IN THE SUPREME COURT OF FLORIDA

GEORGE I. WRIGHT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Supreme Court Case No.: SC04-137

DCA Case No.: 2D03-3165

PETITIONER GEORGE I. WRIGHT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

In 1979, Petitioner George I. Wright ("Mr. Wright"), in an omnibus sentencing hearing, pleaded guilty to armed robbery counts in two separate cases (Case Numbers 79-4802 and 79-4803), along with other lesser charges. (R. 11-22).[1] The plea reveals that the offenses occurred in 1979. (R. 17-21). In each case, the court sentenced Mr. Wright to 75 years' incarceration. (R. 8-9). The sentences were to run concurrent, and in each case the court retained jurisdiction over one-third of the sentence, notwithstanding that section 947.16(3), Fla. Stat. (Supp. 1978), provided that jurisdiction may be retained in only one of two or more concurrent sentences. (R. 8-9).

The sentencing colloquy shows that the sentencing court specifically advised Mr. Wright that he would be ineligible for parole during the period the court retained jurisdiction over his sentences. (R. 13). Furthermore, and critically important here, the record shows that the sentencing court did not set forth any justification for retaining jurisdiction over either sentence, contrary to the express language of section 947.16(3)(a), Fla. Stat. (Supp. 1978). (R. 7-22).

In 2002, Mr. Wright, pro se, filed a motion pursuant to Florida Rule of Criminal Procedure 3.800(a) to correct his illegal sentences. (R. 2), (A. 2). In the

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[1] Citations to the record on appeal shall be in the form (R. x), with x being the page number. Citations to the accompanying Appendix shall be in the form (A. y), with y being the tab number.

motion, Mr. Wright contended that, contrary to the statute authorizing the retention of jurisdiction, the sentencing court (1) impermissibly retained jurisdiction over two concurrent sentences, and (2) failed to justify the retention in either case. (R. 4-5). Because of these statutory violations, Mr. Wright contended that the retention of jurisdiction over his sentences was illegal and should be invalidated. (R. 4-7).

Through two orders, the trial court granted the motion in part and denied it in part. (A. 3-4). Granting the motion on the first ground, the trial court ruled that "Florida law is clear that the Court could only retain jurisdiction over one concurrent sentence." (R. 24). Accordingly, the trial court relinquished jurisdiction over case number 79-4803. (R. 33).

As to Mr. Wright's contention that the sentencing court failed to justify its retention of jurisdiction, the trial court stated, incorrectly, that it was "unclear what reasons were given for retention of jurisdiction" and that an evidentiary hearing "would probably" be necessary to determine this. (R. 30). However, as Mr. Wright alleged and the judgments and sentences and sentencing transcript show, no justification was given for the retention of jurisdiction. (R. 3-4, 8-22). The trial court further stated that it read King v. State, 805 So. 2d 966 (Fla. 2d DCA 2001), and Mobley v. State, 590 So. 2d 1023 (Fla. 2d DCA 2001), to require claims regarding reasons for retaining jurisdiction to be brought on direct appeal, not in a

motion to correct an illegal sentence, and that the court would follow those cases over the (supposedly) conflicting decisions in Macias v. State, 614 So. 2d 1216 (Fla. 3d DCA 1993), and Hampton v. State, 764 So. 2d 829 (Fla. 1st DCA 2000). (R. 30). The trial court accordingly held that Mr. Wright's claim was procedurally barred. (R. 30). The court made no mention of King v. State, 835 So. 2d 1224 (Fla. 2d DCA 2003), where the Second District expressly held that a sentencing court's justification for retaining jurisdiction may be challenged through a rule 3.800(a) motion.

Mr. Wright, still pro se, appealed the trial court's order.[2] The Second District implicitly recognized the trial court's error in interpreting the district court's precedents. However, rather than reversing the trial court's ruling that Mr. Wright could not challenge the justifications for retaining jurisdiction through a rule 3.800(a) motion, as the Second District permitted in King v. State, 835 So. 2d 1224 (Fla. 2d DCA 2003), the Second District heard the appeal en banc and receded from King. Wright v. State, 864 So. 2d 1153, 1154-55 (Fla. 2d DCA 2003); (R. 107-08), (A. 1). Relying on this Court's decision in Davis v. State, 661 So. 2d 1193 (Fla. 1995), the en banc court held that Mr. Wright's challenge was

[2] The Record on Appeal contains many papers filed by Mr. Wright in his effort to prosecute an appeal from this order, but apparently there were technical defects with those papers. (R. 36-63). The Second District ultimately permitted Mr. Wright to proceed. (R. 63). These separate matters are not relevant to this Court's review.

not cognizable in a rule 3.800(a) motion because a reservation of jurisdiction without setting forth sufficient justification was not an "illegal sentence" under the rule. 864 So. 2d at 1154-55; (R. 107-08). The court certified that its new position expressly and directly conflicted with decisions of the First, Third, and Fourth Districts, including the decisions in Macias and Hampton.

With regard to Mr. Wright's rule 3.800(a) claim that the sentencing court had improperly retained jurisdiction over two concurrent sentences, the Second District expressly affirmed the grant of relief in vacating the retention on one sentence. Id. at 1154; (R. 107). The court thus affirmed the trial court's decision in its entirety. The Second District did not explain how a rule 3.800(a) challenge was proper with regard to this aspect of retained jurisdiction but improper with regard to the sentencing court's failure to comply with the statutory justification requirement.

Still pro se, Mr. Wright petitioned this Court to review the Second District's en banc decision. This Court has postponed its decision on jurisdiction, ordered a briefing schedule, and appointed counsel to represent Mr. Wright on a pro bono basis before this Court.

