IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No.: 79,932

KENNETH RUCRER,

Respondent.

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# PETITIONER'S REPLY BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

The state relies on the original statement in its initial brief,

## SUMMARY OF ARGUMENT

As to Issue I:

The decision below, as highlighted by the district court's subsequent interpretation in Hodges conflicts with this Court's decision in Eutsey. It also conflicts with Baxter and Bonner.

**As to Issue 11:**

Because this case is before this Court on a narrow certified question, this Court should refuse to address this issue. In any event, the issue is without merit.

## ARGUMENT

### Issue I

WHETHER THIS COURT SHOULD 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.

In Anderson v. State, 592 So.2d 1119 (Fla. 1992), the district court originally held that a trial court was required to make explicit findings that the predicate felonies for habitual felon sentencing had not been pardoned or set aside in collateral proceedings even though these affirmative defenses had not been raised by defendant Anderson. Although the state had relied on the contrary holding of this Court in Eutsey v. State, 383 So.2d 219 (Fla. 1980), the district court neither cited nor distinguished Eutsey. Subsequently, when this error was pointed out on petition for rehearing, the court adhered to its ruling but tacitly acknowledged the conflict by certifying a question of great public importance of whether trial courts were required to find that unraised affirmative defenses were not present even though neither party had raised the question and the state had no burden of proof, pursuant to Eutsey.

A subsequent panel of the First District eviscerated the certified question by holding that Anderson necessarily required

the state to assume the burden of proof, thereby creating unmistakable direct and express conflict with Eutsey. Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992). Compare Eutsey, 383 So.2d at 226 (pardons or set-asides "are affirmative defenses available to Eutsey rather than matters required to be proved by the State"), with Hodges, 596 So.2d at 482 ("the burden rests on the state to present evidence sufficient to enable the trial court to make such findings"). In view of this explicit conflict, it is hard to understand how respondent can argue that there is no direct and express conflict. See also Baxter v. State, 17 F.L.W. D1369 (Fla. 2d DCA May 27, 1992); Bonner v. State, 17 F.L.W. D1421 (Fla. 2d DCA June 5, 1992) (where Second District examined and followed Eutsey and certified conflict with Anderson/Hodges). But see Banes v. State, 17 F.L.W. D1217 (Fla. 4th DCA May 13, 1992) (the court, without analysis, followed Anderson and certified the Anderson question, but did not cite or recognize Hodges).

Respondent also relies on Walker v. State, 462 So.2d 452 (Fla. 1985), Parker v. State, 546 So.2d 727 (Fla. 1989), and Rolle v. State, 586 So.2d 1293 (Fla. 4th DCA 1991), none of which involves the question of whether the trial court must find, and the state must prove, that the affirmative defenses of pardon and set aside are not present. Instead, all three cases involve the unrelated question of whether the trial court must find that habitual felony sentencing "is necessary for the protection of

the public from further criminal activity by the defendant." **Fla. Stat.** §775.084(4)(a) (1987). As the Court is aware, this requirement, which was not an affirmative defense and was contained in a different statutory subsection than that at issue here, was repealed by 1988 **Fla. Laws** ch. 88-131, § 6.

In Walker, the issue was whether a trial court's failure to find that habitual felon sentencing was necessary to protect the public could be raised on direct appeal when no objection was entered below.[1] In Walker v. State, 442 So.2d 977 (Fla. 1st DCA 1983), the First District Court of Appeal said no. In Brown v. State, 435 So.2d 940 (Fla. 3d DCA 1983), the Third District Court of Appeal said yes. This Court said yes, agreeing with the Third District Court of Appeal, but citing in support Weston v. State, 452 So.2d 95 (Fla. 1st DCA 1984), where, again, the issue was the necessity to protect the public finding.

Anderson's reliance on Parker is similarly misplaced, because the statute at issue was the 1987 version or earlier. The First District, in Parker v. State, 538 So.2d 978 (Fla. 1st DCA 1989), had held that the findings could be stated at a reported hearing and need not be separately written. The district court certified direct conflict with Hoefert v. State, 509 So.2d 1090 (Fla. 2d DCA 1987), where that court held that the 1983 statute required the trial court to enter written findings

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[1] The statute at issue was from 1981, prior to the repeal above.

that an extended term of imprisonment was necessary for the protection of the public. Relying an Eutsey, this Court held that the findings at issue, i.e., the need to protect the public, could be recited into the record and did not require separate written findings. Again, Parker furnishes no support to respondent's position. It should also be noted that respondent's reliance on Justice England's dissenting in part opinion is similarly misplaced. Justice England simply expressed a preference for separate written rather than recited findings.

