IN THE SUPREME COURT OF FLORIDA

MARBLEE SEABROOK,

Petitioner,

vs. CASE NO. 80,953

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
SENIOR ASSISTANT ATTORNEY GENERAL
FLA. BAR #325791

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THE CAPITOL
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904/488-0600

COUNSEL FOR RESPONDENT

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OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The state supplements Petitioner's statement with the following.

Counsel for petitioner Seabrook first filed a brief in the district court pursuant to Anders v. California, 386 U.S. 738 (1967) acknowledging that no arguably reversible errors occurred but suggesting that the trial court failed to expressly find that the predicate five felonies for habitual felony sentencing had not been set aside or pardoned and thus should be reversed. Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1992), review pending, Case No. 79,535. (Appellant's initial brief of 20 March 1992.) Appellate counsel then filed another initial brief, with the permission of the district court, raising the Anderson issue and, for the first time, a claim that section 775.084, Florida Statutes (1989) was inequitable, irrational, vague, subject to arbitrary and capricious application, that it provides no due process, and violates the separation of powers. (Appellant's initial brief of 7 April 1992.) The district court affirmed but nevertheless certified the purported question of great public importance from Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992), review pending, Case No. 79,728. The state petitioned for rehearing arguing that the certified question on the constitutionality of section 775.084 was unnecessary in view of the numerous decisions of this Court upholding the plenary authority of the Florida Legislature to impose habitual felon sentencing. Appellant Seabrook opposed, and the district court

denied, the state's petition for rehearing. Copies of the parties briefs and petitions below, and the district court opinion are in the appendix.

SUMMARY OF ARGUMENT

1. The constitutionality of section 775.084 was not raised in the trial court. Only the facial validity of the statute could be raised on appeal. The district court below erred in addressing claims not grounded on facial overbreadth and facial vagueness.

2. This Court should not reach the issues of due process, equal protection, and separation of powers but, if it does, the claims have been consistently and specifically rejected by previous decisions of this Court.

ARGUMENT

ISSUE I

DID THE DISTRICT COURT ERR IN ADDRESSING AND CERTIFYING ISSUES NOT PROPERLY COGNIZABLE UNDER A CHALLENGE OF FACIAL CONSTITUTIONALITY?

Petitioner was sentenced as an habitual (nonviolent) felon under section 775.084(1)(a), Florida Statutes (1989). No objections were entered and no sentencing issues were preserved. S 12-22. Both here and in the district court below, petitioner raises a broad challenge to the constitutionality of section 775.084(1)(a), as applied to him and to others. This broad challenge is contrary to the scope of a challenge permitted to the facial validity of a statute under case law from both this Court and the United States Supreme Court.

There are two permitted prongs to a facial validity challenge: overbreadth and vagueness. Sandstrom v. Lender, 370 So.2d 3 (Fla. 1979). Justice Overton, for this Court, set out the permitted scope of these two prongs in Southeastern Fisheries Association, Inc. v. Dept. of Natural Resources, 453 So.2d 1351, 1353 (Fla. 1984).

> Too often, courts and lawyers use the terms "overbroad" and "vague" interchangeably. It should be understood that the doctrines of overbreadth and vagueness are separate and distinct. The overbreadth doctrine applies only if the legislation "is susceptible of application to conduct protected by the First Amendment." Carricarte v. State, 384 So.2d 1261,

> 1262 (Fla.), cert. denied, 449 U.S. 874, 101 S.Ct. 215, 66 L.Ed.2d 95 (1980) (citing Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970)). See also McKenney v. State, 388 So.2d 1232 (Fla. 1980); State v. Ashcraft, 378 So.2d 284 (Fla. 1979). See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv.L.Rev. 844 (1970). The vagueness doctrine has a broader application, however, because it was developed to assure compliance with the due process clause of the United States Constitution.
>
> * * * *
>
> A vague statute is one that fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement.

Id.

Overbreadth is a standing doctrine which permits parties in cases involving the first amendment to argue that the statute is invalid because of its effect on the first amendment rights of others not present before the court. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Similarly, "an attack . . . as unconstitutionally overbroad will not lie absent an assertion that the provision proscribes constitutionally protected speech or activities. [cites omitted.]" Sandstrom v. Lender, 370 So.2d 3, 5 (Fla. 1979).

The United States Supreme Court has spoken similarly in Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494-495, 102 S.Ct. 1186, 71 L.Ed.2d 362, 369 (1982).

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment if impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

Id. (footnotes omitted).

In footnote 5 to the above, the Court made it clear that a facial vagueness challenge faces an exceptionally high hurdle: "A 'facial' challenge in this context, means a claim that the law is "invalid in toto-and therefore incapable of any valid application.' [cite omitted]." Id.

Petitioner does not argue here, and did not argue in the district court, that his or anyone's first amendment rights are implicated by the recidivist statute, section 775.084(1)(a), or sentence. Thus, there can be no challenge for overbreadth. Southeastern Fisheries, Hoffman Estates, Sandstrom.

For similar reasons, petitioner, except for labeling the challenge as facial, has not in substance challenged the facial vagueness of the statute. Sections 775.084(1)(a), (3) and (4)

are not merely unmistakably clear; they unmistakably apply to petitioner who unquestionably meets the criteria for habitual felony sentencing. Thus, as a matter of settled law, petitioner cannot argue that the statute might be unconstitutionally applied to some one else. Southeastern Fisheries, Sandstrom, Hoffman Estates.

This Court should hold that the mislabeled facial validity challenges here and in the district court were not cognizable for the first time on appeal.

The state acknowledges that the above analysis relying on the settled case law of this Court and of the United States Supreme Court may not survive this Court's recent expansive dicta in State v. Johnson, Case No. 79,150 & 79,204 (Fla. January 14, 1993). There, this Court arguably states that the constitutionality of any statute involving a liberty interest, i.e., any criminal statute, may be raised for the first time on appeal to determine if the statute has been unconstitutionally applied to the defendant. As this is written, the state is seeking rehearing and clarification of the Johnson decision.

ISSUE II

ARE THE PROVISIONS OF SECTION 775.084 APPLICABLE TO HABITUAL NONVIOLENT FELONIES UNCONSTITUTIONAL?

The district court affirmed petitioner's sentence as an habitual nonviolent felon but inexplicably certified the question from Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992), review pending, Case No. 79,728, concerning the constitutionality of the habitual violent felony statute. Although it would appear that the certified question is inapposite and has been answered countless times, the district court rejected without explanation the state's petition to withdraw the certified question. (The state notes that petitioner's brief here at page i also refers to the "violent" felony statute.)

If the question refers to the violent felony statute certified in Hodges, it should be answered no. Ross v. State, 601 So.2d 1190 (Fla. 1992); Tillman v. State, 17 Fla. L. Weekly S707 (Fla. November 19, 1992); Funchess v. State, 17 Fla. L. Weekly S719 (Fla. November 25, 1992); Warren v. State, 17 Fla. L. Weekly S719 (Fla. November 25, 1992); Simmons v. State, 17 Fla. L. Weekly S719 (Fla. November 25, 1992); Merriweather v. State, 17 Fla. L. Weekly S719 (Fla. November 25, 1992); Raulerson v. State, 17 Fla. L. Weekly S720 (Fla. November 25, 1992; Becker v. State, 17 Fla. L. Weekly S738 (Fla. December 3, 1992); Reeves v. State, 17 Fla. L. Weekly S739 (Fla. December 3, 1992); Hall v. State, 17 Fla. L. Weekly S739 (Fla. December 3, 1992); Scott v. State, 17 Fla. L. Weekly S740 (Fla. December 3, 1992); Jolly v.

State, 17 Fla. L. Weekly S740 (Fla. December 3, 1992); Perkins v. State, 18 Fla. L. Weekly S79 (Fla. January 21, 1993).

