**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

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# PETITIONER GEORGE I. WRIGHT'S REPLY BRIEF

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## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

ARGUMENT ..... 1

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 ..... 1

II. ALTERNATIVELY, THE RETENTION OF JURISDICTION TO VETO A PAROLE RELEASE VIOLATES SEPARATION OF POWERS PRINCIPALS, AND THUS THE RETENTION OF JURISDICTION FOR THAT PURPOSE IS AN ILLEGAL SENTENCE ..... 4

CONCLUSION ..... 9

CERTIFICATE OF SERVICE ..... 11

CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE ..... 11

## TABLE OF AUTHORITIES


Borden v. State, 402 So. 2d 1176 (Fla. 1981) ..... 4, 5, 7, 8, 9

Bover v. State, 797 So. 2d 1246 (Fla. 2001) ..... 1

Bush v. Schiavo, 29 Fla. L. Weekly S515, 2004 WL 2109983 (Fla. Sept. 23, 2004) ..... 8

Carter v. State, 786 So. 2d 1173 (Fla. 2001) ..... 1

Davis v. State, 661 So. 2d 1193 (Fla. 1995) ..... 1

Harmon v. State, 438 So. 2d 369 (Fla. 1983) ..... 7

Maddox v. State, 760 So. 2d 89 (Fla. 2000) ..... 1

Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373 (Fla. 1999) ..... 5

Puryear v. State, 810 So. 2d 901 (Fla. 2002) ..... 7

Sparkman v. McClure, 498 So. 2d 892 (Fla. 1986) ..... 6

Springfield v. State, 443 So. 2d 484 (Fla. 2d DCA 1984) ..... 7, 8


## OTHERS


Article IV, § 8(c), Fla. Const. ..... 2

Rule 3.800(a) ..... 1, 3, 4, 9

Section 947.16(3), Fla. Stat. (Supp. 1978) ..... 5, 6, 7, 9

## 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.

In the Initial Brief, Mr. Wright first demonstrated that this Court has never adopted a single, exclusive, one-size-fits-all definition of "illegal sentence" as that term is used in Rule 3.800(a). The State's Answer Brief never directly addresses this point, effectively conceding it.

The Initial Brief next showed how the sentence in this case fits within the guideposts established by this Court's case law and, more importantly, presents two substantial dimensions that make this sentencing situation different from all others heretofore considered by the Court. The State responds by addressing only the Court's prior case law. The State argues that, consistent with the decisions in Davis v. State, 661 So. 2d 1193 (Fla. 1995), Carter v. State, 786 So. 2d 1173 (Fla. 2001), and Bover v. State, 797 So. 2d 1246 (Fla. 2001), and not inconsistent with Maddox v. State, 760 So. 2d 89 (Fla. 2000), the failure to provide justifications for retaining jurisdiction over execution of a sentence is merely the sort of procedural failure that this Court has deemed will not make a sentence "illegal."

The State's response completely ignores the two unique dimensions to the error at issue here, aspects of a sentence that have never before been considered by this Court. First, by statute, the retention of jurisdiction permits a judicial branch

official the power to "veto" an executive decision to parole a prisoner, extending the judiciary's role to include not only its historical role of adjudicating guilt and sentencing but also the historically executive function of carrying out a sentence. See Ini. Br. at 16. Assuming arguendo that such governmental branch role-shifting is constitutionally permissible, such shifts should nonetheless not be undertaken unless the plain, unambiguous statutory requirements for doing so are met. Where, as here, those requirements are not met, a continuing harm results, with the judiciary's actual, continuing jurisdiction over the sentence failing as a result.

In addition, Article IV, section 8(c), of the Florida Constitution expressly provides that the Legislature may create a commission empowered to grant parole to persons under sentence for crime. Again assuming arguendo that the Legislature can enact a statute that empowers a judicial official to grant an unappealable "judicial veto" over a Commission decision to grant parole, the trial court's exercise of jurisdiction over the Commission's decision can, at most, only be lawful under separation of powers principles where the plain statutory requirements for invoking such oversight have been met. In cases such as Mr. Wright's, it is clear that those requirements have not been met and that the trial court's continuing exercise of jurisdiction over Mr. Wright's sentence is not only unlawful but constitutionally infirm.