Finally, respondent's reliance on Rolle is also misplaced. In Rolle, the Fourth District Court of Appeal neglected to cite the year of the statute but relied on this Court's decisions in Parker and Walker which, as shown above, address the repealed necessity to protect the public from the **1987** and earlier statutes. The Fourth District Court of Appeal also cited its own case, Meehan v. State, 526 So.2d **1083** (Fla. 4th DCA 1988), where the stated issue was the finding of "necessary for the protection of the public." The court relied an Hapkins v. State, 463 So.2d **521** (Fla. 3d DCA 1985), where the issue was the pre-1988 perennial of whether "the extended term of imprisonment is necessary for the protection of the public.''

Misuse and misapplication of selected words and sentences from cases outside their factual context and contrary to their actual meaning is a form of misquoting which usually arises from inexperience or careless and optimistic reading. It creates

direct and express conflict, Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980). Here, the state pointed out the factual inappositeness of the cases in its petition for rehearing in Anderson and in its initial brief here. Continued reliance on the misquotes in respondent's answer brief without challenge, or reference, to the state's argument that they are factually inapposite is inexplicable, at best. The state notes that these factually inapposite cases were abandoned in opposing counsel's answer brief of the companion case of Hodges v. State, Case No. 78,728.

Respondent's arguments are irrelevant to the affirmative defense issue, and his answer brief does not even challenge, let alone refute, the state's arguments.

## Issue II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO IMPEACH A DEFENSE WITNESS WITH HER RECOLLECTION OF STATEMENTS SHE MADE TO THE PROSECUTOR AND AN INVESTIGATOR DURING PRETRIAL DISCOVERY (Restated).

Initially, the state submits that respondent's presentation of a new issue in his answer brief is highly improper. The First District certified but one question in this case, and that is the question posed by the first issue. To use this as an opportunity to present an additional issue flies in the face of appellate practice. This Court should follow its own case law and refuse to address this issue. Stephens v. State, 572 So.2d 387 (Fla. 1991).

Additionally, Fla. R. App. P. 9.210 states that an answer brief "shall be prepared in the same manner as the initial brief." See also Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1122 (Fla. 1984). Here, it is quite clear that respondent has opted to prepare his answer brief according to his own wishes. "Such unorthodox procedure, completely contrary to the provisions of the rules in such cases made and provided, [will] render[] [this Court's] task of review extremely difficult and cumbersome." American Baseball Cap, Inc. v. Duzinski, 308 So.2d 639, 641 (Fla. 1975).

In any event, as argued in the First District, respondent misperceives the issue and fails to acknowledge his failure to object on specific grounds in the trial court. See Answer Brief of the State (attached hereto as an exhibit).

## CONCLUSION

For the above reasons, the district court below should be reversed on the Anderson/Hodges issue and should be affirmed on *the impeachment issue.*

Respectfully submitted,

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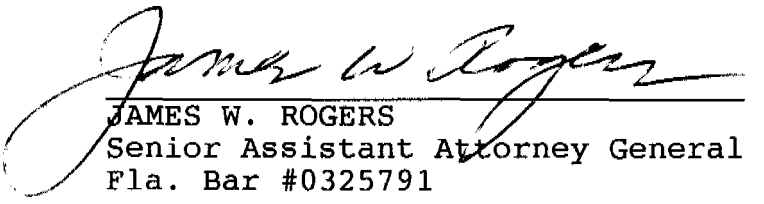

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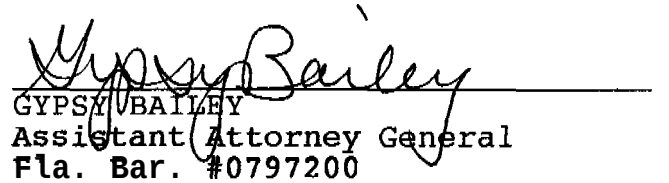

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to NANCY DANIELS, Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 12th day of August, 1992.

Gypsy Bailey

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