If the question is addressed to the habitual nonviolent statute, it should be answered no on the authority of relevant language in Ross, Tillman, Eutsey v. State, 383 So.2d 219 (Fla. 1980), Reynolds v. Cochran, 138 So.2d 500 (Fla. 1962), Washington v. Mayo, 91 So.2d 621 (Fla. 1956), Cross v. State, 96 Fla. 768, 119 So. 380 (1928), recognizing the settled authority of the Florida Legislature to define criminal offenses and to prescribe the punishment thereof to criminal recidivists. See, particularly, Cross specifically holding that greater punishment for recidivists is not a violation of constitutional provisions against ex post facto, double jeopardy, "cruel and unusual punishment," claims and rights to jury trial, equal protection, and due process. See, also, Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), review denied, Case No. 76,482 (Fla. 1990) and Love v. State, 569 So.2d 807 (Fla. 1st DCA 1990) where the district court canvassed case law and upheld the constitutional validity of the statute.

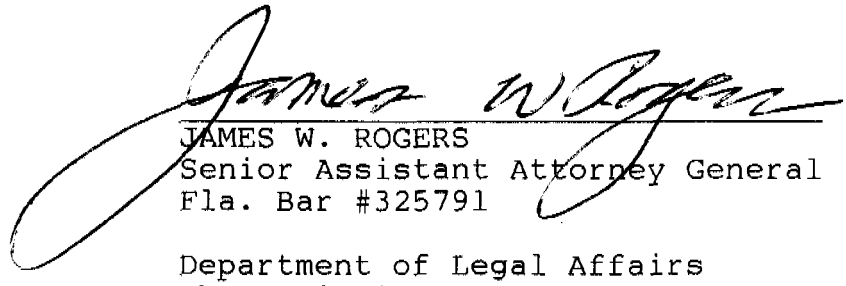
This Court should not reach the merits of the improper challenge to the facial constitutionality of the statute but, if it does, the district court should be affirmed.

CONCLUSION

The district court should be affirmed without reaching the merits on the basis that the challenge to the facial constitutionality was improperly grounded on non-cognizable arguments. Alternatively, if the merits are reached, the certified question should be answered no.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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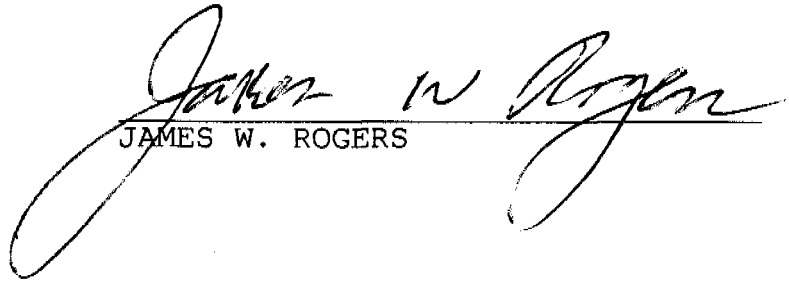
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Tallahassee, Florida 32301, this 11th day of February, 1993.



JAMES W. ROGERS

IN THE SUPREME COURT OF FLORIDA

MARBLEE SEABROOK,

Petitioner,

vs. CASE NO. 80,953

STATE OF FLORIDA,

Respondent.
_____/

APPENDIX TO

RESPONDENT'S BRIEF ON THE MERITS

DOCUMENT

91-0870-TLR

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MARBLEE SEABROOK,	:	
Appellant,	:	
v.	:	CASE NO. 91-0939
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR LEVY COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR APPELLANT

4/9/92

APPENDIX A

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TABLE OF CITATIONS

STATUTES

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MARBLEE SEABROOK,

Appellant,

v. CASE NO. 91-0939

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Marblee Seabrook was the defendant in the trial court and will be referred to in this brief as "appellant," "defendant," or by his proper name. Reference to the volume of the record on appeal containing the pleadings and orders filed in this cause will be by use of the symbol "R" followed by the appropriate page number in parenthesis. Reference to the volume of the record containing a transcript of the jury selection, conducted February 18, 1991, will be by use of the symbol "J" followed by the appropriate page number in parenthesis. Reference to the volume of the record containing a transcript of appellant's jury trial, conducted February 22, 1991, will be by use of the symbol "T" followed by the appropriate page number in parenthesis. Reference to the volume of the record containing a transcript of the sentencing proceedings of March 25, 1991, will be by use of the symbol "S" followed by the appropriate page number in parenthesis.

II STATEMENT OF THE CASE AND FACTS

Count I of an amended information containing two charges alleged that appellant and Tammy Coleman, on January 25, 1990, sold or delivered to a confidential informant a controlled substance, cocaine, contrary to Section 893.13, Florida Statutes (1989). Count II alleged that appellant, on February 25, 1990, was in actual or constructive possession of a controlled substance, cocaine, contrary to Section 893.13, Florida Statutes (1989) (R 1).

Before trial, appellant filed a motion in limine seeking to prohibit the introduction of opinion testimony of Deputy Rudolph Dallas concerning the voice identification and/or personal identification from video or audio tape recordings of the transaction (R 30-34). Just before the commencement of trial, this motion was denied (T 3-9).

During jury selection, the state used peremptory challenges to excuse the only two black persons on the venire, Joyce Atkins and Roosevelt Woodley, Jr. The prosecutor indicated that he excused Woodley because he had a relative who was prosecuted for a drug offense. The prosecutor stated he struck Atkins because she is from the same town as appellant, and they have common friends. Defense counsel asserted that the excuse given for striking Atkins was insufficient. The trial court approved the reasons given by the prosecutor (J 30-34).

Appellant proceeded to a trial by jury. Aaron Edward Eagan, the first state witness, testified that on January 25, 1990, he functioned as a confidential informant for the Levy

County Sheriff's Department. Eagan testified that on January 25, 1990, both his person and his automobile were searched. Audio and video surveillance equipment were installed in his automobile. Eagan was instructed to go to a place called Jesse Pitts to make a crack cocaine buy. He was given $20 to pay for the cocaine. Eagan testified also that, for his services, he was paid $40.

Eagan drove to the Jesse Pitts' area. Two individuals, one of whom was appellant, approached Eagan's vehicle. Appellant handed an item to the second individual, a woman, who in turn handed it to Eagan. The item was the alleged crack cocaine. Egan gave the woman $20. After she received it, appellant requested the money from the woman.

Over a hearsay objection, Eagan testified that, after the two persons approached the vehicle, the woman asked him what he needed. Eagan told the woman that he wanted a "quarter", a street term for a $20 piece of crack cocaine. At this point, the woman turned to the defendant and reached out her hand. He placed an object in her hand, which she in turn gave to Eagan. Eagan gave the woman $20. Appellant asked the woman for his money, and as she turned away, he grabbed it from her. Thereafter, Eagan drove to the location where he had received the audio and video equipment. He gave the purchased cocaine to Investigator Johnny Smith (T 18-36).

At the conclusion of Eagan's testimony, the state moved to introduce the actual video tape into evidence. Defense counsel objected on the same grounds raised as to the co-defendants

statements, namely, that they were inadmissible hearsay. The trial court overruled the objection and the tape was admitted into evidence (T 57-58).

Investigator Johnny Smith of the Levy County Sheriff's Department testified that on January 25, 1990, he was involved with a controlled drug buy. After receiving suspected cocaine from a confidential informant, Aaron Eagan, it field-tested positive for cocaine. He then sealed the remaining cocaine.

Without objection, the cocaine was introduced into evidence (T 62-67).

Denise Holmquist, a crime laboratory analyst in the chemistry section of the FDLE, was deemed an expert in analyzing chemicals. She expressed the opinion that the substance purchased by Eagan on January 25, 1990, was cocaine (T 69-79).

