IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO, 80,568

MICHAEL C. KNICKERBOCKER,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, appellee below, will be referred to herein as "the State." Respondent, Michael C. Knickerbocker, appellant below and defendant in the trial court, will be referred to herein as "the defendant." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). References to the transcript of proceedings will be by the use of the symbol "T" followed by the appropriate page number(s).[1]

[1] All references are to the record and transcripts contained in the First District's case number 90-03312 (circuit court case number 89-3161-CF).

STATEMENT OF THE CASE AND FACTS

The defendant was charged with three counts of sexual battery contrary to Section 794.011(3), Florida Statutes, as well as one count of kidnapping and one count of armed burglary of a dwelling (R 11-12), and a jury found him guilty as charged on all five counts (R 135-140). Pursuant to these convictions, the trial court adjudged the defendant guilty and sentenced him to consecutive terms of life imprisonment as a habitual violent felony offender (R 183-188). On appeal, the First District Court of Appeal reversed the sentences imposed by the trial court on the three sexual battery counts, holding that life felonies are not subject to sentencing under Section 775.084, Fla. Stat. (Supp. 1988), the habitual felony offender provision. However, the First District certified the following question of great public importance:

> MAY A SENTENCE FOR A LIFE FELONY BE ENHANCED PURSUANT TO THE PROVISIONS OF THE HABITUAL OFFENDER STATUTE?

Additionally, the First District, relying on its previous decision in Anderson v. State, infra, held that the trial court erred reversibly in failing to make specific findings of fact before sentencing the defendant as a habitual violent felony offender.

On October 5, 1992, the State filed a notice to invoke discretionary review pursuant to Art. V, § 3(b)(4), Fla. Const. and Fla.R.App.P. 9.030(a)(2)(A)(v), based on the certification of the aformentioned question.

SUMMARY OF ARGUMENT

Issue I: By enacting Section 775.0842, Florida Statutes, the legislature expressly declared its intent that all felonies -- including life felonies -- committed within this state are subject to punishment under the habitual felony offender provision. Furthermore, the substantive provision pursuant to which the defendant here was convicted and sentenced expressly provides for punishment under Section 775.084, the habitual felony offender provision. This Court therefore should answer in the affirmative the certified question as to whether life felonies are subject to enhanced sentencing under the habitual felony offender statute.

Issue II: The First District's decision in Anderson v. State, infra, conflicts with this Court's decision in Eutsey v. State, infra, and with decisions of other district courts. Eutsey should be reaffirmed and the decision below reversed. Additionally, Anderson is contrary to the settled rule 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. Finally, the First District's decision in Anderson is contrary to the rule that final convictions are presumed valid until a colorable challenge is raised. This Court therefore should reverse the district court's decision in the instant case, based on the holding in Anderson, that the trial court erred

reversibly in failing to make findings of fact before sentencing the defendant as a habitual violent felony offender.

ARGUMENT

ISSUE I

MAY A SENTENCE FOR A LIFE FELONY BE ENHANCED PURSUANT TO THE PROVISIONS OF THE HABITUAL OFFENDER STATUTE?

The defendant argued below that the trial court improperly sentenced him as a habitual violent felony offender after he was convicted of life felonies in three counts of sexual battery pursuant to Section 794.011(3), Fla. Stat. (1987). The First District agreed with the defendant and held that life felonies are not subject to sentencing under Section 775.084, Fla. Stat. (Supp. 1988), regardless of the fact that the sexual battery statute under which the defendant was convicted specifically provides for sentencing under that provision. Accordingly, the First District held that the trial court erred in sentencing the defendant as a habitual violent felony offender in Counts I, 11, and 111, and it certified to this Court the above-stated question of great public importance. For the following reasons, this Court should answer the certified question in the affirmative and reinstate the sentences imposed by the trial court.

As the First District acknowledged in its opinion below, its decision on this point directly and expressly conflicts with the Third District's decision in Lamont v. State, 597 So.2d 823 (Fla. 3d DCA 1992) (en banc), rev. pending, Case no. 79,586 (Fla.). There, the Third District

determined that Lamont, who was convicted of sexual battery with a weapon pursuant to Section 794.011(3), Florida Statutes, was subject to sentencing under the habitual felony offender statute. In rejecting the defendant's claim that life felonies are not subject to sentencing under Section 775.084, the Lamont court determined that

> [t]o follow the defendants' construction of the Act would defeat the expressed legislative intent of providing enhanced penalties for career criminals in order to deter criminal conduct. It is not rational, to say the least, to interpret the statutes so that those career criminals who commit the most serious of felony crimes are not subject to enhanced punishment under the habitual offender statute, while those that commit less serious crimes are included within its scope,

Id. at 826. The court further noted that Section 794.011(3), the substantive statute under which Lamont was convicted, specifically provided for sentencing under Section 775.084. The court thus concluded that

> [t]he legislature would not have specifically indicated in each statute that Section 775.084 was to be used in determining a defendant's sentence if it had intended to exclude defendants convicted of such felonies from the scope of the Act.

Id. at 826-827 (footnote omitted).

