IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC 06-2211

ABRAHAM YISRAEL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Petitioner and Respondent was the Respondent in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

STATEMENT OF THE CASE AND FACTS

The procedural history and facts on which the Fourth District Court of Appeal relied in making its decision are found in Yisrael v. State, 938 So.2d 546 (Fla. 4th DCA 2006), which Respondent adopts as its statement of the case and facts for the purpose of determining jurisdiction in this appeal. A copy of the Fourth District Court of Appeal's decision is attached hereto for the convenience of this Court.

SUMMARY OF THE ARGUMENT

ISSUE I The State submitted the necessary and proper evidence at the trial court to establish the Petitioner's prior convictions and last prison release date and established the statutory requirements necessary to sustain the habitual violent felony offender sentence imposed upon Petitioner. The records from the Department of Corrections were properly admitted under Fla. Stat. § 90.803(8), the public records exception to the hearsay rule.

ISSUE II Petitioner argues that the facts relating to the predicate offenses must be submitted to a jury. Petitioner is in error, Apprendi v. New Jersey, 530 U. S. 466, 120 S. Ct. 2348, 147 L. Ed. 435 (2000) does not apply to recidivism statutes such as Florida's habitual violent felony offender sentencing procedures.

ARGUMENT

ISSUE I

THE REQUISITE PRISON RELEASE DATES WERE PROPERLY ADMITTED UNDER THE PUBLIC RECORDS HEARSAY EXCEPTION (RESTATED).

Petitioner was charged, by Information, with trafficking in cocaine, and possession of a firearm by a convicted felon. The Information alleged that the offenses occurred on Feb. 21, 2001

(R 6-7). The State served a Notice of Intent to seek Habitual Offender Status (R 18-19), on the Petitioner.

After the Petitioner was found guilty, by a jury, a sentencing hearing was held (SR 1-61). At the hearing the State submitted State's Exhibit C (SR 41), a certified document, submitted under seal, from the Florida Department of Corrections, certifying that the last release date from the Department of Corrections for the Petitioner was April 8, 1998 (SR 25-26). The document was received without objection. Petitioner in the case at bar subsequently filed two(2) Fla. R. Crim. P. 3.800(b)(2) motions to correct sentencing error. The Petitioner's second motion (SR 1-6), raised the issue presented in the case at bar, that the document from the Florida Department of Corrections certifying Petitioner's last release date, was inadmissible hearsay.

The State has the burden of establishing that Petitioner's last release date from prison was within five(5) years of the date of the current offense,(Fla. Stat. § 775.084), and State's Exhibit C was offered, and received for this purpose. The trial court found that the State submitted sufficient proof, and found that Petitioner qualified and sentenced him, as a habitual violent felony offender to life in prison on the count of trafficking in cocaine with a seven(7) year mandatory minimum, and thirty(30) years in prison on the count of possession of a firearm (SR 46-47). Petitioner argues that this fact was proven solely as a result of inadmissible hearsay, and that the matter should be reversed based upon this ground.

The Fourth District Court of Appeal, in Yisrael v. State, 938 So. 2d 546 (Fla. 4th DCA 2006) affirmed Petitioner's conviction and sentence, and ruled that the letter from the Department of Corrections "was properly considered by the trial court as sufficient to establish the criminal history predicate for a recidivist-enhanced sentence—in this instance under HVFO", Id at 549, finding the document was admissible under the public records exception to the hearsay rule, Fla. Stat. § 90.803(8).

In reaching the decision in the case at bar, the Fourth District Court of Appeal certified conflict with Gray v.

State, Id. However, in Gray, the First District Court of Appeal held that a letter from the Department of Corrections, certifying the defendant's release date, was inadmissible hearsay, not admissible under the business records exception to the hearsay rule. Yisrael relies upon the public records exception, and therefore, is not in direct conflict with Gray. In Gray the defendant had objected to the introduction of the records from the Department of Corrections, and unlike the case at bar, the records was admitted over objection.

The two cases however, are clearly in conflict concerning the admissibility of the letter or affidavit from the Department of Corrections, and the State agrees that the issue is a recurring issue, not unique to the case at bar, and the State urges this Court to accept discretionary jurisdiction in order to resolve the issue on a statewide basis.

Fla. Stat. § 90.803(8), the public records exception to the general hearsay rules provides as follows:

> (8) *PUBLIC RECORDS AND REPORTS.* --Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness.

