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FILED

SID J. WHITE

FEB 1 1993

CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

CASE NO.: 81,034

JOEY WASHINGTON,
Respondent.

_____ /

PETITIONER'S BRIEF ON MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	

ISSUE I

WHETHER THE STATE MUST SHOW, AND THE TRIAL COURT FIND, THE ABSENCE OF A PARDON OR SET -ASIDE AS TO AN HABITUAL FELON'S PREDICATE OFFENSES; WHEN NEITHER IS RAISED AS AN AFFIRMATIVE DEFENSE	4
CONCLUSION	20
CERTIFICATE OF SERVICE	20
APPENDIX	
A. Opinion Below	

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Adams v. State,</u> 376 So. 2d 47 (Fla. 1st DCA 1979)	18
<u>Anderson v. State,</u> 592 So. 2d 1119 (Fla. 1st DCA 1992)	Passim
<u>Banes v. State,</u> 597 So. 2d 975 (Fla. 4th DCA 1992)	19
<u>Baxter v. State,</u> 599 So. 2d 721 (Fla. 2d DCA 1992)	19
<u>Bonner v. State,</u> 599 So. 2d 768 (Fla. 2d DCA 1992)	19
<u>Burdick v. State,</u> 594 So. 2d 267 (Fla. 1992)	5
<u>Caristi v. State,</u> 578 So. 2d 769 (Fla. 1st DCA 1991)	7,18
<u>Eutsey v. State,</u> 383 So. 2d 219 (Fla. 1980)	Passim
<u>Glass v. State,</u> 574 So. 2d 1099 (Fla. 1991)	5-6
<u>Hodges v. State,</u> 596 So. 2d 481 (Fla. 1st DCA 1992)	Passim
<u>Hoffman v. Jones,</u> 280 So. 2d 431 (Fla. 1973)	9
<u>Jefferson v. State,</u> 571 So. 2d 70 (Fla. 1st DCA 1990)	6,19
<u>Jones v. State,</u> 17 FLW D 2375 (Fla. 1st DCA Oct. 14, 1992)	2,8-9
<u>Likely v. State,</u> 583 So. 2d 414 (Fla. 1st DCA 1991)	7,18
<u>McClain v. State,</u> 356 So. 2d 1256 (Fla. 2d DCA 1978)	10

<u>Myers v. State,</u> 499 So. 2d 895 (Fla. 1st DCA 1986), <i>jurisdiction discharged</i> , 520 So. 2d 575 (Fla. 1968)	10,18-19
<u>Robinson v. State,</u> 551 So. 2d 1240 (Fla. 1st DCA 1989)	19
<u>State v. Beach,</u> 592 So. 2d 237 (Fla. 1992)	15-16
<u>Stevens v. State,</u> 409 So. 2d 1051 (Fla. 1982)	15
<u>Stewart v. State,</u> 385 So. 2d 1159 (Fla. 2d DCA 1980)	17-19
<u>Walker v. State,</u> 462 So. 2d 452 (Fla. 1985)	8
<u>Wright v. State,</u> 476 So. 2d 325 (Fla. 2d DCA 1985)	10

OTHER AUTHORITIES

Art. IV, §8, Fla. Const.	12
Ch. 940, Fla. Stat.	12
§775.084 (1)(a) and (b), Florida Statutes (1977)	4, 18
§775.084(3)(d), Florida Statutes (1977)	5
§921.187, Florida Statutes (1989)	6
Florida Rule of Criminal Procedure 3.200	13
Section 5.A of the current Rules	12
Section 775.084(1)(a)2	12
Section 924.33, Florida Statutes	16

PRELIMINARY STATEMENT

The jurisdictional question before this court is the same question certified in Anderson, 592 So. 2d 1119 (Fla. 1st DCA 1992). The same issue is present in Hodges v. State, 596 So. 2d 481 (Fla. 1st DCA 1992). Anderson and Hodges are pending before this court as case no. 79,535 and no. 79,728 respectively.

STATEMENT OF THE CASE AND FACTS

The Respondent, Joey Washington, was convicted by a jury for three counts of sale of a controlled substance and one count of possession of a controlled substance with intent to sell. (slip op., pg.1). He was sentenced to 30 years on each count to run concurrently. (slip op., pg.1).