This brief is filed pursuant to the Court's order.

SUMMARY OF ARGUMENT

Point I. This Court has never adopted an exclusive definition of an illegal sentence. The Court has instead characterized an illegal sentence by focusing on the patent nature of the error, the need for an evidentiary hearing to confirm the error's existence, and whether the erroneous sentence is such that it could not be imposed under any circumstances. The erroneous sentence in this case shares the characteristics of other sentences the Court has found to be illegal.

Furthermore, the Second District erred in relying on Davis v. State to hold that a failure to provide sufficient justification for a retention of jurisdiction is no different than a failure to provide written reasons to support a departure sentence. To the contrary, the two situations are vastly different. The first is a mere error in the process of sentencing, akin, possibly, to an error in the course of a trial. By comparison, an error in retaining jurisdiction without complying with the statutory requirements for making such a retention triggers a significant constitutional concern: a separation of powers violation.

The retention of jurisdiction authority set forth in section 947.16(3), Fla. Stat. (Supp. 1978), expressly permits a trial court to veto a Parole and Pardon Commission decision to grant an inmate parole. Traditionally, however, the execution of a sentence lies with the executive branch, and, more importantly, article IV, section 8(c), of the Florida Constitution expressly and textually assigns

the power to grant paroles to a legislatively created parole and pardon commission. While this Court upheld this statute from a separation of powers challenge in Borden v. State, it remains clear that the statutory authorization is the only possible source of the judiciary's authority to intrude on executive branch decisions to grant parole and veto those decisions.

Accordingly, absent compliance with the statute, an unconstitutional intrusion of power occurs and continues for as long as the trial court wrongly exercises jurisdiction over the executive branch's authority to parole an inmate. For these reasons, the failure to comply with the statutory justification requirement results in an illegal sentence that can be corrected under rule 3.800(a) at any time.

Point II. Alternatively, the Court should revisit its fractured decision in Borden and recede from the result there. In Borden, an inmate argued that the reservation of jurisdiction statute violated the express language of article IV, section 8(c), which provides that the Legislature may create a parole and pardon commission with the power to grant paroles.

Rejecting that argument, a three-justice opinion conducted no analysis of the specific separation of powers issue before the Court and simply relied on a prior decision that had no bearing whatsoever on whether the Legislature could constitutionally assign the judiciary the power to veto an executive branch decision to parole an inmate. A fourth justice simply stated he believed the statute to be

constitutional, leaving no majority decision articulating a rationale as to how the Legislature could possibly overcome article IV, section 8(c)'s express provision that the power to grant paroles should be assigned to a parole and pardon commission.

The three-justice dissent in Borden analyzed the situation and reached the correct result: the retention of jurisdiction statute is unconstitutional. To permit the Legislature to give the judiciary a veto over the executive decision to grant parole is to permit a clear violation of the constitutional separation of powers.

This Court has the authority to correct an erroneous legal analysis in its precedent and recede from an incorrect decision. The Court should do so now, in this case, and declare the retention of jurisdiction unconstitutional. Such a sentence is an illegal one and is correctable through rule 3.800(a).

STANDARD OF REVIEW

The issues before this Court involve pure questions of law, and, as such, this Court's review is de novo. See, e.g., Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000).

ARGUMENT

I. THE JUDICIARY'S ERRONEOUS RETENTION OF A VETO OVER THE PAROLE COMMISSION'S RELEASE AUTHORITY IS A PATENT, CONSTITUTIONALLY SIGNIFICANT HARM THAT SHOULD BE CORRECTED AT ANY TIME.

Under section 947.16(3), Fla. Stat. (Supp. 1978), a sentencing judge could elect to retain jurisdiction over portions of certain criminal sentences. Among the statute's requirements were that the court must justify the retention "with individual particularity" and make the justification part of the record. § 947.16(3)(a), Fla. Stat. (Supp. 1978). The district courts have held that this requirement is satisfied only where a particular and legally sufficient basis for retaining jurisdiction is set forth. E.g., Hampton v. State, 764 So. 2d 829, 830 (Fla. 1st DCA 2000); Macias v. State, 614 So. 2d 1216, 1217 (Fla. 3th DCA 1991); Robinson v. State, 458 So. 2d 1132, 1133-34 (Fla. 4th DCA 1984); Abbott v. State, 421 So. 2d 24, 24 (Fla. 1st DCA 1982). This Court has stated that jurisdiction should be retained "sparingly and carefully." Wilson v. State, 414 So. 2d 512, 514 n.* (Fla. 1982).

Three district courts have expressly held, in various contexts, that the failure to satisfy the justification requirement creates an illegal sentence that can be corrected at any time by a rule 3.800(a) motion. E.g., Hampton, 764 So. 2d at 830; Macias, 614 So. 2d at 1217; Anderson v. State, 584 So. 2d 1127, 1127 (Fla. 4th DCA 1991). The Second District had been in agreement with these other districts,

see King v. State, 835 So. 2d 1224 (Fla. 2d DCA 2003), but in the en banc decision below, written without the benefit of briefing by any attorney, the Second District receded from that position. Wright v. State, 864 So. 2d 1153 (Fla. 2d DCA 2003). The Second District held that this Court's decision in Davis v. State, 661 So. 2d 1193 (Fla. 1995), governed the context of unarticulated sentencing justifications and that, as the sentence there was found not to be an illegal one under rule 3.800(a), the failure to comply with the justification requirements for retaining jurisdiction over a sentence does not result in an illegal sentence as well.

