IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

KENNETH RUCKER,

Respondent.

CASE NO. 79,932

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

	Page(s)
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT,,.....	1
STATEMENT OF THE CASE AND FACTS	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT.....	5
ISSUE	
WHETHER THIS COURT SHOULD RATIFY THE DISTRICT COURT DECISION BELOW WHICH OVERRULES EUTSEY V. STATE, 383 SO.2D (FLA.1980) BY HOLDING THAT THE STATE HAS THE BURDEN OF PROOF TO SHOW, AND THE TRIAL COURT MUST FIND, THAT PREDICATE FELONIES NECESSARY FOR HABITUAL FELON SENTENCES HAVE NOT BEEN PARDONED OR SET ASIDE.....,..	5
CONCLUSION.....,.....	25
CERTIFICATE OF SERVICE	25
APPENDIX	26

TABLE OF AUTHORITIES

CASES	PAGES
Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979)	22
Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1991)	passim
Banes v. State, 17 F.L.W. D1217 (Fla. 4th DCA May 13, 1992)	24
Baxtes v. State, 17 F.L.W. D1369 (Fla. 2d DCA May 27, 1992)	23
Bonner v. State, 17 F.L.W. D1421 (Fla. 2d DCA June 5, 1992)	24
Burdick v. State, 594 So.2d 267 (Fla. 1992)	10
Caristi v. State, 578 So.2d 769 (Fla. 1st DCA 1991)	23
Eutsey v. State, 383 So.2d 219 (Fla. 1980)	passim
Hodges v. State, 17 F.L.W. D787 (Fla. 1st DCA March 24, 1992)	passim
In Re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure, 416 So.2d 1127 (Fla. 1982)	8,9,23
Jefferson v. State, 571 So.2d 70 (Fla. 1st DCA 1990)	23
Likely v. State, 583 So.2d 414 (Fla. 1st DCA 1991)	23
McClain v. State, 356 So.2d 1256 (Fla. 2d DCA 1978)	10
Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1986), jurisdiction discharged, 520 So.2d 575 (Fla. 1988)	10,21,24

Parker v. State,
462 So.2d 747 (Fla. 1989) 6

Rolle v. State,
16 F.L.W. D2558 (Fla. 4th DCA October 2, 1991) 6

State v. Beach,
592 So.2d 237 (Fla. 1992) 18,21

Stevens v. State,
409 So.2d 1051 (Fla. 1982) 18

Stewart v. State,
385 So.2d 1159 (Fla. 2d DCA 1980) 21,22,23

Walker v. State,
462 So.2d 452 (Fla. 1985) 6

Wright v. State,
476 So.2d 325 (Fla. 2d DCA 1985) 10

OTHER

§775.084, Fla. Stat. 17,13

§775.084(1)(a), Fla. Stat. 23

§775.084(1)(a)2, Fla. Stat. 13

§775.084(1)(a)3, Fla. Stat. 7

§775.084(1)(a)4, Fla. Stat. 7

8924.33, Fla. Stat. 20

Ch. 940, Fla. Stat. 12

Art. IV, §8, Fla. Const. 12

Art. V, § 3(b), Fla. Const. 8,23

Rule 3.200, Fla.R.Crim.P. 14,15

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. KENNETH RUCKER, Respondent.	)	CASE NO. 79,932

PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecuting authority in the trial court and appellee below and will be referred to herein as "the State" or "Petitioner." Respondent, Kenneth Rucker, was the defendant in the trial court and appellant below and will be referred to herein as "Respondent."

When it was first issued, Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1992) was the lead case in which the district court first certified a question of great public importance. However, a subsequent panel of the district court, in Hodges v. State, 17 F.L.W. D787 (Fla. 1st DCA Mar. 24, 1992), interpreted and applied Anderson in a manner which negated the underpinnings of the certified question and placed the district court in direct and express conflict with this Court's decision in Eutsey v. State, 383 So.2d 219 (Fla. 1980). Nevertheless, the Hodges panel certified the same question of great public importance. Thereafter, because of the subsequent interpretation and application by the Hodges panel and of procedural delays by Anderson in filing his answer brief, Hodges became the lead case.

The facts in each case, although slightly different in detail, present the same legal issues. The State's arguments here, although adjusted for factual differences, are the same as those previously presented in Hodges and Anderson. Thus, this case should travel with and be controlled by the Court's decisions in Hodges and Anderson.

STATEMENT OF THE CASE AND FACTS

Respondent was charged with and convicted of burglary of a conveyance and criminal mischief. (R 27, 59-60). Prior to sentencing, Respondent was provided written notice of the prosecution's intention to seek habitual felony offender sentencing. (R 57). The convictions upon which the State sought to rely were detailed in the notice and again in a motion to classify Respondent as a habitual offender. (R 57, 61). At the sentencing hearing, copies of two prior judgments and sentences were admitted into evidence, one for burglary of an occupied dwelling, and one for resisting arrest with violence, bath of which were rendered within five years of the current offense. (T 253). With respect to the judgments of conviction, defense counsel stated, "I cannot quarrel with the State's representations as to the burglary of a dwelling while occupied and the resisting with violence. There are judgments and sentences. He does appear to have been represented by counsel and that paperwork does appear to be in order." (T 256). Shortly thereafter, the trial court stated, "I do find that the evidence supports by a preponderance thereof classification of the defendant as a habitual offender and he will be sentenced a3 such." (T 264). The trial court then imposed a sentence of seven years in prison followed by three years of probation as a habitual felony offender on the burglary charge and a consecutive one year of probation on the criminal mischief charge. (T 264-66; R 76-77).

On appeal to the First District Court of Appeal, Respondent challenged, among other things, his habitual offender sentence,

based an the trial court's failure to make findings that Appellant's prior convictions had not been pardoned or set aside. In response, the State made the same arguments that it makes here. Thereafter, the First District published its opinion reversing the sentencing order because the trial court failed to find that the predicate convictions had not been pardoned or set aside and certified the same question as in Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1991), rev. pending, Fla. S.Ct. case no. 75,535, and Hodges v. State, 17 F.L.W. D787 (Fla. 1st DCA Mar. 24, 1992), rev. pending, Fla. S.Ct. case no. 79,728:

> Does 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?

The State timely filed its notice to invoke the discretionary jurisdiction of this Court, and this appeal follows.

SUMMARY OF ARGUMENT

1. The district court decision conflicts with this Court's decision in Eutsey and with decisions of other district courts and the district court below. Eutsey should be reaffirmed and the decision below reversed.

2. The decision below is contrary to the settled rules that the burden of proof for affirmative defenses falls on the defendant and that a trial court is not required to rule on unraised affirmative defenses.

3. The decision below is contrary to the rule that final convictions are presumed valid until a colorable challenge is raised.

