IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO.: 80,513
DCA CASE # 91-3108

LEWIS D. CRITTON,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Lewis D. Critton, defendant below, will be referred to herein as "Respondent." Petitioner, the State of Florida, will be referred herein as either "Petitioner" or "the State." References to the record on appeal will be by the symbol "R" followed by the appropriate page number. References to the transcripts of proceedings will be by the symbol "T" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent, Lewis D. Critton, was convicted on August 30, 1991, of one count of aggravated assault and one count of aggravated battery (R 63). Prior to trial, the State filed notice of its intent to seek habitual violent felony offender sentencing (R 19).

At sentencing, counsel for Respondent stated that he had no legal exceptions or objections to imposition of a habitual violent felony offender (HVFO) sentence (T 539). The State introduced into evidence a prior judgment and sentence for armed robbery (T 539). Defense counsel stated:

> Judge, that's correct. I have reviewed that judgment and sentence along with his fingerprints. My client has reviewed that as well and it appears to be a valid judgment and sentence.

(T 539).

The trial judge found, and Respondent concurred, that there was no legal impediment to imposition of an HVFO sentence (T 540, 544), stating that

> On the jury's finding of guilt as to count one to the charge of aggravated assault, the defendant first is adjudicated to be guilty of that offense. The Court is satisfied, based upon the evidence received in the form of the certified copy of prior judgment and sentence that he meets the criteria for classification as an habitual violent felony offender. He is, therefore, adjudged to be an habitual violent felony offender.

(R 544).

On appeal to the First District Court of Appeal, Respondent raised four issues, two dealing with evidentiary matters, one dealing with restitution, and one dealing with the adequacy of the trial court's compliance with the habitual offender statute, relying on Anderson v. State, infra.

In a written opinion issued on September 21, 1992 (attached hereto as Appendix A), the district court held, inter alia, that

> In sentencing the appellant as a habitual violent felony offender the court did not make any finding as to whether the appellant's prior offenses had been pardoned or set aside in a postconviction proceeding. Such findings are required by section 775.084(1)(b)3 and 4, and Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1991), petition for review filed, case no. 79.535, establishes that these findings are an essential part of a habitual felony offender sentence. See also, Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992). Other districts have taken various views on this issue. E.g., compare Baxter v. State, 599 So.2d 721 (Fla. 2d DCA 1992), petition for review filed, case no. 80,033. But the state properly concedes that in this district the issue is controlled by Anderson.

The court acknowledged conflict with Baxter, supra, and certified in this case the same question certified in Anderson as one of great public importance;

> 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?

Anderson, 592 So.2d at 1121.

SUMMARY OF ARGUMENT

1. The district court decision in Anderson 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 Anderson 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 Anderson decision below is contrary to the rule that final convictions are presumed valid until a colorable challenge is raised.

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

5. The Eutsey certified question should be answered yes and the decision below reversed.

ARGUMENT

ISSUE:

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?

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

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 an 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 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.[e.s.] Cites omitted.

Anderson, 592 So.2d at 1120.

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. (The Anderson opinion is attached hereto as Appendix B).

Three significant points about Anderson require comment. First, the case law cited in support 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, a3 Hodges subsequently held. Third, again in goad 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."

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.

(The Hodges decision is attached hereto as Appendix C).

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, 1128 (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.

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 intra 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 braader 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 1st DCA below. See, Myers v. State, 499 So.2d 895, 897 (Fla. 1st DCA 1987) (Defendant is required to dispute truth of sentencing hearsay and, relying on Eutsey, in the absence of such dispute, "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[1]. 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 fact. 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

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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 v. Jones, 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.

rejected this argument by holding that the defendant had the 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, g8, 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

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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 Coordinatar of that office which is included here as Appendix D. 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.

are for felony convictions, the annual percentage of pardons to 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. (e.s.)

Section 775.084(1)(a)2 provides:

> 2. The felony for which the defendant is to be sentenced was committed within 5 years of

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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 E. If Respondent objects, and/or this Court wishes, the appendix can be struck without impact on the state's argument.

> the date of the conviction of the last prior felony or other qualified offense of which he 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; (e.s.)

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, i.e., 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 an 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, 20 June 1992, there are already scores of direct appeal cases pending in the 1st DCA which will require reversal and resentencing proceedings pursuant to Anderson/Hodges unless the 1st DCA recedes therefrom or this Court overrules.

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 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 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.[4]

In contrast to the simplicity of requiring the defendant to raise and introduce evidence tending to show that a conviction has been collaterally overturned in those rare instances where it has, see 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

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[4] The unfortunate trend, as in Anderson and Hodges, denigrating the role of trial courts and counsel can also be seen in, e.g, Ford 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, a5 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.

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 1st DCA 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 most 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,[5] As section **924.33** applies here, 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 or showing of actual injury here and the state

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[5] See, Ross v. Moffitt, **417** U.S. **600, 611, 94** S.Ct. **2437, 41** L.Ed.2d **341 (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, 97 S.Ct. 2034, 52 L.Ed.2d 651 (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, 105** S.Ct. **830, 83** L.Ed.2d 821 (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].").

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.[6]

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

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[6] Although the facts will vary from case-to-case, those here are both representative and instructive. The record shows that Critton is simply a career criminal who commits felonies, serves time, is released, and commits additional felonies in such close proximity that he never even becomes eligible for consideration for a pardon. Yet here we are, one year after a sentencing proceeding where no issues were raised or preserved, arguing whether the state must prove, and the trial court find, that unraised affirmative defenses do not exist. An issue which this Court resolved twelve years ago. The state suggests that there is more than a merely coincidental relationship between the trend condemned by Judge Letts in Demons, footnote *6*, as exemplified by this appeal, and the continuing inability of public defenders to furnish timely representation to indigent criminal appellants, necessitating large scale withdrawals which place costly burdens on the host counties and lengthy delays on the appellate process, See In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, **561** So.2d 1130 (Fla. **1991);** Woods v. State, 595 So.2d 264 (Fla. 1st DCA 1992); Young v. State, **580** So.2d 301 (Fla. 1st DCA 1991); Day v. State, **570** So.2d 1003 (Fla. **1st DCA 1990);** Terry v. State, **547** So.2d **712** (Fla. **1st DCA 1989);** Grube v. State, **529** So.2d **789** (Fla. 1st DCA 1988).

pardoned or his sentences set aside. Relying on 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 1st DCA 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 on by Eutsey, where the 1st DCA 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 1st DCA 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 caurt 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.

The state would further note that two other district courts have declared positions on the Anderson/Hodges versus Eutsey schism. In Baxter v. State, 17 F.L.W. D1369 (Fla. 2d DCA May 27, 1992), consistent with its decision in Stewart on which the 1st DCA relied in Myers, the 2nd DCA 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. Followed by 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 Banner and highlighted the conflict with Eutsey.

CONCLUSION

The district court decision should be reversed for the reasons set forth above by reaffirming Eutsey. To the degree it has any remaining relevance after Hodges, the certified question should be answered yes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to JOHN S. LYNCH, Special Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Fourth Floor North, Tallahassee, Florida 32301, this 30th day of September, 1992.

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