As Mr. Wright now shows, the Second District's decision was incorrect and should be quashed by this Court. The failure to comply with the statutory requirements for permitting the judiciary to veto a parole release decision gives rise to an illegal sentence, remediable at any time under rule 3.800(a).

A. THIS COURT HAS NOT ADOPTED AN EXCLUSIVE DEFINITION OF "ILLEGAL SENTENCE."

Since the Court adopted rule 3.800 in 1967, subsection (a) of the rule has permitted trial courts in criminal cases to correct an "illegal sentence" at any time. At no point, however, has this Court set forth an exclusive definition of that term, either in the rule itself or through case law. Rather, through a series of recent cases, the Court has begun the process of expressly considering the term's applicability on a situation-specific basis.

The Court's recent effort to examine what sentences are "illegal" for purposes of rule 3.800(a) began with Davis v. State, 661 So. 2d 1193 (Fla. 1995). There, the Court rejected a claim that a sentence departing from the sentencing guidelines without contemporaneous written reasons constituted an illegal sentence. Id. at 1196. Instead, the Court held, only a sentence that exceeds the maximum sentence set forth by law without regard to the guidelines is an illegal sentence. Id. ("Only if the sentence exceeds the maximum allowed by law would the sentence be illegal."). This language was unclear regarding whether the Court was explaining what sort of guideline departure would constitute an illegal sentence or whether the Court was limiting rule 3.800(a) to instances where a sentence is imposed beyond the statutory maximum period.

The Court resolved that uncertainty in subsequent cases. Despite the potentially restrictive language of Davis, the Court held in Hopping v. State, 708 So. 2d 263, 265 (Fla. 1998), that a sentence increased on resentencing in violation of constitutional double jeopardy principles constituted an illegal sentence. In State v. Mancino, 714 So. 2d 429, 433 (Fla. 1998), the Court held that a sentence not crediting a prisoner properly for time served was an illegal sentence, and in Carter v. State, 786 So. 2d 1173, 1180 (Fla. 2001), the Court held that a habitual offender sentence based on a crime for which Florida Statutes did not permit enhanced punishment for habitual offenders was an illegal sentence.

At times, the Court has attempted to characterize the sort of sentence that will constitute an illegal sentence. In State v. Callaway, 658 So. 2d 983 (Fla. 1995), receded from on other grounds, Dixon v. State, 730 So.2d 265, 269 (Fla. 1999), the Court stated that a rule 3.800 motion should be "limited to those sentencing issues that can be resolved as a matter of law without an evidentiary hearing." Id. at 988. In Mancino, while holding that an illegal sentence includes one failing to give proper credit for time served, the Court characterized the "evidentiary hearing" factor as one that would preclude use of rule 3.800(a) where such a hearing is necessary to establish the illegality. 714 So. 2d at 433 ("The entitlement to time served is not a disputed issue of fact in the sense that an evidentiary hearing is needed to determine whether there is such an entitlement."). Mancino further provided that "[a] sentence that patently fails to comport with statutory or constitutional limitations is by definition illegal." Id.

Most recently, in Carter, the Court suggested that the definition of "illegal sentence" offered in Davis may have been too narrow, while the characterization suggested in Mancino may have been too broad. Carter, 786 So. 2d at 1177. Carter approved a definition arrived at by the Fourth District's Judge Farmer when he attempted to synthesize the Court's case law: "[A] sentence is 'illegal' if it imposes a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances." Carter, 786

So. 2d at 1181 (quoting Blakely v. State, 746 So. 2d 1182, 1187 (Fla. 4th DCA 1999)).

This Court in Carter made clear, however, that Judge Farmer's definition was not exclusive, and perhaps not entirely accurate, by explaining that the Court based its approval on the fact the definition "comes close to formulating a workable definition of 'illegal' sentence." Carter, 786 So. 2d at 1181 (emphasis added). Carter also concluded that it might be "more helpful" for rule 3.800 to describe the types of sentencing errors correctable as illegal "rather than relying on a somewhat elusive definition of 'illegal sentence.'" Id.

Ultimately, the only immutable truth concerning an illegal sentence is that it is one that can be corrected at any time. See Davis, 661 So. 2d at 1196; Callaway, 658 So. 2d at 988 (Fla. 1995) ("A rule 3.800 motion can be filed at any time, even decades after a sentence has been imposed . . . ."). This Court has accepted a definition of an illegal sentence it called "close" to "workable," but the Court has never attempted to foresee all means by which sentencing errors may arise and to craft an exclusive rule regarding which such errors give rise to an illegal sentence.

Sentencing is a complex matter, and it continuously becomes more so. It is always possible that the Court will be faced with a previously unexplored error, similar to yet distinguishable from those previously examined, that results in an illegal sentence under rule 3.800(a). This is such a case.

B. PETITIONER'S SENTENCE IS AN ILLEGAL SENTENCE BECAUSE THE ERROR IS PATENT AND IDENTIFIABLE WITHOUT A HEARING, AND IT CAUSES THE JUDICIARY TO INTRUDE ON THE EXECUTIVE'S CONSTITUTIONALLY PRESCRIBED ROLE OF GRANTING PAROLE RELEASE.

The sentence in this case is similar to the types of sentences that this Court has historically viewed as illegal sentences. The error is patent and identifiable without an evidentiary hearing, and under no set of facts could the retention of jurisdiction here, as made, be proper. More importantly, though, the sentence in this case is critically distinct from the types of illegal sentences this Court has previously considered. An erroneous reservation of jurisdiction creates a continuing constitutional infirmity -- an ongoing violation of the separation of powers provision set forth in article II, section 3, of the Florida Constitution.

