IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 79,728

BILLY JOE HODGES,

Respondent.

# RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON **THE MERITS**

**1 PRELIMINARY STATEMENT**

Respondent, BILLY JOE HODGES, was the defendant below, and will be referred to as "respondent" or by his proper name, "Hodges." The State of Florida, prosecuting below, will be referred to as "petitioner" or as "state." The record on appeal will be referred to by the letter "R" followed by the applicable page number, while the transcript of trial and sentencing proceedings will be referred to by the letter "T" followed by the applicable page number. The initial brief of petitioner will be referred to by the letters **"IB"** followed by the applicable page numbers.

## II STATEMENT OF THE FACTS

Billy Joe Hodges is an unemployed black crack cocaine addict born on January 4, 1962, who was arrested in Jacksonville, Duval County, Florida, and charged with armed robbery. He stuck his hand under his shirt, pointed his finger, and took two $20 bills from a convenience store clerk who knew him, telling him that was all he needed to purchase crack cocaine (R 1-3; T-63). He was sentenced as a violent felony offender to 30 years of incarceration, with a ten-year minimum mandatory term (R 29-35).

## III SUMMARY OF ARGUMENT

Hodges is a black offender whose sentence was enhanced pursuant to Florida's habitual felony offender statute. That statute is applied in a discriminatory manner to members of the black race, including Hodges, Prosecutorial discretion in selecting offenders for enhanced sentencing is not subject to review, though the prosecutorial selection prefers members of the black race. Sentencing discretion has been removed from the judiciary. The statute, as applied, violates the Equal Protection Clause of the Florida Constitution, the Equal Protection of the Fifth and Fourteenth Amendments to the United States Constitution; violates due process; and violates the principle of separation of powers.

## IV ARGUMENT

### ISSUE I

WHETHER SECTION 775.084, FLORIDA STATUTES (1989), DENIES DUE PROCESS OR EQUAL PROTECTION OF LAW UNDER THE FLORIDA CONSTITUTION OR THE UNITED STATES CONSTITUTION; OR VIOLATES THE DOCTRINE OF SEPARATION OF POWERS, AS SET FORTH IN THE FLORIDA CONSTITUTION.

This cause is before the Court for answers to two certified questions, the first of which requests a decision on the constitutionality of section 775.084, Florida Statutes (1989). That section creates two classes of offenders--habitual felony offenders and habitual violent felony offenders--and allows for substantial increases in criminal penalties for offenders designated as members of those classes. As written, it serves a rational purpose of the state. In its operation, however, the habitual offender statute is applied to four sub-classes: qualifying habitual felony offenders who are black: qualifying habitual felony offenders who are white or "other"; qualifying violent habitual felony offenders who are black; and qualifying violent habitual felony offenders who are white or "other."

The statute is applied in an arbitrary and capricious manner which discriminates against blacks, contrary to the Equal Protection clause of the Constitution of the State of Florida, and the Fifth and Fourteenth Amendments to the United States Constitution. This Court must strictly scrutinize the statute as applied in Florida. Having done so, it will come to

the inevitable conclusion that the statute, as applied, cannot stand constitutional muster, but must fall.

It is settled that prosecutorial discretion as to whom to prosecute is broad United States v. Goodwin, 457 U.S. 368, 380, n.11 (1982). It is not unfettered, but is subject to constitutional constraints Wayte v. United States, 470 U.S. 598, 508 (1985), quoting United States v. Batchelder, 442 U.S. 114, 125 (1979). And, though federal standards of review seem fluid, changing from term to term,[1] it would appear that appellant's assertion that he has been denied equal protection of the laws must pass a two-prong test. He must demonstrate (1) that he is a member of an identifiable group that is a recognizable, distinct class, and (2) that, as such, he has been singled out for different treatment under the laws, as written or as applied. Casteneda v. Partida, 430 U.S. 482, 494 (1977).[2]

At the time of his arrest in Jacksonville, Hodges was far more likely to be incarcerated for his crime than an unemployed

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[1] See, Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harvard Law Review 1 (1972).

