IN THE SUPREME COURT
OF FLORIDA

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**CASE NO. SC04-654**

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**CHRISTIAN E. JACKSON,**

Petitioner,

vs.

**STATE OF FLORIDA,**

Respondent.

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On Discretionary Review of a Certified Conflict
Decision of the Second District Court of Appeal

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# INITIAL BRIEF

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## STATEMENT OF THE CASE AND FACTS

Petitioner Christian Jackson, an inmate at Polk Correctional Institution, seeks review of a decision of the Second District Court of Appeal, *Jackson v. State*, 895 So. 2d 1275 (Fla. 2d DCA 2005) (R-20-21) (*see* Appendix), affirming the denial of his Rule 3.800(a) motion. *See* SR-6 (Order Dismissing Motion to Correct Illegal Sentence). The motion sought to vacate Jackson's sentence for second degree robbery, on the ground that the record showed it was a vindictive sentence imposed in violation of due process of law. SR-1-5 (Motion).[1]

The *pro se* Rule 3.800(a) motion alleged that the trial court "initiated" and participated in plea discussions, and "at the pre-trial conferences on July 6 and 7, 1998[,] and on July 8, 1998 as jury selection was to start" (SR-3), offered Jackson a 12-year prison sentence if he were to plead guilty to robbery. But when Jackson elected to go to trial and was convicted, the court imposed a substantially more severe sentence: a habitual violent felony offender sentence of 20 years incarceration (10 years mandatory) followed by 10 years probation. SR-1-5.

Relying on this Court's decision in *Wilson v. State*, 845 So. 2d 142 (Fla. 2003) (establishing procedures for judicial participation in plea discussions), Jackson's Rule

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[1] The conviction and sentence were affirmed on direct appeal in a per curiam affirmance without written opinion. *Jackson v. State*, 753 So.2d 94 (Fla. 2d DCA 2000).

3.800 motion alleged that by "initiating and repeating the plea offers, the trial judge departed from his role as an impartial arbiter" (SR-4), and since no factors of record supported the increased sentenced, Jackson asked the Circuit Court to "grant [the] motion and reverse and remand for resentencing before another judge. *See Jones v. State*, 750 So. 2d 709 (Fla. 2d DCA 2003)." SR-5.[2]

Circuit Judge Richard A. Luce (Pinellas County, Sixth Judicial Circuit) "DISMISSED" the motion without examining the record and without reaching the merits, reasoning that, under controlling authority from the Second District, Rule 3.800(a) was not a proper procedural vehicle for bringing a claim of vindictive sentencing:

> The Defendant alleges that his current sentence is illegal because it was vindictively imposed as a punishment for going to trial. However, ***this type of claim cannot be raised in a 3.800(a) motion. Boyd v. State***, [880 So. 2d 726] 2004 WL 1123494 (Fla. 2d DCA May 21, 2004).

SR-6 (Order) (emphasis supplied).

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[2] *Jones* is a direct appeal case, apparently cited for the proposition that when a presumptively vindictive sentence is imposed, and that presumption is not rebutted, resentencing before another judge is required. *See also Wilson v. State*, 845 So. 2d 142, 159 (Fla. 2003) ("in cases where an unrebutted presumption of judicial vindictiveness arises, we conclude that the appropriate remedy is resentencing before a different judge").

Jackson appealed, filing a *pro se* Initial Brief in the District Court. R-3-13. Pursuant to Rule 9.141(b)(2)(C), Fla.R.App.P., governing appeals from the summary denial of post-conviction motions decided without an evidentiary hearing, the State did not file a Brief. The Second District affirmed in a summary appeal, also citing its prior decision in *Boyd v. State*, 880 So. 2d 726 (Fla. 2d DCA), *rev. denied* 888 So. 2d 621 (Fla. 2004), but certified "direct conflict" with *Johnson v. State*, 877 So. 2d 795 (Fla. 5th DCA 2004), which had "reversed a circuit court order denying a rule 3.800(a) motion and remanded for consideration of the claim of vindictive sentencing raised in the motion." R-20-21.

