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FILED

SID J. WHITE

NOV 6 1992

CLERK, SUPREME COURT

By ____________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO.: 80,661

DERRICK CHARLES LARRY,

Respondent.

______________________________/

PETITIONER'S BRIEF ON MERITS

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<u>OTHER AUTHORITIES</u>

PRELIMINARY STATEMENT

The jurisdictional question before this court is the "same question certified in Anderson [592 So.2d 1119 (Fla. 1st DCA 1992)]" (slip p.2). The same issue is present in Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992). Anderson and Hodges are pending before this court as case no. **79,535 and** no. **79,728;** respectively. As **of** October 1992, there were approximately 65 cases pending in the First District that include the issue raised by the Anderson question.

STATEMENT OF THE CASE AND FACTS

Larry was convicted by a jury[1] for attempted first degree murder, aggravated battery, burglary of a dwelling with an assault, and robbery with a deadly weapon; all as charged in the information. (R 11-12). He was sentenced as an habitual felon to sentences **of 30**, 15, **30 and 30** years; respectively, on counts I-IV. The sentences are concurrent. (R **183-9, 672-78).**

At sentencing the court referenced the **PSI** report, the guidelines scoresheet (R 191), and the stipulated exhibits (R 125-47) showing Larry's predicate felony convictions. (R 672-3). Larry was declared to be an habitual offender as to each count.

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[1] The verdicts were inadvertently omitted from the record on appeal. The First District granted the State's motion to supplement by order dated November 22, 1992. That order accepted the State-supplied copy of the verdicts, which are attached as Appendix **A**.

Id. The trial court did not expressly find that Larry had received a pardon or set aside as to any of his predicate felony convictions.

The First District affirmed Larry's convictions without comment. (slip op., p.1) [2] That court reversed his sentence as an habitual felon, remanded for resentencing, and certified the "same question certified in Anderson."[3] (slip op., p.2).

The opinion below was rendered September 30, 1992; the State filed its notice to invoke this court's discretionary jurisdiction on October 21. By order dated October 26, this court postponed its jurisdictional decision and required briefs on the merits.

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[2] The opinon below is attached as App. B.

[3] The question certified in Anderson reads

> 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 oK set aside, in that they are "affirmative defenses available to [a defendant]," Eutsey at 226, relieve the trial court of its statutory obligation to make findings regarding those factors, if the defendant does not affirmatively raise, as a defense, that the qualifying convictions provided by the state have been pardoned or set aside?

Anderson, 592 So.2d at 1121.

SUMMARY OF ARGUMENT

In Eutsey v. State, 383 So.2d 219 (Fla. 1980) this court construed the 1977 habitual felon statute, and expressly declared that the presence of a pardon or set aside as to an habitual felon's predicate offenses was an affirmative defense. Id. at 226. The corresponding language of the current habitual felon statute has not changed in substance. Many habitual felon sentences have been imposed relying on Eutssy. Since the relevant statutory language has not changed, this court must not change its interpretation.

The state does not have to prove, and the trial court does not have to find, that unraised affirmative defenses do not exist. Eutsey. The certified question must be answered the affirmative, and the opinion below reversed; thereby upholding Larry's sentence.

ARGUMENT

ISSUE I

WHETHER THE STATE **MUST** SHOW, AND THE **TRIAL COURT FIND, THE** ABSENCE OF A **PARDON** OR SET-ASIDE AS TO *AN* HABITUAL FELON'S PREDICATE **OFFENSES;** WHEN NEITHER **IS** RAISED AS AN AFFIRMATIVE **DEFENSE**

The First District declared that a trial court, when sentencing an habitual felon, must expressly find the absence of a pardon or set-aside as to the felon's predict convictions. (slip op., p.1-2). It did so despite the fact that the existence of a pardon or set aside was expressly declared to be an affirmative defense by this court. Eutsey, supra at 226.

In Eutsey, this court construed §775.084 (1)(a) and (b), Florida Statutes (1977), the definitions of "habitual felony offender" and "habitual misdemeanant," respectively. Both definitions contained subparts that specified:

> The defendant has not received a pardon for any felony oK other qualified offense that is necessary for the operation of this section' and
>
> A conviction of a felony, misdemeanor, or other qualified offense necessary to the operation of this section has not been set aside in any post conviction proceeding,
>
> * * * *
>
> The defendant has not received a pardon on the ground of innocence for any crime that is necessary for the operation of this section; and
> A conviction of a crime necessary to the operation of this section has not been set aside in any post conviction proceeding.

