IN THE SUPREME COURT OF FLORIDA

ABRAHAM YISRAEL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC06-2211
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER=S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

CONTENTS **PAGES**

TABLE OF CONTENTS ..... i, ii

AUTHORITIES CITED ..... iii, iv

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY SENTENCING PETITIONER AS A HABITUAL VIOLENT FELONY OFFENDER WHERE THE REQUISITE PRISON RELEASE DATE FOR A PREDICATE FELONY WAS PROVEN SOLELY THROUGH HEARSAY. 4

POINT II

THE TRIAL COURT ERRED BY SENTENCING APPELLANT AS A HABITUAL VIOLENT FELONY OFFENDER WHERE THE FACTS REQUIRED TO BE PROVEN FOR ENHANCED SENTENCING WERE NEITHER ALLEGED IN THE INFORMATION NOR FOUND BY THE JURY TO HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT 8

CONCLUSION 9

CERTIFICATE OF SERVICE 10

CERTIFICATE OF FONT SIZE 10

AUTHORITIES CITED

CASES CITED PAGES

Bryan v. Butterworth, 692 So. 2d 878 (Fla. 1997) 6

Gray v. State, 910 So. 2d 867 (Fla. 1st DCA 2005) 7

Jackson v. State, 738 So. 2d 382 (Fla. 4th DCA 1999) 7

Johnson v. Department of Health and Rehabilitative Services, 546 So. 2d 741 (Fla. 1st DCA 1989) 5

Kirk v. State, 869 So. 2d 670 (Fla. 5th DCA 2004) 6

Lee v. Department of Health and Rehabilitative Services, 698 So. 2d 1194 (Fla. 1997) 7

McElroy v. Perry, 753 So. 2d 121 (Fla. 2d DCA 2000) 7

Shevin v. Byron, Harless, Schaffer, Reid & Associates, ... 379 So. 2d 633 (Fla. 1980) 6

Sikes v. Seaboard Coast Line R. Co., 429 So. 2d 1216 (Fla. 1st DCA 1983) *pet. rev. denied,* 440 So. 2d 353 (Fla. 1983) 7

Simmons v. State, 697 So. 2d 985 (Fla. 4th DCA 1997) 8

Smith v. Mott, 100 So. 2d 173 (Fla. 1957) 7

FLORIDA STATUTES

Section 90.803(6) 7
Section 90.803(8)(2000) 5
Sections 90.801 & 90.803(8)(2000) 4

OTHER AUTHORITIES CITED

C. Ehrhardt, Florida Evidence,
' 803.8 (2006 edition) 6, 7

PRELIMINARY STATEMENT

Petitioner was the defendant in the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and appellee in the lower courts. In this brief the parties will be referred to as they appear before the Court.

The symbol "R" denotes the one-volume record on appeal, which consists of the relevant documents filed below.

The symbol "T" denotes the five-volume trial transcript.

The symbol "SR" denotes the supplemental record on appeal, which consists of documents relevant to petitioner's initial *Florida Rule of Criminal Procedure* 3.800(b)(2) motion to correct sentencing error.

The symbol "SSR" will denote the second supplemental record on appeal, which consists of documents relevant to petitioner's second *Florida Rule of Criminal Procedure* 3.800(b)(2) motion to correct sentencing error.

STATEMENT OF THE CASE AND FACTS

Petitioner will rely upon the statement of the case and facts submitted in his initial brief.

SUMMARY OF THE ARGUMENT

POINT I

The documents reviewed in preparing the last prison release date letter may have been admissible under the public records exception to the rule excluding hearsay, but the letter itself was not. Respondent=s reliance upon the definition of Apublic records@ found in Florida Public Records Act, to argue that the last prison release date letter was admissible under the public records hearsay exception was misplaced. Public records are defined more broadly in the context of the Public Records Act. Respondent made no attempt to introduce the last prison release date letter under the business records exception to the hearsay rule. In addition, it is unlikely that the last prison release date letter was kept in the course of the department=s regularly conduced business activity or that it was the regular practice of the department to keep such letters and it appears that the letter was prepared for the purpose of litigation. As a result, it does not appear that the letter would have qualified for admission as a business record.

POINT II

Petitioner will rely upon the summary of the argument submitted in his initial brief.

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY SENTENCING PETITIONER AS A HABITUAL VIOLENT FELONY OFFENDER WHERE THE REQUISITE PRISON RELEASE DATE FOR A PREDICATE FELONY WAS PROVEN SOLELY THROUGH HEARSAY.

In response to petitioner=s argument that the last prison release date letter constituted hearsay, inadmissible under the public records exception to the rule excluding hearsay, respondent asserted the following: because the Department of Corrections maintains inmate records, including when the inmate is scheduled for release, any argument that the department is not required to maintain last release date letters is form over substance; the last prison release date letter introduced at petitioner=s sentencing was a public record because it was drafted by an employee of the department and was meant to convey knowledge to the trial court; and regardless of whether the letter was admissible under the public records exception, it was admissible under the hearsay exception for business records. Petitioner does not agree with respondent=s arguments.

