmative evidence of record". *Id* at 156. This type of analysis is not applicable in a rule 3.800(q) proceeding and should have been addressed at an earlier stage.

Boyd, 880 So. 2d at 727-728.

The Second District's reasoning was correct and in line with this Court's reasoning in Carter, *supra.* In the instant case, petitioner alleged in his pro se 3.800(a) motion was convicted by a jury in September of 1998 for the offense of robbery, a second degree felony and sentenced to twenty (20) years imprisonment with a ten (10) year minimum mandatory term followed by ten (10) years probation as habitual violent felony offender after rejecting plea offer initiated and repeated by the court at pre-trial conferences on July 6th and July 7th and on July 8th as jury selection was to start of twelve years (R/2-3). A sentence of twenty (20) years imprisonment with a ten (10) year minimum mandatory term followed by ten (10) years probation as a habitual violent felony offender for the second degree felony of robbery is not per se an "illegal" sentence. It is a legal sentence under § 774.084(4)(b)2, Fla. Stat. (Supp. 1996).

As this Court stated in Carter, *supra*, at 1181 (bold emphasis added):

> [a] sentence is "illegal" if it "imposes a kind of punishment that **no judge** under the entire sentencing body of sentencing statutes **could possibly inflict**

> **under any set of factual circumstances** - because it comes close to formulating a workable definition of "illegal" sentence.

The sentence imposed on petitioner was a "legal" sentence because it is a sentence that could be imposed by any judge. The fact it may have been improperly imposed by the trial judge in this specific case turns on the specific factual circumstances of the case. However, as the definition above points states a sentence is illegal when it is one no judge "could possibly inflict under any set of factual circumstances".

As the Second District reasoned in Judge v. State, 596 So. 2d 73, at 77 (Fla. 2d DCA 1991) (bold emphasis added):

> Rule 3.800(a) is intended to provide relief for a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law. It is concerned primarily with whether the terms and conditions of the punishment for a particular case are permissible as a matter of law. **It is not a vehicle designed to re-examine whether the procedure employed to impose the punishment comported with statutory law and due process**.

Petitioner had remedies available. He could have raised the matter on direct appeal or raised the matter in a timely filed 3.850 motion. He failed to do so and should not be permitted to raise issue at any time he chooses under a 3.800(a) motion years after the sentence and conviction were imposed in 1998.

CONCLUSION

Respondent respectfully requests that this Honorable Court approve the opinion of the lower court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Beverly A. Pohl, Esq. and Cynthia, E. Gunther, Esq., of Bruce S. Rogow, P.A., Broward Financial Center, Suite 1930, 500 East Broward Blvd., Ft. Lauderdale, Florida 33394, this 5th day of July 2005.

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,
CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

_____

RONALD NAPOLITANO
Assistant Attorney General
Florida Bar No. 175130
2002 N. Lois Ave. Suite 700
Tampa, Florida 33607-2367
(813)801-0600
Fax (813)873-4771
COUNSEL FOR RESPONDENT