At the sentencing hearing, the State introduced certified copies of the Respondent's convictions for robbery and possession of a firearm by a convicted felon in case nos. 85-199 and 87-157, respectively. (R 156-157). The prosecutor then stated:

Your Honor, the State would allege, as it has in its notice [of intent to seek habitual offender sentence], that the felonies for which the defendant is to be sentenced for today are committed within five years from the date of the last enumerated felony or within five years of the defendant's release from parole or otherwise from a prison sentence or other commitment as a result of one of these prior convictions for the enumerated felony. I would also allege that the convictions in the above case[s] have not been set aside in any post-conviction proceeding and the defendant has not received a pardon on the grounds of innocence.

(R 158). The trial court found that Washington qualified for sentencing as a habitual offender, but did not expressly find that the defendant had not been pardoned or that his convictions had not been set-aside. (R 166).

The First District affirmed Washington's convictions without comment, but reversed the sentences as a habitual offender and remanded for resentencing. (slip op., pg.2). On the State's Motion for Clarification and Suggestion for Certification, the First District certified the same question certified in Jones v. State, 17 Fla. L. Weekly D2375 (Fla. 1st DCA Oct. 14, 1992):

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?

Id. at 2376. The question certified in Jones was the same question certified in Anderson, 592 So. 2d at 1121.

The opinion below was rendered on November 19, 1992. The opinion on the State's Motion for Clarification and Suggestion for Certification was rendered December 31, 1992. The State timely filed Notice to Invoke Discretionary Jurisdiction on January 6, 1993. This Court postponed its jurisdictional

decision and required briefs on the merits by order dated January 11, 1993.

SUMMARY OF ARGUMENT

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

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

ARGUMENT

ISSUE I

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

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

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

The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this section' and

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

* * * *

The defendant has not received a pardon on the ground of innocence for any crime that is necessary for the operation of this section; and

A conviction of a crime necessary to the operation of this section has not been set aside in any post conviction proceeding.

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

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

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

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

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

Glass is particularly instructive. There, the issue was whether split probationary sentences were authorized by §921.187, Florida Statutes (1989). This court expressly acknowledged that Glass made a legitimate argument against statutory authority. Id. at 1101-2. However, the court recognized earlier decisions had found probationary split sentences to be authorized by law. Id. at 1101. Significantly, the court noted that the sentencing statute addressed in the earlier decisions "contained essentially the same wording" (id.) as the statute at issue.

As in Glass, the statute at issue here contains essentially the same wording as the statute at issue in Eutsey. Following Glass, this court must establish a stable construction of §775.084, and reverse the opinion below.

This issue was not raised by the Respondent before the trial court. Until recently, this would have barred appellate review. See, Eutsey v. State, 383 So. 2d 219, 226 (Fla. 1980) (There is no merit in Eutsey's contention "that the state failed to prove he had not been pardoned of the previous offense or that it had not been set aside in a post-conviction proceeding since these are affirmative defenses available to Eutsey rather than matters required to be proved by the State"); Jefferson v. State, 571 So. 2d 70 (Fla. 1st DCA 1990) (It is unnecessary to make the requisite statutory findings of fact and the defendant

may waive right to require proof of criteria relating to habitual felony offender); Likely v. State, 583 So. 2d 414 (Fla. 1st DCA 1991); Caristi v. State, 578 So. 2d 769 (Fla. 1st DCA 1991). Later, a panel of the First District revisited the issue and determined that it was fundamental error cognizable for the first time on appeal if the trial court failed to explicitly find that the predicate convictions had not been pardoned or set aside in post-conviction proceedings even if the defendant had not raised these affirmative defenses. Anderson v. State, 592 So. 2d 1119 (Fla. 1st DCA 1992).

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

Does the holding in Eutsey v. State, 383 So. 2d 219 (Fla. 1980) that the state has no burden of proof as to whether the convictions necessary for habitual felony offender sentencing have been pardoned or set aside, in that they are "affirmative defenses available to [a defendant]," Eutsey at 226, relieve the trial court of its statutory

obligation to make findings regarding those factors, if the defendant does not affirmatively raise, as a defense, that the qualifying convictions provided by the state have been pardoned or set aside? Anderson, 592 So. 2d at 1121.