[2] This court is not bound by federal standards of review, but may view those standards as the "uniform minimum, the highest common denominator of freedom that can prudently be administered throughout all fifty states," but may instead look to our own state constitution, "and construe each provision freely in order to achieve the primary goal of individual freedom and autonomy." Traylor v. State, 17 FLW S42, 43 (January 16, 1992).

white male;[3] and, since members of the black race comprised 73.6 percentum of all habitual felony offenders sentenced between July 1, 1990 and June 30, 1991, far more likely to receive habitual offender enhancement than a similarly situated member of any other race.[4] Further, since Duval County designated a higher percentage of offenders as habitual felony offenders than any other county in the State of Florida, accounting for 12 percentum of the total habitual felony offenders incarcerated in calendar year 1991, Hodges was more likely to be sentenced as an habitual offender than offenders in any other Florida county for which figures are available.[5] And, since 88 percentum of violent habitual felony offenders sentenced in Duval County are black, while 77 percentum of all violent felony offenders are black, he was more likely, solely because he is black, to be sentenced there as an habitual violent felony offender.[6]

Finally, since Hodges was sentenced in the State of Florida, he was very likely to be sentenced by a white judge, since 94.5 percentum of all judges in Florida are white. And,

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[3] See, Appendix 1, Chiricos and Bales, Unemployment and Punishment: An Empirical Assessment, 29 Criminology 701 (1991), pp. 716-717, Table 8.

[4] See, Appendix 2, Cover letter from Florida Department of Corrections dated June 15, 1992, with accompanying data.

[5] See, Appendix 3, Cover letter from Florida Department of Corrections dated June 15, 1992, with accompanying data.

[6] Also, see Chiricos/Bales Study, App. 1, supra, p. 718.

as Hodges was sentenced in the northern region of Florida, where less than one percentum of all judges are members of a minority race, he was overwhelmingly likely to be sentenced by a white judge.7

Hodges was sentenced as a violent habitual felony offender to 30 years of incarceration, with a 10-year minimum mandatory term, instead of a guidelines recommended sentence in the 5-1/2 to 9-year permitted range [see Scoresheet, R-41.1 He has been denied due process and the equal protection of the law.

Before inception of the sentencing guidelines in 1983, statutory maximums and the review of sentences by a parole commission provided some uniformity of actual incarcerated time served among those convicted of similar crimes. The drafters of the guidelines then attempted to provide for similar sentences for those similarly situated, in exchange for the loss of the opportunity for parole.

Florida's earlier habitual offender statute provided for sentences outside the statutory maximums, but not outside the guidelines, unless other reasons for departure existed. And, arising contemporaneously with the sentencing guidelines were

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7 See, Appendix 4, Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission, December 11, 1990, pp. 13-15. This report was unable to provide accurate figures of minority lawyers practicing in Florida, but it is clear there are no elected state attorneys who are members of a minority.

new forms of gain time, which were applied uniformly to most inmates serving guideline sentences.

In 1987, this Court held in Whitehead v. State, 498 So.2d 863, 865 (Fla. 1986), that section **775.084** "cannot be considered **as** providing an exemption for a guidelines sentence." Thereafter, the Florida Legislature amended section **775.084** once again, to provide that sentences imposed thereunder were not subject to the guidelines and to remove the requirement that a trial judge determine that an enhanced sentence was necessary to protect the public. [Chapter 88-131, Laws of Florida].

These changes in the statute effectively eliminated the statutory mandate for uniformity in sentencing and actual incarcerated time served. The low-threshold requirements make the statute applicable to a substantial number, if not a solid majority, of those persons sentenced to prison in the State of Florida. Yet, of the tens of thousands who are eligible for sentencing under this statute, only those chosen by a prosecutor in an arbitrary manner, and those then designated by a judge in an equally arbitrary manner, are actually sentenced under its provisions. Others who commit the same offense under the same circumstances and with the same prior records will escape the operation of the statute, for no expressible reasons.