After addressing these specific aspects of the statute, the Lamont court reached the following conclusion:

> In order to give effect to the legislative intent, and to avoid a construction of the statutory language

> which would lead to an absurd result, our analysis must focus upon a consideration of the Act as a whole. Accordingly, a far more reasonable construction of the statute which would give effect to the legislative intent of deterring repeat offenders, would be to recognize that extended terms of imprisonment for life felons are authorized under subsection (4)(e) of the statute. Thus, a more accurate analysis of the applicability of the act would be as follows. Once a defendant has been classified as a habitual felany offender, then "the court may impose an extended term of imprisonment as provided in this section." §775.084(1)(b), Fla. Stat. (1989). Referring to subsection (4)(c) "in this section," the court may then sentence life felony defendants to life imprisonment because subsection (4)(e) of the statute removes habitual violent felony offenders from the sentencing guidelines, makes them ineligible for parole and removes their eligibility for gain-time (except that specified).

Id. at 827 (footnotes omitted).

While the First District did not discuss the correctness of the Lamont decision in its opinion in the instant case, the court squarely addressed the Lamont holding in its recent opinion in Lee v. State, 17 F.L.W. D2392 (Fla. 1st DCA October 12, 1992) (en banc). In Lee, the First District rejected the Third District's reasoning in Lamont as follows:

> The rationale of ~~Lamont~~ fails when the history of the relevant statutes is examined. Since the advent of life felonies in chapter 72-~~724~~, Laws of Florida, no amendment to recidivist statute has referenced life felonies, and prior to enactment of section 6, chapter 88-131, Laws of Florida, the

> penalty provisions of sectian 775.084 did ~~not~~ include subsection (4)(e). Yet, in chapter 75-298, Laws of Florida, the legislature began directing punishment as provided in section 775.084 for life felonies. It appears that this omnibus crime bill made universal reference to section 775.084 for all felonies other than capital felonies, without consideration of the specific contents of the recidivist statute. The Lamont court having conceded that sections 775.084(4)(a) and 775.084(4)(b) do not apply to life felonies, we fail to see the logic of the legislative intent it ascribes to the 1975 enactment.

Lee v. State, 17 F.L.W. at D2393-2394 (emphasis added).

An examination of the legislature's 1988 amendments to the habitual felony offender provision, as well as its 1988 enactment of Sections 775.0841 and 775.0842, Fla. Stat. (Supp. 1988), reveals that the Lamont court was eminently correct in determining that life felonies are subject to the habitual felony offender provision, and that the First District's contrary interpretation af Section 775.084 in Lee was erroneous. In 1988, the legislature amended Section 775.084 to include subsection (4)(e), which exempts habitual felons from the sentencing guidelines, makes habitual felons ineligible for parole, and limits the amount of gain-time habitual felons may receive. Simultaneously, the legislature enacted Section 775.0841, Fla. Stat. (Supp. 1988), which provides as follows:

> Legislative findings and intent. The Legislature hereby finds that a substantial and disproportionate number of serious crimes is committed in Florida by a relatively small number of

> multiple and repeat felony offenders, commonly known as career criminals. The Legislature further finds that priority should be given to the investigation, apprehension, and prosecution of career criminals in the use of law enforcement resources and to the incarceration of career criminals in the use of available prison space. The Legislature intends to initiate and support increased efforts by state and local law enforcement agencies and state attorneys' offices to investigate, apprehend, and prosecute career criminals and to incarcerate them for extended terms.

More importantly, the legislature enacted Section 775.0842, Fla. Stat. (Supp. 1988), wherein it expressly defined "persons subject to career criminal prosecution efforts" as follows:

> (1)(a) A person who is under arrest for the commission, attempted commission, or conspiracy to commit *any* felony in this state shall be the subject of career criminal prosecution efforts provided that such person has previously been convicted of two or more felonies as outlined in section 775.084(1).

(Emphasis added).

Despite the explicit statement of legislative intent contained in the above provisions, the First District consistently has held that the legislature's failure to list life felonies under the enhancement or "bump-up" provisions of Sections 775.084(4)(a) and (4)(b) is indicative of the legislature's intent to exclude those convicted of life felonies from sentencing under the habitual felony offender provision. See, e.g., Lee v. State, supra; Gholston v.

State, 589 So.2d 307 (Fla. 1st DCA 1990), approved, 17 F.L.W. S554 (Fla. July 23, 1992) (on other grounds). At most, however, the omission of life felonies from subsections (4)(a) and (4)(e) creates an ambiguity which must be resolved by an examination of other expressions of legislative intent, i.e., the legislative intent expressed in Sections 775.0841 and 775.0842. This ambiguity is readily resolved by the express language of Section 775.0842(1)(a), Fla. Stat, (Supp. 1988), which evinces the legislature's clear intent to prosecute and punish as career criminals persons under arrest for the commission of "any felony in this state," including life felonies. The ambiguity is further dissipated by the legislature's simultaneous addition of subsection (4)(e) to Section 775.084, and its enactment of Sections 775.0841 and 775.0842.[2] Hence, the First District's holding to the contrary in Lee notwithstanding, the legislature has indeed amended the habitual felony offender provision to reference life felonies. Furthermore, as the Third District acknowledged in Lamont, an interpretation of Section 775.084 which exempts those convicted of the most serious felonies from habitual offender classification is directly contrary

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[2] The simultaneous enactment of Section 775.084(4)(e) (exempting habitual felons from the diminished penalties of the sentencing guidelines), and Section 775,0842 (providing for career criminal prosecution of persons arrested for "any felony"), makes it quite apparent that the legislature intended to make those convicted of life felonies subject to the provisions of Section 775.084(4)(e).

to the legislative intent expressed in Sections 775.0841 and 775.0842.