Sgt. Rudolph Dallas of the Levy County Sheriff's Department testified that on January 25, 1990, he was involved in a controlled drug buy operation. He also testified that he knows appellant on a social basis. He used to cut appellant's hair, and has attended the same church as appellant and his family. From time to time, appellant's family would eat at Dallas' house, and at other times Dallas' family would eat at appellant's house. He has known appellant since he was a child. Dallas is familiar with the sound of appellant's voice and his facial appearance. Over renewed objection, Dallas testified that the person depicted on the video tape standing next to the woman who actually sold the cocaine to Eagan was appellant (T 69-90).

At the conclusion of Dallas' testimony, the state rested. Defense counsel moved for a judgment of acquittal on both charges. The trial court denied the motion as to Count I, but granted it as to Count II. After further argument, however, the trial court reversed its decision as to Count II, and denied the motion for judgement of acquittal as that charge (T 97-112).

The defense rested without presenting any evidence (T 113).

After argument of counsel and the trial court's instructions on the law, and after deliberation, the jury returned a verdict finding appellant guilty of sale of cocaine as charged in Count I of the information, and possession of cocaine as charged in Count II (T 52-53).

Appellant was adjudged guilty of both charges. The trial court deemed him to be a habitual felony offender and sentenced him to two, concurrent, five-year terms of imprisonment, with credit (S 1-22, R 101-106).

Notice of appeal was timely filed (R 99), appellant was adjudged insolvent, and the Public Defender of the Second Judicial Circuit has been designated to handle this appeal (R 112).

III CONCLUSION

THE UNDERSIGNED COURT-APPOINTED COUNSEL FOR APPELLANT IS UNABLE TO MAKE AN ARGUMENT IN GOOD FAITH THAT REVERSIBLE ERROR OCCURRED IN THE LOWER TRIBUNAL.

Upon review of the record and research of the applicable law, the undersigned is drawn to the conclusion that no good faith argument can be made that reversible error occurred below. Accordingly, this brief is being filed pursuant to Anders v. California, 386 U.S. 738 (1967).

The Court's decisions in Forrester v. State, 542 So.2d 1358 (Fla. 1st DCA 1989) and Smith v. State, 496 So.2d 971 (Fla. 1st DCA 1986) require the undersigned to address each judicial act to be reviewed identified by trial counsel.

The first judicial act to be reviewed concerns the denial of the defendant's motions for judgements of acquittal (R-94). Defense counsel moved for an acquittal at the close of the state's case (T-97-112). The defense did not present any evidence. Since the state's proof satisfies the appellate standard for assessing sufficiency of the evidence claims, this point cannot be argued before this Court in good faith. Tibbs v. State, 397 So.2d 1120 (Fla. 1981). See also Tingley v. State, 549 So.2d 649 (Fla. 1989).

The second judicial act questions the ruling of the trial court overruling appellant's objection to the state's use of peremptory challenges to exclude black jurors from the jury (R-94).

The record shows that the state used peremptory challenges to excuse the only two black persons on the venire, Woodley and Atkins. A brother of Woodley had been arrested in a case which the prosecutor said had "almost the same facts" as the instant case (J-16). Atkins stated that she knows appellant because he and she were from the same town, Williston. She had never had a conversation with the defendant but they do have some friends in common (J-17-18). When the trial court required the prosecutor to give reasons for the strikes, the prosecutor recited the prosecution of Woodley's brother, and the fact that appellant and Atkins were from the same community and had friends in common. The trial court expressly deemed these reasons race neutral, although he also characterized the one given with respect to Ms. Atkins as "so close." (J-30-32). Defense counsel stated he was sure that other persons on the venire were also from Williston, but that he had to check a list to make sure (J-33). Defense counsel did not apparently check the list or, at least, he never placed the results of such a check on the record. Thus, the record is silent on the question of whether other members of the jury were from Williston. Moreover, defense counsel did not move for a mistrial or seek to strike the venire after the trial judge approved the state's reasons.

Cases which support the view that the reason given for excusing Atkins is constitutionally invalid include Hicks v. State, 591 So.2d 662 (Fla. 4th DCA 1991) and State v. Slappy, 522 So.2d 18 (Fla.), cert. denied, 487 U.S. 1219 (1988).

The third, and last, judicial act to be reviewed identifies the denial of appellant's motion for a new trial (R-94). The motion for a new trial contains numerous grounds (R-56-58).

Grounds (1), (2), (3)(f), (3)(h), and (3)(i) of the motion for a new trial, that the evidence was insufficient, and that the trial court erred in allowing the state to excuse Ms. Atkins from the jury, have already been discussed.

The next allegation, (3)(a), in the motion for a new trial concerns the denial of a motion in limine requesting the exclusion of the testimony of Rudy Dallas (R-56).

Before trial, the defense filed a motion in limine to exclude testimony from Dallas that it was the defendant depicted on a videotape of the alleged drug transaction. The grounds alleged were that such testimony would invade the fact-finding function of the jury, and Dallas' status as a police officer would suggest past criminal activity on the part of the defendant (R-24-27). This motion was denied just prior to the start of trial (T-1-9), and was renewed when Officer Dallas testified (R-79-80). Dallas testified that he has known the defendant socially since appellant was a child and that, based upon this knowledge, it was appellant who was depicted on the video tape (T-86-90).

As to the ground alleging the fact that Dallas' occupation as an officer would suggest past criminal activity on appellant's part, cases that support the defendant's position include Edwards v. State, 583 So.2d 740 (Fla. 1st DCA 1991) and Hardie v. State, 513 So.2d 791 (Fla. 1st DCA 1991). As to the

ground alleging such testimony invades the fact finding domain of the jury, cases that support the defendant's position include Edwards, supra, and Ruffin v. State, 549 So.2d 250 (Fla. 5th DCA 1989).

The next ground alleged in the motion for new trial, (3)(b), was that the trial court erred in allowing the state to introduce statements of co-defendant Tammy Coleman, through the testimony of Aaron Eagan (R-56).

Although defense counsel's initial hearsay objections were sustained (T-23), statements of Tammy Coleman were ultimately admitted, apparently pursuant to the the co-conspirator exception to the hearsay rule (T-23-32). Cases that support the defendant's position on this point include State v. Edwards, 536 So.2d 288 (Fla. 1st DCA 1988), and cases cited therein.

The next allegation in the motion for new trial, (3)(c), questions the admissibility of the video tape itself (R-57). This issue is in reality the same as the hearsay issue with respect to Tammy Coleman's statements, since the reason defense counsel objected to the tape was the alleged hearsay (T-57-58).

Allegation (3)(d) of the motion for a new trial asserts error in restricting the cross-examination of Aaron Eagan as to his recollection of other persons from whom he purchased drugs (R-57).

During cross examination, the defense sought to attack the credibility of Eagan's testimony by asking him who else he had purchased drugs from during his stint as a confidential information for the sheriff's office, and what they were wearing.

After allowing this line of questioning to a certain extent, the trial court eventually cut it off (T-38-45).

Cases that support the defendant's position that the trial court erred in restricting defense counsel's cross examination of Eagan include Porter v. State, 386 So.2d 1209 (Fla. 3d DCA 1980).

Allegation (3)(e) is substantially the same as (3)(d), only the restriction of cross examination took place during the re-cross examination of Mr. Eagan (T-55-57). Porter, supra, supports the defendant on this point also.

The motion for a new trial also contends, under (3)(g), that it was error to convict the defendant for both sale and possession of the same cocaine (R-57). Defense counsel raised this point below when moving for a judgment of acquittal (T-98-112). Cases that support this argument include Carawan v. State, 515 So.2d 161 (Fla. 1987) and Porterfield v. State, 567 So.2d 429 (Fla. 1990).

The last allegation in the motion for a new trial, (3)(j), contends the trial court erred in limiting defense counsel's arguments with respect to Tammy Coleman (R-58).

During closing argument, defense counsel, referring to co-defendant Coleman, asked the jury if they would have liked to have heard Coleman's testimony. The prosecutor's objection to this argument was sustained (T-127-128). Cases that support the view that the trial court erred include Williamson v. State, 459 So.2d 1125 (Fla. 3d DCA 1984).