These concerns, discussed at length in the Initial Brief, render the error at issue here entirely unlike the errors this Court has previously considered under Rule 3.800(a). The errors at issue in the Court's earlier cases ultimately concerned the length or characteristics of a sentence that was imposed, with finality, by a trial court, there ending the judicial labor in the matter. By comparison, the sentence at issue in this and similar cases involves a trial court's effort to grant itself continuing authority over the execution of a sentence, permitting a "judicial veto" over a decision by the Commission to parole a prisoner, without complying with the plain, unambiguous statutory requirements for doing so.

The State's unwillingness even to address these critical distinctions from the Court's prior cases speaks volumes. Likewise, the State's silence confirms Mr. Wright's point that the impact of addressing cases such as this one under Rule 3.800(a) should be minimal, in light of the fact that parole has not been available for offenses committed on or after October 1, 1983, and trial courts have, to our knowledge, ceased reserving jurisdiction over sentences as a result. See Ini. Br. at 20-21. Accordingly, approving the First, Third, and Fourth Districts' decisions holding the claim in this case to be cognizable under Rule 3.800(a) will not open any litigation floodgates.

In the end, there is no principled reason that a prisoner such as Mr. Wright should have to pursue a petition for writ of prohibition from a district court (or this

Court) to establish that a trial court does not, in fact or law, have continuing jurisdiction over a sentence where the plain, unambiguous statutory requirements for exercising such jurisdiction have not been met. Such matters can be handled most thoroughly and efficiently by trial courts through Rule 3.800(a) motions.

For the reasons stated above, and all of the extensively discussed reasons set forth in the Initial Brief, this Court should hold that the trial court's improper retention of jurisdiction over Mr. Wright's sentence gives rise to an illegal sentence, correctable under Rule 3.800(a). The decision below should be quashed and the conflicting decisions approved.

## 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.

The State sets forth a cursory, two-prong defense to the constitutionality of section 947.16(3), Fla. Stat. (Supp. 1978). First, the State contends that Mr. Wright's facial challenge is not properly before this Court. Second, the State declares that Borden should remain the law of this state based on the doctrine of stare decisis. As demonstrated below, the State's contentions are without merit.

As to the first issue, the State cites Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 384 (Fla. 1999), in arguing that Mr. Wright should have followed "usual procedures" to challenge a statute on its face by filing

suit in the circuit court. See An. Br. at 13. Nothing in Memorial Hospital precludes this Court's consideration of Mr. Wright's argument that section 947.16(3) is constitutionally invalid.

First, in Memorial Hospital, there was no controlling decision by this Court on the constitutional question at issue. The circuit and district courts could consider the constitutional claim and reach the result they concluded the law required. Here, by comparison, the lower courts had no authority to reconsider this Court's decision in Borden v. State, 402 So. 2d 1176 (Fla. 1981).

Second, nothing in Memorial Hospital implicated the trial court's continuing jurisdiction over the case. Mr. Wright's facial attack on section 947.16(3) directly challenges the trial court's present and future jurisdiction over Mr. Wright's case through the trial court's retention of jurisdiction. Mr. Wright's challenge demonstrates a significant constitutional separation of powers violation that should be remedied by Florida's courts and under the circumstances here can be remedied by this Court alone. Memorial Hospital is entirely inapposite.

Notably, the State makes no effort to distinguish the authorities cited in the Initial Brief that demonstrate this Court's willingness and power to address, in an appropriate case, constitutional issues raised for the first time on appeal. See Ini. Br. at 22 (citing State v. Johnson, 616 So. 2d 1, 3-4 (Fla. 1993), Heggs v. State, 759 So. 2d 620, 624 (Fla. 2000), and Harvey v. State, 848 So. 2d 1060, 1066-67

(Fla. 2003) (Pariente, J., specially concurring)). It is manifest that the Court may address the significant constitutional issue presented here.

The State also cites Sparkman v. McClure, 498 So. 2d 892 (Fla. 1986), for the proposition that this Court should not alternatively consider the instant proceeding as a petition for writ of prohibition. See An. Br. at 14. Contrary to the State's assertions, Sparkman actually supports Mr. Wright's position that prohibition is appropriate here.

In Sparkman, prohibition had originally been sought to dismiss a prosecution on speedy trial grounds. See 498 So. 2d at 894. After prohibition had been denied, the defendant was tried and convicted. The defendant then appealed the refusal to grant extraordinary relief, but this Court held such an appeal to be improper. The Court explained that while prohibition is appropriate "to forestall the future actions of public officials," id. at 895, the appeal in Sparkman concerned only past actions of the trial court and the defendant had a right to appeal (and in fact had appealed) the conviction itself. See id. at 894-96. In this case, by comparison, Mr. Wright seeks to prohibit the trial court's ongoing exercise of jurisdiction over his sentence and case, and thus to forestall only future actions of the trial court.