A final indication that the trial court in the instant case properly sentenced the defendant as a habitual violent felony offender for the three sexual battery convictions is the fact that, as was the case in Lamont, the defendant here was convicted under Section **794.011(3),** which specifically provides for punishment pursuant to Section **775.084,** the habitual felony offender statute. This clearly reflects that even though Section 775.084 does not list life felonies in the enhancement provisions of subsections (4)(a) and (4)(e),[3] the legislature intended to make habitual felons convicted of that crime subject to the gain-time restrictions, and particularly the exemption from the sentencing guidelines, provided by Section 775.084(4)(e). Moreover, as the Lamont court correctly concluded, a holding by this Court to the contrary would lead to the absurd result, never intended by the legislature, that habitual felons convicted of the most serious crimes benefit from the diminished penalties of the sentencing guidelines and receive extensive gain-time, while those convicted of lesser crimes do not. Furthermore, such a holding would lead to the even more absurd result that repeat offenders **of** serious

[3] Because life felonies are already subject to a maximum penalty of life imprisonment, there simply **was** no need for the legislature to "enhance" the maximum possible penalty for life felonies, as it was for first, second, and third degree felonies.

crimes would be exempted completely from classification as habitual felons by virtue of the fact that they habitually commit life felonies. This Court must avoid such a result. Dorsey v. State, 402 So.2d 1178, 1183 (Fla. 1981) ("In Florida it is a well-settled principle that statutes must be construed so as to avoid absurd results." (Citation omitted)); State v. Webb, 398 So.2d 820, 824 (Fla. 1981). Lastly, as this Court noted in Burdick v. State, 594 So.2d 267 (Fla. 1992) with respect to first degree felonies punishable by life, excluding life felonies from the habitual felony offender statute would operate as a disincentive to a state attorney who might otherwise be inclined to prosecute an accused for a life felony but who instead chooses to pursue a less severe substantive penalty because that penalty is subject to habitual offender enhancement. Id. at 269.

To summarize, by simultaneously amending Section 775.084 to include subsection (4)(e) and stating in Section 775.0842 that all felonies are subject to the habitual felony offender statute, the legislature expressed its clear intent to punish those convicted of life felonies pursuant to Section 775.084. Additionally, the substantive provision under which the defendant was convicted specifically lists Section 775.084, the habitual offender statute, as a possible punishment. This again reflects the legislature's intent that the life felony of which the defendant was convicted is indeed subject to punishment under the habitual

felony offender statute. Finally, an interpretation of Section 775.084 which excludes defendants convicted of life felonies from sentencing under the habitual felony offender statute would lead to the absurd result that habitual felons convicted of the most serious offenses would retain the protection of the sentencing guidelines and gain-time provisions, while those convicted of lesser crimes would not. This Court therefore should answer the certified question in the affirmative and reinstate the habitual violent felony offender sentences imposed by the trial court in the three sexual battery counts.

ISSUE II

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.[4]

Anderson argued in the district court that the State failed to introduce evidence showing, and the trial caurt failed to find, that the predicate felonies far 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,

[4] In its opinion below, the First District cited Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1992), rev. pending, Case no. 79,535 (Fla.), as controlling authority for its determination that the trial caurt erred reversibly in failing to make the required findings of fact before sentencing the defendant as a habitual violent felony offender. Because Anderson is currently pending review based on the First District's certification of a question of great public importance, this Court has jurisdiction over that same question in the instant case. *See, e.g.*, Jollie v. State, 405 So.2d 418 (Fla. 1981) (exercise of this Court's discretionary conflict jurisdiction proper where per curiam affirmance by district court cited case already pending review on basis of conflict jurisdiction).

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.

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. (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, 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 and 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.

No doubt recognizing that the aforementioned corollary acknowledged by the Hodges panel caused at least an appearance of conflict with this Court's holding in Eutsey,

the First District recently revisited this issue en banc in Jones v. State, Case no. 91-2961 (Fla. 1st DCA October 14, 1992). In Jones, a majority of the First District concluded that Anderson was correctly decided, and that a trial court must indeed find on the record that a defendant's prior convictions have not been pardoned or set aside before it may sentence the defendant pursuant to the habitual felony offender provision. Noting that the trial court in Eutsey actually made verbal findings that the defendant's prior convictions had not been pardoned or set aside, the Jones majority determined that the lack of those findings requires reversal under Section 775.084(1)(a), regardless of the fact that these matters are affirmative defenses, and regardless of whether there is any evidence in the record to support those findings. Jones, slip op. at 6-7. Accordingly, the majority rejected the dissent's conclusion that "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." Slip op. at 11.

The Anderson/Hodges/Jones 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.

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[5] A copy of the Jones opinion is attached hereto as Appendix C.

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 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, Hodges, and Jones were wrongly decided. However, there are still other flaws and fallacies which deserve attention.[6] One of the characteristics 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

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[6] 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 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.

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 ta 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 na 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 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.[7] 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 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

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[7] 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 D. The figures confirm what common sense suggests, pardons as a percentage af 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, as it did in Anderson and Hodges. 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.

the Rules of Executive Clemency of Florida. A comparison of the eligibility requirements for applying for a pardon under the Rules[8] and the eligibility requirements for a 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 conditianal release for at least 10 years. (Emphasis added).

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 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.)**

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.

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 yeas 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, Hodges, and Jones decisians, 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, Hodges, and Jones 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. Indeed, 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/Jones unless this Court overrules those decisions.

The 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.[9]

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

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[9] 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 caunsel 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's 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.

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 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, Hodges, and Jones 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.[10] As

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[10] 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

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 suggests that the defendant 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, Hodges, and Jones 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 on Eutsey, the Second District rejected the argument:

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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]. ").