Recent studies have shown that it is not fortune which exempts some. Instead, it is race. The Interim Project report

of the House Committee on Criminal Justice, November 6, 1991, has noted:

> Finally, there is the inference that these habitual offender statutes are being applied in a racially discriminatory manner. In the past two fiscal years, FY 1990-91, 2,2026 and 2,730 habitual offenders were admitted to Florida's prison system. These two figures represent 4.7% and 7.5% of all persons admitted to prison in those years. Yet of the number going to prison, **black** offenders made **up 78.4%** and **73.6%** habitualized inmates in those years. Unlike guidelines sentences, which are race and gender neutral, habitual offender sentencing depends upon the decision to invoke the enhanced sentence at two, independent points. The first occurs when the state attorney chooses whether to give notice that it will seek an enhanced sentence, while the second occurs when the judge decides whether to impose the enhanced sentence. At each of these points non-judicially related racial biases could intervene to direct more black defendants into enhanced sentences than white defendants, whether conscious or not. [p. 71, footnotes omitted.][8]

Theodore G. Chiricos **and** William D. Bales have published a study [hereafter "Chiricos/Bales Study"] in which they concluded that unemployed black males are 5.0 times more likely to be sentenced to incarceration than unemployed white males,

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[8] See, Appendix 5, Interim Project, House Committee on Criminal Justice, Habitual Offender and Minimum Mandatory Sentencing in Florida: A Focus on Sentencing Practices and Recommendations for Legislative Reform, November *6*, 1991.

and unemployed young black males are 6.0 times more likely to be sentenced to incarceration than unemployed white males.[9]

Indisputably, blacks are more likely to be unemployed than whites particularly young black men. The latest available figures from the Federal Bureau of Labor Statistics for the State of Florida are those for 1990, which demonstrate that while unemployment for white men was 4.7 percentum, unemployment for black men was 11.8 percentum. And, while unemployment for white men 20-24 years of age was 6.2 percentum, the rate for black males in that age group was 16.0, nearly three times that of whites.[10]

If there are nearly three times as many unemployed young black men as unemployed young white men, and unemployed young black men are 6.0 times more likely to be incarcerated for offenses than young white men, it must follow that a higher percentage of black men will make up the base group from which habitual felony offenders are selected.

If the habitual offender statute is being applied objectively, in a race neutral manner, and unemployed black men are more likely to be incarcerated, using the Chiricos/Bales

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[9] See, Appendix 1, Chiricos and Bales, pp. 716-721. Chiricos and Bales also have established a correlation between race, employment and types of crimes. See, p. 718.

[10] See, Appendix 6, Employment Status of the Civilian Noninstitutional Population by sex, age, race, Hispanic origin, and marital status: Detailed Characteristics--1990 Annual Averages--Florida, compiled by the U.S. Department of Labor, BLS, Current Population Survey, 1990.

Study figures, there should be at least between 5.0 percentum and 6.8 percentum more blacks than white sentenced as habitual felony offenders. Figures from the Department of Corrections reveal, however, that in calendar year 1991, the total of persons incarcerated in Florida comprised 59.3 percentum black, and 40.6 percentum white; while the total of persons treated as habitual felony offenders (including violent felony offenders) was comprised of 74.5 percentum black, and 25.4 percentum white. Thus, racial bias against blacks is evident state-wide in the selection and sentencing of habitual felony offenders.

Further, Hodges has been denied due process and equal protection of the law under both the Florida Constitution and the United States Constitution because of the harsher, disparate treatment of black offenders in Duval County, Florida, as opposed to treatment provided black offenders and white offenders in other counties of Florida. Duval County had a total population in 1990 of 672,971 persons, while Dade County, Florida had a total population of 1,937,094.[12] Yet, judges in Jacksonville have accounted for 12 percentum of the total habitual offenders, while Dade County only accounts for 6

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[11] See, Appendix 2, Data from Department of Corrections.