Id. at 221-2, note 1. The 1977 statute [§775.084(3)(d)] also provided:

> Each of the findings required as the basis for such sentence should be found to exist by a preponderance of the evidence ....

Simple comparison of the 1977 statutory provisions and the 1988 statute under which Larry was sentenced[4] reveal that there has been no substantive change as to the requirements that the defendant not have received a pardon or set aside. More significant, the 1977 statutory requirement of findings by the trial court, still codified as §775.084(3)(d), has not been changed at all.

In short, there is no substantive difference between the 1977 and 1988 statutes as to the presence or absence of a pardon or set aside, and the findings required of the trial court. Consequently, this court must not change its interpretion, and must again hold that the presence of a pardon or set aside is an affirmative defense which must be raised by the defendant. Glass v. State, 574 So.2d 1099, 1102 (Fla. 1991) ("[A] court should be consistent in its construction of statutes and should establish a stable interpretation upon which affected parties should be entitled to rely.") (citations omitted). See Burdick v. State, 594 So.2d 267 (Fla. 1992) ("It is a well-settled rule of statutory construction that when a statue is reenacted, the

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[4] Larry's crimes were committed on September 1, 1989. (R 11-12).

judicial construction previously placed on the statute is presumed to have been adapted in the reenactment.").

Glass is particularly instructive. There, the issue was whether split probationary sentences were authorized by **9921.187**, Florida Statutes **(1989).** This court expressly acknowledged that Glass made a legitimate argument against statutory authority. Id. at 1101-2. However, the court recognized earlier decisions had found probationary split sentences to be authorized by law. Id. at 1101. Significantly, the court noted that the sentencing statute addressed in the earlier decisions "contained essentially the same wording" (id.) as the statute at issue.

As in Glass, the statue at issue here contains essentially the same wording as the statute at issue in Eutsey. Following Glass, this court must establish a stable construction of s775.084, and reverse the opinion below.

This issue was not raised by Larry before the trial court or the First District. Until recently, this would have barred appellate review. See, Eutsey v. State, **383** So.2d 219, 226 (Fla. 1980) (There is no merit in Eutsey's contention "that the state failed to prove 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"). Jefferson v. State, **571** So.2d **70** (Fla. 1st **DCA** 1990) (It is unnecessary to make the requisite statutory findings of fact and the defendant may waive right to require proof of criteria relating to habitual felony offender). Likely v. State, 583 So.2d 414 (Fla. 1st DCA 1991); Caristi v. State, 578 So.2d 769 (Fla. 1st DCA 1991).

Later, a panel of the First District revisited the issue and determined that it was fundamental error cognizable for the first time on appeal if the trial court failed to explicitly find that the predicate convictions had not been pardoned or set aside in post-conviction proceedings even if the defendant had not raised these affirmative defenses. Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1992).

The Anderson panel, on rehearing, recognized that this Court had explicitly held in Eutsey that the claims that the predicate conviction had been pardoned oK overturned by post-conviction proceeding were affirmative defenses which the defendant had to prove. In an awkward attempt to avoid this definitive holding, the Anderson panel reasoned that the trial court was still required to rule that the unraised affirmative defenses did not exist even though they had not been raised and the state was not required to disprove them, However, in a near acknowledgment that it had not successfully distinguished the explicit holding in Eutsey, the panel certified the following question of great public importance to the Florida Supreme Court.

> Does the holding in Eutsey v. State, 383 So.2d 219 (Fla. 1980) that the state has no burden of proof as to whether the convictions necessary for habitual felony offender sentencing have been pardoned or set aside, in that they are "affirmative defenses

> available to [a defendant]," Eutsey at 226, relieve the trial court of its statutory obligation to make findings regarding those factors, if the defendant does not affirmatively raise, as a defense, that the qualifying convictions provided by the state have been pardoned or set aside?
> Anderson. 592 So.2d at 1121.