> 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 on 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 ok 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). (Emphasis added)

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. 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.

The State would further note that two other district courts have declared positions on the Anderson/Hodges/Jones 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 First District relied in Myers, the Second District again analyzed this issue and concluded an 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 Hodgss had issued well prior to Bonner and highlighted the conflict with Eutsey.

CONCLUSION

For the reasons set forth herein, the State respectfully requests that the certified question under Issue I be answered in the affirmative, and that this Court reverse the First District's decision with respect to Issue II by reaffirming Eutsey.

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 George F. Schaefer, Esquire, 15 S.E. Seventh Street, Gainesville, Florida 32601, this 2nd day of November, 1992.

Amelia L. Beisner
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **CASE NO. 80,568**

MICHAEL C. KNICKERBOCKER,

Respondent.

APPENDIX A

First District Court of Appeal Opinion in ~~Knickerbocker v.~~ State

Victim Services

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

MICHAEL C. KNICKERBOCKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NOS. 90-3134/3312
(CONSOLIDATED)

Opinion filed August 21, 1992.

An Appeal from the Circuit Court for Alachua County, Thomas M. Elwell, Judge.

George F. Schaefer, Gainesville, for Appellant.

Robert A. Butterworth, Attorney General; Amelia L. Beisner, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

In these two consolidated cases, appellant seeks review of his convictions for three counts of sexual battery, burglary, kidnapping and attempted trespass; and of the sentences imposed for those offenses. We conclude that all of the fourteen issues and sub-issues addressed to appellant's convictions are without merit, and that none requires discussion. Accordingly, we affirm all of appellant's convictions without further comment. However, we are constrained to reverse the sentences imposed for the

sexual battery, burglary and kidnapping convictions, and to remand to the trial court for resentencing.

In Case No. 89-3257-CF, appellant was convicted of three counts of sexual battery by use of, or threats to use, a deadly weapon or by actual use of physical force likely to cause serious personal injury, in violation of Section 794.011(3), Florida Statutes (1987); armed burglary, with an assault, in violation of Section 810.02(2)(a) and (b), Florida Statutes (1987); and kidnapping, in violation of Section 787.01(2), Florida Statutes (1987). The trial court sentenced appellant, as an habitual violent felony offender, to life in prison for each offense, the five sentences to run consecutively to each other. Appellant challenges these sentences on three grounds: (1) the convictions are not subject to the enhanced sentencing provisions of the habitual offender statute [§ 775.084, Fla. Stat. (Supp. 1988)]; (2) the trial court failed to make the required findings before concluding that appellant was an habitual violent felony offender; and (3) because all of the convictions arose out of a single criminal episode, there is no authority for the imposition of consecutive sentences.

Burglary during which an assault is committed, or while armed with a deadly weapon, is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life. § 810.02(2)(a), (b), Fla. Stat. (1987). The same is true of kidnapping. § 787.01(2), Fla. Stat. (1987). It is now clear that a sentence for a first-degree felony punishable by

imprisonment for a term of years not exceeding life may be enhanced pursuant to the habitual offender statute. Burdick v. State, 594 So.2d 267 (Fla. 1992). Accordingly, insofar as the burglary and kidnapping convictions are concerned, appellant's first argument lacks merit.

The three sexual battery convictions are all life felonies. § 794.011 (3), Fla. Stat. (1987). The supreme court has not yet addressed the issue of whether a sentence for a life felony may be enhanced pursuant to the habitual offender statute. However, this court has held that it may not be. See, e.g., Conley v. State, 592 So.2d 723 (Fla. 1st DCA 1992); Gholston v. State, 589 So.2d 307 (Fla. 1st DCA 1991); Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990). The Second, Fourth and Fifth Districts have reached the same conclusion. *See*, e.g., McKinney v. State, 585 So.2d 318 (Fla. 2d DCA 1991); Walker v. State, 580 So.2d 281 (Fla. 4th DCA 1991), review dismissed, 593 So.2d 1049 (Fla. 1992); Power v. State, 568 So.2d 511 (Fla. 5th DCA 1990). Only the Third District has concluded that a sentence for a life felony is subject to enhancement pursuant to the habitual offender statute. Lamont v. State, 597 So.2d 823 (Fla. 3d DCA 1992) (en banc). Accordingly, we conclude that it was error to enhance appellant's three sexual battery sentences pursuant to the habitual offender statute.

The habitual offender statute requires that certain findings of fact be made before the enhanced penalties afforded by that statute may be applied. § 775.084(3)(d), Fla. Stat. (Supp.

1988). See e.g., Walker v. State, 462 So.2d 452 (Fla. 1985); Eutsey v. State, 383 So.2d 219 (Fla. 1980). Moreover, "the trial court's failure to make such findings is appealable regardless of whether such failure is objected to at trial." Walker, at 454. The state concedes that the trial court failed to make the required findings. Accordingly, appellant's sentences as an habitual violent felony offender must be reversed, and the case remanded for resentencing.

Regarding appellant's final argument directed to his sentences, we conclude that the trial court clearly possessed the power to impose consecutive sentences, notwithstanding the fact that all of the convictions arose out of the same criminal episode. § 775.021(4), Fla. Stat. (Supp. 1988). *See* Marshall v. State, 596 So.2d 114 (Fla. 2d DCA 1992). We note however that should the trial court again decide to sentence appellant as an habitual violent felony offender for the burglary and kidnapping' convictions, it is obliged to impose 15-year mandatory minimum sentences. § 775.084(4)(b)1., Fla. Stat. (Supp. 1988). Those mandatory minimum sentences must be imposed concurrently, rather than consecutively. Daniels v. State, 595 So.2d 952 (Fla. 1992).