There is no dispute that, absent section 947.16(3), the trial court would have no authority to exercise jurisdiction over the length of Mr. Wright's sentence. It follows then, that if section 947.16(3) is invalid, there is no legal basis for the trial

court's exercise of jurisdiction here. As Mr. Wright demonstrated in his Initial Brief, section 947.16(3) should be held invalid under fundamental principles governing the separation of powers.

The State's second response to Point II of Mr. Wright's brief is that Borden should remain the law of Florida based on the doctrine of stare decisis. See An. Br. at 14. Mr. Wright does not dispute that this Court adheres to stare decisis; rather, Mr. Wright contends, and this Court has recognized on numerous occasions, that adherence to stare decisis must yield where, as here, there has been an error in legal analysis. See, e.g. Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002).

To support the notion that Borden was correctly decided, the State simply cites Harmon v. State, 438 So. 2d 369 (Fla. 1983), and Springfield v. State, 443 So. 2d 484 (Fla. 2d DCA 1984). Neither case says anything that supports, explains, or justifies the Borden plurality opinion's scant and erroneous legal analysis.

The entire analysis in Harmon concerning the validity of the statute was as follows: "The statute providing the trial court's authority to retain jurisdiction is clearly constitutional. Borden v. State, 402 So. 2d 1176 (Fla. 1981)." Harmon, 438 So. 2d at 370. Interestingly, the challenge in Harmon was not a separation of powers challenge but rather one predicated on article I, section 17, of the Florida Constitution, concerning indefinite imprisonments. Id. Nothing in Harmon explains Borden or otherwise offers any meaningful support for its result.

Springfield concerned an ex post facto challenge, not a separation of powers challenge. 443 So. 2d at 485. The court summarily rejected the ex post facto argument by citation to Borden and two other district court cases. See id. Because no analysis was advanced in Springfield, that case, like Harmon, provides no basis to support the Borden plurality's decision.

On the merits of this Point II, the State makes no effort to challenge the extensive analysis set forth at pages 21-34 of the Initial Brief. Thus, Borden itself contains no analysis to support its holding, and no further analysis can be seen in subsequent case law or even the State's Answer Brief here on appeal. Simply put, Borden is unsupported and unsupportable.

At bottom, this Court should address the merits of Mr. Wright's facial constitutional challenge because the significant constitutional violation implicates not only the propriety of Mr. Wright's sentence and all similar sentences but also the proper allocation of sovereign power among three co-equal branches. As this Court very recently demonstrated in Bush v. Schiavo, 29 Fla. L. Weekly S515, 2004 WL 2109983 (Fla. Sept. 23, 2004), this Court must maintain the integrity of the Florida Constitution's separation of powers requirements.

Moreover, this matter is before this Court based on conflict among the district courts of appeal. This Court should resolve that conflict with finality, reaching the correct legal result under Florida law. The issue presented regarding

the constitutionality of the statute at issue is ripe. No facts need to be developed. Appointed pro bono counsel have briefed the matter as thoroughly as possible. It would be a waste of judicial resources, and an unnecessary and inappropriate risk, to require a new separation of powers challenge to be brought by petition for writ of prohibition in the hope that a district court will resolve the question in a manner that gives rise to jurisdiction in this Court, leading to a new proceeding that will return the Court to the exact place where it stands today.

In the light of all of these factors, this Court should address the merits of Mr. Wright's facial challenge to section 947.16(3). And for the reasons explained in Mr. Wright's Initial Brief, this Court should recede from Borden and conclude that section 947.16(3) violates the separation of powers provision contained in article II, section 3, of the Florida Constitution.

## CONCLUSION

For the foregoing reasons, this Court should hold that the retention of jurisdiction over Mr. Wright's sentence, in violation of the plain requirements of section 947.16(3)(a), Fla. Stat. (Supp. 1978), constitutes an illegal sentence for purposes of rule 3.800(a). This result may be reached based upon the nature of the claim itself or, alternatively, by receding from the decision in Borden and holding that section 947.16(3), Fla. Stat. (Supp. 1978), as enacted and later amended, violates the Florida Constitution's separation of powers principles. 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.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November ___, 2004, a copy of the foregoing Reply 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 ___th day of November, 2004, that the type size and style used throughout Petitioner's Initial Brief is Times New Roman 14-Point Font.

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