IN THE SUPREME COURT
OF FLORIDA

CASE NO. SC05-654

CHRISTIAN E. JACKSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

REPLY BRIEF

BEVERLY A. POHL
CYNTHIA E. GUNTHER
BRUCE S. ROGOW, P.A.
Broward Financial Centre
500 East Broward Blvd., Ste. 1930
Fort Lauderdale, Florida 33394
(954) 767-8909

Counsel for Christian E. Jackson

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

CASES **Page**

TABLE OF CITATIONS (continued)

CONSTITUTIONAL PROVISIONS **Page**

STATUTES AND RULES

OTHER

ARGUMENT

I.

JURISDICTION EXISTS AND SHOULD BE EXERCISED

Rule 9.120(d), Fla.R.App.P., provides that A[i]f jurisdiction is invoked under rules 9.030(a)(2)(A)(v) or (a)(2)(A)(vi) (certifications by the district courts to the supreme court), ***no briefs on jurisdiction shall be filed***.@ (emphasis supplied). This is such a case; the District Court said: AWe certify direct conflict with *Johnson*.@ (Appendix to Initial Brief, p. 2). That certification gives rise to jurisdiction under Rule 9.030(a)(2)(A)(vi), Fla.R.App.P.; the petitioner need not persuade the Court that jurisdiction exists. Nonetheless, here the parties have addressed jurisdiction in their principal briefs, and we wrap up the discussion, urging the Court to move to the merits of this case.

This Court has held that a district court=s certification of Adirect conflict@ with a decision from another district is sufficient to provide not only jurisdiction in this Court, but a reason for the Court to exercise that jurisdiction. *See Clark v. State*, 783 So. 2d 967 (Fla. 2001), in which the State, as respondent, challenged the Court=s jurisdiction, despite certified direct conflict from the District Court. This Court excused a lack of actual conflict, and reached the merits of the case:

> [W]e conclude that ***the district court's decision here is not in direct conflict*** with *Williamson*. ***However, the certification of conflict by the district court gives this Court jurisdiction to review this case***. *See* art. V, ' 3(b)(4), Fla. Const.; *see*

> *also* Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova L.Rev. 1151, 1243 (1994) (A***[T]he very act of certifying conflict creates confusion or uncertainty in the law that should be resolved by the Court.***@).

Id. at 969 (emphasis supplied).[1] Thus, the State=s Answer Brief (p. 6), arguing that Athis Court lacks jurisdiction@ and that A[t]here is no certifiable direct conflict,@ is simply wrong; certified conflict provides jurisdiction as a matter of Florida constitutional law.

The State=s reliance on *Reaves v. State*, 485 So. 2d 829 (Fla. 1986), and *State v. Walker*, 593 So. 2d 1049 (Fla. 1992) (Answer Brief, pp. 7-8), does not undermine the Court=s Acertified conflict@ jurisdiction, because *Reaves* and *Walker* involved the Court=s

---

[1] We note that a more recent edition of the cited article, citing *Clark v. State* and *Harmon v. Williams*, 615 So. 2d 681 (Fla. 1993), recognizes that Athe Court has found discretion to hear certified conflict cases even if it ultimately finds no conflict . . . .@ Harry Lee Anstead, Gerald Kogan, Thomas D. Hall & Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. No. 3, 431, 530 (Spring 2005).

Aexpress and direct@ conflict jurisdiction under Article V, ' 3(b)(3), Fla. Const., ***not*** Acertified conflict@ jurisdiction under Article V, ' 3(b)(4).[2]

In addition, by identifying numerous cases in which this Court=s certified conflict jurisdiction has been invoked on the same basis as in this case (*see* Answer Brief, pp. 9-11), the State illustrates that the decision below is not an aberration. And, since various courts have found *Johnson v. State*, 877 So. 2d 795 (Fla. 5th DCA 2004), to be in conflict as to whether Rule 3.800(a) can be used to raise a vindictive sentencing claim, a final resolution of the issue is necessary to avoid Aconfusion and uncertainty in the law.@

In sum, this Court has jurisdiction, and should exercise it to address the important but unanswered question of whether an unconstitutionally vindictive sentence, which is established by the record, is an illegal sentence that may be challenged and remedied *via* Rule 3.800(a).

---

[2] Similarly, *Little v. State*, 206 So. 2d 9 (Fla. 1968), cited in the block quotation at page 9 of the Answer Brief, is inapposite, because that decision came before the Florida Constitution was revised to create Article V, ' 3(b)(4) Acertified conflict@ jurisdiction in this Court. *See Little*, 206 So. 2d at 9 (ABy a petition for certiorari we have for review a decision of a District Court of Appeal which allegedly conflicts with a prior decision of this Court@); *id*. at 10 (citing AFla Const., Art. V, ' 4") .

II.

THE STATE=S VIEW OF RULE 3.800(a) AILLEGAL SENTENCE@ CLAIMS IS TOO LIMITED

In *Hidalgo v. State*, 729 So. 2d 984 (Fla. 3d DCA 1999), Judge Cope noted the Aunending debate about what is an `illegal= sentence for purposes of Rule 3.800(a). . . .@ *Id.* at 987. The passage of time, and this Court=s most recent discussion of the subject in *Carter v. State*, 786 So. 2d 1173 (Fla. 2001), have not ended the debate. In *Carter*, the Court refined the definition of what constitutes an Aillegal sentence,@ trying to Astrike the proper balance between concerns for finality and concerns for fundamental fairness in sentencing.@ *Id.* at 1178. In this case, the fundamental fairness concerns implicated by the supported-by-the-record allegations of an unconstitutionally vindictive sentence, are weighty.[3]

[3] We remind the Court that the trial judge, having initiated and participated in plea discussions, offered Jackson a 12-year sentence if he were to plead guilty, but after trial, imposed 20 years incarceration (10 years mandatory) followed by 10 years probation. *See* Initial Brief, p. 1.