[12] See, Appendix 7, Florida Department of Commerce, Bureau of Economic Analysis" Population by Age, Race, Sex and Housing: State of Florida, Counties and Selected Municipalities from the 1990 Census of Population and Housing, January 1992.

percentum. Unless Jacksonville can prove both that it has a bigger crime problem than Miami and that the problem is nearly exclusively caused by black offenders, then the sentencing regime in force there is fundamentally flawed.

The figures lead to the ineluctable conclusion that racial bias infuses the application of the statute, resulting in inevitable denial of equal protection of the law. "[T]he practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by the statute." Snowden v. Hughes, 321 U.S. 1, 9 (1944).

Appellant has met the two-pronged federal test and demonstrated denial of equal protection of the law, not only to him, but to similarly situated members of the black race. He has provided evidence herein that persons similarly situated have not been prosecuted, and he has shown that the decisions were made on the basis of an unjustifiable standard, i.e., race. See, generally, Wayte v. United States, 470 U.S. 598 (1985); United States v. Goodwin, 457 U.S. 368 (1982); Oyler v. Boles, 368 U.S. 448 (1962); and Yick Wo v. Hopkins, 118 U.S. 356 (1886).

The very nature of the statute, which does not require any demonstration or articulation of race-neutral [or other status-neutral] reason for a prosecutor to seek enhancement against one person as opposed to another, results in an inevitable denial of due process. There are no standards; there is no possibility of review. Due process of law is not only violated; it is not provided.

Further, the habitual offender statute, as applied, violates the principle of separation of powers, removing from the judiciary its sentencing power, or discretion in sentencing. Once the prosecutor determined--under whatever nonreviewable standards employed (if, indeed, standards even exist)--to seek habitual violent offender status for Hodges, the trial court's sentencing discretion was usurped, and the court must then impose a minimum mandatory sentence.

The power to fix maximum and minimum punishments properly rests with the legislature. Lightbourne v. State, 438 So.2d 380, 385 (Fla. 1983). That power does not extend, however, to fixing specific, required penalties for commission of any felony by repeat offenders, then granting to the executive branch the power to select some offenders, but not others, to receive this penalty.

Unlike mandatory penalties fixed for capital crimes and those involving firearms, where the application of the required penalties is uniform, the habitual offender statute permits the executive branch to determine who shall and shall not receive enhanced penalties. As applied, then, the statute offends the principle of separation of powers, and infringes on the judicial power established in Article V, section 1 of the Florida Constitution.

In summary, section 775.084, Florida Statutes (1989) violates the Equal Protection Clause of the Fifth and Fourteenth Amendments to the United States Constitution and section 2, Article I of the Constitution of the State of

Florida because it creates irrational classifications and removes the levelling influence of the sentencing guidelines and parole eligibility from certain defendants; it violates the Equal Protection Clause of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 of the Constitution of the State of Florida because of the prevalence of racial discrimination in its administration; it violates constitutional guarantees of due process because the means selected to achieve its purpose--and the tremendous disparities in sentences it produces--are unreasonable, arbitrary, and capricious; it eliminates any notion of due process because the means selected to achieve its purpose are inarticulable, and not subject to review; and, it violates the constitutional principle of separation of powers by taking from courts their inherent authority to fix punishments within the parameters established by the legislature, and granting that authority to prosecutors without providing a means of review, contrary to the provisions of Article V, section 1 of the Constitution of the State of Florida. For these reasons, the Florida habitual felony statute is unconstitutional, and should be stricken by this Court.