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

Most recently, the First District read Eutsey in conjunction with this court's later decision in Walker v. State, 462 So. 2d 452 (Fla. 1985), to hold (by a vote of 7 to 6) that the trial court must make "a specific finding that the defendant meets each of the criteria of the statute." Jones v. State, 17 FLW D 2375, 2376 (Fla. 1st DCA Oct. 14, 1992) (en banc). The large dissenting bloc relied on a common-sense reading of Walker, to conclude that "there is no need for findings relating to issues

which were not subject to proof below." Id. at 2377. The dissent also concluded any error was harmless. Id.

Although the First District relies on Jones for its decision in the present case, the courts reasoning in Jones adds nothing to Anderson and Hodges. Thus, the remainder of the State's argument will be couched in terms of those decisions.

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

We also reject his contention that the State failed to prove that he had not been pardoned of the previous offense or that it had not been set aside in a post-conviction proceeding since these are affirmative defenses available to Eutsey rather than matters required to be proved by the State.

Thus, Hodges removes even a modicum of compliance with the case law from this court. Hoffman v. Jones, 280 So. 2d 431, 434 (Fla. 1973) ("District Courts of Appeal ... are free to certify questions of great public interest to this Court for consideration, and even to state their reasons for advocating change" but "[t]hey are bound to follow the case law set forth by this Court").

The Anderson/Hodges holdings are also contrary to the entire rationale of Eutsey in upholding the constitutionality of the

statute. Eutsey addressed the broader question of whether the full panoply of due process rights required in the guilt phase was also required in the sentencing phase. The Court held it was not. One of the specific issues was whether the state could rely on presentence investigation reports and other hearsay in showing that the defendant should be sentenced as an habitual offender. The Court held that it could, and that the burden was on the defendant to come forth with specific challenges to the accuracy of hearsay and to introduce evidence and witnesses as appropriate. This principle is well-settled in case law. See, Myers v. State, 499 So. 2d 895, 897 (Fla. 1st DCA 1986), *jurisdiction discharged*, 520 So. 2d 575 (Fla. 1968) (defendant is required to dispute truth of sentencing hearsay and, relying on Eutsey, in the absence of such dispute, "the trial court was not required to order the state to produce corroborating evidence."); Wright v. State, 476 So. 2d 325, 327 (Fla. 2d DCA 1985) ("Where, as here, the defendant does not dispute the truth of the listed convictions, the state is not required to come forward with corroborating evidence"); Eutsey v. State, 383 So. 2d 219 (Fla. 1980); McClain v. State, 356 So. 2d 1256 (Fla. 2d DCA 1978)").

By itself, the above analysis shows Anderson and Hodges were wrongly decided. However, there are still other flaws and fallacies in the First District's reasoning which deserve attention. One of the characteristics of affirmative defenses is that they represent exceptions to the norm. For example, the overwhelming majority of homicides are not justifiable as self-defense. Several propositions flow from this characteristic.

Affirmative defenses are rarely at issue, so that evidence showing their absence would be irrelevant in the overwhelming majority of cases. Burdening the trial with irrelevant evidence would 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, possibly even reversible error, if the state made the absence of a self-defense plea a feature of a trial. Moreover, the party in the best position to bring forth evidence on affirmative defenses is the defendant.

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

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

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

Section 775.084(1)(a)2 provides:

2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later; (e.s.)

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

There are two ways to prove or disprove that a pardon has been granted: (1) introduce affirmative evidence that a pardon has been granted, i.e., the pardon or (2) introduce negative evidence tending to show that a pardon has not been granted. Because the law strives for rationality and certainty, approach one, taken by Eutsey, places the burden of proof on defendants by requiring them to affirmatively prove that they have received a pardon. This places practically no burden on the courts or the parties because pardons are so rare. Moreover, as Eutsey and other settled authority holds, there is no due process problem in placing a burden on defendants to make an adequate claim and a colorable showing that an affirmative defense exists. By analogy, see Florida Rule of Criminal Procedure 3.200, Notice of Alibi, which places such burden on the defendant. These rules, comporting with common sense, are intended to bring relevant issues to the fore so that the parties may fairly controvert them. Imagine, if possible, the difficulty of affirmatively proving that no conceivable alibi exists in the absence of a

claim pursuant to rule 3.200. The number of persons required to testify as to the absence of an alibi is limited only by the population of the world.