4. The decision below is contrary to the rule that sentencing hearsay is presumed valid until its accuracy is brought into question.

5. The certified question should be answered in the affirmative and the decision below reversed.

ARGUMENT

ISSUE

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

Because the case here should be controlled by this Court's disposition of Hodges, case no. 79,728, and Anderson, Case no. 79,535, now pending, it is necessary to examine the inextricably intertwined holdings and relationship of those cases.

Anderson argued in the district court that the state failed to introduce evidence showing, and the trial court failed to find, that the predicate felonies for the habitual offender sentence had not been pardoned or set aside. This issue had not been raised at trial. The state relied on this Court's holding in Eutsey that these were affirmative defenses which had to be raised and proven by the defendant, rather than the state, and pointed out that Anderson had conceded three predicate felonies at trial, that he had not challenged either the presentence investigation report or the sentencing guidelines scoresheet, and had stipulated that he was the person in the two certified predicate judgments admitted in evidence. Nevertheless, without acknowledgment of or reference to Eutsey, the district court held in relevant part:

> The trial court's failure to make the findings required by section 775.084(1)(a) is, however, reversible error, even in the absence of objection. Rolle v. State, 16

> F.L.W. D2558 (Fla. 4th DCA October 2, 1991), citing Parker v. State, 462 So.2d 747 (Fla. 1989) and Walker v. State, 462 So.2d 452 (Fla. 1985). Anderson's sentence must therefore be reversed. We note that, on remand for resentencing, the trial court may resentence Anderson as an habitual offender, if the requisite statutory findings are made by the court and supported by the evidence.

Anderson, 592 So.2d at 1120 (emphasis added; citations omitted).

By petition for rehearing, the state argued that the district court had overlooked entirely the state's reliance on Eutsey which had interpreted and glossed the statute to place the requirement for raising the affirmative defenses on the defendant. On petition for rehearing the district court wrote to explain its decision and to certify a question of great public importance. The explanatory opinion acknowledged that Eutsey placed the burden of proof on the defendant, not the state, but concluded that the trial court was nevertheless required to make the findings even if no evidence was introduced and no objections were entered.

Three significant points about Anderson require comment. First, the case law cited by the court in support of its decision is factually inapposite. Rolle, without setting out the facts of the case or even the year of the statute at issue, simply holds that the trial court failed to make unspecified statutorily required findings and then cites Parker and Walker in support. The latter two cases address the failure of a trial court to make the formerly mandatory finding that protection of the public required imposition of habitual felon sentencing. That requirement, which clearly was not an affirmative defense, was

deleted from section 775.084 in 1988. The cited cases lend no support to the proposition that a trial court must rule on the unraised affirmative defenses at issue here.

Second, because, in good faith, we must assume that the district court considered that its holding was not in conflict with the Eutsey holding--that the burden of proof was on the defendant--it had to believe that requiring the trial court to make factual findings was consistent with neither party introducing evidence to support the findings. That conclusion is simply illogical, as Hodges subsequently held. Third, again in good faith, the district court's statutory interpretation of section 775.084 had to be based on a conclusion that Eutsey was not grounded on a statutory interpretation by this Court that section 775.084(1)(a)3 & 4 created affirmative defenses which had to be raised by the defendant and which were waived when not raised. By not recognizing that it was simply reploughing ground already authoritatively covered in Eutsey, the district court created direct and express conflict with a controlling decision of this Court.

The decision in Hodges removes any doubt about direct and express conflict with Eutsey by (logically) interpreting Anderson as requiring the state, not the defendant, to assume the burden of proof on whether predicate felonies had been pardoned or set aside:

> A corollary of the holding in Anderson, although not discussed, would appear to be that the burden rests upon the state to present evidence sufficient to enable the trial court to make such findings.

17 F.L.W. at 788. Contrast, Eutsey:

> We also reject his contention that the State failed to prove that he had not been pardoned of the previous offense or that it had not been set aside in a post-conviction proceeding since these are affirmative defenses available to Eutsey rather than matters required to be proved by the State.

Eutsey, 383 So.2d at 226.

As will be seen below, Anderson and Hodges not only conflict with this Court's case law, they also conflict with case law from other districts and from the first district itself. It was helpful for the Hodges panel to explicitly recognize the implicit corollary holding of Anderson but these separate actions of the two panels individually and collectively placed the district court in direct and express conflict with Eutsey. It would have been even more helpful for this Court, for the district court itself, and all the parties who appear before it in these habitual felon cases, had the panel followed the sound advice of In Re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure, 416 So.2d 1127 (Fla. 1982):

> We have full confidence that the district court of appeal judges, with a full understanding of our new appellate structural scheme, will endeavor to carry out their responsibility to make law consistent within their district in accordance with that intent. We would expect that, in most instances, a three-judge panel confronted with precedent with which it disagrees will suggest an en banc hearing. As an alternative, the district court panel could, of course, certify the issue to this Court for resolution. Consistency of law within a district is essential to avoid unnecessary and costly litigation.

Id. at 1128.

It seems clear that the Hodges panel recognized there was a serious analytical flaw in Anderson which created conflict with Eutsey. The state suggests that intracourt resolution is far preferable to sending the parties off to the state's highest court with a certified question, particularly when, as here, there is also intracourt and intercourt conflict and the certified question has been undercut by the corollary holding. In Re Rule and Article V, section 3(b) of the Florida Constitution do not contemplate that this Court's limited jurisdiction, as with certified questions, will be a device to resolve intradistrict conflict or to otherwise substitute for district court en banc procedures.

The Anderson/Hodges holdings are not only inconsistent with the explicit holding of Eutsey that the statutory burden of proof is on the defendant to show that the predicate felonies have been pardoned or set aside. They are also contrary to the entire rationale of Eutsey in upholding the constitutionality of the statute. The Court in Eutsey addressed the broader question of whether the full panoply of due process rights required in the guilt phase was also required in the sentencing phase, i.e., was the state required to affirmatively prove all information used in the sentencing process beyond a reasonable doubt? The Court held it was not. One of the specific issues was whether the state could rely on presentence investigation reports and other hearsay in showing that the defendant should be sentenced as an habitual offender. The Court held that it could and that the burden was on the defendant to come forth with specific challenges to the

accuracy of hearsay and to introduce evidence and witnesses as appropriate. This principle is well-settled in case law, including cases from the First District. See Myers v. State, 499 So.2d 895, 897 (Fla. 1st DCA 1987) (requiring the defendant to dispute truth of sentencing hearsay and, relying on Eutsey, in the absence of such dispute, holding that "the trial court was not required to order the state to produce corroborating evidence"); Wright v. State, 476 So.2d 325, 327 (Fla. 2d DCA 1985) ("Where, as here, the defendant does not dispute the truth of the listed convictions, the state is not required to come forward with corroborating evidence. Eutsey v. State, 383 So.2d 219 (Fla. 1980); McClain v. State, 356 So.2d 1256 (Fla. 2d DCA 1978).").