ISSUE II

WHETHER THE HOLDING IN Eutsey v. State, 383 So.2d 219 (Fla. 1980), THAT THE STATE HAS NO BURDEN OF PROOF AS TO WHETHER THE CONVICTIONS NECESSARY FOR HABITUAL FELONY OFFENDER SENTENCING HAVE BEEN PARDONED OR SET ASIDE, IN THAT THEY ARE "AFFIRMATIVE DEFENSES AVAILABLE [TO A DEFENDANT]'' Eutsey AT 226, RELIEVE THE TRIAL COURT OF ITS STATUTORY OBLIGATION TO MAKE FINDINGS REGARDING THOSE FACTORS, IF THE DEFENDANT DOES NOT AFFIRMATIVELY RAISE, AS A DEFENSE, THAT THE QUALIFYING CONVICTIONS PROVIDED BY THE STATE HAVE BEEN PARDONED OR SET ASIDE.

Petitioner makes one basic argument: that a sentencing court need not make the findings required by statute, either because this Court's decision in Eutsey v. State, 383 So.2d 219 (Fla. 1980) does not require it, or because the legislature didn't understand what it was doing when it wrote the statute. Respondent's position is equally simple, or because it simply isn't fair. Respondent simply contends that this Court, in delivering the Eutsey opinion, did not intend to relieve trial courts of their legislatively imposed burden of providing a clear record of what exactly transpired and the basis therefor.

Sections 775.084(1)(b)1-4, Florida Statutes (1989) require the sentencing court to make four findings before imposing an extended term of punishment. Those findings were made by the Eutsey trial court.

In the recital of the facts of Eutsey is the following:

> At the conclusion of the hearing, the trial court found, beyond and to the exclusion of every reasonable doubt, that Eutsey is the same person who was convicted of attempted robbery on January 23, 1976, and received a three-year sentence; that he

> is the same person who was convicted on July 20, 1978 of burglary in the present case; that each is a felony: and that the latter conviction was within five years of the earlier conviction, and commission of the latter crime was within nineteen or twenty days after Eutsey's release from prison on the first felony for which he was sentenced. The court further found that Eutsey had not received a pardon and that his convictions had not been set aside in post-conviction relief proceedings. (Id. at 223)(e.s.)

Thus, it is clear that the trial court in Eutsey made the requisite statutory findings.

It is equally clear that this court approved of that process from Justice England's concurring opinion, which states:

> I further agree that section 775.084(3)(d), and due process, require the trial court to make findings of fact which show on their face that an extended sentence is necessary to protect the public from defendant's further criminal conduct. I recognize that findings of fact need not be in writing. (Id., 226-27).

Justice England then dissented from the majority opinion in his belief that the findings needed to be written "to allow meaningful appellate review." (Id. at 227), quoting from a First District Court of Appeal opinion:

> [t]he statutory requirement for findings of fact, capable of review on appeal, is the cap of a legislative purpose which . . . assures the defendant in Section 775.084 proceedings of [due process] . . . .
>
> * * *
>
> . . . In order that an appellate court may perform its duty to review the sentencing court's ultimate finding . . . we must be apprised of the underlying facts

> and circumstances which the trial judge relief on in making that finding. Otherwise, the appellate court will be left with the hopeless task of determining from the raw data in the presentence report and elsewhere what material might have influenced the trial judge to the ultimate finding . . . and, in a real sense, the appellate court will be put in a position of duplicating the sentencing function which is properly and exclusively that of the trial court.

Neither the legislature nor any other court took up the Justice's suggestion that findings be reduced to writing. It would appear then, that Eutsey still controls, i.e., that the required statutory findings of fact be spread on the record. The decision of the First District Court of Appeal should be affirmed,

## V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court strike section 775.084, Florida Statutes (1989).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to James W. Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Respondent, BILLY JOE HODGES, #110435, New River Correctional Institution, Post Office Box 333, Raiford, Florida 32083, on this 16th day of July, 1992.

CAROL ANN TURNER