As shown above, the Court has previously focused on whether a sentence's unlawfulness was patent or could be determined as a matter of law without an evidentiary hearing. Mancino, 714 So. 2d at 433; see also Callaway, 658 So. 2d at 988. The reservation of jurisdiction in this case presents precisely this type of error. Section 947.16(3)(a), Fla. Stat. (Supp. 1978), required the sentencing court to provide sufficient justification for retaining jurisdiction, using "individual particularity." E.g., Hampton, 764 So. 2d at 830; Macias v. State, 614 So. 2d at 1217; Robinson v. State, 458 So. 2d at 1133-34; Abbott v. State, 421 So. 2d at 24. Here, as shown by the record, neither the judgment and sentence nor the sentencing

transcript reveals any justification for the court's retention of jurisdiction, let alone a legally sufficient justification. The error is patent and can be verified without dispute and as a matter of law.

The error also resulted in the sort of punishment that no judge could impose under any factual circumstances. See Carter, 786 So. 2d at 1181 (quoting Blakely v. State, 746 So. 2d 1182, 1187 (Fla. 4th DCA 1999)). No sentencing judge could retain jurisdiction over Mr. Wright's sentence unless the judge complied with section 947.16(3), Fla. Stat. (Supp. 1978), which required a sentencing court to set forth a legally sufficient justification for retaining jurisdiction in order to do so. Regardless of the actual facts in Mr. Wright's case, as a matter of law he could not be subjected to the trial court's continuing jurisdiction over him without a legally sufficient justification having been set forth at sentencing.

In the decision below, the Second District relied upon this Court's opinion in Davis and held that a challenge to the sufficiency of a sentencing court's reasons for retaining jurisdiction is analogous to a challenge to a sentencing court's failure to failure to provide reasons for a departure sentence. The Second District erred. While both situations involve reasons for particular choices in the sentencing process, the similarities end there.

Davis involved the statutory procedure for departing from the statutory sentencing guidelines and the requirement that a trial court provide written reasons

for a departure. See § 921.001(6), Fla. Stat. (1989). The Court concluded that the failure to file written reasons for an upward departure does not constitute an illegal sentence under rule 3.800(a). Davis, 661 So. 2d at 1196. Davis relied on Gartrell v. State, 626 So. 2d 1364 (Fla. 1994), where the Court reached the same conclusion with respect to downward departures. Neither Gartrell nor Davis, however, offered any analytical basis for the Court's decision. Davis simply emphasized, by way of comparison, that a sentence exceeding the statutory maximum for a particular offense amounts to an illegal sentence under rule 3.800(a).

The decisions in Gartrell and Davis were, in all likelihood, based on the Court's view of the magnitude of the sentencing error at issue. Whether a departure sentence is upward or downward, so long as the defendant has received a sentence within the maximum period set forth by law for a particular offense, the error is comparable to an error in the underlying guilt proceedings and, like such errors, is correctable through other appellate avenues. The actual sentence, while perhaps the result of error, is not "illegal" and cannot be corrected at any time.

An erroneous retention of jurisdiction presents an entirely different situation because it creates a continuing wrong that concerns, and can create conflict with, one of our state's fundamental governing principles: the separation of powers. The Florida Constitution divides the state government into three branches and expressly states that officers of one branch may not exercise the powers of another:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Art. II, § 3, Fla. Const. The doctrines embodied by this language prohibit each branch from encroaching upon the powers of the others and from delegating its constitutionally assigned powers to another. Chiles v. Children, 589 So. 2d 260, 263-64 (Fla. 1991).

Historically, sentencing an offender has been a mixed judicial and legislative function, as the judiciary imposes sentences in conformity with the legislature's pronouncements. See, e.g., Pearson v. Moore, 767 So. 2d 1235, 1238-39 (Fla. 1st DCA 2000); Thomas v. State, 612 So. 2d 684, 684 (Fla. 5th DCA 1993); see also Petition of the State Bar Ass'n for Adoption of Rules for Practice and Procedure, 21 So. 2d 605, 607 (Fla. 1945) (explaining that the powers of each branch are determined by examining a number of factors, including the historical allocation of government power); Simms v. State, Dept. of Health & Rehabilitative Servs., 641 So. 2d 957, 960-61 (Fla. 3d DCA 1994) (same). Carrying out a sentence once imposed, however, has been an executive function. E.g., Pearson, 767 So. 2d at 1238-39.

Most important here, the Florida Constitution expressly empowers the Legislature to create by law "a parole and probation commission with power to supervise persons on probation and to grant paroles or conditional releases to

persons under sentences for crime." Art. IV, § 8(c), Fla. Const. That provision is an express constitutional limitation on how the Legislature may utilize a parole release system: by a commission empowered to grant paroles to persons under sentences for crime.

Notwithstanding the limitation set forth in article IV, section 8(c), under section 947.16(3)(f), Fla. Stat. (Supp. 1978), a trial court with retained jurisdiction over a sentence is authorized to vacate a release order by the Parole and Probation Commission (the "Parole Commission") if the court finds that the order was not based on competent substantial evidence or that parole was simply "not in the best interest of the community or the inmate . . . ." Section 947.16(3)(g) expressly provided that a decision to vacate a release order "shall not be appealable." Although codified in renumbered sections and surrounded by various procedural amendments made over the years, the power to overrule a Parole Commission decision to grant a parole release and the prohibition on appealability remain part of section 947.16 today. See § 947.16(4), Fla. Stat. (2003).