Thus, this case presents an opportunity for the Court, in trying to achieve the proper balance, to either further refine its *Carter* definition of Aillegal sentence@ to include an unconstitutional vindictive sentence, or to explain how the existing definition can be applied to ensure fundamental fairness in sentencing when substantial due process concerns and liberty interests are at stake. In *Carter*, 786 So. 2d at 1181, the Court noted that it had A referred the question of whether rule 3.800(a) should be amended to the Criminal Appeals Reform Act Committee and the Florida Bar Criminal Procedure Rules Committee and requested that they jointly consider this matter that is important to the fair and efficient administration of justice.@ Unless and until those committees offer recommendations, the Court should provide clearer guidance to the lower courts than that which may be gleaned from *Carter*. In view of the fact that some courts are granting relief for allegedly vindictive sentences using Rule 3.800(a),[4] and some courts are refusing to do so [5] (*see* Initial Brief), the rule itself and this Court=s precedents are inadequate for the task.

Focusing solely on the length of Jackson=s sentence, the State asserts that Aa claim of vindictive sentencing ***even if it is alleged is apparent on the face of the record*** cannot be raised in [a] rule 3.800(a) motion@ (Answer Brief, p. 14) (emphasis supplied), because

---

[4] *See Johnson v. State*, 877 So. 2d 795 (Fla. 5th DCA 2004); *Smith v. State*, 842 So. 2d 1047 (Fla. 3d DCA 2003).

[5] *See Boyd v. State*, 880 So. 2d 726 (Fla. 2d DCA 2004), and its progeny.

it is Aa legal sentence under ' 774.084(4)(b)2, Fla. Stat. (Supp. 1996),@ which sets forth the maximum and mandatory minimum habitual offender sentence applicable to Jackson=s offense.[6]

Section 775.084(4)(b)2 provides that an habitual offender may be sentenced:

> In the case of a felony of the second degree, for a term of years not exceeding 30, and such offender shall not be eligible for release for 10 years.

Jackson=s sentence fell within those parameters, but if that were the end of the inquiry, the Aunending debate@ noted in *Hildago*, *supra*, would have been concluded long ago. In the Initial Brief (p. 17, n. 10), we cited numerous post-*Carter* decisions that have granted relief under Rule 3.800(a) even though the challenged sentences did not exceed the statutory maximum. The State did not address those decisions in its Brief.

The State does rely on one case, however, not cited in the Initial Brief, which warrants discussion in this Reply. *Judge v. State*, 596 So. 2d 73 (Fla. 2d DCA 1991) (*en banc*) (*see* Answer Brief, p. 18), affirmed the denial of a Rule 3.800(a) motion, which had presented two claims. The first claim, that the defendant (who had pled guilty) had not been convicted of the necessary predicate acts to warrant his sentencing as an habitual

---

[6] The statute appears in Chapter 775, not Chapter 774, which is an apparent typographical error in the State=s Brief.

offender, was refuted by the record. 596 So. 2d at 76. The second claim, that the defendant had not personally received notice of the State=s intent to have him sentenced as an habitual offender (although his counsel did receive notice), was held to be procedural and not cognizable under Rule 3.800(a). *Id.* at 77-78. In its discussion of the 1991 understanding of what then constituted an Aillegal sentence,@ the Second District opined that Rule 3.800(a) Ais not a vehicle designed to re-examine whether the procedure employed to impose the punishment comported with statutory law and due process.@ 596 So. 2d at 77. But the allegedly unlawful procedure in *Judge* B lack of personal notice of the State=s intent to seek habitualization B is a far cry from the allegations in this case, involving an unconstitutionally vindictive sentence that is supported by the record. While we might agree that Judge=s claim of a procedural sentencing error was properly denied, Christian Jackson=s claim is more substantial; his claim (years of incarceration imposed as punishment for going to trial) is more disturbing.

The gravity of the wrong of vindictive sentencing is well established. *See Wilson v. State*, 845 So. 2d 142 (Fla. 2003); *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). Since ARule 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,@ *Carter*, 786 So. 2d at 1186, since vindictive sentencing is contrary to the requirements of law, and since some such claims (including Jackson=s) can be established on the face of the record, there is no

valid reason why those claims should not be cognizable at any time under Rule 3.800(a).

CONCLUSION

For the foregoing reasons, and those advanced in the Initial Brief, the Court should accept jurisdiction, disapprove the decision below, and remand for consideration of the merits of Christian Jackson=s Rule 3.800(a) motion based on the record. In addition, Petitioner should be permitted to supplement his motion with those portions of the record that he identified in his Motion, but did not have available to attach to his Motion.

Respectfully submitted,

BEVERLY A. POHL
Florida Bar No. 907250
CYNTHIA E. GUNTHER
Florida Bar No. 0554812
BRUCE S. ROGOW, P.A.
Broward Financial Centre, Suite 1930
500 East Broward Boulevard
Fort Lauderdale, FL 33394
Ph: (954) 767-8909
Fax: (954) 764-1530

By:
BEVERLY A. POHL

By:
CYNTHIA E. GUNTHER

Counsel for Petitioner
Christian E. Jackson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished to RONALD NAPOLITANO and ROBERT J. KRAUSS, OFFICE

OF THE ATTORNEY GENERAL, Criminal Appeals Division, Concourse Center Four, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607, by U.S. Mail this 21st day of July , 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.

BEVERLY A. POHL