It should also be noted that Eutsey was decided in 1980. Despite the numerous changes to the statute over the years, as Hodges acknowledged, none have changed the relevant provisions which Eutsey interpreted. Thus, the subsequent legislative amendments and reenactments are presumed to approve Eutsey. See Burdick v. State, 594 So.2d 267 (Fla. 1992) ("It is a well-established rule of statutory construction that when a statute is reenacted, the judicial construction previously placed on the statute is presumed to have been adopted in the reenactment.").

The above shows beyond all doubt that Anderson and Hodges were wrongly decided. However, there are still other flaws and fallacies which deserve attention. One of the characteristics

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[1] Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973), holds that "District Courts of Appeal . . . are free to certify questions of great public interest to this Court for consideration and even to

of affirmative defenses is that they represent exceptions to the norm, i.e., they represent a minority occurrence. For example, the overwhelming majority of homicides are not justifiable as self-defense. Several propositions flow from this characteristic. Affirmative defenses are rarely at issue, so that evidence showing their absence would be irrelevant in the overwhelming majority of cases. Burdening trials with irrelevant evidence would serve no useful purpose, needlessly expand their length and cost, and tend to confuse the proceedings, even to the extent of causing reversible error, The only party who can claim an affirmative defense is the defendant. It would be improper, possibly reversible error, if the state made the absence of self-defense a feature of a trial when self-defense was not claimed by the defendant. Moreover, the party in the position to bring forth evidence on affirmative defenses is the defendant. That was, in fact, one of the major points at issue in Eutsey. Who has the burden of proving that a predicate conviction has been pardoned or overturned by post-conviction proceedings? Eutsey contended that the trial court's finding that no pardon or post-conviction reversal had been entered was not supported by the record and that the state had the burden of proof. This Court rejected this argument by holding that the defendant had the

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state their reasons for advocating change" but "[t]hey are bound to follow the case law set forth by this Court." Because the district court did not follow Hoffman, the posture of the parties in this case is upside down. The Petitioner/State is in the unusual position of-urging this Court to uphold its own case law against a contrary district court decision without first hearing why this Court should recede from its own case law. Thus, the state's initial brief is perhaps longer than it might otherwise be if it were answering arguments for receding from settled law.

burden of raising and proving these affirmative defenses. Eutsey clearly stands for the proposition that introduction of certified copies of judgments or PSIs satisfy the preponderance of evidence test set out in the statute. This holding was consistent with settled law which, happily, is itself based on a common sense understanding of what is involved in proving or disproving affirmative defenses.

The common sense aspects are obvious if one thinks through the pardon and post-conviction processes. Pardons are granted by the Governor and Cabinet sitting as the Executive Clemency Board. See art. IV, §8, Fla. Const.; Ch. 940, Fla. Stat. To understate the matter, pardons are very rare. During the period **1989-1991** only 100 pardons were granted, an average of 33 per year.[2] Again severely understating the matter, if we assume that there are only 10,000 felony convictions a year, and that all 33 pardons are for felony convictions, the annual percentage of pardons to

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[2] This information was extracted from the public records of the Board of Executive Clemency by the person responsible for maintaining those records. It is contained in a letter and attachment from the Coordinator of that office which is included here as appendix A. The figures confirm what common sense suggests, pardons as a percentage of felony convictions are extremely rare, very nearly non-existent. The state asks the Court to take judicial notice of this public record information pursuant to section 90.202(12) and 90.203(1), Florida Statutes. (A separate motion has also been filed).

In this connection, note the holding in Eutsey that hearsay information may be considered by the courts in determining sentences, as in PSIs, unless their accuracy is challenged and refuted. This is particularly apt here because the Court is addressing sentencing issues which were not raised in the trial court. Should the Court decline to consider the figures in this paragraph, the entire paragraph can be struck without impact on the state's argument. The figures illustrating the statistical insignificance of pardons merely serve to put this pseudo issue in factual context.

felonies would be less than one-third of one percent. Raise the hypothetical 10,000 felonies to a realistic figure and it can be fairly said that the likelihood that a given defendant has received a pardon for a predicate felony is so unlikely as to be pragmatically nonexistent.

This pragmatic nonexistence decreases even further by factoring in the criteria for obtaining pardons set out in the Rules of Executive Clemency of Florida. A comparison of the eligibility requirements for applying for a pardon under the Rules[3] and the eligibility requirements for an habitual offender under section 775.084 is very instructive. Section 5.A of the current Rules provides:

> A person may not apply for a pardon unless he or she has completed all sentences imposed and all conditions of supervision have expired or been completed, including but not limited to parole, probation, community control, control release, and conditional release for at least 10 years.

(Emphasis supplied). Section 775.084(1)(a)2 provides:

> 2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he

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[3] These Rules constitute a plenary statement of the law in this state pursuant to Article IV, section 8 of the Florida Constitution. Dugger v. Williams, 593 So.2d 180, 182 (Fla. 1991). If needed, copies of the Rules should be obtainable from the Office of Executive Clemency pursuant to chapter 119, Florida Statutes, the Public Records Act. The previous rules in effect at the time of sentencing here were last amended on 18 September 1986. The current rules were last amended on 18 December 1991, effective 1 January 1992. A copy of the latter, which was provided by the Coordinator of the Office of Executive Clemency is provided here as appendix B. If respondent objects, and/or this Court wishes, the appendix can be struck without impact on the state's argument.

> was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later.

(Emphasis supplied). It is clear that the "within" five years eligibility criteria for an habitual offender and the "for at least 10 years" eligibility criteria for a pardon are mutually exclusive. The ten years represents a recent increase from a former five year requirement but the "within" and "for at least" would still be mutually exclusive. It is harder, and rightly so, for a person with a criminal record to meet the criteria for a pardon than it is for the same person to merely avoid the criteria for enhanced sentencing as an habitual offender.

There are two ways to prove or disprove that a pardon has been granted: (1) introduce affirmative evidence that a pardon has been granted, e.g., the pardon, or (2) introduce negative evidence tending to show that a pardon has not been granted. Because the law strives for rationality and certainty, approach one, taken by this Court in Eutsey, placed the burden of proof on defendants by requiring them to affirmatively prove that they had received a pardon. As common sense and the above analysis show, this places practically no burden on the courts or the parties because pardons are so rare as to be statistically nonexistent. Moreover, as Eutsey and other settled authority holds, there is no due process problem in placing a burden on defendants to make an adequate claim and a colorable showing that an affirmative defense exists. By analogy, see Florida Rule of Criminal Procedure 3.200, Notice of Alibi, which places such burden on the

defendant. These rules comport with common sense. Rules of due process are intended to bring relevant issues to the fore so that the parties may fairly controvert them. Imagine, if possible, the difficulty of affirmatively proving that no conceivable alibi exists in the absence of a claim pursuant to rule 3.200. The number of persons required to testify as to the absence of an alibi is limited only by the population of the world.