Forrester and Smith also require the undersigned to identify any other issue, apart from those set forth in the judicial acts to be reviewed, which might arguably support the appeal. In this regard, appellant notes that, while sentencing him as a habitual felony offender, the trial court did not expressly find that the predicate convictions had not been set aside pursuant to post-conviction proceedings, or that they had not been pardoned by the governor (S-15), as required by Anderson v. State, 17 FLW D471 (Fla. 1st DCA Feb. 13, 1992)(on rehearing).

Based upon the foregoing, this brief is being filed pursuant to Anders, supra. It is requested that appellant be given a reasonable period of time within which to file a pro se brief in this Court, raising any issue upon which he wishes the Court to rule. A motion to effectuate this request is being filed with this brief.

Respectfully submitted,

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SECOND JUDICIAL CIRCUIT

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Assistant Public Defender
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(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Mr. James Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Marblee Seabrook, #242020, North Florida Reception Center, Post Office Box 628, Lake Butler, Florida, 32054, on this 20th day of March, 1992.

Carl S. McGinnes

CARL S. McGINNES

91-0939-TR
F

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MARBLEE SEABROOK, :

Appellant, :

v. : CASE NO. 91-0939

STATE OF FLORIDA, :

Appellee. :

:

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR LEVY COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. McGINNES #230502
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ATTORNEY FOR APPELLANT

APPENDIX B

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (cont'd)

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MARBLEE SEABROOK,

Appellant,

v. CASE NO. 91-0939

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

I. PRELIMINARY STATEMENT

Marblee Seabrook was the defendant in the trial court and will be referred to in this brief as "appellant, "defendant," or by his proper name. Reference to the volume of the record containing the pleadings and orders filed in this cause will be by use of the symbol "R" followed by the appropriate page number in parentheses. Reference to the volume of the record containing a transcript of the jury selection conducted February 18, 1991, will be by use of the symbol "J" followed by the appropriate page number in parentheses. Reference to the volume of the record containing a transcript of appellant's jury trial, conducted February 22, 1991, will be by use of the symbol "T" followed by the appropriate page number in parentheses. Reference to the volume of the record containing a transcript of the sentencing proceedings of March 25, 1991, will be by use of the symbol "S" followed by the appropriate page number in parentheses.

II. STATEMENT OF THE CASE AND FACTS

Count I of an information containing two charges alleged that appellant and Tammy Coleman, on January 25, 1990, sold or delivered a controlled substance, cocaine, to a confidential informant, contrary to Section 893.13, Florida Statutes (1989). Count II alleged that appellant and Coleman, on February 25, 1990, was in actual or constructive possession of a controlled substance, cocaine, contrary to Section 893.13, Florida Statutes (1989)(R-1).

Appellant proceeded to a trial by jury which returned verdicts finding appellant guilty of both charges (T-52-53).

The state gave notice of intent to seek enhanced penalties as a habitual felony offender (R-14). At sentencing, defense counsel acknowledged receipt of the notice (S-13). The state introduced into evidence, without objection, certified copies of five prior felony convictions (S-13-14). The trial court found that they qualified for the predicate convictions required by statute for habitual felony offender purposes (S-14). Upon inquiry by the court, defense counsel indicated that the defense had no evidence that any of the predicate convictions had been pardoned or set aside. The court then found appellant to be a habitual felony offender (S-15). Appellant was adjudged guilty of both offenses and sentenced to two, concurrent, five-year terms of imprisonment as a habitual felony offender, with credit (S-1-22, R-101-106).

Notice of appeal was timely filed (R-99), appellant was adjudged insolvent, and the Public Defender of the Second Judicial Circuit has been designated to handle this appeal.

On March 20, 1992, the undersigned filed an initial brief pursuant to the procedures established in Anders v. California, 386 U.S. 738 (1967). Four days later, on March 24, 1992, this Court rendered its a decision in Hodges v. State, 17 FLW D787 (Fla. 1st DCA March 24, 1992). Filed with this brief is a motion requesting that the undersigned be allowed to withdraw his previously filed Anders brief, and to substitute the instant brief based upon Hodges, supra. This Initial Brief Of Appellant follows.

III. SUMMARY OF ARGUMENT

In Issue I, infra, appellant argues that Florida's habitual felony offender statute, Section 775.084, Florida Statutes (1989), deprives those sentenced under its provisions of equal protection and due process of law; violates the principle of separation of powers by depriving judges of sentencing prerogative on a broad range of offenses, and further establishes a capricious system of selective punishment which has no standards of application, is non-appealable, and unreviewable by any tribunal, all contrary to the provisions of both the Constitution of the State of Florida and the Constitution of the United States of America.

In Issue II, infra, appellant contends the trial court erred in placing the burden on the defense to prove that the prior convictions relied upon by the state to support appellant's habitual felony offender sentence had not either been set aside or pardoned. Appellant further argues that the trial court erred in failing to expressly find that the prior convictions had not been set aside or pardoned.

IV. ARGUMENT

ISSUE I

THE FLORIDA HABITUAL OFFENDER STATUTE IS UNCONSTITUTIONALLY INEQUITABLE, IRRATIONAL, VAGUE, AND SUBJECT TO ARBITRARY AND CAPRICIOUS APPLICATION; PROVIDES NO DUE PROCESS OF LAW; VIOLATES THE PRINCIPLE OF SEPARATION OF POWERS IN VIOLATION OF SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION; AND THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 775.084, Florida Statutes, (1989), as amended by Chapter 88-131 and Chapter 89-280, Laws of Florida, creates two classes--habitual felony offenders, and habitual violent felony offenders--and allows for substantial increases in criminal penalties for those found to be members of those classes. Appellant was sentenced as an habitual felony offender (R-101-106, S-1-22).

Appellant contends the trial court erred in sentencing him as a habitual felony offender because the statute is facially unconstitutional. Because appellant is attacking the facial validity of the statute, the issue can be raised for the first time on appeal. Trushin v. State, 425 So.2d 1126 (Fla. 1983).

The Florida habitual offender statute is unconstitutional in several respects. Appellant acknowledges this Court has ruled the previous version of the statute to be constitutional in Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), rev. den., No. 76,482 (Fla. Dec. 14, 1990); and that the conclusions of Barber apply equally to the amended statute [Love v. State, 569 So.2d 807 (Fla. 1st DCA 1990)]. The arguments set forth in

each of those cases are adopted here, in addition to the arguments set forth below, not expressly addressed in Barber.

As this Court recognized in Barber, supra, substantive due process prohibits statutes which are discriminatory, arbitrary and capricious. The Florida habitual offender statute, as amended, is utterly arbitrary and capricious in its potential application. The broad sweep of the statute, the lack of standards governing its application, and the exemption of those sentenced under it from parole, the guidelines, and most types of gain-time virtually guarantee impermissible disparities in sentencing. The inherent capriciousness and unavoidable arbitrariness of application render the statute invalid.

Before inception of the sentencing guidelines in 1983, statutory maximums and the review of sentences by a parole commission provided some uniformity of sentences among those convicted of similar crimes. The guidelines then attempted to provide for similar sentences for those similarly situated, in exchange for the loss of the opportunity for parole.

Florida's earlier habitual offender statute provided for sentences outside the statutory maximums, but not outside the guidelines, unless other reasons for departure existed. And, arising contemporaneously with the sentencing guidelines were new forms of gain time, which were applied uniformly to most inmates serving guideline sentences.

Florida's present statute, however, destroys objectivity in sentencing. Its low-threshold requirements make the statute applicable to a substantial number, if not a solid majority, of

those persons sentenced to prison in the State of Florida. Yet, of the tens of thousands who are eligible for sentencing under this statute, only those chosen by a prosecutor--in a NECESSARILY arbitrary manner--are actually sentenced under its provisions. Others who commit the same offense under the same circumstances and with the same prior records will escape the operation of the statute, for no expressible reason other than fortune.