Plainly, the only purpose of retaining jurisdiction is to allow trial courts an optional window of time during which they can overrule the Parole Commission's decisions to parole inmates. In State v. Williams, 397 So. 2d 663, 665 (Fla. 1981), the Court aptly referred to the reservation procedure as creating a "parole veto" power for trial courts. That characterization was wholly accurate. Much like the

Governor wields an unreviewable veto power over bills passed by the Legislature, see art. III, section 8(a), Fla. Const., the trial court wields an unreviewable veto power over the Parole Commission's parole decisions for any person still subject to the court's reserved jurisdiction. Indeed, the parole veto is more final -- the Legislature can override a gubernatorial veto, see art. III, section 8(c), but a parole veto is, at least by statute, unreviewable even on appeal. § 947.16(3)(g).

On its face, the statutory retention of jurisdiction option contradicts the constitutional command that, by law, a parole and pardon commission may be created with the power to grant paroles. Nonetheless, in Borden v. State, 402 So. 2d 1176 (Fla. 1981), this Court rejected a challenge that the reservation of jurisdiction mechanism violates article IV, section 8(c), and article II, section 3. The Court did so, however, only by a three-justice opinion joined by a fourth justice's partial concurrence, with little or no discussion in either opinion, and over a principled dissent by three other justices.

For purposes of this Point I, the Court need not revisit the holding in Borden. Rather, Mr. Wright merely emphasizes that an issue of fundamental, constitutional magnitude exists where the judiciary assumes veto authority over a power constitutionally assigned to a parole and pardon commission. Assuming arguendo that Borden reached the correct result and section 947.16(3), Fla. Stat. (Supp. 1978), is constitutional, the judiciary's encroachment into the parole process

through a veto power obtained by retaining jurisdiction over a sentence is an intrusion that should be carefully controlled. Therefore, strict compliance with the statutory scheme must be required, including the legislative dictate that a sufficient justification for retaining jurisdiction be set forth with individual particularity. To do otherwise permits the judiciary to usurp a power reserved not only to the executive branch but to a specific commission that the Legislature is empowered to create, and in fact has created.

Accordingly, where a sentencing court retains jurisdiction over a defendant's sentence but fails to do so in accordance with the statutory requirements for such retention, the court is exercising continuing jurisdiction over the defendant's sentence in a manner that would surely not be constitutionally permissible in the absence of the authorizing statute. Yet, the sentence in this case fails to comply with that statute, as the record shows. The result of such error is not simply a sentence that perhaps differs from the sentence a defendant would have received had an error not occurred in the trial court, as where a sentencing court fails to provide written reasons for a departure sentence. To the contrary, the result is a clear and continuing wrongful encroachment by the judiciary upon the authority of the executive branch and, specifically, upon the authority of the Parole Commission. That should be held to constitute an illegal sentence, correctable at any time.

It bears mention that, in the decision below, the Second District affirmed the trial court's ruling granting relief under rule 3.800(a) to the extent Mr. Wright demonstrated that the sentencing court erroneously retained jurisdiction over more than one sentence. 864 So. 2d at 1154. Yet that situation and the one at issue here should be treated alike. Both involved reservations of jurisdiction. Both involved plain violations of the statute's requirements. Both resulted, and could continue to result, in the judiciary wrongly exercising jurisdiction over the functions of another branch of government and, in particular, a function constitutionally assigned to a particular part of the executive branch. Both should be correctable at any time through rule 3.800(a).

Petitioner also points out that the ramifications of quashing the decision below and approving the conflicting decisions of the First, Third, and Fourth Districts will affect only a limited class of persons. In 1983, the Legislature enacted Florida's first comprehensive set of sentencing guidelines and therein provided that persons convicted of a crime committed on or after October 1, 1983, may be released only under a set of enumerated circumstances, and the granting of parole was not among them. See § 921.001(8), Fla. Stat. (1983). That remains the law to this day. § 921.0010(10)(a), Fla. Stat. (2003). Thus, while section 947.16 still permits courts to retain jurisdiction over certain sentences, Mr. Wright

understands that the practice has effectively ended because the impetus for doing so -- permitting the trial court a "parole veto" -- is no longer present.

In sum, the Second District erred when it receded from its prior position, and the position held by the First, Third, and Fourth Districts, and concluded that the sentencing judge's failure to provide the statutorily required justification for retaining jurisdiction over Petitioner's sentence did not amount to an illegal sentence under Rule 3.800(a). The Second District failed to appreciate the significance and magnitude of the sentencing error at issue, as well as the distinctions between the error at issue here and that at issue in Davis. For these reasons, the decision below should be quashed.

II. ALTERNATIVELY, THE RETENTION OF JURISDICTION TO VETO A PAROLE RELEASE VIOLATES SEPARATION OF POWERS PRINCIPLES, AND THUS THE RETENTION OF JURISDICTION FOR THAT PURPOSE IS AN ILLEGAL SENTENCE.

Mr. Wright concedes that this Court has upheld the validity of section 947.16(3), Florida Statutes (1979), authorizing a sentencing court to retain jurisdiction to veto a parole release, in the face of a separation of powers challenge. See Borden, 402 So. 2d at 1177. Borden, however, followed an incorrect legal analysis to reach an incorrect result. Accordingly, this Court may depart from stare decisis and now conclude that the statute is unconstitutional. See, e.g., Puryear v.

State, 810 So. 2d 901, 905 (Fla. 2002) ("The doctrine of stare decisis bends . . . where there has been an error in legal analysis.") (internal citations omitted).