The contradictory approach, adopted by the Anderson and Hodges panels, requires the state to prove a negative by showing the absence of evidence that a pardon has been granted, Where the predicate conviction was obtained in Florida, this would require communicating with the Office of Executive Clemency and asking that it search its records in the years since the conviction to determine if a pardon had been granted and to attest in a letter or other written communication that there was no evidence showing that a pardon had been granted. Where the predicate conviction is from another jurisdiction, obtaining evidence on pardons would require the state to research the law of the foreign jurisdiction and locate the appropriate office or offices which can attest to the lack of evidence showing that a pardon has been granted. Sentencing would be routinely delayed for the weeks or months that this process requires. This Court is aware, of course, that habitual felony sentencing is, and has been, commonplace and that thousands of such sentences are imposed each year. The burden of Anderson and Hodges will be substantial, if they stand for any significant period of time, particularly when those sentenced over the last decade or so

begin to file their post-conviction motions. As this is written, there are already scores of direct appeal cases pending in the First District which will require reversal and resentencing proceedings pursuant to Anderson/Hodges unless the First District recedes therefrom or this Court overrules them.[4]

These same general factors discussed above also apply to proving or disproving that a predicate conviction has been overturned in a post-conviction proceeding. For the obvious reasons, the burden of bringing forth colorable evidence that a predicate felony has been pardoned or set aside is inconsequential for the defendant involved. Under the provisions of the habitual offender statute, defendants are given advance notice of the state's intent to seek habitual offender sentencing. The purpose of this notice is to give the defendant an opportunity to challenge the predicate convictions by showing, e.g., they never happened, are too remote, have been pardoned, or have been set aside in post-conviction proceedings. Because of this prior notice, as Eutsey so plainly holds, whether one speaks of affirmative defenses to habitual offender sentencing or the

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[4] The state continues to argue in the district court below on each of these cases that Anderson and Hodges were wrongly decided and should be receded from. A timely decision to do so would significantly mitigate the mischief of having violated Eutsey and Hoffman by reducing the time period in which this bad law rules. However, the Public Defender's office moved to strike the state's briefs on the grounds that a party may not argue in its merits brief that a district court decision is in error because this constitutes an improper indirect motion for en banc consideration in violation of Florida Rule of Appellate Procedure 9.331(b). The district court has ordered the state to show cause why the briefs should not be stricken and the state has responded. At writing, the district court has not ruled.

accuracy of PSIs, it comports with due process to place the burden on the defendant to challenge the validity of predicate convictions.

Our adversarial system goes to great lengths and expense to require, e.g., prior notice and assistance of counsel at trial. This system loses its raison d'etre if appellate courts treat trial counsel and courts as, to use a recent description, "potted plants." The state submits it is entirely reasonable to expect and require trial counsel, given prior notice of habitual offender sentencing, to consult with the client for the purposes of raising, e.g., pardons and post-conviction reversals.[5]

In contrast to the simplicity of requiring the defendant to raise and introduce evidence tending to show that a conviction

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[5] The unfortunate trend, as in Anderson and Hodges, denigrating the role of trial courts and counsel can also be seen in, e.g, Fard v. State, 575 So.2d 1335 (Fla. 1st DCA), rev. denied, 581 So.2d 1318 (Fla. 1991), which rests largely, if inadvertantly, on the proposition that trial counsel are presumptively incompetent to provide effective assistance of counsel by recognizing and objecting to errors which may conceivably occur at or following entry of a guilty or no contest plea. Ford requires that appellate counsel and appellate courts conduct de novo review of all guilty or unreserved no contest pleas to search for errors not recognized by trial counsel and the trial court. See Judge Letts' perceptive lament on the state of contemporary appellate law in Demons v. State, 577 So.2d 702, 703 (Fla. 4th DCA 1991): "I grow impatient with the ever increasing demands the appellate courts place on already overburdened trial judges. More and more, we require them to justify themselves in minute detail or we will reverse. As I see it, trial judges should not have to carry the burden of proof to establish they were not wrong. To the contrary, it should be the duty of the criminal-appellant to overcome the presumption that the trial court was right." This comment is particularly apt where, as here, the issue is whether the trial court erred in not ruling that an affirmative defense did not exist when the defense was not raised and no evidence was introduced.

has been collaterally overturned in those rare instances where it has, note the difficulty of disproving the proposition in the overwhelming number of cases where the conviction has not been set aside in collateral proceedings. It can be fairly said, as with pardons, that post-conviction reversals of actual convictions are also very rare. Disproving their presence would consist largely of showing that the state has been unable to find any evidence that the conviction was overturned in the various records of state, foreign and federal courts and the data bases of, e.g., WESTLAW.

The Eutsey holding also reaffirms the settled presumption of validity accorded to final judgments and sentences. A judgment of conviction is presumed to be correct until reversed. Stevens v. State, 409 So.2d 1051 (Fla. 1982). A recent example can be found in State v. Beach, 592 So.2d 237 (Fla. 1992). By affidavit, Beach claimed he had not been afforded counsel for prior final convictions. The trial court ruled that the affidavit was insufficient to shift the burden to the state but the First District held otherwise. This Court reversed because the affidavit was simply insufficient to overcome the presumption that the prior convictions were valid and that constitutional protections had been afforded. The same principle applies here. There is no rational reason to require the state to reprove the continued validity of prior convictions every time they are used in sentencing. This would be incredibly burdensome on all concerned, including defendants. It would also be totally pointless in that, as Eutsey holds, there is no due process

problem in requiring a defendant to come forth with a challenge to the hearsay which is commonly used in all sentencing procedures. The question naturally arises, if the district court below would require the state to sua sponte prove the current validity of every prior conviction used in habitual offender sentencing, why would it not also be necessary to prove the current validity of every conviction on the PSI or sentencing guidelines scoresheet? It is plain that the decisions below are contrary to Eutsey in both letter and spirit in that they accelerate the current, undesirable, trend to make sentencing, which was once the least complex of legal proceedings, into a very complex undertaking fraught with hidden hazards. The state submits that the working presumption that an otherwise valid final judgment of conviction has not been pardoned or set aside is one of the safest, and sensible, that the law could adopt.

