IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 79,728

BILLY JOE HODGES,

Respondent.

REPLY BRIEF OF PETITIONER

ANSWER BRIEF OF CROSS-RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
SENIOR ASSISTANT ATTORNEY GENERAL
FLA. BAR #325791

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
904/488-0600

COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

Respondent/Cross-Petitioner Hodges has filed an answer brief in Issue II which addresses the Eutsey v. State, 383 So.2d 219 (Fla. 1980) issue. Petitioner/Cross-Respondent state will reply under Issue I of this brief.

Respondent/Cross-Petitioner Hodges challenges the constitutionality of section 775.084(1)(b), Florida Statutes (1989) in Issue I of his brief. The state will answer under Issue II of this brief.

STATEMENT OF THE CASE AND FACTS

The state notes that cross-petitioner Hodges did not challenge the constitutionality of the habitual violent felony statute, section 775.084(1)(b) in the trial court.

SUMMARY OF ARGUMENT

REPLY BRIEF

I. Eutsey v. State is on-point and should not be receded from.

ANSWER BRIEF

11. The constitutionality of section 775.084(1)(b) was not raised in the trial court and, thus, it could only be challenged as facially unconstitutional in the district court below. None of Hodges arguments below addressed the only two permissible grounds of vagueness and overbreadth. Hodges finishes his hat trick by making still another new argument here, which is also not cognizable, relying on appended material which is not within the record on appeal and is thus not cognizable.

ARGUMENT

ISSUE I

SHOULD THIS COURT RATIFY THE DISTRICT COURT DECISION BELOW WHICH OVERRULES EUTSEY V. STATE, 383 SO.2D 219 (FLA. 1980) BY HOLDING THAT THE STATE HAS THE BURDEN OF PROOF FOR SHOWING, AND THE TRIAL COURT MUST FIND, THAT PREDICATE FELONIES NECESSARY FOR HABITUAL FELON SENTENCES HAVE NOT BEEN PARDONED OR SET ASIDE?

Hodges abandons entirely the factually inapposite cases on which he relied below. He now relies solely on the dissenting portion of Justice England's concurring in part and dissenting in part opinion in Eutsey. There, Justice England simply expressed a preference for separately written findings of fact as opposed to findings recited into the record by the trial court. Thus, even this dissenting opinion lends no support to the holding below that trial courts must find, and the state must prove, that the unraised affirmative defenses of pardon and collateral set aside are not present.

Although there are now something like fifty of these cases pending either here or in the district court below, appellate counsel has effectively abandoned any effort to support the decision below by tacitly recognizing *that* there is no basis for the decision below.

For the numerous, unrefuted reasons set forth in the state's initial brief, the district court should be reversed on this issue, and the certified question, to the degree it survives, should be answered yes.

ISSUE II

IS SECTION 775.084(1)(b), FLORIDA STATUTES (1989) FACIALLY UNCONSTITUTIONAL?

Hodges did not challenge the constitutionality of the statute in the trial court. Thus, in the district court and here, the only permissible challenge was and is to the facial constitutionality of the statute on the grounds of vagueness and overbreadth. Trushin v. State, 425 So.2d 1126 (Fla. 1983); Southeastern Fisheries v. Dept. of Natural Resources, 453 So.2d 1351 (Fla. 1984). Hodges did not argue below, and does not argue here, that the habitual violent felony offender statute impinges on any protected First Amendment right. Sandstrom v. Leader, 370 So.2d 3 (Fla. 1979); Southeastern Fisheries. Similarly, he did not argue below, and does not argue here, that the provisions of the habitual violent felony statute are not definite enough, "when measured by common understanding and practice, to apprise ordinary persons of common intelligence of what conduct is proscribed." State v. Ashcraft, 378 So.2d 284, 285 (Fla. 1979). Even if the arguments had been presented, it is obvious from merely reading the statute, that it presents no vagueness or overbreadth issues. In this connection, see Ross v. State, 17 F.L.W. S367, S368 (Fla. June 18, 1992), where, only a month ago, this Court rejected a vagueness challenge because "this statute is highly specific on the requirements that must be met before habitualization can occur."

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For the convenience of the Court, a copy of Hodges brief in the district court is appended. It is readily apparent that counsel for Hodges has adopted an entirely new position for this Court based entirely on material outside the record which she appends as 1-7. None of the material or arguments were raised in the trial court and are not cognizable here. Trushin, Southeastern Fisheries.