This particular argument was not asserted in the Rule 3.800(a) motion below. Nonetheless, Mr. Wright should be permitted to raise the issue here. Because this is a facial constitutional challenge, reaching the merits of Mr. Wright's argument is consistent with the Court's decisions in State v. Johnson, 616 So. 2d 1, 3-4 (Fla. 1993), and Heggs v. State, 759 So. 2d 620, 624 (Fla. 2000). In Harvey v. State, 848 So. 2d 1060 (Fla. 2003), Justice Pariente articulated the important reasons why constitutional errors should be corrected on appeal, even where the issue was not raised in the trial court. See id. at 1066-67 (Pariente, J., specially concurring).

Moreover, Mr. Wright's challenge is, in essence, a challenge to the trial court's continuing jurisdiction over his case. 848 So. 2d 1060. See, e.g., Harris v. State, 854 So. 2d 703, 705 (Fla. 3d DCA 2003) ("[C]ase law establishes that the absence of jurisdiction may be raised at any time."). Accordingly, and if necessary, this Court could treat this proceeding as a petition for a writ of prohibition. See State v. Johnson, 306 So. 2d 102 (Fla. 1974) (holding that review should not be dismissed on account of seeking improper remedy where proper remedy available).

As a practical matter, this case may present the Court's best and perhaps only occasion to reconsider its erroneous decision in Borden and lift the erroneous lingering effects of that decision off the class of persons still subject to retained jurisdiction sentences under section 947.16. New sentences are apparently not being rendered with reservations in light of the unavailability of parole under section 921.001(8), Fla. Stat. (1983) (now codified at § 921.0010(10)(a), Fla. Stat. (2003)), which forecloses the possibility of direct appeals on the issue, and in any event Borden stands as a complete bar to relief in the lower courts.

Because the conflict issue before this Court involves the illegality of a retained jurisdiction sentence, this is the appropriate case for the Court to reconsider Borden. This Court specifically appointed undersigned counsel to advance all meritorious issues and to aid this Court in reaching the correct legal result in resolving the present conflict among the districts. This is a meritorious issue.

A. THE FLORIDA CONSTITUTION PERMITS THE LEGISLATURE TO ASSIGN THE POWER TO GRANT PAROLE TO A PAROLE AND PROBATION COMMISSION.

Florida's separation of powers provision, article II, section 3, of the Florida Constitution, provides in pertinent part that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Nothing in Florida's Constitution expressly provides

the judiciary any authority to make parole decisions. Thus, section 947.16(3) unconstitutionally attempts to authorize the judiciary to exercise the executive's parole power.

Time and again, this Court has held that one of the two "fundamental prohibitions" contained in the separation of powers provision "is that no branch may encroach upon the powers of another." See, e.g., Florida Senate v. Florida Public Employees Council 79, 784 So. 2d 404, 408 (Fla. 2001); Chiles v. Children, 589 So. 2d 260, 264 (Fla. 1991); Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400, 407 (Fla. 1996). The fundamental policy consideration underlying the separation of powers doctrine is the preservation of liberty from an intrusion by tyranny. In discussing the chilling consequences of not honoring separation of powers, this Court has noted:

> The fundamental concern of keeping the individual branches separate is that the fusion of the powers of any two branches into the same department would ultimately result in the destruction of liberty.

Children, 589 So. 2d at 263. This need to maintain a strict separation of the branches was recognized even before the colonies formed a more perfect Union. See id.

Writing for this Court, Justice Mathews sagely observed what would happen should the judiciary assume the powers of the either of the other coordinate branches:

> The separation of governmental power was considered essential in the very beginning of our Government, and the importance of the preservation of the three departments, each separate from and independent of the other becomes more important and more manifest with the passing years. Experience has shown the wisdom of this separation. If the Judicial Department of the Government can take over the Legislative powers, there is no reason why it cannot also take over the Executive powers; and in the end, all powers of the Government would be vested in one body. Recorded history shows that such encroachments ultimately result in tyranny, in despotism, and in destruction of constitutional process.

Pepper v. Pepper, 66 So. 2d 280, 284 (Fla. 1953).

Because of the importance of the separation of powers doctrine, this Court has been resolute: "If a statute purports to give one branch powers textually assigned to another by the Constitution, then that statute is unconstitutional." B.H. v. State, 645 So. 2d 987, 992 (Fla. 1994). But that is exactly what the Legislature has done through section 947.16 by assigning the judiciary a veto power over certain of the executive branch's parole decisions.

As noted above, section 947.16(3) permits a sentencing court to retain on-going jurisdiction over an inmate's sentence, with the sole result of allowing the court, perhaps many decades after an inmate is sentenced, to veto a decision to release an inmate on parole. Under Florida's Constitution, though, a parole commission, if authorized by the Legislature, is the entity that is exclusively entitled to make parole determinations. See art. IV, § 8(c), Fla. Const. That provision provides:

> There may be created by law a parole and probation commission with power to supervise persons on probation and to grant paroles or conditional releases to persons under sentences for crime. The qualifications, method of selection and terms, not to exceed six years, of members of the commission shall be prescribed by law.

It is beyond debate that the Legislature created the Parole and Probation Commission (now the Parole Commission) and that it is a creature of the executive branch. See generally ch. 947, Fla. Stat.; see also Owens v. State, 316 So. 2d 537, 538 (Fla. 1975); Dorminey v. State, 314 So. 2d 134, 136 (Fla. 1975).

This Court has been emphatic that "the doctrine of separation of powers requires that the judiciary refrain from deciding a matter that is committed to a coordinate branch of government by the demonstrable text of the constitution." McPherson v. Flynn, 397 So. 2d 665, 667 (Fla. 1981) (emphasis added). Nothing could be more clear from article IV, section 8(c) than the fact that, if parole decisions are to be made, those decisions are to be made by an executive branch parole commission. Nothing in Florida's Constitution permits the judiciary any parole authority whatsoever.

