**IN THE SUPREME COURT OF FLORIDA**

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

# PETITIONER'S BRIEF ON THE MERITS


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## 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 was charged by information with trafficking in between 200 and 400 grams of cocaine[1] and possession of a firearm by a convicted felon[2], neither count alleging the predicate facts qualifying him as a habitual violent felony offender. *R 6-7.* Respondent filed notice of intent to seek imposition of sentence as a habitual felony offender, habitual violent felony offender, three-time violent felony offender, or violent career criminal. *R 18-19.* The case proceeded to trial before a jury. The jury found petitioner guilty of both offenses as charged, but was not asked to determine whether he qualified for habitual violent felony offender sentencing. *R 84-85; T 340-351, 358-359.*

At sentencing, respondent, seeking imposition of a habitual violent felony offender sentence, introduced a letter from the Florida Department of Corrections which read:

> I, JOYCE HOBBS, CORRECTIONAL SERVICES ADMINISTRATOR, CENTRAL RECORDS OFFICE, STATE OF FLORIDA DEPARTMENT OF CORRECTIONS, DO HEREBY CERTIFY THAT THIS SEAL IS THE OFFICIAL SEAL OF THE FLORIDA DEPARTMENT OF CORRECTIONS. I ALSO CERTIFY THAT THE LAST RELEASE DATE FOR **INMATE EUGENE LUMSDEN, DC# 647647, B/M, DOB: 4/1/1963, WAS APRIL 08, 1998, FOR CASE**

[1] § 893.135(1)(b)1.b., *Fla. Stat.* (2000).

[2] § 790.23, *Fla. Stat.* (2000).

**#89-20161, 89-21062 - BROWARD COUNTY, FLORIDA.**

*T 672-673, 701-702.*[3]

Finding, among other things, that petitioner was previously convicted of arson and robbery, predicate felonies for habitual violent felony offender sentencing, on July 10, 1992, and that he was released from prison for the predicate felonies on April 8, 1998, within five years of the date the crimes for which sentence was to be imposed were committed, the trial court sentenced petitioner as a habitual violent felony offender to life in prison on the trafficking charge and to 30 years in prison for the firearm charge. *R 117-122; T 711-716.*

After filing his notice of appeal, petitioner filed two motions to correct sentencing errors pursuant to *Florida Rule of Criminal Procedure* 3.800(b)(2). In his first motion, petitioner argued that he was entitled to be resentenced under the criminal punishment code because the information did not allege facts establishing that he qualified for sentencing as a habitual violent felony offender and the jury did not make a finding that he did. *SR 1-51.* Petitioner's second motion sought resentencing under the criminal punishment code on the ground that nothing more

[3] During the sentencing hearing a fingerprint analyst testified that petitioner's known fingerprints and the fingerprints found on six judgments of conviction were one in the same. *T 677-678, 685-691.* The convictions in case number 89-20161CF were for arson and grand theft and the conviction in case number 89-20162CF was for robbery. The conviction date for the three offenses was July 10, 1992. Petitioner and Eugene Lumsden are the same person.

than hearsay evidence, which violated his right to confrontation, established his most recent prison release date, a fact necessary to imposition of a habitual violent felony offender sentence. *SSR 1-61.* The former motion was stricken by the trial court and the latter denied. *SR 56; SSR 62.*

Before the Fourth District Court of Appeal, petitioner, relying upon *Gray v. State,* 910 So. 2d 867 (Fla. 1st DCA 2005)[4], asserted that the Florida Department of Corrections letter referred to above "was hearsay, that it could not be considered by the trial court in sentencing, and that the State had therefore failed to establish the necessary predicate for an HVFO sentence." *Yisrael v. State,* 938 So. 2d 546, 548 (Fla. 4th DCA 2006) (*en banc*).[5] The court, while recognizing that *Gray* involved an identical letter, rejected petitioner's argument, stating:

> We find that the letter in evidence 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. The public records exception to the hearsay rule, in which the availability of the declarant is immaterial, allows the admission of:
>
> "Records, *reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies,*

[4] *Gray* held that a prison release letter identical to the one at issue in this case constituted inadmissible hearsay.