The new argument appears to be grounded on the race of Hodges, who we are told for the first time is Black, and the locale of the crimes. It is settled law that this Court will not address an argument not specifically raised below. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). The arguments here were not raised in either the trial or district courts. It is also settled law that an appellant has a duty to make error clearly appear by bringing to the Court a record which shows such error. Lynn v. City of Fort Lauderdale, 81 So.2d 511 (Fla. 1955). The burden of making and preserving a record cannot be satisfied by filing a series of appendices to the brief containing matter outside the record.

Ordinarily, such blatant disregard for the rules of appellate procedure and practice would lead the state to move to strike the portion of the brief and the appendices but doing so might further delay the important appeal in Issue I. Accordingly, the state will simply ask the Court to disregard the improper argument and material and will not seek sanctions for these departures from the accepted norms of appellate practice by opposing counsel.

It should be noted, however, that previous abuses of this type from the same law firm have occurred. In State v. Barnes, 595 So.2d 22 (Fla. 1992), counsel for Barnes filed an extraneous supplemental authority on the day of oral argument and proceeded to make a constitutional equal protection argument, similar to that here, even though Barnes was exclusively a statutory interpretation case on whether two felonies on the same day were adequate predicates. One of the justices there questioned the propriety of the argument and the Court simply ignored the improper argument in its opinion. Nevertheless, we seem to be sinking ever deeper into what could be described as appellate review by ambush. Here, for example, neither of the two issues before this Court were raised in the trial court. The state suggests that it is desirable to make it clear that the principles of appellate review contained in Trushin, Southeastern Fisheries, Lynn, Steinhorst, and similar opinions are at the heart of any viable system of appellate review and, further, the Rules of Professional Conduct are incompatible with careless or deliberate violation of these principles.

CONCLUSION

On Issue I, the Court should reaffirm Eutsey.

On Issue 11, the Court should reject the challenge to the constitutionality of section 775.084(1)(a).

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
Senior Assistant Attorney General
Fla. Bar #325791

Department of Legal Affairs
The Capitol
Tallahassee, Florida 32399-1050
904/488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Carol Ann Turner, Assistant Public Defender, Leon County Courthouse, Tallahassee, Florida 32301, this 17th day of July, 1992.

JAMES W. ROGERS

APPENDIX

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

8/11/9

BILLY JOE HODGES,

Appellant,

v.

CASE NO. 91-1569

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CAROL ANN TURNER #243663
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904)488-2458

ATTORNEY FOR APPELLANT

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

BILLY JOE HODGES,

Appellant,

v. CASE NO. 91-1569

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant was the defendant below, and will be referred *to* as "appellant" in this brief. The state, prosecuting below, will be referred to as "appellee" or "state," A one-volume record on appeal will be referred to as "R," followed by the applicable page number in parentheses. A one-volume transcript will be referred to as "T," followed by the applicable page number. All proceedings below were before Circuit Judge John D. Southwood, sitting in Jacksonville, Duval County, Florida.

II STATEMENT OF THE CASE

Appellant was charged by information with one count of robbery, apparently on January 31, 1991, the date of the notary's acknowledgement; however, the clerk's acknowledgement of filing indicates the information was filed in the clerk's office the day prior to that, January 30, 1991 (R-7). A Notice of Intent to Prosecute Defendant as a Career Criminal was filed in the clerk's office on January 30, 1991, also being dated January 31, 1991. (R-9) A Notice of Intent to Classify Defendant as a Habitual Violent Felony Offender was filed with the Clerk on February 13, 1991 (R-17).

The appellant was tried by a jury, which was instructed by the judge as to robbery and theft (T-99-102) and found guilty as charged (T-112; R-20). At sentencing, the state introduced a certified copy of judgment and sentence in case 88-8213-CF, two counts unarmed robbery, dated July 29, 1988, from Duval County, Florida (T-118-119). No finding was made as to whether defendant had received a pardon, or whether the conviction had been set aside in any post-conviction proceeding.

Appellant was sentenced as a violent felony offender to a term of 30 years in the Department of Corrections, with a ten-year minimum mandatory provision imposed (T-125).