This Court stated in Barber, supra, that "[t]he type of discretion afforded the prosecutor under this law is constitutionally permissible, for it is no different from that afforded a prosecutor in other areas of the law." (at 1172) (emphasis supplied). This Court then went on to give examples, i.e., that prosecutors choose who to prosecute, who to charge with capital offenses, who to offer plea bargains to, and which of two statutes to proceed under. (Id., at 1172) But each of those examples used by this Court is distinguishable from the "discretion" used in applying the habitual felony offender statute in this specific manner: in each of the instances cited, there is no necessary uniformity in the class of affected persons, and perceivable, articulable reasons could be given for each choice made.

Under the habitual felony statute, the very elements of the definition guarantee a homogenous class of highly similar, if not identical, affected persons. The choice by a prosecutor to proceed against some, and not all under the habitual offender statute, is, therefore, necessarily arbitrary, and that is

the infirmity that distinguishes this situation from those cited by this Court.

Both this Court and the Supreme Court of the United States have stated that "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, citing Bordenkircher v. Hayes, 434 U.S. 357 (1978); and Oyler v. Boles, 368 U.S. 448 (1962). Yet it is just such a contention that appellant is unable to make under the rulings of this Court which do not require any demonstration or articulation of a prosecutor's reasons for seeking enhancement against one person as opposed to another.

There are no standards; there is no possibility of review. This Court, by its findings, would have all persons who qualify as habitual felony offenders to rely upon some hoped-for fairness in prosecutors, because nobody, no court anywhere, is permitted to look over the shoulder of those prosecutors to determine if persons within the habitual offender class are being selected according to some unjustifiable standard, such as race, religion, or other arbitrary classification. Due process of law is not only violated; it is not provided.

In the recent case of King v. State, 17 FLW D662 (Fla. 2d DCA, Case No. 91-36, March 4, 1992),[1] the Second District Court of Appeal concluded that "the 1988 amendment to subsection 775.084(3) changed that determination of habitual offender status from a discretionary determination to a ministerial determination." (D663) The court then made the anomalous observation that:

> The trial judge, however, does retain the discretion to exercise leniency and to sentence a defendant found to be an habitual felony offender or an habitual violent felony offender to a sentence less severe than the maximum sentence that is permitted by subsections 775.084(4)(a) or (b). (at D663)

Once the ministerial designation of a person as an habitual felony offender is accomplished, all of the sanctions regarding loss of gain time are applicable, and sentencing discretion is effectively removed from the trial court. Even were the sentencing court to place a designated habitual felony offender on a probationary grant, a violation of that probation would result in maximum time served within the permitted one-cell bump up.

Further, this Court has construed the statute to remove from the sentencing judge any discretion over sentence length.

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[1]While King, supra, is not binding on this Court of Appeal, it is binding on any trial judge in this district, as this court has not previously ruled specifically on this issue. See, Pardo v. State, 17 FLW S194, 195 (Fla., Case No. 78,318, March 26, 1992), citing Weiman v. McHaffie, 470 So.2d 682, 684 (Fla. 1985).

Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990). Once the prosecutor determines--under whatever nonreviewable standards employed (if, indeed, standards even exist)--to seek habitual offender status, the trial court's sentencing discretion is usurped, and the court must then impose the sentence mandated by the statute upon a showing that the defendant qualifies.

The power to fix maximum and minimum punishments properly rests with the legislature. Lightbourne v. State, 438 So.2d 380, 385 (Fla. 1983). That power does not extend, however, to fixing specific, required penalties for commission of any felony by repeat offenders, then granting to the executive branch the power to select some offenders, but not others, to receive this penalty. Unlike mandatory penalties fixed for capital crimes and those involving firearms, where the application of the required penalties is uniform, the habitual offender statute permits the executive branch to determine who shall and shall not receive enhanced penalties.

Thus, as interpreted by this Court in Donald, supra, section 775.084, Florida Statutes, and by the Fifth District Court of Appeal in King v. State, supra, violates the constitutional principle of separation of powers, and infringes on the judicial power established in Article V, section 1 of the Florida Constitution.

In summary, section 775.084 violates the equal protection clause because it creates irrational classifications and removes the levelling influence of the sentencing guidelines and parole eligibility from certain defendants; it violates

constitutional guarantees of due process because the means selected to achieve its purpose--and the tremendous disparities in sentences it produces--are unreasonable, arbitrary, and capricious; it eliminates any notion of due process because the means selected to achieve its purpose are inarticulable, and not subject to review; and, it violates the constitutional principle of separation of powers by taking from courts their inherent authority to fix punishments within the parameters established by the legislature, and granting said authority to prosecutors, without providing a means of review. For these reasons and others specifically rejected by this Court in Barber, the Florida habitual felony statute is unconstitutional.

Appellant requests that this Court certify to the Florida Supreme Court the question certified in Hodges v. State, supra:

> DOES SECTION 775.084, FLORIDA STATUTES (1989), DENY EITHER DUE PROCESS OR EQUAL PROTECTION OF LAW UNDER EITHER THE FLORIDA OR THE UNITED STATES CONSTITUTION; OR VIOLATE THE DOCTRINE OF SEPARATION OF POWERS, AS SET FORTH IN THE FLORIDA CONSTITUTION?

ISSUE II

THE TRIAL COURT ERRED IN PLACING THE BURDEN UPON APPELLANT TO DEMONSTRATE THAT THE PRIOR CONVICTIONS RELIED UPON BY THE STATE TO JUSTIFY SENTENCING HIM AS A HABITUAL FELONY OFFENDER HAD BEEN PARDONED OR SET ASIDE PURSUANT TO POST CONVICTION PROCEEDINGS, AND ERRED FURTHER IN NOT EXPRESSLY FINDING THAT THE PRIOR CONVICTIONS HAD NOT BEEN PARDONED OR SET ASIDE.

Even if, contrary to appellant's position under Issue I, supra, the habitual felony offender is constitutional, appellant contends that two other errors were made by the trial court in this case. Both of these errors arise from the following portion of the record:

> THE COURT: The Court finds both of these [prior convictions introduced into evidence by the state] are qualifying. And there are other felony convictions also for this defendant.
>
> Does the defendant have any showing that he's either been pardoned or -- of either of these two crimes, Mr. Nelson?
>
> MR. NELSON [defense counsel]: No, Your Honor.
>
> THE COURT: Can the defendant show that either of these two convictions have been set aside by any form of post-conviction relief?
>
> MR. NELSON: No, Your Honor.
>
> THE COURT: Well, the Court finds by a preponderance of the evidence that the defendant is an habitual felony offender as it is defined in Chapter 775 of the Florida Statutes, and he is hereby adjudged to be such, and shall be sentenced as such.

(S-14-15).

The first error asserted is that the trial court erred in placing the burden on the defendant to prove the prior

convictions had been set aside or pardoned, rather than on the state to prove they had not been set aside or pardoned.

Under the habitual felony offender statute, the prior convictions relied upon by the state to support an enhanced sentence must not have been set aside or pardoned by the governor. Sections 775.084(1)(b)3. and 4., Florida Statutes (1989). In Hodges, supra, this Court observed that, under the holding of Anderson v. State, 16 FLW D3024 (Fla. 1st DCA Dec. 3, 1991), on rehearing, 17 FLW D471 (Fla. 1st DCA Feb. 13, 1992), it now appears that the burden is on the state to present evidence sufficient to enable the trial court to find the prior convictions had not either been pardoned or set aside).

The Court did, however, recognize in Hodges that, in Eutsey v. State, 383 So.2d 219 (Fla. 1980), our supreme court opined that the whether a predicate conviction has been either set aside or the subject of a pardon was an affirmative defense. The Court also noted that the language of the statute construed in Eutsey and that contained in the present statute are substantively indistinguishable from one another. Nevertheless, the Hodges court followed Anderson. Appellant, of course, relies upon Anderson. In both Anderson and Hodges, the following issue was certified to the 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?