Aside from being erroneous, the state submits that Anderson and Hodges are decisions whose final effect on the actual outcome of cases is simply legal churning. The wasteful use of scarce judicial resources and taxpayer money will be substantial, as will the lengthy delays in every habitual sentencing procedure, but, in the end, because pardons and post-conviction reversals of predicate convictions are rare to nonexistent, the actual number of habitual offender sentences overturned as a result of all this pointless activity, i.e., legal churning, will be rare and probably nonexistent.

Two points are worth noting in this connection. First, from the viewpoint of an appellate counsel, it is improper to argue a point merely for the sake of argument if winning the point does not offer some benefit, or prevent some injury, to the client upon remand to the trial court. Appellate counsel has the burden of showing, not only that there was "error," but that the error injured the client. Second, consistent with the preceding professional responsibility of appellate counsel, an appellate court may not reverse a judgment, even when error occurs, unless that error "injuriously affected the substantial rights of the appellant," Section 924.33, Florida Statutes. In this connection, it should be remembered that there is no constitutional right to appeal a non-capital criminal judgment or sentence under either the United States or Florida Constitutions. The right to appeal is a substantive right which is granted subject to the terms and conditions which the state or legislature chooses to impose.[6] As section 924.33 applies here,

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[6] See Ross v. Moffitt, 417 U.S. 600, 611 (1974) ("[I]t is clear that the State need not provide any appeal at all. McKane v. Durston, 153 U.S. 684, 38 L.Ed 867, 14 S.Ct. 913 (1894)."); Abney v. United States, 431 U.S. 651, 656 (1977) ("It is well settled that there is no constitutional right to an appeal;" and "The right of appeal as we presently know it in criminal cases, is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of the applicable statute."); Evitts v. Lucey, 469 U.S. 387, 393 (1985) ("Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. McKane v. Durston, 153 U.S. 684, 38 L.Ed 867, 14 S.Ct. 913 (1894)."); and State v. Creighton, 469 So.2d 735, 739 (Fla. 1985) ("Cases decided after the 1972 revision of article V [of the Florida Constitution] still recognize the right of appeal as a matter of substantive law controllable by statute not only in criminal cases but in civil cases as well. (cites omitted).").

consistent with the constitutional separation of powers, an appellate court may not reverse an habitual felony sentence unless the appellant makes a colorable showing that he has suffered an injury from the claimed error. See, e.g., State v. Beach and the requirement to allege actual injury. There has been no claim OK showing of actual injury here and the state suggests that respondent cannot in good faith allege that his predicate felonies have been pardoned or set aside or that he has even a colorable reason to so believe.

The Anderson and Hodges holdings that the state must show, and the trial court must find, that the predicate felonies have not been pardoned or set aside also conflict with case law from other districts and the first district itself. In Stewart v. State, 385 So.2d 1159, 1160 (Fla. 2d DCA 1980), the trial court made findings that the defendant had previously committed a felony for which he had been released within five years of the current offense and that habitual offender sentencing was necessary for the protection of the public. Stewart contended that the trial court erred in not finding that he had not been pardoned or his sentences set aside. Relying an Eutsey, the second district rejected the argument:

> The evidence that Stewart had been released from prison less than five years prior to the instant conviction was unrebutted. The record would amply support findings that Stewart had not been pardoned and that his conviction had not been set aside. Since the findings required by the statute are fully supported on the face of the record, the mere failure to recite a specific finding in the sentencing order to that effect is harmless

> error, if error at all, and therefore, the judge properly imposed the extended sentence. Cf., McClain v. State, 356 So.2d 1256 (Fla.2d DCA 1978).

Id.

Similarly, in Myers v. State, 499 So.2d 895, 898 (Fla. 1st DCA 1986), jurisdiction discharged, 520 So.2d 575 (Fla. 1988), Myers challenged the trial court's acceptance of a PSI, an affidavit, and copies of judgments as hearsay and contended the trial court erred in not finding that he had not received a pardon or set aside of his predicate felonies. The First District rejected the hearsay challenge and the absence of the findings because, "as settled by Stewart v. State, 385 So.2d 1159 (Fla. 2d DCA 1980), the trial court committed harmless error, if any error at all, in failing to recite the specific finding that Myers had not been pardoned or received post-conviction relief from his last felony conviction since this finding was fully supported on the face of the record." Id.

In the same vein, see Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979), which was relied an by Eutsey, where the First District recited:

> Turning to the facts of this case, we see that the sentencing judge found Adams was previously convicted of armed robbery and was released less than five years before committing the felonies for which he was to be sentenced, all of which was admitted or properly proved by competent evidence, including a witness who was subject to cross-examination. Adams was thus shown to be an habitual felony offender within the meaning of section 775.084(1)(a). (e.s.)

Section 775.084(1)(a) referred to in Adams includes the pardon and set aside provisions at issue here. It is clear from the

recitation of facts that it is not necessary to controvert and disprove affirmative defenses which are not raised by the defendant. See also Likely v. State, 583 So.2d 414 (Fla. 1st DCA 1991), Caristi v. State, 578 So.2d 769, 774 (Fla. 1st DCA 1991), and Jefferson v. State, 571 So.2d 70, 71 (Fla. 1st DCA 1990), where the First District held that a defendant could waive any or all of the findings and hearings prerequisite to sentencing as part of a plea bargain. The state suggests that, for the purpose of a knowing waiver, a defendant, such as here, who appears in open court, accepts the validity of all hearsay information showing the predicate felonies, and offers no legal reason why sentencing should not be accomplished, has fully waived any right on appeal to challenge the absence of evidence or findings that predicate felonies have not been pardoned or set aside. In citing and analyzing these conflicting intradistrict cases, the state recognizes that intradistrict conflict does not provide jurisdiction for this Court. In Re Rule; Art. V, §3(b), Fla. Const. However, when jurisdiction otherwise exists, such cases are persuasive for the purposes of showing that the latest panel case law from the district court is wrongly decided and that the district court case law is in disarray. In any event, the district court not only conflicts with itself, it also conflicts with this Court and other district courts.

As this is written, two other district courts have declared positions on the Anderson/Hodges versus Eutsey dichotomy. In Baxter v. State, 17 F.L.W. D1369 (Fla. 2d DCA May 27, 1992), consistent with its decision in Stewart on which the First

District relied in Myers, the Second District again analyzed this issue and concluded on the authority of Eutsey that the affirmative defenses of pardon and collateral set aside had to be raised by the defendant, and that the state and trial court were not required to address such unraised defenses. The court certified conflict with both Anderson and Hodges. ~~See also~~ Bonner v. State, 17 F.L.W. D1421 (Fla. 2d DCA June 5, 1992). Contra Banes v. State, 17 F.L.W. D1217 (Fla. 4th DCA May 13, 1992) (where the court, without analysis except citation to factually inapposite cases, followed Anderson and certified the Anderson question. The court did not cite or recognize Hodges, although Hodges had issued well prior to Bonner and highlighted the conflict with Eutsey).