Petitioner Christian Jackson timely filed a notice to invoke discretionary review,[3] and this Court postponed a decision on jurisdiction, appointed undersigned counsel, and ordered briefing. (April 27, 2005 Order).

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[3] The Notice to Invoke was dated April 11, 2005, a Sunday. Pursuant to Rule 9.420(f) ("The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a holiday described below, in which event, the period shall run until the end of the next day that is neither a Saturday, Sunday, nor holiday"), it was timely.

## SUMMARY OF ARGUMENT

1. This Court has two bases for jurisdiction in this case, both certified conflict with *Johnson v. State*, 877 So. 2d 795 (Fla. 5th DCA 2004), and express and direct conflict with *Smith v. State*, 842 So. 2d 1047 (Fla. 3d DCA 2003), invoking the Florida constitutional jurisdictional provisions of Article V, Section 3(b)(4) and Section 3(b)(3), respectively. The Court should accept jurisdiction and decide whether the trial courts of this state are empowered to correct a vindictive sentence – one imposed in violation of due process of law and *Wilson v. State*, 845 So. 2d 142 (Fla. 2003) – in a proceeding brought under Rule 3.800(a), when the record supports and does not rebut the allegation of vindictiveness. The fact that many courts are following the guidance of *Boyd v. State*, 880 So. 2d 726 (Fla. 2d DCA 2004), *rev. denied* 888 So. 2d 621 (Fla. 2004) (table), and holding that such claims are not cognizable under Rule 3.800(a), deprives Christian Jackson, and others similarly situated, of any post-conviction remedy for what is recognized to be an unconstitutional sentence. This Court should grant review to consider whether those courts are improperly limiting the reach of Rule 3.800(a).

2. Claims of vindictive sentencing that are supported by the record (defined as all non-hearsay documents in the trial clerk's record, including the trial transcript) should be cognizable in a Rule 3.800(a) proceeding, because a sentence shown to be

imposed in violation of *Wilson v. State*, 845 So. 2d 142 (Fla. 2003), and in violation of due process of law, falls within the definition of "illegal sentence" announced in *Carter v. State*, 786 So. 2d 1173 (Fla. 2001), and should not have to be served.

The decision leading to a spate of recent decisions, including the decision below, holding that claims of vindictive sentencing may *not* be brought in a Rule 3.800(a) proceeding, *Boyd v. State*, 880 So. 2d 726 (Fla. 2d DCA 2004), *rev. denied* 888 So. 2d 621 (Fla. 2004), was wrongly decided because it misapplied the *Carter* definition of "illegal sentence." *Boyd* focused solely on the length of the defendant's sentence, but a sentence within the statutory maximum can still be "illegal" under *Carter*, and an unconstitutional vindictive sentence established by the record is within that category.

Chief Judge Schwartz had it right in *Smith v. State*, 842 So. 2d 1047 (Fla. 3d DCA 2003), which held, in a Rule 3.800 proceeding, that reversal and resentencing before another judge was "required" where the record revealed that the trial court imposed a vindictive sentence. Petitioner Christian Jackson's allegations – which identified (but did not attach) the portions of the record supporting his claim – should be considered on the merits, affording him an opportunity to supplement his motion with the portions of the record that he has referenced in his Rule 3.800(a) motion. If his 20-year incarcerative sentence, followed by 10-years probation, was imposed in

violation of due process, Rule 3.800(a) provides an appropriate procedural vehicle, based on the record, and without the need for an evidentiary hearing, to challenge, vacate, and correct that sentence.