The assignment of the parole power to the parole commission does not come from the Legislature; rather, it comes from the people of Florida themselves. See Art. I, § 1, Fla. Const. The people of Florida have assigned parole decisions to the executive branch, not the judicial branch. As a result, the Legislature is without power to assign parole responsibility to the judiciary. McPherson.

The Legislature first purported to grant the judiciary the authority to retain jurisdiction over parole decisions when it enacted House Bill 73 in 1978. See ch. 78-318, § 1, at 894-95, Laws of Fla. (A. 5). Indeed, the Legislature at that time specifically intended to fundamentally alter the parole system to permit the judiciary's participation. The Senate staff analysis to House Bill 73 provided:

> HB 73 proposes a potentially major shift in control over the lengths of time served from the executive branch to the judicial branch. The essence of this shift is, where at the time of sentence such a desire is noted by the sentencing court, the court possesses the power to nullify a decision to parole . . . .

Fla. S. Comm. on Corr., Prob. & Parole, HB 73 (1978) Staff Analysis 1 (May 1, 1978) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.) (A. 6).

An undated "Memorandum on Constitutional Issues Raised by HB 73 and SB 779" ("the Memorandum") indicated that the "judicial encroachment" permitted by House Bill 73 was "compelling." (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla., carton 18/599) (A. 7). That is so because parole historically has been an executive, not judicial function. See id. After raising multiple additional constitutional concerns, the Memorandum prophetically concluded:

> In summation, a challenge on constitutional grounds is a virtual certainty in any legislation affecting time served by inmates. Only three have been briefly outlined here, but others may exist. Although research has not led to a conclusive finding of unconstitutionally, the challenges, based either on alleged violations of federal or state

> constitutions, are not so totally lacking substance that advance assurances can be given that either bill will pass constitutional muster.

Id. (emphasis added).

Presumably, the State will respond to Mr. Wright's positions and contend that Florida's Constitution is a limitation of power and thus the Legislature has the broad authority over determining the possible range of sentences and can therefore permit a court on-going supervision of an inmate for parole consideration. That contention, however, defies the express language of the constitution, and, is therefore, incorrect.

This Court on numerous occasions has held that where the constitutional text provides how something must be done, that is the exclusive manner of doing it. Concisely stated:

> When the Constitution prescribes the manner in which a thing shall be done or a fact ascertained by implication, it prohibits the Legislature from by statute providing a different manner--the one prescribed in the Constitution is exclusive of all other modes.

Thomas v. State ex rel. Cobb, 58 So. 2d 173, 178 (Fla. 1952) (quoting State ex rel. Church v. State, 77 So. 262, 263 (Fla. 1917); see also Cook v. City of Jacksonville, 823 So. 2d 86, 91-92 (Fla. 2002). This is so even though the Florida Constitution is a limitation on authority, not a grant of authority. See, e.g., Thomas, 58 So. 2d at 177.

With respect to parole, a close reading of the text of Article IV, section 8(c), indicates that the Legislature's power is to determine whether to permit parole in the first instance. That provision specifically assigns a parole commission the power to make parole decisions once the Legislature permits parole.

What article IV, section 8(c), does not permit, though, is for the Legislature to assign members of the judiciary any authority in the decision to grant parole, let alone a veto power over the Parole Commission's decision. Because Florida's Constitution expressly provides who will make parole decisions if authorized by the Legislature, the Legislature does not have the constitutional authority to alter who makes those parole decisions.

B. THE THREE-JUSTICE DISSENT IN BORDEN CORRECTLY DETERMINED THAT RESERVING JURISDICTION TO VETO A PAROLE DECISION VIOLATES THE CONSTITUTIONAL PRESCRIPTION FOR SEPARATING POWERS.

Returning to this Court's analysis in Borden, it should be observed that none of the opinions in that case commanded four votes. Therefore, there was no opinion of this Court setting forth why this statute does not violate the separation of powers principles of Florida's Constitution. See, e.g., Santos v. State, 629 So. 2d 838, 840, n.1, n.2 (Fla. 1994) (explaining that there is no Court opinion where four or more justices do not agree to the analysis and reasoning of the decision).

The entire analysis contained in the three-justice lead opinion authored by Justice McDonald concerning the validity of section 947.16 was as follows:

> Passed in 1978, this statute apparently was a response to rising general criticism that convicted felons were being released on parole too soon. The statute permits a review of parole decisions in certain instances and for a certain period of time. In *Owens v. State*, 316 So. 2d 537 (Fla. 1975), this Court recognized the authority of the legislature to set conditions under which parole may be granted. We see no reason to retreat from that position now. The First District Court of Appeal recently addressed the constitutionality of this statute in Arnett v. State, 397 So. 2d 330 (Fla. 1st DCA 1981). We agree with that court that section 947.16(3) is constitutional.

402 So. 2d at 1176-77 (McDonald, J.) (footnote omitted) (emphasis added). Justice Alderman, writing separately on this issue, and providing the fourth vote for a decision, simply stated that he agreed that the statute was constitutional. See id., 402 So. 2d at 1177 (Alderman, J., concurring in part and dissenting in part).

In a three-justice dissent joined by Justices Adkins and Boyd, Justice England cogently set forth reasons why this statute violated Florida's separation of powers provision. This Court should adopt Justice England's dissent and hold that section 947.16(3) is constitutionally invalid.