[5] The *en banc* opinion was necessitated by the district court's decision to recede from its prior decision in *Sutton v. State,* 929 So. 2d 1105 (Fla. 4th DCA 2006) which found that the same letter constituted inadmissible hearsay.

*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." [e.s.]

§ 90.803(8), *Fla. Stat.* (2005). Here the letter statement specifies that it is given under seal. The declarant states that she is the Correctional Services Administrator for the Central Records Office of FDOC. She states that defendant (known by his other name) was last released on April 8, 1998, on a specific qualifying offense-which, it turns out, is within the statutorily prescribed period for sentencing under HVFO. We think that this statement by a named FDOC official is entitled to be recognized as a public record within the meaning of section 90.803(8). The document in question 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 imprisonment on a specific offense. We can think of no reason why it is not sufficient to establish the specific predicate fact regarding this defendant's criminal history relevant and necessary to sentencing under HVFO for his latest offense.FN14

FN14. Because this evidentiary fact relates to criminal history-and not to guilt for the offense-it does not involve a confrontation of witnesses issue under the Sixth Amendment.

In *Sutton* and *Gray* the use of an identical letter was primarily analyzed under the business records exception to the hearsay rule. But when a document from a public agency like FDOC satisfies the requirements for consideration as a public record, we think it is unnecessary to consider the requirements for the business record exception. The pertinent records of a public agency under a statutory duty to acquire and maintain

> records on a specific subject are entitled to recognition as being reliable and trustworthy by virtue thereof and do not require the additional safeguards required by the business records exception. For this purpose, the Legislature has given such public records a presumption of reliability and accuracy not deemed inherent in ordinary business records.

*Id.* at 549-550.

In rejecting petitioner's argument, the Fourth District certified conflict with the decision of the First District Court of Appeal in *Gray*. *Id.* at 550.[6] Petitioner's motion for rehearing was denied. Thereafter, petitioner timely filed notice of intent to invoke the discretionary jurisdiction of this Court. By order dated January 26, 2007, this Court entered an order postponing its decision on jurisdiction and setting a briefing schedule. This brief now follows.

[6] Although recognizing that precedent was not on his side, appellant also raised the claim that he could not be sentenced as a habitual violent felony offender because the predicate facts necessary for the enhanced sentence were neither alleged in the information nor found by the jury to have been proven beyond a reasonable doubt. The district court did not address the issue in its opinion.

## SUMMARY OF THE ARGUMENT

### POINT I

In its effort to establish that petitioner qualified for sentencing as a habitual violent felony offender, respondent introduced a letter written by an employee of the Department of Corrections which stated the date he was released from prison for a predicate felony. The letter constituted hearsay. The Fourth District Court of Appeal, certifying conflict with the First District Court of Appeal, concluded that the letter was admissible under the hearsay exception for public records. The letter was not admissible under the public records exception to the rule excluding hearsay because it did not set forth the activities of the Department in regard to petitioner, the record did not reflect that the letter's author had personal knowledge of petitioner's release date, no statute or rule required the letter to be regularly prepared, and its author fell within the class of other law enforcement personnel. Because no other evidence of petitioner's release date was introduced during the sentencing hearing, respondent failed to establish that he qualified for habitual violent felony offender sentencing. Accordingly, resentencing under the criminal punishment code is required.

### POINT II

Petitioner was sentenced as a habitual violent felony offender. Because the information did not include factual allegations supporting imposition of an

enhanced sentence and the jury made no such findings, sentencing petitioner as a habitual violent felony offender violated due process. Reversal and remand for resentencing under the criminal punishment code is required.

## 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.**

To establish petitioner's prison release date for a predicate felony necessary to imposition of a habitual violent felony offender sentence, respondent introduced a letter from the Florida Department of Corrections which read:

> I, JOYCE HOBBS, CORRECTIONAL SERVICES ADMINISTRATOR, CENTRAL RECORDS OFFICE, STATE OF FLORIDA DEPARTMENT OF CORRECTIONS, DO HEREBY CERTIFY THAT THIS SEAL IS THE OFFICIAL SEAL OF THE FLORIDA DEPARTMENT OF CORRECTIONS. I ALSO CERTIFY THAT THE LAST RELEASE DATE FOR **INMATE EUGENE LUMSDEN, DC# 647647, B/M, DOB: 4/1/1963, WAS APRIL 08, 1998, FOR CASE #89-20161, 89-21062 - BROWARD COUNTY, FLORIDA.**