## ARGUMENT

### I.

### THIS COURT HAS JURISDICTION

Because the Second District Court of Appeal certified conflict with a decision of the Fifth District Court of Appeal, *Johnson v. State*, 877 So. 2d 795 (Fla. 5th DCA 2004), which reversed the denial of a Rule 3.800(a) motion alleging vindictive sentencing and "remanded for consideration of Defendant's motion in light of the totality of the circumstances," *id.* at 796, implicitly acknowledging that such a claim is cognizable in a Rule 3.800(a) proceeding, this Court has discretionary jurisdiction to review the decision below, pursuant to Article V, § 3(b)(4), Florida Constitution (the supreme court "[m]ay 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"). But since the Court has postponed its decision on jurisdiction, we address jurisdiction as a threshold matter.

The Second District has certified direct conflict with *Johnson* on this issue three times.[4] The Third District has certified direct conflict with *Johnson* on this issue seven times.[5] *Johnson* has not been overruled by this Court or receded from by the Fifth District acting *en banc*, so *Johnson* remains in force and the conflict that has been recognized and certified by ten appellate panels continues. *See Bunkley v. State,* 882 So.2d 890, 908 (Fla. 2004) ("the `decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court.'") (internal citation omitted); *Wood v. Fraser,* 677 So.2d 15, 18 (Fla. 2d DCA 1996) ("absent an en banc opinion expressly receding from a point of law announced in previous opinions of this court, a trial court should not rely on the expressions of a three-judge panel as a basis to conclude that a previous opinion of another three-judge panel no longer carries the force of law").

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[4] In addition to this case, *see Griffin v. State*, ___ So. 2d ___, 30 Fla. L. Weekly D93 (Fla. 2d DCA Dec. 29, 2004); *Ey v. State*, 884 So. 2d 376 (Fla. 2d DCA 2004).

[5] *See Gonzalez v. State*, 897 So. 2d 551 (Fla. 3d DCA 2005); *Taylor v. State*, 897 So. 2d 495, 497 (Fla. 3d DCA 2005) ("The Fifth District allows a vindictive sentencing issue to be raised by a Rule 3.800(a) motion. . . . We certify direct conflict with *Johnson*."); *Reese v. State*, 896 So. 2d 807 (Fla. 3d DCA 2005); *Satahoo v. State*, 895 So. 2d 1195 (Fla. 3d DCA 2005); *Luma v. State*, 895 So. 2d 1202 (Fla. 3d DCA 2005); *Galindez v. State*, 892 So. 2d 1231 (Fla. 3d DCA 2005); *Wright v. State*, 891 So. 2d 618 (Fla. 3d DCA 2005).

However, recently in *Bouno v. State*, ___ So. 2d ___, 30 Fla. L. Weekly D945 (Fla. 5th DCA April 8, 2005), a panel of the Fifth District concluded that claims of vindictive sentencing are *not* cognizable in a Rule 3.800(a) motion, and (contrary to the ten decisions cited in footnotes 4 and 5) further concluded that that holding did *not* conflict with that court's prior opinion in *Johnson*.

Apparently looking beyond the four corners of the decision in *Johnson*, and delving into the record, *Bouno* distinguished *Johnson* this way: "A review of this court's file in [*Johnson*], 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 had correctly applied the law of the case doctrine. Therefore, our opinion today ***does not conflict*** with *Johnson* . . ." *Bouno*, 30 Fla. L. Weekly D945 (emphasis supplied).[6]

That district court opinion (*Bouno*) concerning the meaning of *Johnson*, a prior panel opinion from the same district court, does not divest this Court of jurisdiction that is based on certified conflict (*see* Art. V, § 3(b)(4), Fla. Const.), but if it creates any doubt about whether that certification was correct, or whether this Court's

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[6] We note that Judge Monaco was on the panel both in *Bouno* and in *Johnson*.

certified conflict jurisdiction should be exercised, we note that there is another basis for jurisdiction in this Court: express and direct conflict with a decision of the Third District Court of Appeal.