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner respectfully asserts that this Honorable Court should reverse the district court's decision below by reaffirming Eutsey. To the extent it has any remaining relevance after Hodges, the certified question should be answered in the affirmative.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail ta Nancy A. Daniels, Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 29th day of June, 1992.

SARA D. BAGGETT
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

***STATE* OF FLORIDA,**

Petitioner,

v. **CASE NO. 79,932**

KENNETH RUCKER,

Respondent.

_____/

APPENDIX

A. **Coordinator, Office of Executive Clemency letter and attached data**

B. **Rules of Executive Clemency (1992)**

Phone: 904/488-2952

OFFICE OF EXECUTIVE CLEMENCY
KOGER EXECUTIVE CENTER
Suite 308, Knight Building
2737 Centerview Drive
Tallahassee, Florida 32399-0950

March 11, 1992

Mr. James Rogers
Attorney General's Office
111 S. Magnolia Dr.
Suite 29
Tallahassee, FL 32301

Dear Mr. Rogers:

Pursuant to our telephone conversation on March 9, 1992, attached is a chart showing the number of full pardons and conditional pardons granted by the Governor and members of the Cabinet, sitting as the Executive Clemency Board, from 1989 through 1991.

In accordance with the Rules of Executive Clemency adopted by the Board on December 18, 1991, a convicted felon may not apply for a full pardon until at least 10 years have passed from the date his sentence, parole or probation was completed. Prior to this revision, the waiting period was 5 years.

If a person meets the eligibility requirement and makes application for a full pardon, he must undergo a full background investigation by the Florida Parole Commission before the case is heard at an executive clemency hearing. The Board is very conservative about granting full pardons and an applicant must be found *to* be "very deserving" with a good community reputation and support, and no arrests (not even traffic tickets) in the past 10 years. This is why very few pardons are granted compared to the number considered at each hearing.

I hope this information is helpful to you. If I can be of any further assistance, please let me know.

Sincerely,

Janet H. Keels

Coordinator

JHK/jh

Enclosures: Chart of Full Pardons Granted
Rules of Executive Clemency

APPENDIX A

FULL PARDONS & CONDITIONAL PARDONS GRANTED

1989

April 12 -	9	
June 28 -	7	
October 11 -	10	
December 6 -	4	
Total	30	

1990

March 14 -	7	
June 19 -	12	
September 12 -	5	
December 19 -	5	
Total	29	

1991

			Requests Considered:
March 13 -	3		19
June 11 -	16		26
September 11 -	12	(1 conditional pardon)	27
December 18 -	10	(1 conditional pardon)	17
Total	41	(2 conditional pardons)	89

RULES OF EXECUTIVE CLEMENCY

1. Statement of Policy

Executive Clemency is a power vested in the Governor by the Florida Constitution of 1968. Article IV, Section 8(a) of the constitution provides:

> Except in cases of treason and in cases where impeachment results in conviction, the governor may, by executive order filed with the secretary of state, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days and, with the approval of three members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.

Clemency is an act of grace proceeding from the power entrusted with the execution of the laws and exempts the individual upon whom it is bestowed from all or any part of the punishment the law inflicts for a crime committed.

The Governor and members of the Cabinet collectively are the Clemency Board.

2. Office *of* Executive Clemency

In order to assist in the orderly and expeditious exercise of this executive power, the Office *of* Executive Clemency is created to process those matters of Executive Clemency requiring approval of the Governor and three members of the Cabinet. These rules are created by mutual consent of the Clemency Board to assist persons in applying for clemency and to provide guidance to the members of the Clemency Board; however nothing contained herein can *or* is intended to limit the authority given to the Clemency Board in the exercise of its constitutional prerogative.

The Governor with the approval of three members of the Cabinet shall appoint a Coordinator who shall appoint all assistants. The Coordinator and assistants shall comprise the Office of Executive

clemency. The coordinator shall keep a proper record of all proceedings, and shall be the custodian of all records.

3. Parole and Probation

The Clemency Board will not grant or revoke parole or probation, and such matters will not be entertained by the Clemency Board.

4. Clemency

The Governor has the unfettered discretion to deny for any reason any request for clemency. The Governor, with the approval of three Cabinet members, has the unfettered discretion *to* grant, for any reason, the following acts of grace:

A. Full Pardon

A Full Pardon unconditionally releases the person from punishment and forgives guilt. It entitles an applicant *to* all of the rights of citizenship enjoyed by the person before his or her conviction, including the right to own, possess, or use firearms.

B. Conditional Pardon

A Conditional Pardon releases the person from punishment and forgives guilt, if the applicant fulfills the conditions specified by the Governor with the approval of three Cabinet members. If the conditions *of* the pardon are violated or breached, the conditional pardon may be revoked and the applicant may be returned to his or her status prior to receiving the conditional pardon.

C. Commutation of Sentence

A Commutation of Sentence may adjust the applicant's penalty to one less severe, but does not restore any civil rights and it does not restore the authority to own, possess or use firearms.

See Rule 15 on commutation of death sentences.

D. Remission of Fines and Forfeitures

A Remission of Fines and Forfeitures suspends or removes fines *or* forfeitures.

E. Specific Authority *to* Own, Possess or Use Firearms

The Specific Authority to Own, Possess *or* Use Firearms restores to the applicant the right to own, possess or use firearms. Pursuant *to* the Federal Gun Control Act of 1968, a person who has been convicted *of* a felony in a court other than a Court of the State of Florida and has been granted restoration of civil rights with specific authority to own, possess *or* use firearms, must apply to the Assistant Director, Criminal Enforcement, Bureau of Alcohol, Tobacco and Firearms, P.O. Box 784, Ben Franklin Station, Washington, D.C., 20044, in order to meet federal requirements.

F. .Restoration of Civil Rights in Florida

The Restoration of Civil Rights restores to the applicant all or some *of* the rights of citizenship in the State of Florida enjoyed before the felony conviction(s).

G. Restoration of Residence Rights in Florida

The Restoration of Residence Rights restores *to* the applicant, who is not a citizen of the United States, any and all rights enjoyed by him or her as a resident *of* Florida which were lost as a result of a felony conviction under the laws of the State of Florida, any other state, or the federal government.

5. Persons Eligible *to* Apply for Clemency

A. Pardons

A person may not apply for a pardon unless he or she has completed all sentences imposed and all conditions of supervision

have expired or been completed, including but not limited to, parole, probation, community control, conditional release, and conditional release for at least 10 years.

B. Commutation of Sentence

A person may not apply for a commutation of sentence unless he or she has been granted a waiver pursuant to Rule 8.