Finding that petitioner was previously convicted of a predicate felony and that he was released from prison for the predicate felony within five years of the date the crimes for which sentence was to be imposed were committed, the trial court sentenced him as a habitual violent felony offender. In a post-sentencing

motion petitioner unsuccessfully argued that the trial court erred by relying upon the letter to establish his prison release date because it was inadmissible hearsay.[7]

The issue presented in this case is whether a letter, written by an employee of a public office or agency, setting forth facts that the employee learned by reviewing documents maintained by the office or agency is a public record admissible under the public records exception to the rule excluding hearsay. Petitioner asserts that while the documents reviewed might constitute public records, the letter does not. Accordingly, the decision of the Fourth District Court of Appeal should be quashed.

## I

The Fourth District Court of Appeal rejected the argument petitioner made, certifying conflict with the decision of the First District Court of Appeal in *Gray v. State,* 910 So. 2d 867 (Fla. 1st DCA 2005) *rev. denied,* 920 So. 2d 628 (Fla. 2005).

[7] Imposition of a habitual violent felony offender sentence involves a mixed question of law and fact which will be upheld if the correct rule of law is applied and competent substantial evidence supports the trial courts findings of fact. *Cf. Green v. State,* 907 So. 2d 489, 500 (Fla. 2005)(standard of review employed for aggravating factors in death penalty cases) *cert. denied,* - U.S. -, 126 S.Ct. 163, 163 L.Ed. 2d 710 (2005). Although the question of whether evidence constitutes hearsay is reviewed *de novo, Burkey v. State,* 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006) *rev. denied,* 940 So. 2d 427 (Fla. 2006), whether the same evidence is admissible under an exception to the hearsay rule is reviewed for an abuse of discretion, *K.V. v. State,* 832 So. 2d 264, 265 (Fla. 2002). The abuse of discretion standard may be appropriate where application of an exception rests upon live testimony, but it seems that the *de novo* standard of review is better suited when the question is whether a written document is admissible as a public record. *See Dooley v. State,* 743 So. 2d 65, 68 (Fla. 4th DCA 1999).

*Yisrael v. State,* 938 So. 2d 546 (Fla. 4th DCA 2006). Article V, section 3(b)(4) of the *Florida Constitution* provides this Court discretionary jurisdiction to review the Fourth District's decision. *See also Fla. R. App. P.* 9.030(a)(2)(A)(vi). In *Gray,* where the State relied upon a letter identical to the one introduced in petitioner's case to establish Gray's prison release date for purposes of prison releasee reoffender sentencing, the First District vacated the sentence holding that the letter "constituted hearsay, and the state proved no proper predicate for its admission under any exception to the rule excluding hearsay." 910 So. 2d at 869. The Fourth District, in *Yisrael*, determined that the letter was admissible under the hearsay exception for public records. 938 So. 2d at 549.

Unlike cases where the Court determined that jurisdiction, based upon certified conflict, was improvidently granted because the claimed conflict arose in cases with significantly different material facts, *see e.g. State v. Lovelace,* 928 So. 2d 1176, 1177 (Fla. 2006), here two district courts of appeal, based upon almost identical facts, reached different decisions regarding the application of a hearsay exception to the same piece of evidence. Therefore, a direct conflict exists between *Yisrael* and *Gray. See SAIA Motor Freight Line, Inc. V. Reid,* 930 So. 2d 598 (Fla. 2006). Not only does this case present an actual conflict, but it involves an issue that is recurring, rather than unique to a single case, and due to the conflict, sentencing proceedings involving similarly situated defendants are being

handled differently depending upon where, within the State of Florida, the defendant is prosecuted. Accordingly, while this Court is not required to accept this case for review, it should do so in the interest of bringing uniformity to the law.