III STATEMENT OF THE FACTS

Two clerks employed by Li'l Champ stores testified that on the evening of January 18, 1991, close to closing time at 11:00 p.m., appellant entered the store (T-21-23; 41). Each clerk knew appellant, as he was a regular customer at the store (T-32-33; 46). Appellant walked behind the counter where one clerk was counting coins prior to closing out the register. Appellant's hand was under his sweater, and he indicated to the clerk that he had a gun (T-35; 43-44), Appelant removed two twenty dollar bills from the drawer (T-27), and exited the store. One clerk testified that he felt threatened at the time of the incident, but later had his doubts as to whether he was in danger of being hurt (T-36); the other clerk testified that he was not afraid at the time, but that later he gave the matter some thought (T-47-48).

A police officer testified that appellant confessed to him that he had pretended to have a gun in order to insure that he would get the money, and that he needed the money for a crack cocaine fix. (T-63) Based upon the identification of the appellant given by one of the clerks, the officer prepared a photographic line-up, and each clerk identified appellant as the person who took money from the register (T-52-53).

IV SUMMARY OF THE ARGUMENT

A. Florida s habitual offender statute, section 775.084, Florida Statutes 1989), deprives those sentenced under its provisions of equal protection and due process of law; violates the principle of separation of powers by depriving judges of sentencing prerogative on a broad range of offenses; and further establlses a capricious system of selective punishment which has no standards of application, is non-appealable, and unreviewable by any tribunal, all contrary to the provisions of the United States Constitution and the Constitution of the State of Florida.

B. The trial court erred by failing to make the findings necessary to support imposition of an enhanced sentence.

V ARGUMENT

A: THE FLORIDA HABITUAL OFFENDER STATUTE IS UNCONSTITUTIONALLY INEQUITABLE, IRRATIONAL, VAGUE, AND SUBJECT TO ARBITRARY AND CAPRICIOUS APPLICATION; PROVIDES NO DUE PROCESS OF LAW: VIOLATES THE PRINCIPLE OF SEPARATION OF POWERS IN VIOLATION OF SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION; AND THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 775.084, Florida Statutes, (1989), as amended by Chapter **88-131** and Chapter **89-280,** Laws of Florida, creates two classes--habitual felony offenders, and habitual violent felony offenders--and allows for substantial increases in criminal penalties for those found to be members of those classes. Appellant was sentenced as an habitual violent felony offender to 30 years of incarceration, instead of a guidelines recommended sentence in the 12 to 17-year range **(see** Scoresheet, **R-35).**

The Florida habitual offender statute is unconstitutional in **several** respects. Appellant acknowledges this Court has ruled the previous version of the statute to be constitutional in Barber **v.** State, 564 So.2d 1169 (Fla. 1st DCA 1990), **rev. den., No. 76,482 (Fla. Dec. 14, 1990); and** that the conclusions of Barber **apply** equally to **the** amended statute [Love v. State, 569 **So.2d 807 (Fla.** 1st DCA 1990)]. The arguments **set** forth in **each** of those cases are adopted here, in addition to the **arguments** set forth below, **not** expressly addressed in Barber.

As this Court recognized in Barber, **supra,** substantive due process prohibits statutes which are discriminatory, arbitrary and capricious. **The** Florida habitual offender statute, **as** amended, is utterly arbitrary and capricious in its potential

application. The broad sweep of the statute, the lack of standards governing its application, and the exemption of those sentenced under it from parole, the guidelines, and most types of gain-time virtually guarantee impermissible disparities in sentencing. The inherent capriciousness and unavoidable arbitrariness of application render the statute invalid.

Before inception of the sentencing guidelines in 1983, statutory maximums and the review of sentences by a parole commission provided some uniformity of sentences among those convicted of similar crimes. 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 new forms of gain time, which were applied uniformly to most inmates serving guideline sentences.

Florida's present statute, however, destroys objectivity in sentencing. Its 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 a NECESSARILY 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 expressable reason other than fortune.

This Court stated in Barber, supra, that "[t]he type of discretion afforded the prosecutor under this law is constitutionally permissible, for it is no different from that afforded a prosecutor in other areas of the law" (at 1172) (emphasis supplied). This Court then went on to give examples, i.e., that prasecutors choose who to prosecute., who to charge with capital offenses, who to offer plea bargains to, and which of two statutes to proceed under. (Id., at 1172) But each of those examples used by this Court is distinguishable from the "discretion" used in applying the habitual felony offender statute in this specific manner: in each of the instances cited, there is no necessary uniformity in the class of affected persons, and perceivable, articulable reasons could be given for each choice made.