Appellant does not dispute that the rule excluding hearsay has an exception for public records. '' 90.801 & 90.803(8), *Fla. Stat.* (2000). Notwithstanding the declarant=s availability, the public records exception allows the introduction of:

> Records, reports, statements reduced to writing, or date 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.

' 90.803(8), *Fla. Stat.* (2000).

Respondent asserts that a letter written by an employee of the Department of Corrections, detailing factual findings based upon her review of an inmate=s records maintained by the department, is a public record admissible under section 90.803. Petitioner asserts that while the actual inmate records may be admissible under the public records exception, the letter is not. Petitioner=s position does not elevate form over substance, but is instead concerned with applying the exception in a manner that will increase the likelihood that accurate, trustworthy evidence is admitted under the public records exception. *See Johnson v. Department of Health and Rehabilitative Services,* 546 So. 2d 741, 743 (Fla. 1st DCA 1989).

There are many public offices and agencies at the local, state, and federal levels maintaining documents that are relevant to various types of litigation. What those documents say or do not say may be critical to the outcome of a given legal proceeding. Some of those documents may be highly complex, subject to

misinterpretation by all but the most knowledgeable of persons. Respondent asserts that rather than require introduction of the actual document, the parties should be permitted to introduce letters written by employees of the office or agency detailing what their examination of the public documents uncovered. The judicial system would be best served by requiring introduction of the actual public records and allowing the trier-of-fact to decide what they do or do not say.

Respondent=s reliance upon *Shevin v. Byron, Harless, Schaffer, Reid & Associates*, 379 So. 2d 633 (Fla. 1980) and *Bryan v. Butterworth*, 692 So. 2d 878 (Fla. 1997) to define a public record as Aany material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type@ and argue that the last prison release date letter was a public record because it was intended to communicate knowledge to the trial court is misplaced. Both *Shevin* and *Bryan* addressed public records under the Public Records Act, chapter 119 of the Florida Statutes. AThe definition of >public record= under [section 90.803(8)] is much narrower than is the definition of public record under chapter 119 of the Florida Statutes, Florida=s Public Records Act.@ C. Ehrhardt, Florida Evidence ' 803.8 (2006 edition). A public record for purposes of section 90.803(8) is a document that sets forth the activities of the public office or agency, *see Kirk v. State,* 869 So. 2d 670 (Fla. 5th DCA 2004), or sets forth matters

observed pursuant to duty imposed by law as to which matters there was a duty to report, *see Smith v. Mott,* 100 So. 2d 173 (Fla. 1957). *Lee v. Department of Health and Rehabilitative Services,* 698 So. 2d 1194, 1201 (Fla. 1997); *Sikes v. Seaboard Coast Line R. Co.*, 429 So. 2d 1216, 1221 (Fla. 1st DCA 1983) *pet. rev. denied*, 440 So. 2d 353 (Fla. 1983); Charles W. Ehrhardt, *Florida Evidence,* ' 803.8 (2006 ed.). Unless the document falls into one of those two categories, the fact that it perpetuates, communicates, or formalizes knowledge does not make it admissible under the public records exception to the rule excluding hearsay.

It may well be the case that various documents of the Department of Corrections are admissible under the business records exception to the rule excluding hearsay, section 90.803(6), *Florida Statutes.* However, in neither this case nor *Gray v. State*, 910 So. 2d 867 (Fla. 1st DCA 2005) did the State make an attempt to introduce records of the department under the business records exception. In addition, it appears that the last prison release date letter was prepared not in the regular course of the department=s business, but at the request of the Seventeenth Judicial Circuit=s State Attorney=s Office and for the purpose of litigation, leaving its admissibility under the business records exception questionable. *See McElroy v. Perry,* 753 So. 2d 121, 126 (Fla. 2d DCA 2000); *See also Jackson v. State,* 738 So. 2d 382, 386 (Fla. 4th DCA 1999)(articulating

predicate for admission of evidence under business records exception); *Simmons v. State*, 697 So. 2d 985, 986 (Fla. 4th DCA 1997)(no evidence document maintained in course of regularly conducted business activity or that it was the regular practice of the business to keep such a list).

POINT II

THE TRIAL COURT ERRED BY SENTENCING APPELLANT AS A HABITUAL VIOLENT FELONY OFFENDER WHERE THE FACTS REQUIRED TO BE PROVEN FOR ENHANCED SENTENCING WERE NEITHER ALLEGED IN THE INFORMATION NOR FOUND BY THE JURY TO HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT.

Petitioner will rely upon the argument submitted in his initial brief.

CONCLUSION

This Court should grant the petition for discretionary review, quash the decision of the Fourth District Court of Appeal, and remand this cause with directions to impose sentence under the criminal punishment code.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Petitioner's Reply Brief on the Merits has been furnished by courier to Mr. Thomas Palmer, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432 this 27th day of March, 2007.

_____
David John McPherrin

Attorney for Abraham Yisrael

CERTIFICATE OF FONT SIZE

In accordance with *Florida Rule of Appellate Procedure* 9.210, petitioner hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately.

_____
David John McPherrin

Attorney for Abraham Yisrael