A later panel of the First District commented that the habitual offender statute under which Eutsey was decided was indistinguishable in its relevant provisions from the current statute but felt constrained to follow the Anderson decision. However, recognizing that there was a serious analytical flaw in holding that a trial court must make factual findings an affirmative defenses which neither party has specifically addressed, and for which there may be no direct evidence; the second panel modified Anderson by adopting a corollary holding that the burden rests upon the state to present evidence sufficient to enable the trial court to make the findings that the affirmative defenses do not exist; i.e., there has been no pardon and the conviction has not been overturned in post-conviction proceedings. Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992).

Most recently, the First District read Eutsey in conjunction with this court's later decision in Walker,[5] to hold (by a vote of 7 to 6) that the trial court must make "a specific finding that the defendant meets each of the criteria of the statute," Jones v. State, 17 FLW D 2375, 2376 (Fla. 1st DCA Oct. 14, 1992)

[5] Walker v. State, 462 So.2d 452 (Fla. 1985).

(en banc), The large dissenting bloc relied on a common-sense reading of Walker, to conclude "there is no need for findings relating to issues which were not subject to proof below." Id. at 2377. The dissent also concluded any error was harmless. Id.

Although Jones is the most recent case, its rationale adds nathing to Anderson and Hodges. The remainder of the State's argument will be couched in terms of those decisions.

The Hodges panel was obviously correct in interpreting Anderson as necessarily requiring the corollary holding. Nevertheless, the corollary holding that "the burden rests upon the state to present evidence sufficient to enable the trial court to make such findings" directly and expressly conflict with the controlling holding in Eutsey at 226:

> 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.

Thus, Hodges removes even a modicum of compliance with the case law from this court. Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973) ("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."]

The Anderson/Hodges holdings are also contrary to the entire rationale of Eutsey in upholding the constitutionality of the statute. 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. 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. See, Myers v. State, 499 So.2d 895, 897 (Fla. 1st DCA 1986), *jurisdiction discharged,* 520 So.2d 575 (Fla. 1968) (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)").

By itself, the above analysis shows Anderson and Hodges were wrongly decided. However, there are still other flaws and fallacies which deserve attention. One of the characteristics of affirmative defenses is that they represent exceptions to the norm. For example, the overwhelming majority of homicides are not justifiable as self defense. Several propositions flow from this characteristic. Affirmative defenses are rarely at issue, so that evidence showing their absence would be irrelevant in the overwhelming majority of cases. Burdening the trial with irrelevant evidence would serve no useful purpose, needlessly expand the length and cost of trial, and tend to confuse the proceedings, even to the extent of causing reversible error.

The only party who can claim an affirmative defense is the defendant. It would be improper, probably 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.

Who has the burden of proving that a predicate conviction has been pardoned or overturned by post-conviction proceedings? Eutsey contended that the trial court's finding that no pardon or post-conviction reversal had been entered was not supported by the record and that the state had the burden of proof. This Court rejected that argument by holding that the defendant had the burden of raising and proving these affirmative defenses. Eutsey clearly stands for the propositions that: (1) introduction of uncontradicted certified copies of judgments **or** a PSI showing such convictions satisfy the preponderance of evidence test for showing that predicate felonies exist, and (2) failure to raise the affirmative defenses waives any issue of whether the predicate felonies have been pardoned or set aside. This holding of waiver was consistent with settled law based on a common sense understanding of what is involved in proving or disproving affirmative defenses.

Pardons are granted by the Governor and Cabinet sitting as the Executive Clemency Board. See art. IV, §8, Fla, Const.; Ch. 940, Fla. Stat. A pardon is an act of grace by which the executive branch, based on exceptional reasons, excuses punishment imposed at the direction of the legislative and judicial branches, and the community through the jury, for criminal acts against society. Given the nature of a pardon and the constitutional limitations in article IV, section 8, the criteria for applying for, let alone obtaining, a pardon are exceptionally stringent. The stringency of the Rules of Executive Clemency of Florida confirm what common sense and legal experience suggests. Thus, a comparison of the eligibility requirements for applying for a pardon under the Rules[6] and the eligibility requirements for an habitual offender under §775.084 is very instructive. Section 5.A of the current Rules provides:

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

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6 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). The previous rules were last amended on 18 September 1986. The current rules were last amended on 18 December 1991 and became effective 1 January 1992.