## II

### A

Trafficking in cocaine is a first degree felony which, absent imposition of an enhanced sentence, is punishable by up to 30 years in prison. §§ 775.082(3)(b) & 893.135(1)(b)1., *Fla. Stat.* (2000). A defendant who qualifies as a habitual violent felony offender can receive a sentence of up to life in prison for a first degree felony. § 775.084(4)(b)1., *Fla. Stat.* (2000). Possession of a firearm by a convicted felon is a second degree felony which, absent imposition of an enhanced sentence, is punishable by up to 15 years in prison. §§ 775.082(3)(c) & 790.23(3), *Fla. Stat.* (2002). A defendant who qualifies as a habitual violent felony offender can receive a sentence of up to 30 years in prison for a second degree felony. § 775.084(4)(b)2., *Fla. Stat.* (2000). Before a court can impose a habitual violent felony offender sentence, it must be satisfied that the following facts have been proven by a preponderance of the evidence: (1) the defendant has previously been convicted of committing, attempting, or conspiring to commit a predicate felony, included among which are arson and robbery; (2) the felony for which sentence is

to be imposed was committed while the defendant was serving a sentence or under supervision imposed as a result of a prior conviction for a predicate felony or was committed within five years of the conviction date of the last prior predicate felony or within five years of the release date from a prison sentence or other commitment imposed as a result of a prior conviction for a predicate felony; (3) the defendant has not received a pardon on the grounds of innocence for the predicate felony; and (4) the predicate felony has not been set aside in any postconviction proceeding. § 775.084(1)(b) & (3)(a), *Fla. Stat.* (2000). Because the crimes for which petitioner was being sentenced were committed neither while he was serving a sentence or under supervision imposed upon conviction for a prior predicate felony nor within five years of the conviction date for the last prior predicate felony, respondent was required to prove that petitioner committed the instant offenses within five years of the date he was released from prison.

**B**

**1**

To prove that petitioner was released from prison within the time frame required for habitual violent felony offender sentencing, respondent introduced the prison release date letter. "Where nothing more than inadmissible hearsay received over specific objection is adduced in order to prove a prison release date necessary for sentence enhancement, the enhanced sentence cannot withstand

attack on direct appeal." *Gray,* 910 So. 2d at 870; *accord Campbell v. State,* 3D05-2534 (Fla. 3rd DCA Feb. 7, 2007); *King v. State,* 590 So. 2d 1032 (Fla. 1st DCA 1991). "'Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), *Fla. Stat.* (2000); *See generally Banks v. State,* 790 So. 2d 1094, 1097 (Fla. 2001).[8]

Hearsay evidence is inadmissible unless made admissible by statute. § 90.802, *Fla. Stat.* (2000); *Shennett v. State,* 937 So. 2d 287, 290 (Fla. 4th DCA 2006). Joyce Hobbs' written statement concerning petitioner's prison release date, offered in evidence to prove the truth of the matter asserted, constituted hearsay, *Gray,* 910 So. 2d at 869, and, unlike what occurred in *DeSue v. State,* 908 So. 2d 1116 (Fla. 1st DCA 2005) *rev. denied,* 920 So. 2d 626 (Fla. 2005), petitioner did not establish that the letter was admissible under the business record exception to the hearsay rule. *See Gray,* 910 So. 2d at 869-870.[9] The Fourth District Court of Appeal did not suggest that the release date letter was not hearsay or was admissible under the business records exception to the rule excluding hearsay,

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[8] Statements include written assertions. § 90.801(1)(a)1., *Fla. Stat.* (2000).

[9] While certain Department of Corrections' records may be deemed business records, *DeSue,* 908 So. 2d at 1117 & n. 1; *Stabile v. State,* 790 So. 2d 1235 (Fla. 5th DCA 2001) *approved,* 838 So. 2d 557 (Fla. 2003), here no attempt was made to establish the required foundation for application of the exception to the rule excluding hearsay.

instead determining that it was admissible under the exception for public records. Holding the release date letter authored by Department of Correction's employee Joyce Hobbs admissible under the public records exception to the rule excluding hearsay fails to appreciate the character of the letter, the requirements of the public records exception, and the applicability of the confrontation clause.

Section 90.803(8), *Florida Statutes* (2000), the public records exception to the rule excluding hearsay, states:

> 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.