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

These same general factors discussed above also apply to proving or disproving that a predicate conviction has been overturned in a post-conviction proceeding. For obvious reasons,

the burden of bringing forth colorable evidence that a predicate felony has been pardoned or set aside is inconsequential for the defendant involved. Under the provisions of the habitual offender statute, defendants are given advance notice of the state's intent to seek habitual offender sentencing. The purpose of this notice is to give the defendant an opportunity to challenge the predicate convictions by showing they never happened, are too remote, have been pardoned, or have been set aside in post-conviction proceedings. Because of this prior notice, as Eutsey so plainly holds, whether one speaks of affirmative defenses to habitual offender sentencing or the accuracy of PSIs, it comports with due process to place the burden on the defendant to challenge the validity of predicate convictions.

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

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

An appellate court may not reverse a judgment, even when error occurs, unless that error "injuriously affected the substantial rights of the appellant." Section 924.33, Florida Statutes. In this connection, it should be remembered that there is no constitutional right to appeal a non-capital criminal judgment or sentence under either the United States or Florida Constitutions. The right to appeal is a substantive right which is granted subject to the terms and conditions which the state or legislature chooses to impose.

Section 924.33 applies here. An appellate court may not reverse an habitual felony sentence unless the appellant makes a colorable showing that he has suffered an injury from the claimed error. See, e.g., State v. Beach and the requirement to allege

actual injury. There has been no claim or showing of actual injury here and the state suggests that appellant cannot in good faith allege that his predicate felonies have been pardoned or set aside or that he has even a colorable reason to believe so.

The Anderson and Hodges holdings that the state must show, and the trial court must find, that the predicate felonies have not been pardoned or set aside also conflict with case law from other districts and this district. In Stewart v. State, 385 So. 2d 1159, 1160 (Fla. 2d DCA 1980), the trial court made findings that the defendant had previously committed a felony for which he had been released within five years of the current offense and that habitual offender sentencing was necessary for the protection of the public. Stewart contended that the trial court erred in not finding that he had not been pardoned or his sentences set aside. Relying on Eutsey, the second district rejected the argument:

The evidence that Stewart had been released from prison less than five years prior to the instant conviction was un rebutted. The record would amply support findings that Stewart had not been pardoned and that his conviction had not been set aside. Since the findings required by the statute are fully supported on the face of the record, the mere failure to recite a specific finding in the sentencing order to that effect is harmless error, if error at all, and therefore, the judge properly imposed the extended sentence. Cf., McClain v. State, 356 So. 2d 1256 (Fla. 2d DCA 1978).

Id.

Similarly, in Myers v. State, 499 So. 2d 895, 898 (Fla. 1st DCA 1986), *jurisdiction discharged*, 520 So. 2d 575 (Fla. 1988), Myers challenged the trial court's acceptance of a PSI, an affidavit, and copies of judgments as hearsay and contended the trial court erred in not finding that he had not received a pardon or set aside of his predicate felonies. The First District rejected the hearsay challenge and the absence of the findings because, "as settled by Stewart v. State, 385 So. 2d 1159 (Fla. 2d DCA 1980), the trial court committed harmless error, if any error at all, in failing to recite the specific finding that Myers had not been pardoned or received post-conviction relief from his last felony conviction since this finding was fully supported on the face of the record." Id. (e.s.). See Adams v. State, 376 So. 2d 47, 58 (Fla. 1st DCA 1979):

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

Section 775.084(1)(a) referred to in Adams includes the pardon and set aside provisions at issue here. It is clear from the recitation of facts that it is not necessary to controvert and disprove affirmative defenses which are not raised by the defendant. See also, Likely v. State, 583 So. 2d 414 (Fla. 1st DCA 1991), Caristi v. State, 578 So. 2d 769, 774 (Fla. 1st DCA

1991), and Jefferson v. State, 571 So. 2d 70, 71 (Fla. 1st DCA 1990), where it was held that a defendant could waive any or all of the findings and hearings prerequisite to sentencing as part of a plea bargain. See also, Robinson v. State, 551 So. 2d 1240, 1241 (Fla. 1st DCA 1989), where the First District held that the failure of the defendant to challenge hearsay on prior predicate convictions waived any requirement to corroborate such hearsay, and that the trial court was only required to determine that a defendant was an habitual felon by having committed a predicate felony within five years of his present offense.