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.)

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

There are two ways to prove or disprove that a pardon has been granted: (1) introduce affirmative evidence that a pardon has been granted, i.e., the pardon or (2) introduce negative evidence tending to show that a pardon has not been granted. Because the law strives for rationality and certainty, approach one, taken by Eutsey, places the burden of proof on defendants by requiring them to affirmatively prove that they have received a pardon. This places practically no burden on the courts or the parties because pardons are so rare. 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, comporting with common sense, are intended to bring relevant issues to the fore so that the parties may fairly controvert them. Imagine, if possible, the difficulty of affirmatively proving that no conceivable alibi exists in the absence of a claim pursuant to rule 3.200. The number of persons required to testify as to the absence of an alibi is limited only by the population of the world.

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

These same general factors discussed above also apply to proving or disproving that a predicate conviction has been overturned in a post-conviction proceeding. For obvious reasons, the burden of bringing forth colorable **evidence** that a predicate felony has been pardoned or set **aside** is inconsequential for the defendant involved. Under the provisions of the habitual offender statute, defendants are given advance notice of the state's intent to seek habitual offender sentencing, The purpose of this notice is to give the defendant an opportunity to challenge the predicate convictions by showing 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.

The Eutsey holding also reaffirms the settled presumption of validity accorded to final judgments and sentences. A judgment of conviction is presumed to be correct until reversed. Stevens v. State, 409 So.2d 1051 (Fla. 1982). **A** recent example can be found in State v. Beach, 592 So.2d 237 (Fla. 1992). By affidavit, Beach claimed he had not been afforded counsel for prior final convictions. The trial court ruled that the affidavit was insufficient to shift the burden to the state but the First District held otherwise. This Court reversed because the affidavit was simply insufficient to overcome the presumption that the prior convictions were valid and that constitutional protections had been afforded.

The same principle applies here. There is no rational reason to require the state to reprove the continued validity of prior convictions every time they are used in sentencing. This would be incredibly burdensome on all concerned, including defendants. It would also be totally pointless in that, as Eutsey holds, there is no due process problem in requiring a defendant to come forth with a challenge to the hearsay which is commonly used in all sentencing procedures. The question naturally arises, if this Court requires the state to sua sponte prove the current validity of every prior conviction used in habitual offender sentencing, why is it not also necessary to prove the current validity of every conviction on the PSI or sentencing guidelines scoresheet?

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. It 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.[7]

Section **924.33** applies here. 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 appellant cannot n good faith allege that his predicate felonies have been pardoned or set aside or that he has even a colorable reason to believe so.

The Anderson and Hodges holdings that the state must show, and the trial court must find, that the predicate felonies have not been pardoned or set aside also conflict with case law from other districts and this district. 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

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7 See, Ross v. Moffitt, 417 U.S. 600, **611, 94** S.Ct. 2437, **41** L.Ed.2d 341 (1974)("[I]t is clear that the State need not provide any appeal at all. McKane v. Durston, **153** U.S. 684, **38 L.Ed** 867, 14 S.Ct. **913** (1894)"); Abney v. United States, 431 U.S. 651, 656, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977)("It is well settled that there is no constitutional right to an appeal;" and "The right of appeal as we presently know it in criminal cases, is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of the applicable statute"); Evitts v. Lucey, 469 U.S. 387, 393, 105 S.Ct. 830, **83** L.Ed.2d 821 (1985)("Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. McKane v. Durston, 153 U.S. 684, 38 L.Ed **867, 14** S.Ct. 913 (1894)."); and State v. Creighton, 469 So.2d 735, **739 (Fla. 1985)("Cases** decided after the 1972 revision of article V [of the Florida Constitution] still recognize the right of appeal as a matter of substantive law controllable by statute not only in criminal cases but in civil cases as well. [cites omitted].").