Two types of documents are made admissible by section 90.803(8): records setting forth the activities of the public office or agency, *see Kirk v. State,* 869 So. 2d 670 (Fla. 5th DCA 2004), and those setting 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.). "[H]earsay

evidence is admissible under the public records exception, only when the duty to make or maintain the document is imposed by statute or rule, and the disputed document is one that is regularly prepared." *Juste v. Department of Health and Rehabilitative Services,* 520 So. 2d 69, 72 (Fla. 1st DCA 1988). In order to be admitted under the latter portion of the exception:

> (1) the source of the information must have personal knowledge of the information recorded, as the phrase "matters observed" implies, (2) the source must have had a legal duty to both observe and report the information, and (3) the record is question must be one that the public agency or office is required by law to prepare.

*Id.*

Matters observed by police officers and other law enforcement personnel are not admissible under section 90.803(8) in criminal cases. *Burgess v. State,* 831 So. 2d 137, 140 (Fla. 2002). "If evidence is to be admitted under one of the exceptions to the hearsay rule, it must be offered in strict compliance with the requirements of the particular exception." *Johnson v. Department of Health and Rehabilitative Services,* 546 So. 2d 741, 743 (Fla. 1st DCA 1989).

Petitioner does not dispute that the Florida Department of Corrections maintains records reflecting the date an inmate comes into its custody, the crimes the inmate was convicted of committing and the sentences imposed, the institutions to which the inmate was assigned, and the date the inmate was released from its custody. It may well be the case that those documents, maintained for all inmates

in all cases, rather than being specifically prepared only for those former inmates for whom the state is seeking an enhanced sentence, constitute public records. *See Kirk,* 869 So. 2d at 671-672; *See also Robbins v. Robbins,* 429 So. 2d 424, 427 n. 1 (Fla. 3rd DCA 1983) (depository computer print-out relating history of child support payments may have been admissible as a public record). However, there are significant differences between the release date letter at issue in this case and the aforementioned records

The release date document introduced in this case was not a record setting forth the activities of the Department of Corrections in regard to appellant, but was instead a letter drafted by a Department employee articulating factual findings based upon her review of records maintained by the Department. The records Ms. Hobbs reviewed in preparing her letter may set forth the activities of the Department of Corrections in regard to petitioner, but her letter articulates the conclusions she drew based upon review of those records. *Cf. Zoda v. Hedden,* 596 So. 2d 1225 (Fla. 2d DCA 1992)(public records themselves, not attorney's affidavit based upon review of them, are public records). "Records that rely on information supplied by outside sources or that contain evaluations or statements of opinion by a public official are inadmissible under this provision." *Lee,* 698 So. 2d at 1201. The record fails to reflect that Ms. Hobbs, the source of the information, had personal knowledge of petitioner's release date. In addition,

nothing in the record suggests that Ms. Hobbs was under a legal duty to observe petitioner being released from prison or to report seeing him being released if she saw it occur. *See Desmond v. Medic Ayers Nursing Home,* 492 So. 2d 427, 430-431 (Fla. 1st DCA 1986). Furthermore, petitioner is unaware of any statute or administrative rule that requires the Department of Corrections to maintain release date letters in the files of all inmates. "Lack of such a duty imposed by statute or administrative rule has resulted in court determinations holding that the public records hearsay exception inapplicable." *Sikes,* 429 So. 2d at 1221. But for a request from the State Attorney's Office of the Seventeenth Judicial Circuit, a release date letter would not have been prepared in petitioner's case. Since no law or rule required anyone to prepare the release date letter, it could not be considered a document setting forth matters observed pursuant to duty imposed by law as to which matters there was a duty to report. The record failing to establish that the release date letter was either of the two types of documents admissible under the public records hearsay exception, it was not admissible under the public records exception to the hearsay rule. Finally, even if the release date letter could be viewed as a public record, Ms. Hobbs, an employee of the Department of Corrections, the agency charged with maintaining custody of those convicted of felony offenses and sentenced to serve state prison sentences, fell within the classification of other law enforcement personnel. *See United States v. Oates,* 560

F. 2d 45, 67-68 (2d Cir. 1977); *Cole v. State,* 839 So. 2d 798 (Tex. Crim. App. 1990). As a result, Ms. Hobbs' letter was inadmissible in this criminal proceeding. *See United States v. Cain,* 615 F. 2d 380 (5th Cir. 1980).