In *Smith v. State*, 842 So. 2d 1047 (Fla. 3d DCA 2003) (Schwartz, C.J.), in an "appeal from the denial of the defendant's 3.800 motion," the court found that "the trial judge improperly imposed a `vindictive' sentence," and therefore "[a]s required, . . . reverse[d] for resentencing of the defendant before a different judge." *Id.* That is both the relief sought and mechanism utilized by Petitioner Christian Jackson in the Circuit Court, but which was found there and in the court below to be unavailable *via* a Rule 3.800 proceeding. *See* Appendix, p. 1 (R-20) ("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)"). Thus, the Second District's decision in this case is in express and direct conflict with *Smith v. State*, and this Court has an alternative basis for jurisdiction – conflict jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution. ("the supreme court . . . [m]ay review any decision of a district court of appeal that . . . expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law").

We recognize that other panels of the Third District Court of Appeal (subsequent to *Smith v. State*, 842 So. 2d 1047) have decided that a claim of vindictive sentencing *cannot* be maintained in a Rule 3.800 proceeding (*see* n. 5, *supra*, and *Martinez v. State*, ___ So. 2d ___, 30 Fla. L. Weekly D1150 (Fla. 3d DCA May 4, 2005) (citing cases)), with some decisions attempting to distinguish *Smith. See Reese v. State*, 896 So. 2d 807 (Fla. 3d DCA 2005) (Cope, J.) (in *Smith* "there is no indication that any procedural objection was raised to the use of Rule 3.800(a) . . . and the panel opinion did not discuss the procedural issue"), *rev. dism., pet. for reinstatement pending*, Case No. SC05-612.[7] But it is well established that this Court's conflict jurisdiction must be determined from the "four corners" of the decisions asserted to be in express and direct conflict, without resort to examining the record or speculating about what objections may have been raised by the parties below. *See Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986) ("Conflict between decisions must be express and direct, *i.e.*, it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction. *See Jenkins v. State,* 385 So.2d 1356 (Fla.1980)."

[7] Judge Cope's discussion of *Smith* in *Reese*, appearing also in *Taylor v. State*, 897 So. 2d 495 (Fla. 3d DCA 2005), was a reprise of his concurring opinion views in *Wright v. State*, 891 So. 2d 618 (Fla. 3d DCA 2005).

Applying that standard, the conflict between the Second District's decision in this case – saying that "a claim of vindictive sentencing is not cognizable" in a 3.800(a) motion (Appendix, p. 1) (R-20) – and the Third District's reversal of the alleged vindictive sentence in *Smith v. State*, 842 So. 2d 1047, an "appeal from the denial of the defendant's 3.800 motion," is express and direct, as required by Article V, Section 3(b)(3) of the Florida Constitution, and of sufficient importance to warrant this Court's review. Otherwise, persons such as Petitioner Christian Jackson, who allege that the record establishes a vindictive sentence in violation of due process of law, will not have the same post-conviction remedy that the defendant in *Smith v. State* successfully and rightly obtained.

In *Smith*, Chief Judge Schwartz found that this Court's decision in *Wilson v. State*, 845 So. 2d 142 (Fla. 2003), "***required***" reversal of the sentence, where a presumption of vindictiveness was "not only unrebutted but actually confirmed by the record." *Smith*, 842 So. 2d at 1047 (emphasis supplied). That is the right analysis. Thus, neither *Bouno*'s "no conflict" conclusion nor the authorities that follow *Boyd v. State*, 880 So. 2d at 726, and either ignore or seek to distinguish *Smith*, should dissuade this Court from accepting jurisdiction in this case to clarify and establish controlling law throughout the State. Prison sentences that violate due process of law

ought to be correctable anywhere in the State, and only this Court can ensure that uniformity.