In summary, we affirm both the conviction and the sentence in Case No. 89-3161-CF (the attempted trespass case), In Case No. 89-3257-CF, we affirm all of appellant's convictions. However, we reverse appellant's sentences in the latter case, and remand for resentencing. On remand, the trial court is directed to impose guidelines sentences for the three sexual battery

convictions. The trial court may again sentence appellant as an habitual violent felony offender for the burglary and kidnapping convictions, provided that it makes the required findings of fact. Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1992). Finally, we certify the following question, which we believe to be *of* great public importance:

> MAY A SENTENCE FOR A LIFE FELONY BE ENHANCED PURSUANT TO THE PROVISIONS OF THE HABITUAL OFFENDER STATUTE?

CASE NO. 89-3161-CF AFFIRMED. CASE NO. 89-3257-CF AFFIRMED IN PART; REVERSED IN PART; and REMANDED, with directions.

ERVIN, MINER and WEBSTER, JJ., CONCUR.

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **CASE NO. 80,568**

MICHAEL C. KNICKERBOCKER,

Respondent.

APPENDIX B

Anderson v. State, 592 So.2d 1119 (Fla. App. 1st Dist. 1991)

the award of $16,200.12 for temporary support in the September 27, 1990 order.

Affirmed in part, reversed in part and remanded.

LEHAN, A.C.J., and PARKER, J., concur.

KEY NUMBER SYSTEM

Willie **ANDERSON**, Appellant,

v.

STATE of Florida, Appellee.

No. 90–647.

District Court of Appeal of Florida, First District.

Dec. 3, 1991.

On Motion for Rehearing Feb. 13, 1992.

Defendant was convicted, following jury trial, of four counts each of sale of cocaine and possession of cocaine with intent to sell and was sentenced as habitual felony offender by the Circuit Court, Taylor County, L. Arthur Lawrence, J., and defendant appealed sentencing. The District Court of Appeal, Joanos, C.J., held that failure to make finding that predicate convictions had not been pardoned or set side was reversible error.

Reversed and remanded for resentencing; question certified.

1. Constitutional **Law** ⇐250.3(1)
District **and** Prosecuting Attorneys ⇐8

Statute granting prosecutor discretion to decide who among qualifying defendants will receive habitual offender treatment did not deprive defendant of equal protection of law or infringe upon courts' power to impose punishment absent any proof that persons within habitual offender class were **being** selected according to some unjustifiable standard, West's F.S.A. §§ 775.084, 775.084(1)(a), (1)(a)3, 4; U.S.C.A. Const. Amend. **14.**

2. Criminal **Law** ⇐**1203.21, 1203.27**

Trial court's failure to make requisite habitual offender finding that predicate convictions had not been pardoned or set aside, **was** reversible error, even in absence of objection. West's F.S.A. §§ 775.084, 775.084(1)(a), (1)(a)3, 4.

3. Criminal Law —1203.31

Court's failure to make findings **required** to sentence defendant as habitual felony offender would not preclude resentencing defendant **as** habitual offender on remand, if requisite statutory findings were made **by** court and supported by evidence. West's F.S.A. §§ 775.084, 775.084(1)(a), (1)(a)3, 4.

Nancy A. Daniels, Public Defender, and Carol Ann Turner, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. **Gen.**, and Carolyn J. Mosley, Asst. Atty. Gen., Tallahassee, for appellee.

JOANOS, Chief Judge.

Willie Lee Anderson has appealed from sentencing as an habitual felony offender, following his conviction by jury of four counts each of sale of cocaine and possession of cocaine with intent to sell. We reverse and remand for resentencing.

Following Anderson's conviction, the state filed notice of its intent to seek habitual felony offender classification. At the sentencing proceeding, the **state** offered as predicate convictions two prior felony convictions, which Anderson conceded were his. Based thereon, the court held that Anderson qualified as an habitual felony Offender, and sentence **was** imposed **accordingly**. However, the trial court made no finding that the predicate convictions had not been pardoned or set aside, as required by section **775.084(1)(a)3.** and **4., Florida** Statutes (1989).

Anderson contends first that section 775.084, Florida Statutes (1989) is unconsti-

tutional, in that the prosecutor's discretion to decide who among qualifying defendants will receive habitual offender treatment deprives him of equal protection of the laws, and infringes on the courts' power to impose punishment. He next argues that the classification must be reversed based on the trial court's failure to make all of the findings required by section 775.084(1)(a).

111 Anderson's constitutional arguments are without merit. The issue of prosecutorial discretion was addressed in *Barber v. State,* 564 So.2d 1169 (Fla. 1st DCA), *review denied* 576 So.2d 284 (Fla. 1990). *Barber* held that the guarantee of equal protection is not violated when prosecutors are given the discretion by law to "habitualize" only some of those criminals who are eligible, even though their discretion is not bound by statute. Mere selective, discretionary application of a statute is permissible; only a contention that persons within the habitual offender class are being selected according to some *unjustifiable* standard, such as race, religion, or other arbitrary classification, would raise a potentially viable challenge. *Barber* at 1170 (emphasis in original). *Barber* addressed the separation of power issue as well, holding that "the executive branch is properly given the discretion to chocse which available punishments to apply to convicted offenders.'' *Barber* at 1171.