Under the habitual felony statute, the very elements of the definition guarantee a homogenous class of highly similar, if not identical, affected persons. The choice by a prosecutor to proceed against some, and not all under the habitual offender statute, is, therefore, necessarily arbitrary, and that is the infirmity that distinguishes this situation from those cited by this Court.

Both this Court and the Supreme Court of the United States have stated that "only a contention that persons within the habitual-offender class are being selected according to some unjustifiable standard, such as race, religion, or other

arbitrary classification, would raise a potentially viable challenge." Barber, at 1170, citing Bordenkircher v. Hayes, 434 U.S. 357 (1978); and Oyler v. Boles, 368 U.S. 448 (1962). Yet it is just such a contention that appellant is unable to make under the rulings of this Court which do not require any demonstration or articulation of a prosecutor's reasons for seeking enhancement against one person as opposed to another.

There are no standards; there is no possibility of review. This Court, by its findings, would have all persons who qualify as habitual felony offenders to rely upon some hoped-for fairness in prosecutors, because nobody, no court anywhere, is permitted to look over the shoulder of those prosecutors to determine if persons within the habitual offender class are being selected according to some unjustifiable standard, such as race, religion, or other arbitrary classification. Due process of law is not only violated; it is not provided.

This Court has construed the statute to remove from the sentencing judge any discretion over sentence length. Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990). Once the prosecutor determines--under whatever nonreviewable guidelines employed (if, indeed, guidelines even exist)--to seek habitual offender status, the trial court's sentencing discretion is usurped, and the court must then impose the sentence mandateh by the statute upon a showing that the defendant qualifies.

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,

Thus, as interpreted by this Court in Donald, supra, section 775.084, Florida Statutes, violates the constitutional 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 violates the equal protection clause because it creates irrational classifications and removes the levelling influence of the sentencing guidelines and parole eligibility from certain defendants; 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 said authority to prosecutors, without providing a means of review. For these

reasons and others spec-fically rejected by this Coi rt in Barber, the Florida habitual felony statute is unconstitutional.

B: THE TRIAL COURT ERRED IN NEGLECTING TO MAKE FINDINGS NECESSARY TO SUPPORT IMPOSITION OF AN HABITUAL FELONY OFFENDER SENTENCE.

Sections 775.084(1)(b)1-4, Florida Statutes (1989), require the court to make four findings before imposing an extended term of imprisonment. Here, the trial court found that appellant was convicted of one earlier felony, i.e., robbery, within five years of the instant case, substantially satisfying ss. 775.084(1)(b)1 and 2; however, the state made no showing whatsoever, and consequently the court was unable to find, that appellant had not received a pardon for the earlier offense, or that the conviction had not been set aside in a post-conviction proceeding.

Section 775.084(3)(d) provides that each of the findings required as the basis for an enhanced sentence "be found to exist by a preponderance of the evidence . . . ." Here, there was no evidence. The failure to make the minimal findings requires resentencing. Walker v. State, 462 So.2d 452 (Fla. 1985); Power v. State, 568 So.2d 511 (Fla. 5th DCA 1990); Smith v. State, 16 FLW D245 (Fla. 3d DCA Jan. 22, 1991).

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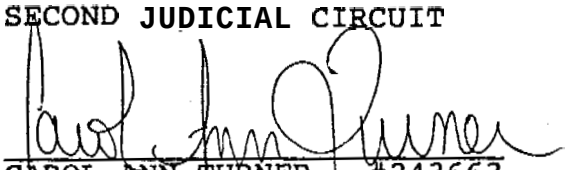
VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, appellant requests that this Court vacate the sentence, and remand this case for resentencing within the statutory maximum and applicable guidelines range.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

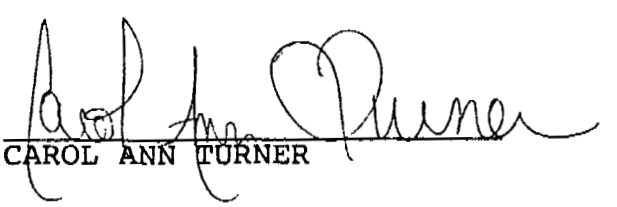


CAROL ANN TURNER #243663
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Mr. James Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Mr. Billy Hodges, #110435, New River Correctional Inst., Post Office Box 333, Raiford, Florida, 32083, on this 22nd day of July, 1991.



CAROL ANN TURNER