C. Specific Authority to Own, Possess, or Use Firearms

A person may not apply for the specific authority to own, possess, or use firearms unless he or she has completed all sentences imposed and all conditions of supervision have expired or been completed, including but not limited to, parole, probation, community control, control release, and conditional release for at least 8 years. The person must be a legal resident in the State of Florida at the time the application is filed, considered, and decided.

D. Restoration of Civil or Residence Rights

A person may not apply for the restoration of his or her civil rights unless he or she has completed all sentences imposed and all conditions of supervision have expired or been completed, including but not limited to, parole, probation, community control, control release, and conditional release. If the person was convicted in a court other than a Court of the State of Florida, he or she must be a legal resident of the State of Florida at the time the application is filed, considered, and acted upon. If the person is applying for restoration of residence rights, he or she must be domiciled in the State of Florida at the time the application is filed, considered, and acted upon.

E. Outstanding Detainers

To be eligible for clemency, no applicant may have any

outstanding detainers and must have paid any and all pecuniary penalties resulting from any criminal convictions. This provision does not apply to persons applying for a remission of fines and forfeitures.

6. **Application for Clemency Forms**

A. All correspondence regarding an application for clemency should be addressed to Coordinator, Office of Executive Clemency, 2737 Centerview Drive, Knight Building, Suite 308, Tallahassee, Florida, 32399-0950. All persons who seek Clemency shall complete an application and submit it to the Office of Executive Clemency. Application forms to be used in making application for Clemency will be furnished by the Coordinator upon request.

All applications for Clemency under these rules must be filed with the Coordinator on the standard form provided by the Office of Executive Clemency.

B. Each application for clemency shall have attached to it a certified copy of the charging instrument (indictment, information or warrant with supporting affidavit) for each felony conviction and a certified copy of the judgment and sentence of each and every felony conviction including those that occurred within the State of Florida, outside the State of Florida and federal convictions. Each application for clemency may include character references, letters of support, or any other documents that are relevant to the application for clemency.

C. Once the application is filed, the Coordinator shall inform the victims, if possible, of the applicant's request.

D. It is the responsibility of the applicant to keep the Office of Executive Clemency advised of any change in the

information provided in the application.

E. If any application does not meet the requirements of the Rules of Executive Clemency, it may be returned by the Office of Executive Clemency to the applicant.

7. Applications Referred to the Florida Parole Commission

Every application which meets the requirements of these Rules may be referred to the Florida Parole Commission for an investigation, report and recommendation. All persons who submit applications shall comply with the reasonable requests of the Florida Parole Commission in order to facilitate and expedite investigation of their case.

8. Waiver of the Rules of Eligibility to Apply for Clemency

A. If an applicant cannot meet the requirements of Rule 5, he or she may seek a waiver of the rules. Any person who seeks a waiver of the rules may obtain a "Request for Waiver" form from the Office of Executive Clemency. Upon receipt of the original and 8 copies of the Rquest for Waiver form and any other material to be considered, the Coordinator shall forward copies of the documents to the Clemency Board and the Florida Parole Commission. The Commission shall review the documents and make a recommendation to the Clemency Board. A waiver of the rules may only be granted by the Governor with the approval of two members of the Cabinet.

B. Upon receipt by the Coordinator of written notification from the Governor and two members of the Cabinet, the Coordinator shall place the case on the agenda to be heard by the Clemency Board.

9. Restoration of Civil and Residence Rights Without a Hearing

A. Except as provided in paragraph D, an applicant shall have his or her civil or residence rights (excluding the specific authority to own, possess, or use firearms) restored without a hearing, if the applicant meets all of the following requirements:

1. The applicant has completed service of all sentences imposed and all conditions of supervision have expired or been completed, including but not limited to, parole, probation, community control, control release, and conditional release.

2. The applicant does not have an outstanding detainer or any pending criminal charges.

3. The applicant does not have any outstanding pecuniary penalty resulting from a criminal conviction or traffic infraction, including but not limited to, fines, court costs, restitution pursuant to a Court Order, restitution pursuant to Section 960.17(1) of the Florida Statutes, and unpaid costs of supervision pursuant to Section 945.30 of the Florida Statutes.

4. The applicant has not been convicted of a capital or life felony.

5. The applicant has not previously had his or her civil rights restored in the State of Florida.

6. The applicant does not have more than two felony convictions. For the purpose of the requirement contained in this subsection only, each felony conviction shall include all related offenses which are those triable in the same court and are based on the same act or transaction or on two or more connected acts or transactions.

7. The applicant is a citizen of the United States, if he or she is requesting restoration of civil rights.

8. The applicant must be a legal resident of the State of Florida, if he or she was convicted in a court other than a Florida state court and is requesting a restoration of civil rights.

9. The applicant must be domiciled in the State of Florida, if he or she is requesting restoration of residence rights.

10. The applicant was not a public official who during his or her term of office committed a criminal offense for which he or she was subsequently convicted.

B. The records of each person convicted in a Court of the State of Florida shall be automatically reviewed by the Florida Parole Commission upon his or her final release to determine if the requirements under Subsection A are met. If the Commission certifies that all of the requirements in Subsection A are met, the Coordinator shall, pursuant to an Executive Order, issue a certificate that would grant restoration of civil rights or residence rights in the State of Florida without the specific authority to own, possess or use firearms.

C. If the person has been convicted in a court other than a Court of the State of Florida, an application for the restoration of civil or residence rights must be submitted in accordance with Rule 6. Such application shall be reviewed by the Florida Parole Commission to determine if the requirements under Subsection A are met. If the Commission certifies that all of the requirements in Subsection A are met, the Coordinator, pursuant to an Executive Order, shall issue a certificate granting restoration of civil or residence rights in the State of Florida without the specific authority to own, possess or use firearms.

restoration of civil or residence rights without a hearing at any time prior to the Coordinator issuing the certificate restoring such rights. Such objection will automatically cause the request for restoration of civil or residence rights to not be considered pursuant to Rule 9.

10. Hearings by the Clemency Board on Pending Applications

A. The Coordinator shall place upon the agenda for consideration by the Clemency Board at its next scheduled meeting:

1. Timely completed applications that meet the eligibility requirements under Rule 5 for which any investigation, report, and recommendation, if any, conducted under Rule 7 is completed;

2. Cases in which an applicant has obtained a waiver pursuant to Rule 8;

3. Cases of exceptional merit that the Florida Parole Commission has brought on its own motion after it has made a thorough investigation an study of the case and made a favorable recommendation to the Clemency Board, fully advising of the facts upon which such recommendation is based or when it has investigated an inmate who is sentenced to life imprisonment, who has actually served at least 10 years, has sustained no charge of misconduct, and has a good institutional record; or

4. Cases of exceptional merit of inmates that the Secretary of the Department of Corrections has presented to the Florida Parole Commission.