In sum, there is both certified conflict jurisdiction with the Fifth District's *Johnson* decision, and express and direct conflict jurisdiction with the Third District's *Smith* decision. The issue is of sufficient importance that this Court should accept jurisdiction and decide whether or not an allegedly vindictive sentence appearing on the face of the record – an admittedly unconstitutional sentence – is one that is also "illegal" under Florida law, and thus subject to being corrected under Rule 3.800(a).

## II.

## THE ALLEGATION THAT A PRESUMPTIVELY VINDICTIVE SENTENCE APPEARS ON THE FACE OF THE RECORD SHOULD BE A COGNIZABLE CLAIM IN A RULE 3.800(a) MOTION TO VACATE AN ILLEGAL SENTENCE

The issue presented – the legal sufficiency of the pleading under Rule 3.800(a), Fla.R.Crim.P., and the scope of relief available under that rule of procedure – is an issue of law subject to *de novo* review. *See State v. McBride*, 848 So. 2d 287, 289 (Fla. 2003).

Rule 3.800(a) provides that relief from an "illegal sentence" may be sought at any time, as long as the grounds for relief appear on the face of the record:

> (a) Correction. A court may at any time correct an ***illegal sentence*** imposed by it, or an incorrect calculation made by it in a sentencing scoresheet, or a sentence that does not grant proper credit for time served ***when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief***, provided that a party may not file a motion to correct an illegal sentence under this subdivision during the time allowed for the filing of a motion under subdivision (b)(1) or during the pendency of a direct appeal.

(emphasis supplied). Rule 3.800(a) "`is intended to balance the need for finality of convictions and sentences with the goal of ensuring that criminal defendants ***do not serve sentences imposed contrary to the requirements of law***.'" *State v. McBride*, *supra*, 848 So. 2d at 289 (*quoting Carter*, 786 So.2d at 1176) (emphasis supplied). "Contrary to the requirements of law" does not mean that any and all sentencing errors may be corrected "at any time," but we argue here that a "vindictive sentence" in violation of due process of law – appearing on the face of the record – falls within the subset of sentences that are contrary to the requirements of law, and that should not have to be served.[8]

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[8] The due process violation of an increased sentence imposed in retaliation for going to trial, rather than accepting a plea urged by the sentencing court, is well established and needs no further elucidation here. *See Wilson v. State*, 845 So. 2d 142, 148-157 (Fla. 2003) (discussing United States Supreme Court precedents and constitutional principles). We note here that the term "vindictive sentence," for an

The term "illegal sentence" used in Rule 3.800(a) is not defined in the Rules, which has led to some confusion and inconsistent results. S*ee Carter v. State*, 786 So. 2d 1173 (Fla. 2001), noting the evolving definition of "illegal sentence," narrowing the definition, and referring the question to the Criminal Appeals Reform Act Committee and the Florida Bar Criminal Procedure Rules Committee for further study of whether the rule should define what types of sentences should be deemed "illegal." While recognizing that a single definition of the term has been elusive, this Court has most recently defined an illegal sentence as one that "`imposes *a **kind of***

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increased sentence after a successful appeal, or after trial in lieu of a plea, absent factors justifying the increased sentence, has become a legal term of art, and does not necessarily require subjective judicial animosity toward the defendant. *See Longley v. State*, ___ So. 2d ___, 2005 WL 1312359, *2, n. 5 (Fla. 5th DCA June 3, 2005):

> A showing of vindictiveness does not require that the trial judge affirmatively intended to punish the defendant for rejecting a plea. "Vindictive" in this context is a term of art which expresses the legal effect of a given course of action, and does not imply any personal or subjective animosity between the court and the defendant. *Cambridge v. State,* 884 So.2d 535 (Fla. 2d DCA 2004); *Harris v. State,* 845 So.2d 329 (Fla. 2d DCA 2003); *Charles v. State,* 816 So.2d 731 (Fla. 3d DCA 2002).

