

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-612

EVANS REESE,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INITIAL BRIEF OF PETITIONER ON THE MERITS

INTRODUCTION

This is a petition for discretionary review based on certified conflict of decisions. In this brief of respondent on jurisdiction, all references are to the slip opinion in the appendix attached to this brief, identified as “A,” followed by the page numbers. All emphasis is supplied unless the contrary is indicated

STATEMENT OF THE CASE AND FACTS

The Petitioner, Evans Reese filed a motion challenging a vindictive sentence. (A. 2). He filed the motion pursuant to Florida Rule of Criminal Procedure 3.800(a), which permits the correction of an illegal sentence at any time. (A. 1-2). The trial court denied the motion, and Mr. Reese appealed to the Third District Court of Appeal.

The district court affirmed. (A. 1-3). The court reasoned: “The trial court correctly denied the motion because a vindictive sentencing claim cannot be brought by a motion to correct illegal sentence under Rule 3.800(a).” (A. 2). In its opinion, the district court certified direct conflict with *Johnson v. State*, 877 So. 2d 795 (Fla. 5th DCA 2004). (A. 3). In *Johnson*, the Fifth District Court of Appeals reversed an order denying a Rule 3.800(a) motion challenging an illegal sentence, and remanded for further proceedings.

The Third District Court of Appeal appointed the Office of the Public Defender for the purpose of pursuing the certified conflict on Mr. Reese’s behalf. Due to an administrative error, however, the notice invoking this Court’s discretionary jurisdiction was not timely filed. By its order dated July 12, 2005, the Court granted the Petitioner’s motion for reinstatement and gave Mr. Reese until July 27, 2005 to file a brief on jurisdiction.

SUMMARY OF ARGUMENT

This Court has jurisdiction based on certified conflict with *Johnson v. State*, 877 So.2d 795 (Fla. 5th DCA 2004). The Third District Court of Appeal held that vindictive sentencing claims could not be raised pursuant to Florida Rule of Criminal Procedure 3.800(a), and certified direct conflict with *Johnson*. The Court's jurisdiction is not affected by the Fifth District Court of Appeal's subsequent panel decision in *Bouno v. State*, 900 So. 2d 672 (Fla. 5th DCA 2005). The Court should exercise its discretionary jurisdiction in this case to hold that a vindictive sentence is an illegal one, and to ensure that like appellants are treated similarly.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE DISTRICT COURT'S OPINION, WHICH CERTIFIES CONFLICT WITH *JOHNSON V. STATE*, 877 SO. 2D 795 (FLA. 5TH DCA 2004).

The Court unquestionably has jurisdiction based on certified conflict. The district court's opinion states: "We certify direct conflict with *Johnson v. State*, 877 So. 2d 795 (Fla. 5th DCA 2004)." (A. 3). This Court has jurisdiction to review decisions of a district court of appeal that are certified to be in direct conflict with a decision of another district court of appeal. Art. V, § 3, Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(vi). The certified conflict with the Fifth District's decision in *Johnson* establishes the Court's jurisdiction to review the Third District's decision in Mr. Reese's case.¹

The Fifth District's opinion in *Bouno v. State*, 900 So. 2d 672 (Fla. 5th DCA 2005), does not alter this conclusion. *Bouno*, like *Johnson*, is a panel decision of the Fifth District Court of Appeal.² The *Bouno* panel held that a vindictive

¹ Florida Rule of Appellate Procedure 9.120(d) states that "no briefs on jurisdiction shall be filed" where jurisdiction is invoked based on certified conflict pursuant to Rule 9.030(a)(2)(A)(vi). This brief is filed pursuant to the Court's order dated July 12, 2005, which states: "Petitioner is allowed to and including July 27, 2005, in which to serve a brief on jurisdiction."

² The panel in *Johnson* consisted of Chief Judge Sawaya and Judges Peterson and Monaco. Judges Torpy, Griffin, and Monaco decided *Bouno*.

sentence is not illegal within the meaning of Rule 3.800(a). In so doing, the *Bouno* panel argued that this holding did not conflict with *Johnson* after all. The *Bouno* court distinguished *Johnson*, noting 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.”

Nevertheless, the fact remains that the *Johnson* panel ordered a trial court to consider the merits of a vindictive sentencing claim raised in a 3.800(a) motion. *See Johnson*, 877 So. 2d at 796 (noting that “A review of the totality of the circumstances is required to determine whether the harsher sentence is vindictive,” and remanding “for consideration of Defendant’s motion in light of the totality of the circumstances”). The *Bouno* panel did not purport to overrule *Johnson*. Even if it had, this Court’s jurisdiction would be undisturbed. The Court’s jurisdiction is not destroyed even where the conflict decision is overruled by a subsequent en banc decision. *See Robertson v. Robertson*, 593 So. 2d 491, 493 (Fla. 1991).

The Court should exercise its discretionary jurisdiction to review Mr. Reese’s case. Mr. Reese has alleged that he received a vindictive sentence. A vindictive sentence is one that punishes the exercise of the constitutional rights not to plead guilty and to demand a jury trial. *See Wilson v. State*, 845 So. 2d 142, 151 (Fla. 2003). A vindictive sentence is not a mere procedural error. Where the record establishes that a sentence vindictively punishes the right to trial, that

sentence is an affront to the constitution, and the “kind of 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 1183 (Fla. 2001).

This Court should also accept jurisdiction to ensure that similarly-situated appellants are treated equally. The Court is already considering the viability of vindictive sentencing claims raised in a 3.800(a) motion in *Jackson v. State*, Case No. SC05-654.³ That case seeks review of a decision that also certified conflict with *Johnson* on the issue. *See Jackson v. State*, 895 So. 2d 1275 (Fla. 2d DCA 2005). Mr. Reese should receive the benefit of a favorable resolution of the issue in *Jackson*.

³ In *Jackson* the Court has ordered briefing on the merits, but has deferred ruling on jurisdiction.

CONCLUSION

This Court has jurisdiction based on certified conflict with *Johnson v. State*, 877 So.2d 795 (Fla. 5th DCA 2004). That jurisdiction is not affected by the Fifth District Court of Appeal's subsequent decision in *Bouno v. State*, 900 So. 2d 672 (Fla. 5th DCA 2005). The Court should exercise its discretionary jurisdiction to hold that a vindictive sentence is an illegal one, and to ensure that like appellants are treated similarly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to Erin Lyn Kinney, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131, on July 27, 2005.

ANDREW STANTON
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

ANDREW STANTON
Assistant Public Defender