[2, 3] 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,* 586 So.2d 1293 (Fla. 4th DCA 1991), *citing Parker v. State,* 546 So.2d 727 (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. *Rodger v. State, 583* So.2d 429 (Fla. 3d DCA 1991); *King v. State, 580* So.2d 169 (Fla. 4th DCA 1991).

Reversed and remanded for resentencing.

SHIVERS and ZEHMER, JJ., concur.

ON MOTION FOR REHEARING

JOANOS, Chief Judge.

The State of Florida seeks rehearing of the court's December 3, 1991 opinion in the above-styled case. That opinions reversed and remanded for resentencing based on the trial court's failure, prior to classifying Anderson as an habitual offender, to make the findings required by sections 775.084(1)(a)3. and 4. and 775.084(3)(d), Florida Statutes (1989). While we deny the motion for rehearing, we write to explain our reasons for doing so, and to certify a question of great public importance.

The State's rehearing motion is premised on *Eutsey v. State, 383* So.2d 219 (Fla. 1980). In *Eutsey,* the appellant was classified as an habitual offender under the 1977 habitual offender statute, following the trial court's finding that he "had not received a pardon and that his convictions had not been set aside in post-conviction relief proceedings." *Eutsey* at 223. Eutsey challenged this finding on appeal, alleging that the state had "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." The Supreme Court rejected Eutsey's contention, in that "these are affirmative defenses available to Eutsey rather than matters required to be proved by the state." *Eutsey* at 226.

The state relies on this language to argue that the trial court's failure to make findings regarding the pardoning or setting aside of the predicate convictions was not error. It contends that, after *Eutsey,* no such findings are required if a defendant does not affirmatively raise the argument that the predicate convictions have been pardoned or set aside.

We reject this argument on several grounds. First, the habitual offender statute, both now and when *Eutsey* was decided, states that "each of the findings required as the basis for [an habitual offender] sentence *shall be found to exist* by a preponderance of the evidence." Section 775.084(3)(d), Fla.Stat. (1989) (emphasis supplied), The statute does not qualify this requirement with regard to the pardoning or setting aside of the predicate convic-

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tions as set forth in section 775.084(1)(a)3. and 4. Therefore, *the* plain statutory language cannot be reconciled with the position which the stab urges us to take on this issue.

The state attempts to overcome this obstacle by arguing that the plain language of the statute must be read with the "judicial gloss" placed thereon by *Eutsey*. However, the *Eutsey* trial court, unlike the trial court herein, made the statutorily required findings regarding the pardoning or setting aside of Eutsey's predicate convictions. Thus, the necessity of making findings on these issues in the absence of their allegation by the defendant was not before the court when it classified them as affirmative defenses, and we are reluctant to apply that language as urged by the state to qualify the plain requirements of the habitual offender statute.

However, it must be acknowledged that the Supreme Court in *Eutsey* did refer to the requirements for habitual offender classification set forth in section 775.084(1)(a)3. and 4. as affirmative defenses, which in our view creates doubt as to the proper application of these statutory requirements. Therefore, pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure, we certify the following question 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?

The motion for rehearing is denied.

SHIVERS and ZEHMER, JJ., concur.

STATE of Florida, Petitioner,

v.

John DOE, Respondent.

No. 91-02739.

District Court of Appeal of Florida, Second District.

Dec. 11, 1991.

Rehearing Denied Feb. 10, 1992.

State attorney petitioned for writ of certiorari to review order in the Circuit Court, Polk County, Susan Wadsworth Roberts, J., granting motion to quash investigative witness subpoena. The District Court of Appeal, Parker, J., held that trial court departed from essential requirements of the law in concluding that subpoena was the equivalent of detention invoking Fourth Amendment protections.

Petition granted, order quashed, and case remanded.

Hall, J., dissented and filed opinion.

1. Certiorari ⇐29

Trial court departed from essential requirements of the law in granting motion to quash state attorney's investigative witness subpoena requesting fingerprint samples and handwriting exemplars; thus, certiorari relief would be granted from that order.

2. Arrest ⇐68(3)
Searches and Seizures ⇐75

Answering state attorney subpoena issued for witness to appear to testify and/or provide nontestimonial evidence before state attorney or at trial does not amount to detention invoking Fourth Amendment protections; state attorney has constitutional and statutory duties to summon witnesses and can obtain nontestimonial evidence without showing of reason-

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,568

MICHAEL C. KNICKERBOCKER,

Respondent.

APPENDIX C

First District Court of Appeal Opinion in Jones v. State, (Case NO. 91-2961 (Fla. 1st DCA October 14, 1992)

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

WILLIAM V. JONES,)

Appellant,)

v.)

STATE OF FLORIDA,)

Appellee.)

)

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED

CASE NO. 91-2961

90-5036 CF-A

Opinion filed October 14, 1992.

An Appeal from the Circuit Court for Alachua County.
Stan R. Moris, Judge.

Nancy A. Daniels, Public Defender, Tallahassee; Carl S. McGinnes, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney.General, Tallahassee; Carolyn J. Mosley, Tallahassee, for appellee.

EN BANC

JOANOS, C.J.

The appellant raises one issue in this appeal. Appellant complains that the trial court erred in imposing habitual felony offender sentences without finding, under section 775.084(1)(a)4., Florida Statutes (1989), that the predicate

convictions required for imposition *of* the habitual offender sentences had not been set aside in post-conviction proceedings. We reverse.