Of course actual vindictiveness is as unacceptable as "legal" vindictiveness. *See Smith v. State*, 842 So. 2d 1047, 1048 n. 2 (Fla. 3d DCA 2003) (reversing sentence, and noting that the trial judge's "remark indicates that, unlike the usual case, he may have been `vindictive' in the dictionary, as well as in the legal sense").

***punishment*** that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances.'" *Carter v. State*, 786 So. 2d at 1181 (emphasis supplied) (*quoting Blakley v. State*, 746 So. 2d 1182, 1187 (Fla. 4th DCA 1999)).

Notably, the Court has not adopted a definition limited to a statutorily unauthorized ***length*** of punishment. The *Carter / Blakley* definition has some room to accommodate sentences within the statutory range, but which are infected with other substantial and intolerable legal errors. Here, we submit that whatever the length of a defendant's sentence, if it is the result of vindictive sentencing, and thus in violation of due process of law, it is the ***kind of punishment*** that no judge, acting properly within his or her discretion under any sentencing statute, could possibly properly inflict.

A Rule 3.800(a) motion must allege three factors:

> 1) "[t]he error must have resulted in an illegal sentence," 2) "[t]he error must appear on the face of the record," and 3) "[t]he motion must affirmatively allege that 'the court records demonstrate on their face an entitlement to relief.'" *Baker v. State*, 714 So.2d 1167 (Fla. 1st DCA 1998), *quoting State v. Mancino*, 714 So.2d 429 (Fla.1998); *cf. Carter v. State*, 786 So.2d 1183 (Fla. 2001). As in *Baker*, we presume "this [third] requirement would necessitate more than mere conclusory allegations": at minimum, "how and where the record demonstrates an entitlement to relief." 714 So.2d at 1167 n. 1.

*Jackson v. State*, 803 So. 2d 842, 844 (Fla. 1st DCA 2001). A defendant could readily satisfy the second and third factors by pointing to the places in the record supporting the claim of vindictive sentencing.[9] Therefore the notion that vindictive sentencing claims are not cognizable in a Rule 3.800(a) proceeding must be predicated on the first factor: whether it can be properly alleged that a vindictive sentence (which may fall within the statutory maximum) is an "illegal" sentence.

Indeed, *Boyd v. State*, 880 So. 2d 726 (Fla. 2d DCA 2004), the progenitor of virtually all the recent decisions summarily holding that vindictive sentencing claims cannot be brought under Rule 3.800(a) (*see* cases cited *supra* in footnote 5; *Bouno v. State*, *supra*, and *Baker v. State*, ___ So. 2d ___, 30 Fla. L. Weekly D1268 (Fla. 4th DCA May 18, 2005)), concluded that Boyd's seventeen-year sentence for second-degree murder with a deadly weapon was not "illegal" under the *Carter* definition because it was within the permissible statutory sentencing range. *Boyd*, 880 So. 2d

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[9] We recognize that Rule 3.800(a) motions must be decided without an evidentiary hearing. But the "record" for purposes of this rule encompasses any part of the trial court file that is not hearsay, *see Burgess v. State*, 831 So. 2d 137, 142 (Fla. 2002), including "`the entire written record available in the circuit court, not just to the limited record on appeal.'" *Jackson*, 803 So. 2d at 844 (*quoting Atwood v. State*, 765 So. 2d 242, 243 (Fla. 1st DCA 2000)). Thus, the record includes the trial transcript. *See Wachter v. State*, 868 So. 2d 629 (Fla. 2d DCA 2004). Petitioner Christian Jackson's *pro se* motion pointed to the particular transcripts supporting his claim, which should have been sufficient. He should have been permitted to supplement his motion with those transcripts.

at 727 ("Mr. Boyd's sentence is not illegal for purposes of rule 3.800(a) ***even if*** the trial court's actions were vindictive") (emphasis supplied). *Boyd* thus held that "an allegedly vindictive sentence that is not otherwise illegal under the rule announced in *Carter* is not a sentence that may be re-examined by way of a motion filed pursuant to Florida Rule of Criminal Procedure 3.800(a)." *Id.* at 728. That reasoning misreads *Carter*, which did not predicate the concept of "illegal sentence" solely on the length of the sentence. Indeed, numerous post-*Carter* decisions have permitted relief under Rule 3.800(a), even though the challenged sentences did not exceed the statutory maximum.[10]