**2**

Assuming arguendo that the last release date letter was admissible as a public record, admission of that letter, even though the evidentiary fact found in it relates to criminal history, rather than guilt, raises a confrontation issue. The Fourth District Court of Appeal confused the Sixth Amendment right to trial by jury with the Sixth Amendment right to confrontation. Because the evidentiary fact found in the release date letter related to criminal history, the failure to submit it to a jury may not have violated appellant's Sixth Amendment right to a jury trial. *See Apprendi v. New Jersey,* 530 U.S. 466, 476, 120 S.Ct. 2348, 2355, 147 L.Ed. 2d 435 (2000). However, the confrontation clause, which applies to sentencing proceedings in Florida, *Way v. State,* 760 So. 2d 903, 917 (Fla. 2000) *cert. denied,* 531 So. 2d 1155, 121 S.Ct. 1104, 148 L.Ed. 2d 975 (2001); *DeSue v. State,* 908 So. 2d at 1117[10], prohibits the introduction of testimonial hearsay absent unavailability

[10] Section 775.084(3)(a)3., *Florida Statutes* (2000), which addresses one aspect of the procedure trial courts shall follow in determining whether a defendant qualifies for habitual violent felony offender sentencing, states, "[e]xcept as provided in subparagraph 1, all evidence presented shall be presented in open court with full rights of confrontation, cross-examination, and representation by counsel." The Florida Legislature appears to view the application of the

of the declarant and a prior opportunity for the defendant to cross-examine the witness. *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004).[11] Affidavits, which Ms. Hobbs' release date letter closely resembles, are testimonial in nature. *See Belvin v. State,* 922 So. 2d 1046, 1050 (Fla. 4th DCA 2006) *rev. granted,* 928 So. 2d 336 (Fla. 2006). Through her letter, prepared not for public benefit but for petitioner's sentencing hearing, Ms. Hobbs asserted the existence of facts necessary to imposition of a habitual violent felony offender sentence, rendering her letter testimonial hearsay. *See Id.* at 1050; *Card v. State,* 927 So. 2d 200, 203 (Fla. 5th DCA 2006). The record failed to reflect that Ms. Hobbs was unavailable and that petitioner had a prior opportunity for cross-examination of her. Accordingly, admission of the release date letter violated petitioner's right to confrontation.

**C**

Respondent failed to prove that petitioner met the qualifications for sentencing as a habitual violent felony offender. The evidentiary deficiency was addressed during the sentencing hearing and in a motion to correct sentencing

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confrontation clause to the prior criminal history requirement of habitual violent felony offender sentencing differently than does the district court.

[11] Courts from other jurisdictions have uniformly held that the confrontation clause does not apply to non-capital sentencing proceedings notwithstanding *Crawford. See e.g. United States v. Cantellano,* 430 F. 3rd 1142, 1146 (11th Cir. 2005) *cert. denied,* - U.S. -, 126 S.Ct. 1604, 164 L.Ed. 2d 325 (2006).

error. In those instances where the trial court imposes a habitual offender sentence, over a well-taken defense objection that the qualifications for imposition of an enhanced sentence have not been established, resentencing must be under the guidelines. *Collins v. State,* 893 So. 2d 592 (Fla. 2d DCA 2004) *rev. granted,* 929 So. 2d 1054 (Fla. 2006); *But see Clarke v. State,* 941 So. 2d 593 (Fla. 4th DCA 2006) *rev. pending,* SC06-2468[12]; *See also Pope v. State,* 561 So. 2d 554, 556 (Fla. 1990)(to avoid multiple appeals, multiple resentencings, and unwarranted efforts to justify the original sentence, when an improper departure sentence is vacated, resentencing must be within the guidelines). As a result, petitioner's habitual violent felony offender sentences must be vacated and this cause remanded for imposition of sentence under the criminal punishment code.

## III

A direct conflict exists between *Yisrael* and *Gray*. In *Yisrael* the Fourth District erroneously determined that the prison release date letter was admissible under the public records exception to the hearsay rule and failed to appreciate the confrontation clause implications of its decision. *Gray* reached the correct result. Accordingly, this Court should grant the petition for discretionary review, quash the decision of the Fourth District Court of Appeal, and remand this cause for imposition of a criminal punishment code sentence.