Appellant was convicted of attempted burglary *of* a dwelling and possession of burglary tools. The state sought to have appellant sentenced as an habitual offender. At the sentencing hearing the State presented evidence that appellant had two prior felony convictions, including the dates of those convictions. The State also presented evidence that appellant had not been pardoned for any of the previous convictions. The trial court made the following findings:

> [U]nder the record presented Mr. Jones is a habitual offender. He has the appropriate prior number of convictions. At least two of those convictions are for burglar[y], and the other for introduction of contraband into a state facility. Those are all felonies, they are timely in the sense of the way they've been presented and have not been excused by the document presented over the signature of the then governor of the state.

Appellant was adjudicated to be a habitual felony offender and sentenced to consecutive five year prison sentences.

Our analysis starts with the habitual felony offender statute. Section 775.084 provides in pertinent part:

> (1) As used in this act:
>
> (a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as pr'ovided in this section, if it finds that:
>
> 1. The defendant has previously been convicted *of* any combination of two or more felonies in this state or other qualified offenses;

> 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 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;
>
> 3. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this section; and
>
> 4. A conviction of a felony or other qualified offense necessary to the operation of this section has not been set aside in any post-conviction proceeding.
>
> . . .
>
> (3) . . . The procedure shall be as follows:
>
> . . .
>
> (d) Each of the findings required as the basis for such sentence shall be found to exist by a preponderance *of* the evidence and shall be appealable to the extent normally applicable to similar findings.

As noted, appellant's sole point on appeal is that the trial court failed to make the finding required by section 775.084(1)(a)4., i.e., that his prior convictions had not been set aside in any post-conviction proceedings.

In our opinion, the mandate of section 775.084(1)(a) is unequivocal. The sentencing court must make a specific finding that the defendant meets each of the criteria of the statute. Walker v. State, 462 So.2d 452, 454 (Fla. 1985); Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1991), review pending, Case

N . 79,535. The failure to make such findings constitutes reversible error. Id. The supreme court's opinion in Walker is particularly instructive. The sole issue on appeal in that case was the trial court's alleged failure to "state, as required by statute, the findings upon which he based [the] decision to [impose an habitual offender sentence]." The supreme court rejected the State's argument that an objection was required stating:

> We hold that the findings required by section 775.084 are critical to the statutory scheme and enable meaningful appellate review of these types of sentencing decisions. Without these findings, the review process would be difficult, if not impossible. It is clear that the legislature intended the trial court to make specific findings of fact when sentencing a defendant as a habitual offender.

Moreover, the supreme court specified that:

> Given this mandatory statutory duty, the trial court's failure to make such findings is appealable regardless of whether such failure is objected to at trial.

Id. at 454.

In this case there is no question that the trial court did not make the finding required by section 775.084(1)(a)4. The State's sole argument in opposition to appellant's argument is that appellant "admitted, at least by implication, that he qualified for sentencing as an habitual offender." In support of that argument the State refers to the following excerpt from the sentencing hearing:

> **THE** COURT: **Is he contesting either of these prior - -**
>
> **[DEFENSE** COUNSEL]: **Neither *of* those two, Your Honor, is** that **correct, Mr. Jones?**
>
> [MR. **JONES]: Right.**
>
> **THE COURT: All right.** That's **a sufficient** factual **basis** for at **least the state to request** habitual **offender.**

In our **opinion that is not an admission, even implicitly,** that **appellant qualified as an** habitual **offender. It is an admission** that **the appellant had** two **prior felony convictions.** It **was** not an **admission** that those **convictions** had **not been** set **aside. Under section** 775.084(1)(a) **the trial court is required to make four separate findings. One of** those **findings is** that appellant has two prior **felony convictions. Another separate finding is** that those convictions **have** not been **set** aside.

The dissent argues that our **decision in** this **case and** Anderson, upon **which** appellant **relies,** are **not** a **proper application** of **the** statute **in light** of the **supreme court's decision in** Eutsey v. State,. 383 So.2d 219, 226 (Fla. 1980). The dissent **asserts that** Eutsey **obviates the need** for **the findings** mandated **by the statute unless the appellant (defendant) presents some** evidence **that** the **prior convictions have been set aside.** In our **opinion that is not a proper reading of** Eutsey.

In Eutsev **the** defendant was tried **and convicted of** burglary **of a dwelling.** The trial **court conducted a** hearing **to** determine whether **Eutsey qualified for sentencing as an habitual offender. The** trial **court,** over **Eutsey's general objection, admitted** into

evidence a presentence investigation containing hearsay.[1] At the conclusion of the hearing, the trial court specifically found:

> . . . that Eutsey is the same person who was convicted of attempted robbery . . . that he is the same person who was convicted . . . of burglary in the present case; . . . that the latter conviction was within five years of the earlier conviction, . . . that Eutsey had not received a pardon and that his conviction had not been set aside in post-conviction relief proceedings.