*Boyd* had it backwards. Relief should not be denied because an allegedly vindictive sentence is under the statutory maximum and therefore *per se* not "illegal." Instead, a sentence that, based upon allegations that are supported by the record,

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[10] *See, e.g., Rousseau v. State*, ___ So. 2d ___, 2005 WL 1249074 (Fla. 1st DCA May 27, 2005) (*Hale* claim that consecutive habitual offender sentences were imposed for a single criminal episode); *Cooley v. State*, ___ So. 2d ___, 30 Fla. L. Weekly D1095 (Fla. 1st DCA Apr. 27, 2005) (written judgment did not comport with oral pronouncement of sentence); *Whitehead v. State*, 884 So. 2d 139 (Fla. 2d DCA 2004) (minimum mandatory sentence was illegal where grounds for enhancement were not alleged in the Information); *Gammon v. State*, 858 So. 2d 357 (Fla. 1st DCA 2003) (record showed no factual basis to support firearm mandatory minimum, where state had conceded that appellant did not possess a firearm during the commission of the offense); *Hood v. State*, 851 So. 2d 829 (Fla. 1st DCA 2003 (double jeopardy claim); *Dorminey v. State*, 837 So. 2d 528 (Fla. 2d DCA 2003) (claim for prison credit for time served).

violates *Wilson v. State,* is ***by definition*** "illegal," because it is one that no judge, acting properly and consistent with due process, could ever lawfully impose. Perhaps a defendant cannot satisfactorily point to portions of the record that support his claim; if so, Rule 3.800(a) relief will be denied. *See Ortiz v. State*, 884 So. 2d 1086 (Fla. 3d DCA 2004) (relief denied because the record failed to establish any judicial participation in any plea negotiations, therefore there could be "no factual basis for a finding of vindictiveness").[11] But where, as here, a defendant alleges and points to portions of the record establishing that the trial court "initiated" and participated in plea negotiations, offered one sentence, but imposed a dramatically more severe sentence after trial and conviction by a jury, with no additional facts to support the longer sentence, the resulting sentence is presumptively "illegal" under *Wilson* and *Carter*, and there is no reason that relief should not be granted *via* Rule 3.800(a), without an evidentiary hearing. In that respect, the Fifth District was correct in *Johnson*, when it remanded Johnson's Rule 3.800(a) motion alleging vindictive sentencing, for consideration of the merits. "A review of the totality of the circumstances is required to determine whether the harsher sentence is vindictive." *Johnson*, 877 So. 2d at 796.

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[11] *Ortiz* appeared to presume that, had the allegations and record been sufficient, that relief could have been granted under Rule 3.800(a).

The Second District's affirmance of the trial court's summary denial of Jackson's Rule 3.800(a) motion was error, and should be reversed.

## CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction, the decision below (and its foundation, *Boyd v. State*, 880 So. 2d 726 (Fla. 2d DCA 2004)) should be disapproved, and the case remanded for consideration of the merits of Christian Jackson's Rule 3.800(a) motion based on the record. In addition, to the extent that Jackson's Rule 3.800(a) motion identifies but does not attach certain portions of the record that he alleges support his claim of vindictive sentencing, on remand to the Circuit Court he should be permitted to supplement his motion with those portions of the record.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished to the OFFICE OF THE ATTORNEY GENERAL, CRIMINAL APPEALS DIVISION, Concourse Center Four, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607, by FedEx this 13th day of June, 2005.

BEVERLY A. POHL

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated brief is prepared in Times New Roman 14-point font, and is in compliance with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure.

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