[12] By order dated January 2, 2007 the proceedings in *Clarke* were stayed pending the outcome in *Collins*.

## 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 INFORMA-TION NOR FOUND BY THE JURY TO HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT.**

Petitioner was charged by information with two felony offenses neither count alleging the predicate facts qualifying him as a habitual violent felony offender. Respondent filed notice of intent to seek imposition of sentence as a habitual felony offender, habitual violent felony offender, three-time violent felony offender, or violent career criminal. A jury found petitioner guilty of both offenses as charged, but was not asked to determine whether he qualified for habitual violent felony offender sentencing. Petitioner was sentenced as a habitual violent felony offender for offenses, both sentences exceeding those permitted by the criminal punishment code. Petitioner's post-sentencing motion, asserting that he could not be sentenced as a habitual violent felony offender because the predicate facts were neither alleged in the information nor found to exist by the jury, was denied.[13]

[13] Whether appellant was sentenced in violation of his Sixth Amendment right to a jury trial is a question of law reviewed *de novo. See generally Nelson v. State,* 875 So. 2d 579, 581 (Fla. 2004).

In *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d (2000), the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires that "any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 476, 120 S.Ct. at 2355.[14] *Apprendi* has been expounded upon in three subsequent decision from the United States Supreme Court. *Shepard v. United States,* 125 S.Ct. 1254 (2005); *United States v. Booker,* 125 S.Ct. 738 (2005); *Blakely v. Washington,* 124 S.Ct. 2531 (2004). In *Shepard*, Justice Thomas, in an opinion concurring in part and concurring in the judgment, wrote:

> *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000), and its progeny prohibit judges from "mak[ing] a finding that raises [a defendant's] sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant." *United States v. Booker,* 543 U.S. -,-, 125 S.Ct. 738, 775, 160 L.Ed. 2d 621 (2005).
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> The need for further refinement of *Taylor* [*v. United States,* 495 U.S. 575, 110 S.Ct. 2143, 109 L. Ed. 2d 607 (1990)] endures because this Court has not yet reconsidered *Almendarez-Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed. 2d 350 (1998),

[14] "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington,* 124 S.Ct. 2531, 2537 (2004).

> which draws an exception to the *Apprendi* line of cases for judicial factfinding that concerns a defendant's prior convictions. *See Apprendi,* supra, at 487-490, 120 S.Ct. 2348. *Almendarez-Torres*, like *Taylor*, has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. *See* 523 U.S., at 248-249, 118 S.Ct. 1219(SCALIA., joined by STEVENS, SOUTER, and GINSBURG, JJ., dissenting); *Apprendi,* supra, at 520-521, 120 S.Ct. 2348 (THOMAS, J., concurring). The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres'* continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres,* despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.

The information filed against petitioner failed to allege the prior enumerated offense qualifying him for habitual violent felony offender sentencing, the conviction date of the enumerated offense, the date petitioner was released from prison or other commitment imposed as a result of the conviction for the enumerated offense, that petitioner had not received a pardon for the enumerated offense, and that the enumerated offense had not been set aside in any postconviction proceeding. In addition, because the foregoing factual matters were not submitted to the jury, the jury failed to find them to have been proven beyond a reasonable doubt. As a result, the sentences petitioner received, which far exceeded those that could be imposed based upon the facts reflected in the jury

verdicts, were the result of factual findings made by the trial judge. The Due Process Clause of the United States Constitution prohibits the manner and method which led to the defendant's sentences.

Petitioner acknowledges *Gudinas v. State,* 879 So. 2d 616 (2004), which held that a defendant was not entitled to have his qualification as a habitual felony offender submitted to a jury. However, since the prior conviction exception may some day be overruled, petitioner raises this issue so that it cannot be argued in the future that he waived any right to relief that he may have by failing to raise the issue in the highest court of this state.

## CONCLUSION

Whereas, Petitioner prays this Honorable Court will exercise its discretion to review the instant decision of the fourth district court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Initial Brief on the Merits has been furnished to: THOMAS PALMER, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida 33401-3432, by courier this ___ day of February, 2007.

_____
DAVID JOHN McPHERRIN

## 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
Assistant Public Defender