Id. at 223. On appeal Eutsey argued, among other things, "that the evidence was insufficient to declare him an habitual offender" and that "the State failed to prove he had not been pardoned . . . or [the prior conviction] . . . had not been set aside in a post-conviction proceeding. . . ." Id. at 226. The supreme court rejected the latter argument stating "these are affirmative defenses available to Eutsey, rather than matters required to be proved by the State." Id. at 226. While that language, without more, appears to support the dissent's argument, we believe that language must be read within the factual context of the case and as tempered by the supreme court's decision in Walker five years later, which decision did

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[1] Although the opinion is not explicit, the PSI apparently contained hearsay statements that Eutsey had a prior felony conviction (at the time of Eutsey's sentence only one prior felony conviction was required for habitual felony offender sentencing). In our experience this is not an uncommon means for the state to prove the predicate felony convictions. E.g., McClendon v. State, 17 F.L.W. D1852 (Fla. 1st DCA July 29, 1992).

no, mention Eutsey.[2] In Eutsey the trial court made the required findings and the issue was whether there was evidence to support the findings. In this case the issue is not whether there is sufficient evidence to support a finding, had a finding been made by the trial court, but rather whether the lack of a finding altogether requires reversal. Walker and Whitfield unequivocally hold that it does. We do not have authority to rewrite the statute or overrule the supreme court. Were the issue a question of whether there was sufficient evidence to support such a finding, Eutsey might control.[3]

By our opinion in this case and Anderson we do not mean to suggest or require that the state jump through some useless or impossible hoop so that the court can make the required finding. In our opinion the State's burden of going forward with sufficient evidence to support the required finding is minimal. As the Supreme Court's opinion in Eutsey makes clear, hearsay evidence is sufficient. Although we are not actually faced with the issue in this case, since we are remanding this matter for resentencing we offer the following guidance to the trial court. We believe that proof of the prior convictions such as by

---

[2] The supreme court reaffirmed Walker a year later in State v. Whitfield, 487 So.2d 1045, 1046 (Fla. 1986), stating that without the requisite statutory findings the sentence is illegal.

[3] The dissent also relies on Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1986). We recede from Myers to the extent it holds that the findings set forth in section 775.084(1)(a) are not required or the failure to make them is harmless.

introduction of duly certified copies of the judgments is sufficient evidence to meet the state's burden and shift the burden of proof to defendant. See State v. Davis, 203 So.2d 160 (Fla. 1967). That case held that in proving possession of a weapon by a convicted felon, the state's burden with regard to the prior conviction is discharged when a record of the prior conviction is placed in evidence; thereafter the defendant must establish the invalidity of the conviction. Id. at 163. We believe that if Walker and Eutsey are construed together the same rule of law results. Once the state puts into evidence competent proof of the prior conviction, the trial court can presume it to still be valid, absent contrary evidence from the defendant, and that presumption is a sufficient basis 'for the trial court to' find that the conviction has not been set aside. As in Anderson, we certify the following question to the supreme court 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?

We reverse appellant's habitual offender sentences and remand this matter to the trial court for further proceedings consistent with this opinion.

ERVIN, SMITH, SHIVERS, WIGGINTON, ZEHMER and MINER, JJ., CONCUR.
ALLEN, J., DISSENTS WITH OPINION IN WHICH BOOTH, BARFIELD, WOLF, KAHN and WEBSTER, JJ., CONCUR.

1-6

ALLEN, J., dissenting.

The appellant does not now assert that his conviction of a predicate offense was ever set aside and he did not make that assertion at the sentencing hearing in the trial court. Although Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1991), supports the appellant's claim of error, I would recede from Anderson, affirm the appellant's sentences, and hold that when a defendant has not asserted the affirmative defense referred to in section 775.084(1)(a)4, a trial judge does not reversibly err by failing to make a finding of fact under that subparagraph before imposing a habitual felony offender sentence.

The supreme court in Parker v. State, 546 So.2d 727 (Fla. 1989), and Eutsey v. State, 383 So.2d 219, 226 (Fla. 1980), held that the findings mandated by section 775.084 must be made on the record in a reported judicial proceeding. The court again stressed the importance of the findings in Walker v. State, 462 So.2d 452, 454 (Fla. 1985).

Interpreting Parker and Walker, we held in Anderson that a trial court committed reversible error when it failed *to* make the findings specified in 775.084(1)(a)3 and 4. On rehearing, the state argued that the trial court is obligated to make the section 775.084(1)(a)3 and 4 findings only where the defendant has affirmatively raised the argument that a predicate conviction has been pardoned or set aside. The state relied upon Eutsey, which held that the matters referenced in section 775.084(1)(a)3 and 4 are affirmative defenses *to* be raised by the defendant. We

rejected the state's rehearing motion primarily because the statute appears *to* require the referenced findings in mandatory terms.

In my view, Anderson is not a proper application of the statute in light of the supreme court's Eutsey decision. 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.

Walker explains that the statute requires findings *of* fact prior to imposition of a habitual felony offender sentence in order to "enable meaningful appellate review *of* these types of sentencing decisions." Walker, 462 So.2d at 454. 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.

Finally, even if the statute is construed to require a section 775.084(1)(a)4 finding under the circumstances presented here, any failure to make the finding before imposing a habitual felony offender sentence is necessarily harmless error. *See* Myers v. *State*, 499 So.2d 895 (Fla. 1st DCA 1986)("[T]he 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 by the record.") In light of the Eutsey decision and the appellant's failure to assert that a predicate conviction has been set aside, it might be said that the record in this case also provides support for a finding that the appellant's conviction has not been set aside. In any event, it is clear that a contrary finding is precluded. Under these circumstances, any error in failing to make a finding under section 775.084(1)(a)4 could not have affected the trial court proceedings.

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,568

MICHAEL C. KNICKERBOCKER,

Respondent.

_____/

APPENDIX D

Letter from the Office of Executive Clemency

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.
suits 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

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,568

MICHAEL C. KNICKERBOCKER,

Respondent.

APPENDIX E

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

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, control 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 fcr 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. . A pted September 10, 1975, I e 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.