Charles Ehrhardt, in Florida Evidence (2006), gives, as a reason for the general exclusion of hearsay evidence, the fact that "because hearsay statements are not made under oath, the reliability that an oath provides to the evidence is missing"…, and that the "reasons for the rule of exclusion are based upon the unreliability of hearsay evidence. Ehrhardt, § 801.1.

However, Professor Ehrhardt goes on to say that the public record exception "is recognized in order to prevent the disruption that would result if every government official involved in making the record was called to testify as to the information therein. Because of the accuracy of public records, resulting from the duty of public officials to accurately record matters, and from the public's scrutiny of public records, the records have sufficient guarantees of truthfulness. In addition, public officials lack any motive to falsify the entries." Ehrhardt § 803.8. The State would also note that Petitioner does not, as found by the District Court of Appeal "challenge the accuracy of the records pertaining to him." Yisrael, Id at 549.

This Court has defined a public record as "any material prepared in correction with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type." Shevin v. Byron, Harless, Schffer, Reid and Associates, 379 So. 2d 633,640 (Fla. 1980); see also Bryan v.

Butterworth, 692 So. 2d 878, 880 (Fla. 1997).

Petitioner states that he is unaware of any statute that requires the Department of Corrections to maintain last release date letters. However, this argument is no more than form over substance. As noted by the District Court in its decision in the case at bar, Fla. Stat. § 945.25(2) requires the Department to maintain records and § 944.605 requires the Department to maintain and provide records of release date. The form of the records, and the seal to be used for authentication, § 945.04(2), of official documents is not formally provided by statute, and the Evidence Code, Fla. Stat. § 90.803(8) provides that public records "in any form" are admissible as an exception to the hearsay rule.

The letter of Joyce Hobbs, an Administrator of the Correctional Services Department, certified and submitted under seal, is clearly a statement, reduced to writing, setting forth the date that the Petitioner was last released from prison, a fact that the Department is required to maintain. It was intended to communicate this knowledge to the trial court. As found by the Fourth District Court of Appeal, it "certainly constitutes a statement or report reduced to writing" about an activity of a government agency, namely the date on which FDOC released a convict from prison on a specific offense." Yisreal,

Id at 549-550. The State respectfully submits that there was sufficient proof submitted to establish this fact, that the letter clearly falls under the public records exception, and was admissible to establish the date of Petitioner's last release from prison.

The State would also submit that that the Gray decision is in error. The records from the Department of Corrections could also be construed as business records that were properly certified under Fla. Stat. § 90.803(6)(a) and (c), and that the document was properly authenticated under Fla. Stat. § 90.902, and that the trial court properly admitted the record of Petitioner's last release date from the Department of Corrections.

In addition to the document from the Department of Corrections, the Petitioner's fingerprint records were properly admitted at the sentencing hearing. The records of Petitioner's convictions were certified, under seal, by the Clerk of the Court

(SR 29-40, State's Exhibit B). The fingerprint records objected to my Petitioner's trial counsel at the sentencing hearing, were the Petitioner's fingerprints taken in court, before Judge Weinstein, on Feb. 5, 2004. The trial judge noted that it was his signature on the fingerprint records, and that it was his

practice to observe the fingerprinting of a defendant in his court room. Those fingerprints were the fingerprints compared to the records of Petitioner's prior convictions by the fingerprint expert, to establish the Petitioner's prior convictions for the purpose of his qualification for habitual violent felony offender sentencing

(SR 45-47).

The fingerprint records on the Petitioner's conviction records, compared by the expert, were all signed by the trial judge, and complied with Fla. Stat. § 921.241 (2) and therefore admissible under Fla. Stat. § 921.241(3). See Louis v. State, 647 So. 2d 324 (Fla. 2nd DCA 1994). The records of Petitioner's convictions in the case at bar were signed by the trial judge, and were therefore properly admitted to establish Petitioner's prior convictions and eligibility for sentencing as a habitual violent felony offender. Banks v. State, 844 So. 2d 715 (Fla. 2nd DCA 2003).

The State respectfully submits that the letter in question, from the Department of Corrections, was admissible to prove the Petitioner's last release date under both the public records, and business records exception to the hearsay rule, as contained in the Florida Evidence Code. The State urges this honorable Court to affirm the decision of the Fourth District Court of

Appeal, and quash the decision of the First District Court of Appeal.

Petitioner also argues that if his sentence is vacated by this Court, that he is entitle to be resentenced under the criminal punishment code.

The State disagrees and submits that if this Court finds that Petitioner's habitual violent felony offender status was not properly established, and if this matter is remanded for a new sentencing hearing, the State must be given the opportunity to establish the Petitioner's status, as an habitual violent felony offender.

