

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA  
September 10, 2004

ROBERT EY,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 2D04-98
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

BY ORDER OF THE COURT:

Appellant's motion for rehearing is granted. The opinion dated July 9, 2004, is withdrawn, and the attached opinion is substituted therefor.

I HEREBY CERTIFY THE FOREGOING IS A  
TRUE COPY OF THE ORIGINAL COURT ORDER.

JAMES BIRK HOLD, CLERK

cc: Robert Ey  
Maura J. Kiefer, Esq.  
Attorney General

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

ROBERT EY,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 2D04-98
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

Opinion filed September 10, 2004.

Appeal pursuant to Fla. R. App. P.  
9.141(b)(2) from the Circuit Court for  
Pinellas County; Brandt C. Downey, III,  
Judge.

PER CURIAM.

Affirmed. See Gipson v. State, 616 So. 2d 992 (Fla. 1993); Boyd v. State,  
29 Fla. L. Weekly D1229 (Fla. 2d DCA May 21, 2004); McCall v. State, 862 So. 2d 807  
(Fla. 2d DCA 2003); Sigafoos v. State, 825 So. 2d 529 (Fla. 2d DCA 2002); Cook v.  
State, 816 So. 2d 773 (Fla. 2d DCA 2002); Caraballo v. State, 805 So. 2d 882 (Fla. 2d

DCA 2001); Shaw v. State, 780 So. 2d 188 (Fla. 2d DCA 2001); State v. Spriggs, 754 So. 2d 84 (Fla. 4th DCA 2000).

After this court held in Boyd that a claim of vindictive sentencing is not raisable in a motion to correct an illegal sentence filed pursuant to Florida Rule of Criminal Procedure 3.800(a), the Fifth District Court of Appeal in Johnson v. State, 29 Fla. L. Weekly D1562 (Fla. 5th DCA July 2, 2004), 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. We certify direct conflict with Johnson.

Also as this court did in McCall, we certify direct conflict with Richardson v. State, 28 Fla. L. Weekly D1716 (Fla. 4th DCA July 23, 2003). This affirmance is without prejudice to any right Mr. Ey might have to file with the circuit court a timely and facially sufficient sworn motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 or to file with this court a timely and facially sufficient sworn petition alleging ineffective assistance of appellate counsel pursuant to Florida Rule of Appellate Procedure 9.141(c).

Affirmed; conflict certified.

FULMER, COVINGTON, and VILLANTI, JJ., Concur.