FILED
SID J. WHITE
NOV 16 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,513

LEWIS D. CRITTON,

Respondent,

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

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PRELIMINARY STATEMENT

Petitioner adopts the preliminary statement set forth in its brief on the merits.

STATEMENT OF THE CASE AND FACTS

Petitioner adopts the statement of the case and facts set forth in its brief on the merits.

SUMMARY OF ARGUMENT

Due to the brevity of the argument herein, a formal summary of the argument will be omitted.

ARGUMENT

ISSUE

SHOULD THIS COURT RATIFY THE DISTRICT COURT DECISION BELOW WHICH OVERRULES EUTSEY V. STATE, 383 SO.2D 219 (FLA. 19801 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?

This Court's answer to the above question must be "No, the State does not have the burden of proving that unraised affirmative defenses have no merit.'' Petitioner would have this Court require prosecutors to submit evidence that a habitual felon's prior felony convictions have not been pardoned or set aside in every case, regardless of whether a defendant contests the point or not. In his dissent in Jones v. State, 17 F.L.W. D ___ (Fla. 1st DCA October 14, 1992) (en banc), Judge Allen writing for six members of the court, wrote:

> Simply stated, section 775.084(1)(a)3 and 4 should not be construed to require a trial judge to make findings of fact upon issues about which he has heard no testimony because the defendant never raised the matters as affirmative defenses. When a defendant asserts that a predicate offense has been pardoned or set aside, the trial judge will have the opportunity to consider evidence relevant to that assertion and he will be able to make a finding concerning whether the affirmative defense has been proved. Absent such an assertion, the record typically contains no evidence upon which the trial judge could make the findings specified in section 775.084(1)(a)3 and 4.

Slip opinion at p. 11.

Respondent does not now, nor did he below, contend that any of his predicate convictions had been pardoned or set aside. The instant controversy involves the elevation of form over substance and has nothing to do with guilt or innocence or the administration of justice,

Respondent's main concern appears to be that the trial court's findings should be sufficient to make an appeal of the enhanced sentence meaningful, citing Walker v. State, 462 So.2d 452 (Fla. 1985). Judge Allen, however, has laid these fears to rest:

> Findings of fact allow the appellate court to determine whether the trial judge considered and decided each issue which was subject to proof at the sentencing hearing. But there is no need for findings relating to issues which were not subject to proof below. Because the appellant did not raise it, the section 775.084(1)(a)4 issue was not subject to proof in the trial court. Therefore, a finding of fact under the subparagraph would not aid our review of the appellant's sentences. Jones, supra, at 11, 12.

This Court should rectify the First District Court of Appeals' misapplication of the principles set forth by this Court in Eutsey v. State, 383 So.2d 219 (Fla. 1980), and reaffirm the common sense holding that the State need not prove, in a habitual felony offender proceeding, that a defendant has not been pardoned of a previous offense or that it had not been set aside in postconviction proceedings as these are affirmative defenses available to the defendant rather than matters required to be proved by the State.

CONCLUSION

Petitioner respectfully urges this Honorable Court to reverse the decision of the appellate court and reinstate Respondent's habitual violent felony offender sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to Carol Ann Turner, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 16th day of November, 1992.

Bradley R Bischoff

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