B. The Coordinator shall prepare an agenda which shall include all cases that qualify for a hearing under Subsection A of this Rule. The agenda shall be distributed to the Clemency Board

at least 20 days before the next scheduled meeting.

C. The applicant's failure to comply with any rule of executive clemency will be sufficient cause for refusal, without notice, to place an application on the agenda.

11. Procedure at Hearings Before the Clemency Board

A. The Clemency Board will meet in the months of March, June, September and December of each year, or at such times as set by the Clemency Board.

B. An applicant is not required to attend his or her hearing for clemency and the failure to attend the hearing will not be weighed against the applicant. The applicant or any other person shall not be permitted to make an oral presentation to the Clemency Board, unless the applicant or the other person first advises the Office of Executive Clemency no later than 20 days prior to the next scheduled meeting of the Clemency Board, that he or she intends to make an oral presentation. Any member of the Clemency Board or the Coordinator for the Office of Executive Clemency may waive this 20 day requirement.

C. Any person making an oral presentation to the Clemency Board, will be allowed not more than 5 minutes. All persons making oral presentations in favor of an application shall be allowed cumulatively no more than 20 mintues. All persons making oral presentations against an application shall be allowed cumulatively no more than 20 minutes. Any member of the Clemency Board may extend the time allotted for an oral presentation.

D. Subsequent to the hearings of the Clemency Board, the Coordinator shall prepare Executive Orders granting clemency as directed and circulate them to the members of the Clemency Board.

After the Executive Orders are fully executed, the Coordinator shall certify and mail a copy to the applicant. The original Executive Order shall be filed with the Secretary of State. The Coordinator shall send a letter to each applicant officially stating the disposition of his or her application. A seal is not used by the Office of Executive Clemency.

12. Continuance of Cases

An interested party may apply for a continuance of a case if the continuance is based on good cause. The Governor will decide if the case will be continued. Cases held under advisement for further information desired by the Governor will be marked "continued" and noted on each subsequent agenda until the case is decided.

13. Withdrawal of Cases

The applicant may withdraw his or her application by notifying the Office of Executive Clemency at least 20 days prior to the next scheduled meeting of the Clemency Board. A request to withdraw a case made within 20 days of the hearing on the application will be allowed if the Governor or the Coordinator for the Office of Executive Clemency determines that there is good cause. Cases that are withdrawn from the agenda will not be considered again until the application is refiled.

14. Reapplication for Clemency

Any person who has been granted or denied any form of executive clemency may not reapply for further executive clemency for at least one year. Any person who has been denied a waiver

under Rule 8 may not apply for another waiver for at least one year from the date the waiver was denied. Any person who (i) has been convicted of a capital or life felony (ii) has been denied a waiver pursuant to Rule 8 after seeking a commutation of sentence and (iii) is incarcerated, may not apply for another waiver for at least three years from the date the waiver was denied.

15. **Commutation of Death Sentences**

This Rule applies to all cases where the sentence of death has been imposed. The Rules of Executive Clemency are inapplicable to cases where inmates are sentenced to death, except Rules 1, 2, 3, 15 and 16.

A. In all cases where the death penalty has been imposed, the Florida Parole Commission shall conduct a thorough and detailed investigation into all factors relevant to the issue of clemency. The investigation shall include (1) an interview with the inmate (who may have legal counsel present) by at least three members of the Commission; (2) an interview, if possible, with the trial attorneys who prosecuted the case and defended the inmate; and (3) an interview, if possible, with the victim's family. The investigation shall begin immediately after the Commission receives a written request from the Governor and shall be concluded within 90 days of the written request. After the investigation is concluded, the members of the Commission who personally interviewed the inmate shall prepare and issue a final report on their findings and conclusions. The report shall include any statements and transcripts that were obtained during the investigation. The report shall contain a detailed summary from each member of the Commission who interviewed the inmate on the issues presented at

the clemency interview. The report shall be forwarded to all members of the Clemency Board within 120 days of the written request from the Governor for the investigation.

B. After the report is received by the Clemency Board, the Coordinator shall place the case on the agenda for the next scheduled meeting or at a specially called meeting of the Clemency Board, if, as a result of the investigation, any member of the Clemency Board requests a hearing within 30 days of receiving the report, Once the hearing is set, notice shall be given to the appropriate state attorney, attorney for the inmate, and the victim's family.

C. Notwithstanding any provision to the contrary in the Rules of Executive clemency, in any case in which the death sentence has been imposed, the Governor may at any time place the case on the agenda and set a hearing for the next scheduled meeting or at a specially called meeting of the Clemency Board.

D. Upon request, a copy of the' actual transcript of any statements or testimony of the inmate that are made part of the report shall be provided to the state attorney, attorney for the inmate, or victim's family. The attorney for the state or the inmate, the victim's family, the inmate, or any other interested person may file a written statement, brief or memorandum on the case up to 10 days prior to the clemency hearing, copies of which will be distributed to the members of the Clemency Board. The person filing such written information should provide 10 copies to the Coordinator of the office of Executive Clemency.

E. Due to the sensitive nature of the information contained in the report, it shall be confidential: The report shall not be made available for public inspection or distribution and shall be

made available only to the members of the Clemency Board and their staff to assist in determining the request for clemency.

F. At the clemency hearing for capital punishment cases, the attorneys for the state and the inmate may present oral argument each not to exceed 15 minutes. A representative of the victim's family may make an oral statement not to exceed 5 minutes.

G. If a commutation of the death sentence is ordered by the Governor with the approval of three members of the Clemency Board, the original order shall be filed with the Secretary of State, and a copy of the order shall be sent to the inmate, the attorneys for each side, a representative of the victim's family, the Secretary of the Department of Corrections and the sentencing judge.

16. Confidentiality of Records and Documents

Due to the nature of the information presented to the Clemency Board, all records and documents generated and gathered in the clemency process as set forth in the Rules of Executive Clemency are confidential and shall not be made available for inspection to any person except members of the Clemency Board and their staff. The Governor has the sole discretion to allow records and documents to be inspected or copied.

17. Cases Proposed by the Governor or Members of the Cabinet

In cases of exceptional merit, the Governor or any member of the Cabinet may propose a case for Executive Clemency. Any such case may be acted upon by the Governor with the approval of three members of the Cabinet and nothing contained herein shall limit the exercise of that power.

18. **Effective Dates**

History. - Adopted September 10, 1975, Rule 6 (formerly Rule 9) effective November 1, 1975; Rule 7 adopted December 8, 1976; Rule 6 amended December 8, 1976, effective July 1, 1977; revised September 14, 1977; Rule 12 amended October 7, 1981; revised December 12, 1984; amended January 8, 1985; amended July 2, 1985; Rule 12 amended September 18, 1986; Rules amended December 18, 1991, effective January 1, 1992.