Appellant's second position, based upon Anderson, is that, while no evidence was presented that the predicate convictions had been either set aside or pardoned, the trial court erred by failing to make an express finding to that effect (S-15).

V. CONCLUSION

Based upon the foregoing, appellant contends reversible error has been demonstrated. Should the Court agree with the arguments made under Issue I, supra, appellant requests the Court to vacate the sentences appealed from and remand the cause to the trial court with directions to resentence appellant to a non-habitual felony offender sentence.

Should the Court agree with the arguments made under Issue II, supra, appellant requests the Court to vacate the sentences appealed from and remand the cause to the trial court with directions to resentence him.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

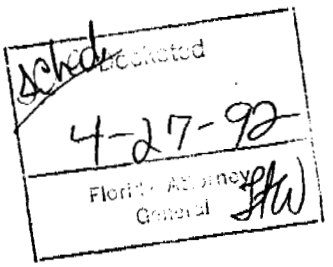
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Mr. James Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Mr. Marblee Seabrook, #242020, North Florida Reception Center, Post Office Box 628, Lake Butler, Florida, 32054, on this 7th day of April, 1992.

Carl S. McGinnes

CARL S. McGINNES

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA



MARBLEE SEABROOK,

Appellant,

vs. CASE NO. 91-939

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR LEVY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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APPENDIX C

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STATEMENT OF THE CASE AND FACTS

The state accepts the appellant's statement with the following addition.

The record shows that there was no challenge to the constitutionality of section 775.084, Florida Statutes (1989).

SUMMARY OF ARGUMENT

1. Section 775.084 is facially constitutional. Appellant has now shown that the statute impignes on protected first amendment rights or that a person of average intelligence would have any didfficulty understanding its meaning.

2. The state does not have to disprove, and the trial court does not have to find, that unraised affirmative defenses do not exist. Eutsey. This Court's decisions in Anderson and Hodges are in conflict with the Florida Supreme Court decision in Eutsey and this Court's decision in Adams.

ARGUMENT

ISSUE I

IS SECTION 775.084, FLORIDA STATUTES (1989) FACIALLY UNCONSTITUTIONAL? (RESTATED)

The constitutionality of the statute was not raised below. Appellant tacitly acknowledges this but contends he may attack the facial constitutionality of the statute.

The state recognizes that the facial constitutionality of a statute may be challenged for the first time on appeal. Trushin v. State, 425 So.2d 1126 (Fla. 1983). However, this very narrow exception is limited to facial overbreadth and facial vagueness. Facial overbreadth only arises when the statute impinges on behavior protected by the First Amendment to the United States Constitution. There can be no suggestion, and appellant does not argue, that the habitual commission of criminal offenses is protected by the first amendment. Nor can it be suggested, and appellant does not argue, that any of the statutory language would cause a person of common intelligence to guess at its meaning. State v. Olson, 586 So.2d 1239 (Fla. 1st DCA 1991) and cases cited therein.

Appellant's arguments that the statute is discriminatory, arbitrary, and capricious are not cognizable in a challenge to the facial constitutionality of a statute.

ISSUE II

IS IT FUNDAMENTAL ERROR, COGNIZABLE FOR THE FIRST TIME ON APPELLATE REVIEW, WHEN THE STATE DOES NOT INTRODUCE EVIDENCE SHOWING, AND THE TRIAL COURT DOES NOT MAKE FINDINGS, THAT THE PREDICATE FELONY CONVICTIONS ON WHICH HABITUAL FELONY SENTENCES ARE BASED HAVE NOT BEEN PARDONED BY THE GOVERNOR AND CABINET OR SET ASIDE IN POST-CONVICTION PROCEEDINGS WHEN THESE AFFIRMATIVE DEFENSES ARE NOT RAISED BY THE DEFENDANT? (RESTATED)

It is uncontroverted that appellant did not raise the affirmative defenses that the predicate felonies had either been pardoned or overturned in post-conviction proceedings. Indeed, the appellant affirmatively acknowledged he had no evidence that the convictions had been pardoned or set aside in post-conviction proceedings. Until recently, this waiver and failure 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"). Recently, however, a panel of this Court 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, 17 F.L.W. D471 (Fla. 1st DCA 1992).

The state maintains that Anderson was wrongly decided for numerous reasons.

The Anderson panel recognized that the Florida Supreme Court had explicitly held in Eutsey that the claims that the predicate conviction had been pardoned or overturned by post-conviction proceeding were affirmative defenses which the defendant had to prove. In an awkward attempt to avoid this definitive holding by the Supreme Court of the state, the Anderson panel acknowledged the Eutsey holding that the burden was on the defendant but 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 tacit 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, 17 F.L.W. at D472.

A subsequent panel of the Court 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, obviously recognizing that there was a serious analytical flaw in holding that a trial court must make factual findings on affirmative defenses which neither party had addressed and for which there was no 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, 17 F.L.W. D787 (Fla. 1st DCA March 24, 1992).

The Hodges panel was obviously correct in interpreting Anderson as necessarily requiring the corollary holding. Nevertheless, the corollary requirement that the state affirmatively disprove the unraised affirmative defenses is totally contrary to the controlling holding in 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.

Thus, Hodges removes even a fig leaf of compliance with the case law from the highest court in the state. 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."] Because this fig leaf was the basis on which the Anderson panel distinguished Eutsey and justified its decision, contrary to Hoffman, not to follow controlling case law from the state's Supreme Court, it can be fairly said that Hodges conflicts with both Eutsey and Anderson.[1] Indeed, the corollary holding that the state is required to present evidence proving that the predicate felonies had not been pardoned or set aside removes the basis on which the certified question in Anderson rests. The question becomes pointless.

The Anderson holding not only directly contradicts an explicit holding of Eutsey. It is also contrary to the entire

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[1] District courts sometimes overlook the Hoffman requirement that the DCA follow the case law of the Supreme Court even when it disagrees with it and certifies a question to the Supreme Court. See, e.g., Obojes v. State, 590 So.2d 461 (Fla. 1st DCA 1991), rev. pending (Fla., case no. 79,261), where the court questioned the viability of a Supreme Court holding, departed from it, and certified a question. Contrast, Glass v. State, 556 So.2d 465 (Fla. 1st DCA 1990), affirmed, 574 So.2d 1099 (Fla. 1991), where the court followed a Supreme Court holding but questioned and certified the issue. There is more to the settled rule of Hoffman than mere protocol or respect for the state's highest court. The rule is substantively critical to the efficient operation of the state's judicial system. By not following the definitive holding of Eutsey, Anderson and Hodges place the trial courts in the untenable position of having to choose between definitive holdings of the state's highest court and another court which, while inferior to the highest court, is superior to the trial court. It can only be hoped that the trial courts will recognize that oaths are taken to the Florida Constitution and that the Florida Supreme Court is the controlling judicial authority under that constitution. This unfortunate situation could easily have been avoided had the court followed Eutsey and Hoffman while certifying its disagreement, as it did in Glass.

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 PSI reports 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 challenging the information in the PSI with witnesses and evidence. In so holding, the Supreme Court relied in large part on, and explicitly adopted language from, an erudite opinion by former judge Robert Smith of this Court. Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979). Judge Smith's examination and recitation of the facts in Adams on which the habitual offender sentence was based is highly instructive.

> 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).

Adams, 376 So.2d at 58. (e.s.)

Section 775.084(1)(a), Florida Statutes (1977), which Judge Smith addressed, provided in relevant part that the trial court may impose an habitual offender sentence if it finds:

> 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, misdemeanor, or other qualified offense necessary to the operation of this section has not been set aside in any post-conviction proceeding.