In Prudent v. State, 867 So. 2d 646 (Fla. 3rd DCA 2004), the District Court of Appeal reversed the Petitioner's designation as a habitual felony offender and remanded stating that "if the state can establish that the defendant was the perpetrator of the predicate crimes at the new sentencing hearing, the trial court may again sentence him as a habitual felony offender." (internal citations omitted). See also Peterson v. State, 911 So. 2d 184 (Fla. 1st DCA 2005)(reversing and remanding a prison releasee reoffender sentence stating "On remand the trial court may again

sentence Petitioner as a PRR if it makes the required findings and

the evidence supports those findings." Peterson, Id at 185); and

Rivera v. State, 877 So. 2d 787 (4th DCA 2004)(remanding the

Petitioner's designation as a prison releasee reoffender and

habitual felony offender for failure to prove a prior conviction

was the Petitioner stating that "if the state can prove the 1999

conviction is of Rivera, and his release date for that conviction,

it is not precluded from again seeking a prison releasee reoffender

or habitual offender sentence for Rivera"). Rivera, Id at 790.

The State acknowledges that this issue is under review in this

Court. Clarke v. State, 941 So. 2d 593 (Fla. 4th DCA 2006), rev.

pending, (Certified Question of Great Public Importance, "Where

the Defendant does not object to the proof of a prior conviction at

the sentencing hearing, but does timely raise the objection in a

Rule 3.800(b)(2) motion, does the State, after reversal of the

Sentence, have another opportunity to prove the prior

convictions?"); see also Collins v. State, 893 So. 2d 592 (Fla. 2d

DCA 2004), rev. granted 929 So. 2d 1054 (Fla. 2006).

ISSUE II

PETITIONER IS NOT ENTITLED TO A JURY DETERMINITATION FOR ENHANCED SENTECNTING

Petitioner claims that the habitual felony violent offender sentence imposed upon him in the trial court was improper because the fact of his qualification for habitual violent felony offender sentencing was not submitted to the jury. This issue was not addressed by the Fourth District, therefore this Court should decline to accept the Petitioner's argument with respect to this issue. See, e.g. Raford v. State, 828 So. 2d 1012, 1021 FN 2 (Fla. 2002) (Court declines to review issues beyond the scope of certified conflict in the case), see also Bautista v. State, 863 So. 2d 1180, 1188 (Fla. 2003).

The prosecutor introduced certified copies of Petitioner's prior convictions (SR 29-40), and certified records from the Florida Department of Corrections (SR 41). The records established Petitioner's last release date from the custody of the Department of Corrections (April 8, 1998), and his six prior felony convictions. The trial court found the Petitioner qualified as a habitual violent felony offender and sentenced him to life in prison on the conviction of trafficking in cocaine, and thirty years in prison on the charge of possession of a firearm by a convicted felon.

The Petitioner's argument that the issue of whether he was habitual violent offender qualified should have been submitted to the jury is incorrect. As acknowledged by Petitioner, in Apprendi v. New Jersey, 530 U. S. 466, 120 S. Ct 2348, 147 L. Ed. 2d 435 (2000), the Supreme Court excluded prior convictions from the requirement that facts which enhance a defendant's sentence must be submitted to a jury. Petitioner also acknowledges that the current law in the State of Florida is that Apprendi does not apply to recidivism statutes and that a defendant is not entitled to have a jury determine the issue of predicate convictions for habitual violent felony offender qualification. This Court stated in Gudinas v. State, 879 So. 2d 616, 618 (Fla. 2004), that "proof to the jury of a defendant's release which subjects a defendant to a sentence under the act (PRR statute) is not required". See also Robinson v. State, 793 So. 2d 891, 893 (Fla. 2001) (Apprendi does not invalidate Florida's PRR statute); McBride v. State, 884 So. 2d 476 (Fla. 4th DCA 2004) and United States v. Marseille, 377 F. 3d 1249 (11th Cir. 2004).

Petitioner states that this issue is being raised in the event that the prior conviction sentence is overruled. Respondent respectfully submits that until such time as the

prior conviction exception is overruled, it is the law of this State, and
the Petitioner's sentence cannot be reversed on this ground.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court affirm the decision of the Fourth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been furnished via courier to: David John McPherrin, Assistant Public Defender, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 this____ day of March, 2007.

_____
THOMAS A. PALMER

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

_____
THOMAS A. PALMER

APPENDIX