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:

> 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. (e.s.). See Adams v. State, 376 So.2d 47, 58 (Fla. 1st DCA 1979):

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

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 it was held that a defendant could waive any or all of the findings and hearings prerequisite to sentencing as part of a plea bargain. See also, Robinson v. State, 551 So.2d 1240, 1241 (Fla. 1st **DCA** 1989), where the First District held that the failure of the defendant to challenge hearsay on prior predicate convictions waived any requirement to corroborate such hearsay, and that the trial court was only required to determine that a defendant was an habitual felon by having committed a predicate felony within five years of his present offense.

More recently, the Second **DCA** in Baxter v. State, 599 So.2d 721 (Fla. 2d **DCA** 1992), consistent with its decision in Stewart on which this Court relied in Myers, again analyzed this issue and concluded on the authority of Eutsey that the affirmative defenses of pardon and collateral set aside had to be raised by the defendant and that the state and trial court were not required to address such unraised defenses. The court certified conflict with both Anderson and Hodges. Bonner v. State, 599 So.2d 768 (Fla. 2d DCA 1992). Contra, Banes v. State, 597 So.2d 975 (Fla. 4th DCA 1992), where the court, without analysis except citation to factually inapposite cases and Anderson, followed Anderson and certified the Anderson question. The court did not cite or recognize Hodges.

CONCLUSION

The certified question must be answered affirmatively and the opinion below reversed; thereby affirming Larry's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Mr. Steven Schenck, Counsel for Respondent, 309 N.W. 1st Street, Gainesville, Florida 32601, this 6th day of November, 1992.

Charlie McCoy

CHARLIE MCCOY
Assistant Attorney General

APPENDIX A

VERDICT

FILED IN OPEN COURT
9-28, 19 90
[signature] D.C.

IN THE CIRCUIT COURT OF FLORIDA
THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY

STATE OF FLORIDA
Plaintiff,
VS.

DERRICK CHARLES LARRY,
Defendant.

CASE NO.: 89-3925-CF

DIVISION: II

Filed before me Sept 28, 1990 [signature]

VERDICT

WE THE JURY, find as follows as to the defendant Derrick Charles Larry in this case:

AS TO COUNT I:

✓ 1. The defendant is guilty of Attempted First Degree Murder as charged in Count I of the Information.

____ a. The defendant is guilty of Attempted Second Degree Murder, a lesser included offense.

____ b. The defendant is guilty of Attempted Third Degree Murder, a lesser included offense.

____ c. The defendant is guilty of Aggravated Battery, a lesser included offense.

____ d. The defendant is guilty of Battery, a lesser included offense.

____ 2. The defendant is not guilty.

AS TO COUNT II:

✓ 1. The defendant is guilty of Aggravated Battery as charged in Count II of the Information.

____ a. The defendant is guilty of Attempted Aggravated Battery, a lesser included offense.

____ b. The defendant is guilty of Battery, a lesser included offense.

____ 2. The defendant is not guilty.

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APPENDIX B

Opinion Below

90-112006-TCR
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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

DERRICK CHARLES LARRY,	*	NOT FINAL UNTIL TIME EXPIRES TO
Appellant,	*	FILE MOTION FOR REHEARING AND
	*	DISPOSITION THEREOF IF FILED.
v.	*	CASE NO. 90-3237
STATE OF FLORIDA,	*	
Appellee.	*	

Docketed
10-1-92
Florida Attorney General

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Opinion filed September 30, 1992.

Appeal from the Circuit Court for Alachua County
Elzie S. Sanders, Judge.

Steven Scheck, Gainesville, for appellant.

Robert A. Butterworth, Attorney General; Charlie McCoy, Assistant Attorney General, for appellee.

PER CURIAM.

After review of the record and briefs in this matter, we affirm appellant's convictions of attempted first degree murder, aggravated battery, burglary of a dwelling with an assault, and robbery with a deadly weapon. The trial court sentenced appellant as an habitual offender without making any record findings that appellant had not received a pardon as to his prior convictions or had not had any of these convictions set aside in any post-conviction proceeding. This court has held that such findings are required by section 775.084, Florida Statutes (1989). Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1991). The case must therefore be remanded for resentencing, at which time the trial court may resentence Mr. Larry as an habitual offender provided the requisite statutory findings are made by the court and supported by the evidence. We certify to the supreme court the same question certified in Anderson, supra.

SHIVERS, ZEHMER and KAHN, JJ., CONCUR.