The state urges the Court to note the following about the above. First, the statute in Adams contained the same pardon and post-conviction set aside provisions addressed here, in Eutsey, in Anderson, and in Hodges. Second, Judge Smith's recitation of facts, or trial court findings, said nothing about pardons or post-conviction overturns for the simple reason that Adams is grounded on the settled principle, subsequently reiterated in Eutsey, that affirmative defenses which are not raised by the defendant are waived. Thus, not only does Anderson conflict with Eutsey and Hodges, it also conflicts with Adams. Such intracourt conflict between panels requires en banc consideration pursuant to the rules of this Court. Regardless of the choice this panel makes, it cannot avoid conflict with either Anderson/Hodges or Adams/Eutsey.

It should also be noted that Eutsey was decided in 1980. Despite the numerous changes to the statute over the years, none of the changes, as Hodges acknowledged, have changed the relevant provisions on which Eutsey rested. Thus, the subsequent amendments and reenactments are presumed to approve Eutsey. See, Burdick v. State, 17 F.L.W. S88, S89 (Fla. February 6, 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 clearly shows that Anderson was wrongly decided and that intradistrict conflict requires en banc consideration to remove the conflict. However, there are still other flaws and fallacies in Anderson which deserve attention. One of the characteristics of affirmative defenses is that they represent exceptions to the norm, i.e., they are uncommon in that they represent a minority occurrence. For example, the overwhelming majority of homicides are not justifiable as self defense. Several propositions flow from this characteristic. Affirmative defenses are generally not at issue, so that evidence tending to negatively show 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 the trial when self defense was not claimed by the defendant. Moreover, the party in the position to bring forth evidence on affirmative defenses is the defendant. That was, in fact, one of the major points at issue in Eutsey. Who has the burden of proving that a predicate conviction has been pardoned or overturned by post-conviction proceedings? Eutsey contended that the trial court's finding that no pardon or post-conviction reversal had been entered was not supported by the record and that the state had the burden of proof. The Supreme Court rejected this argument by holding that

the defendant had the burden of raising and proving these affirmative defenses.[2] 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, e.g., whether a pardon or post-conviction reversal of a final judgment has been granted.

The common sense aspects are obvious if one thinks through the pardon and post-conviction processes.[3] 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. 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

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[2] The Anderson court seriously misread Eutsey on this point and elevated the unsupported finding of the trial court that there had been no pardon or post-conviction reversal, which was at issue, above the explicit holding of the Florida Supreme Court that the burden was on the defendant to raise and prove affirmative defenses. The findings were irrelevant inasmuch as the defendant did not raise and prove the affirmative defenses. The subsequent holding of the Hodges panel that the Anderson holding necessarily includes a corollary that the state must disprove the presence of the affirmative defenses tacitly recognizes the fallacy of Anderson even as it nakedly exposes the conflict between Anderson and Eutsey.

[3] To assist the Court, the state requested and obtained information concerning pardons from the Office of Executive Clemency in the Governor's office. The Rules of Executive Clemency are not published in the Fla. Admin. Code. Dugger v. Williams, 593 So.2d 180, 182 (Fla. 1991). See Appendix A.

it can be fairly said that the likelihood that a defendant has received a pardon for a predicate felony is so unlikely as to be pragmatically nonexistent.

There are two ways to prove or disprove that a pardon has been granted. The approach taken by the Florida Supreme Court in Eutsey was to place the burden of proof on defendants by requiring them to affirmatively prove that they had received a pardon. As common sense and the figures above 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 a prima facie 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 of due process also 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 contradictory approach, adopted by the Anderson and Hodges panels, is to require 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, of course, would be delayed for the weeks or months that this process requires. This upside down world of Anderson, where the state has the burden of introducing evidence tending to show the absence of affirmative defenses, which have not been raised by the defendant, is innovative but irrational.

A comparison of the eligibility requirements for applying for a pardon under the Rules of Executive Clemency and the eligibility requirements for an habitual offender under section 775.084 is also instructive. Section 5.A of the Rules provides:

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

Section 775.084(1)(a)2 provides:

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

These same general factors discussed above also apply to proving or disproving that a predicate conviction had been overturned in a post-conviction proceeding. For obvious reasons, the burden of bringing forth evidence that a predicate felony has been overturned 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 overturned 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, and fundamental fairness, to place the burden on the defendant to challenge the validity of predicate convictions[4].

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[4] Our adversarial system goes to great lengths and expense to require, e.g., prior notice and assistance of counsel at trial.

In contrast to the simplicity of raising and showing that a conviction has been collaterally overturned in those rare instances where it has, see the difficulty of disproving the proposition in the overwhelming number of cases where the conviction has not been overturned. There is no central point at which all post-conviction reversals of convictions are registered. 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,

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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. The contemprorary trend, as in Anderson, 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 inadvertently, 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. Accordingly, contrary to the rule followed when not guilty pleas are entered that issues must be raised and properly preserved, appellate counsel and appellate courts must conduct de novo reviews in order to detect unraised errors when a plea bargain is entered. See Judge Letts recent lament 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.

foreign and federal courts and the data bases of, e.g., WESTLAW. Even more than disproving pardons, disproving the affirmative defense that a final judgment has been subsequently overturned in a collateral proceeding would entail considerable research in numerous data bases. Whether, and at what point, the absence of evidence meets a preponderance of the evidence test is a fine point which illustrates what happens when courts abandon settled principles of law by entertaining appeals with no justiciable issues and requiring that trial courts rule on unraised affirmative defenses or that the state prove a negative.

Aside from being erroneous, the state submits that Anderson is one of those 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 will be rare and probably nonexistent.

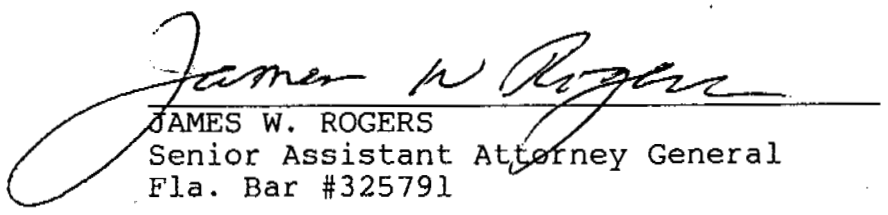
In view of the intradistrict conflict set out above among Anderson, Adams, and Hodges, this panel cannot avoid conflict regardless of the way it rules.

CONCLUSION

The intradistrict conflict on this issue requires resolution. If the conflict is not resolved, the issue should be certified to the Florida Supreme Court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



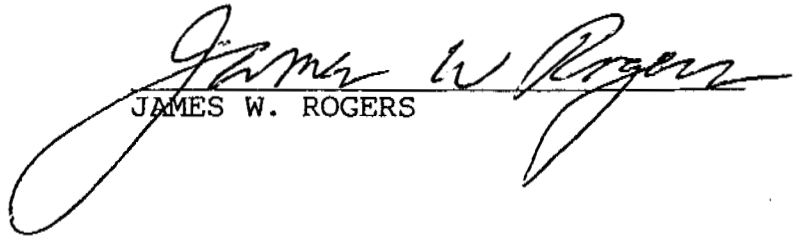
JAMES W. ROGERS
Senior Assistant Attorney General
Fla. Bar #325791

Department of Legal Affairs
The Capitol
Tallahassee, Florida 32399-1050
904/488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Tallahassee, Florida 32301, this 27th day of April, 1992.