Respectfully, the legal error in Justice McDonald's brief statement in Borden is evident when reviewing the principal decision he cited for support: Owens. Neither Owens nor the case upon which it relied involved the judiciary's on-going involvement in an inmate's sentence and parole decision. That fact seems to have been overlooked by the Court in its fractured decision in Borden.

In Owens, a unanimous decision ironically authored by Justice England, this Court addressed the constitutionality of section 775.082(1), Florida Statutes (1973). 316 So. 2d at 538. That statute made individuals convicted of a capital felony and not sentenced to death statutorily ineligible for parole for a period of twenty-five years. See § 775.082(1), Fla. Stat. (1973). Nothing in this statute permitted the judiciary any authority over parole. See id.

Owens correctly explained that under the separation of powers provision of article II, section 3, and the parole authority provision of article IV, section 8(c), the Legislature is authorized to create a parole commission that has the authority to grant parole. 316 So. 2d at 538 ("the exercise of parole authority is characterized for separation of powers purposes, the authority is only exercisable to the extent it has been conferred."). In the statute at issue in Owens, though, the Legislature expressly prohibited the Parole Commission from granting parole for the first twenty-five years of a sentence. See id. This was permissible because the Legislature never authorized parole for the affected individuals in the first instance, which is within the Legislature's constitutional prerogative. See id. Nothing in Owens addressed whether the judiciary had any authority to involve itself in the parole process in instances where the Legislature had authorized parole and the Commission had affirmatively granted a parole release.

Moreover, Owens was based on this Court's earlier decision in Dorminey v. State, 314 So. 2d 134 (Fla. 1975). See Owens, 314 So. 2d at 538 n.3. In Dorminey, this Court also described the appropriate division of constitutional power among the branches. 314 So. 2d at 136. The Court stated that the Parole Commission "considers eligibility of persons for Parole," whereas the Legislature determines the "maximum and minimum penalties to be imposed for violation of the laws." Again, nothing in Dorminey indicates that the judiciary had any on-going role in monitoring an inmate's sentence for purposes of parole decisions, let alone vetoing a release decision already made by the Parole Commission.

The First District in Arnett v. State, 397 So. 2d 330, 332 (Fla. 1st DCA 1981), expressed the view that article IV, section 8(c) permits the Legislature the ability to "establish minimum conditions under which parole may be granted." That analysis fails to address the constitutional prohibition of assigning the judiciary to an executive function.

The Legislature's decision not to authorize parole in the first instance is qualitatively different than the situation where the Legislature specifically authorizes parole but then attempts to assign the judiciary the on-going ability to veto parole release decisions. Yet, Justice McDonald's opinion in Borden suggested there was no difference. According to Justice McDonald, the involvement of the judiciary in parole decisions, a function (if authorized by the

Legislature) specifically and textually committed to a particular commission, was identical to the situation where the Legislature had not authorized parole in the first instance. This is the only reasonable interpretation of Justice McDonald's remark that he saw "no reason to retreat from" the Court's holding in Owens.

Respectfully, that scant analysis was simply erroneous. As demonstrated above, the on-going involvement of the judiciary into an executive function is totally different than the Legislature not permitting parole in the first instance. This Court in Borden apparently overlooked this fundamental distinction. This is a distinction with a difference, however.

Under this Court's precedent, when the constitution designates how something must be done, the Legislature is without power to designate an alternative means. See, e.g., Thomas, 58 So. 2d at 177. None of the justices in their fractured opinions in Borden cited to nor distinguished this fundamental tenant of Florida law. Accordingly, Mr. Wright respectfully submits that the legal analysis supporting the Borden decision was then, and today remains, legally erroneous. Stare decisis does not preclude this Court now from rectifying that legal error.

In sum, no decision from this Court sets forth an analysis agreed to by four justices as to why section 947.16(3), Fla. Stat. (Supp. 1978), as then enacted and to this day amended, does not violate the separation of powers provisions of the

Florida Constitution. The only scant analysis that exists, agreed to by only three justices, on its face appears legally erroneous. As such, stare decisis does not prevent this Court from addressing this issue. This Court has the authority -- and we respectfully suggest the obligation -- to reconsider its previous decision upholding the validity of section 947.16(3).

Once it is acknowledged that the judiciary cannot constitutionally retain jurisdiction over a statute for purposes of vetoing parole release decisions, it becomes manifest that such a retention amounts to an illegal sentence, remediable under rule 3.800(a). The error is patent, identifiable without need of a hearing, and the resulting sentence is one that could not be imposed under any factual circumstances. Accordingly, for this alternative reason, the Court should quash the Second District's decision and approve the conflict decisions from the First, Third, and Fourth Districts.

CONCLUSION

For the foregoing reasons, this Court should hold that the retention of jurisdiction over Mr. Wright's sentence, in violation of the requirements of section 947.16(3)(a), Fla. Stat. (Supp. 1978), constitutes an illegal sentence for purposes of rule 3.800(a). At a minimum, the Court should recede from its decision in Borden and hold that section 947.16(3), Fla. Stat. (Supp. 1978), as acted and later amended, violates the Florida Constitution's separation of powers principles; as a

result, a reservation of jurisdiction under that provision is an unconstitutional, illegal sentence that can be corrected under rule 3.800(a). In either case, the Court should quash the Second District's decision below and approve the conflict decisions from the First, Third, and Fourth Districts.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 17, 2004, a copy of the foregoing Initial Brief of Petitioner George I. Wright as well as the Appendix thereto has been furnished by United States Mail, postage prepaid, to:

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CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

I HEREBY FURTHER CERTIFY, this 17th day of September, 2004, that the type size and style used throughout Petitioner's Initial Brief is Times New Roman 14-Point Font.

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