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FILED

SID J. WHITE

FEB 8 1993

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 80,938

GUILLERMO TRUJILLO-PENTATE,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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DOES THE HOLDING IN <u>EUTSEY V. STATE</u> , 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.	
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :
 Petitioner, :
v. :
 CASE NO. 80,938
GUILLERMO TRUJILLO-PENTATE, :
 Respondent. :
_____ :

RESPONDENT'S BRIEF ON THE MERITS

I STATEMENT OF THE CASE AND FACTS

Respondent agrees with petitioner's statement of the case and facts.

II SUMMARY OF THE ARGUMENT

Petitioner's argument in this cause appears to have been adopted by this Court in State v. Kenneth Rucker, Case No. 79,932, opinion filed February 4, 1993.

III ARGUMENT

ISSUE (Certified Question)

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.

Petitioner argued below that the trial court erred by making no specific finding that the convictions upon which his classification as an habitual felony offender was based had not been pardoned or set aside. That argument was based on the First District Court's opinion in Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1991), review pending, Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992), review pending. See also Jones v. State, So.2d, 17 FLW D2375 (Fla. 1st DCA Oct. 14, 1992), review pending.

Last Thursday, February 4, 1993, however, this Court decided the "Anderson" issue in State v. Rucker, Case No. 79,932. In Rucker, this Court answered the above certified question in the negative but held that where the state has introduced unrebutted evidence of the defendant's prior convictions, a court may infer that there has been no pardon or set aside. In addition, this Court found in Rucker that a trial court's failure to make the statutory findings is subject to harmless error analysis.

Since certified judgments and sentences were introduced without objection in this case and the trial court made findings that "the prior convictions constitute a statutory requirement - or the statutory requirement as classification as an habitual felony offender" (T-197), it appears that Rucker v. State controls. Accordingly, respondent will not repeat the argument which this Court has apparently rejected.

IV CONCLUSION

For the reasons stated, this Court's recent decision in State v. Rucker appears to control the issue presented here and suggests that this Court will quash the decision of the district court and remand for proceedings consistent with the Rucker opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Marilyn McFadden, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to respondent, Guillermo Trujillo-Pentate, #122488, Post Office Box 221, Raiford, Florida, 32083, this 8 day of February, 1993.

Nancy A Daniels

NANCY A. DANIELS