JAMES W. ROGERS

STATE OF FLORIDA

LAWTON CHILES, GOVERNOR, CHAIRMAN
JIM SMITH, SECRETARY OF STATE
ROBERT A. BUTTERWORTH, ATTORNEY GENERAL
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OFFICE OF EXECUTIVE CLEMENCY
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March 11, 1992

Mr. James Rogers
Attorney General's Office
111 S. Magnolia Dr.
Suite 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 N. Keels

Coordinator

JHK/jh

Enclosures: Chart of Full Pardons Granted
Rules of Executive Clemency

FULL PARDONS & CONDITIONAL PARDONS GRANTED

1989			
April 12 -	9		
June 28 -	7		
October 11 -	10		
December 6 -	4		
Total	30		
1990			
March 14 -	7		
June 19 -	12		
September 12 -	5		
December 19 -	5		
Total	29		
1991			Requests Considered:
March 13 -	3		19
June 11 -	16		26
September 11 -	12	(1 conditional pardon)	27
December 18 -	10	(1 conditional pardon)	17
Total	41	(2 conditional pardons)	89

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

Clemency. The Coordinator shall keep a proper record of all 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 sentence

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 all 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 for 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. - Adopted September 10, 1975, Rule 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.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

91-110870 RR F

MARBLEE SEABROOK, :

Appellant, :

v. : CASE NO. 91-939

STATE OF FLORIDA, :

Appellee. :

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR LEVY COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. McGINNES #230502
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

APPENDIX D

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MARBLEE SEABROOK,

Appellant,

v. CASE NO. 91-939

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT

I. PRELIMINARY STATEMENT

Appellant will refer to the parties and the record in the same manner utilized in the Initial Brief Of Appellant filed April 7, 1992. Reference to the brief of the state dated April 27, 1991 will be by use of the symbol "BS" followed by the appropriate page number in parentheses. Reference to the appendix attached to the brief of the state will be by use of the symbol "BSA" followed by the appropriate page number in parentheses.

II. ARGUMENT

ISSUE I

THE FLORIDA HABITUAL OFFENDER STATUTE IS UNCONSTITUTIONALLY INEQUITABLE, IRRATIONAL, VAGUE, AND SUBJECT TO ARBITRARY AND CAPRICIOUS APPLICATION; PROVIDES NO DUE PROCESS OF LAW; VIOLATES THE PRINCIPLE OF SEPARATION OF POWERS IN VIOLATION OF SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION; AND THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant will rely upon the arguments made in his initial brief under this point.

ISSUE II

THE TRIAL COURT ERRED IN PLACING THE BURDEN UPON APPELLANT TO DEMONSTRATE THAT THE PRIOR CONVICTIONS RELIED UPON BY THE STATE TO JUSTIFY SENTENCING HIM AS A HABITUAL FELONY OFFENDER HAD BEEN PARDONED OR SET ASIDE PURSUANT TO POST CONVICTION PROCEEDINGS, AND ERRED FURTHER IN NOT EXPRESSLY FINDING THAT THE PRIOR CONVICTIONS HAD NOT BEEN PARDONED OR SET ASIDE.

It is evident that the state feels the decisions in Anderson v. State, 16 FLW D3024 (Fla. 1st DCA Dec. 3, 1991), on rehearing, 17 FLW D471 (Fla. 1st DCA Feb. 13, 1992) and Hodges v. State, 17 FLW D787 (Fla. 1st DCA Mar. 24, 1992) conflict with Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979). The state thus argues: "Such intracourt conflict between panels requires en banc consideration pursuant to the rules of this Court." (BS-9). Similarly, the state says "...Anderson was wrongly decided and that intradistrict conflict requires en banc consideration to remove the conflict." (BS-10).

Appellant contends the above, for all intents and purposes, amounts to a request or motion for an en banc hearing, which is contrary to Florida Rule Of Appellate Procedure 9.331(b):

> A hearing en banc may be ordered only by a district court of appeal on its own motion. A party may not request an en banc hearing. A motion seeking the hearing shall be stricken

The state also has included an appendix containing non-record material including the statistics on the number of pardons granted between 1989 and 1991 as well as the Rules Of Executive Clemency (BSA-1-15). A significant portion of the

state's brief is devoted to arguments based upon the appendix (BS-11, 13-16). This non-record material in not appropriate for an appendix and is violative of Thornber v. City Of Fort Walton Beach, 534 So.2d 754 (Fla. 1st DCA 1988). This Court should accordingly disregard the appendix and the arguments based upon the appendix.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. McGINNES #230502
Assistant Public Defender
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(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by hand-delivery to Mr. James Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Marblee Seabrook, DOC #242020, North Florida Reception Center, Post Office Box 628, Lake Butler, Florida, 32054, on this 14th day of May, 1992.

CARL S. McGINNES

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MARBLEE SEABROOK,

Appellant,

vs. CASE NO. 91-939

STATE OF FLORIDA,

Appellee.
_____/

PETITION FOR REHEARING

The Florida Supreme Court in Tillman v. State, Case No. 78,715 (Fla. November 19, 1992) has again reiterated Ross v. State, 601 So.2d 1190 (Fla. 1992), Eutsey v. State, 383 So.2d 219 (Fla. 1980), Reynolds v. Cochran, 138 So.2d 500 (Fla. 1962), Washington v. Mayo, 91 So.2d 621 (Fla. 1956), Cross v. State, 96 Fla. 768, 119 So. 380 (1928), Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), and Henderson v. State, 569 So.2d 925 (Fla. 1st DCA 1990), all of which uphold section 775.084 and the constitutional authority of the Florida Legislature to impose habitual felon sentencing. The plenary authority of the Florida Legislature to define criminal offenses and to prescribe the punishment thereof having been upheld so frequently and consistently as to have become black letter constitutional law, the state urges the Court to grant rehearing and to withdraw the certified questions here.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
Senior Assistant Attorney General
Fla. Bar #325791

Department of Legal Affairs
The Capitol
Tallahassee, Florida 32399-1050
904/488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Tallahassee, Florida 32301, this 23rd day of November, 1992.

JAMES W. ROGERS

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

91-1108 TOTAL F

MARBLEE SEABROOK,

Appellant,

v. CASE NO. 91-939

STATE OF FLORIDA,

Appellee.

_____/

REPLY TO PETITION FOR REHEARING

Appellant Marblee Seabrook, through his undersigned attorney, pursuant to Florida Rule Of Appellate Procedure 9.330(a), files this reply to the state's petition for rehearing, and requests that the state's petition be denied for the following reasons:

1. The state requests the Court to withdraw the certified question in light of Tillman v. State, 17 FLW S707 (Fla. Nov. 16, 1992).

2. Tillman involved an issue pertaining to the habitual violent felony offender statute and did not rule upon the issue certified in this case, in Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992), and in other cases.

3. Appellant was not sentenced as a habitual violent felony offender and, consequently, Tillman has little relevance to the instant case.

APPENDIX F

4. Hodges and the numerous other cases that have certified the same issue as Hodges are still pending before the supreme court.

5. Appellant stands in the same legal position as does the defendant in Hodges and should be accorded the same procedural rights.

WHEREFORE, appellant requests the Court to deny the state's petition for rehearing.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Carl S. McGinnes

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply has been furnished by hand-delivery to James W. Rogers, Assistant Attorney General, Criminal Appeals Division, The Capital, Florida, 32301, on this 14th day of December, 1992.

Carl S. McGinnes

CARL S. McGINNES

A6

91-1108 TDR

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

MARBLEE SEABROOK, * NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND

Appellant, * DISPOSITION THEREOF IF FILED.

V. * CASE NO. 91-939

STATE OF FLORIDA, *

Appellee. *

Opinion filed November 18, 1992.

An appeal from the Circuit Court for Levy County. James Tomlinson, Judge.

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

Robert A. Butterworth, Attorney General; James W. Rogers, Senior Assistant Attorney General, Tallahassee, for appellee.

PER CURIAM.

Appellant was sentenced as an habitual felony offender. We affirm. However, as we did in Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992), we certify the following question to the supreme court as one of great public importance:

> DOES SECTION 775.084, FLORIDA STATUTES (1989), DENY EITHER DUE PROCESS OR EQUAL PROTECTION OF LAW UNDER EITHER THE FLORIDA OR THE UNITED

STATES CONSTITUTION; OR VIOLATE THE DOCTRINE OF SEPARATION OF POWERS, AS SET FORTH IN THE FLORIDA CONSTITUTION?

SMITH, WIGGINTON, and WOLF, JJ., CONCUR.