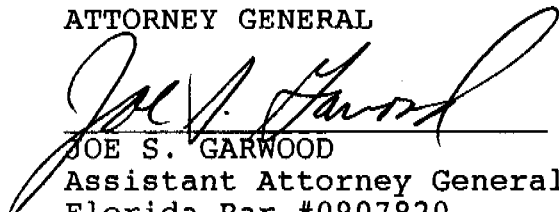
More recently, the Second DCA in Baxter v. State, 599 So. 2d 721 (Fla. 2d DCA 1992), consistent with its decision in Stewart on which this Court relied in Myers, again analyzed this issue and concluded on the authority of Eutsey that the affirmative defenses of pardon and collateral set aside had to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

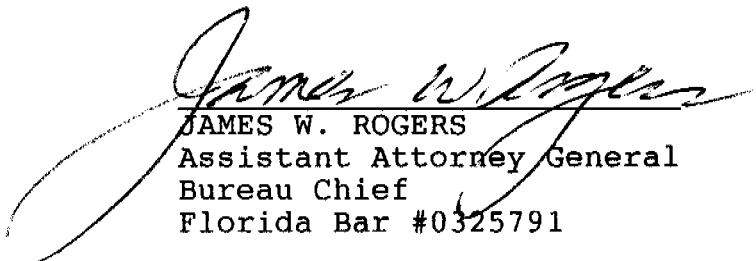
CONCLUSION

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

Respectfully submitted,

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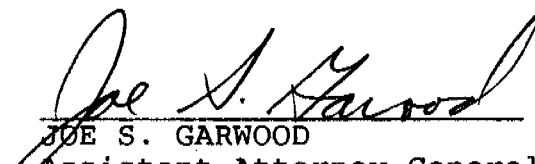

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 1st day of February, 1993.


JOE S. GARWOOD
Assistant Attorney General

APPENDIX A

Opinion Below

91-11620-25
Q

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JOEY WASHINGTON,
Appellant,

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

v.

* CASE NO. 91-2647

STATE OF FLORIDA,
Appellee.

*
*

Docketed
11-23-92
Florida Attorney
General *rb*

NOV 23 1992

Opinion filed November 19, 1992.

An appeal from the Circuit Court for Suwannee County.
L. Arthur Lawrence, Judge.

James C. Banks, Special Assistant Public Defender, Tallahassee,
for appellant.

Robert A. Butterworth, Attorney General; Andrea D. England,
Assistant Attorney General, Tallahassee, for appellee.

WIGGINTON, J.

Appellant appeals his convictions of three counts of sale
of a controlled substance and one count of possession of a
controlled substance with intent to sell, and his sentences as an
habitual offender of 30 concurrent years on each count. We
affirm the convictions but reverse the sentences and remand for
resentencing.

In sentencing appellant as an habitual offender, the trial judge failed to make a specific finding that he meets each of the criteria of section 775.084(1)(a) (1989). As this court recently declared in Jones v. State, 17 F.L.W. D2375 (Fla. 1st DCA Oct. 14, 1992): "The failure to make such findings constitutes reversible error." Therefore, appellant's sentences are hereby reversed and this cause is remanded for resentencing in compliance with section 775.084.

ERVIN and ZEHMER, JJ., CONCUR.

91-111620-TLK
Q

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JOEY WASHINGTON,
Appellant,

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

V.

CASE NO. 91-2647

STATE OF FLORIDA,
Appellee.

Docketed
1-6-93
Florida Attorney
General

JAN 05 1993

Opinion filed December 31, 1992.

An appeal from the Circuit Court for Suwannee County:
L. Arthur Lawrence, Judge.

James C. Banks, Special Assistant Public Defender, Tallahassee,
for appellant.

Robert A. Butterworth, Attorney General; Andrea D. England,
Assistant Attorney General, Tallahassee, for appellee.

OPINION ON MOTION FOR CLARIFICATION
AND SUGGESTION FOR CERTIFICATION

WIGGINTON, J.

The state has filed a motion asking this court to certify
to the supreme court the question certified in Jones v. State, 17
F.L.W. D2375 (Fla. 1st DCA Oct. 14, 1992). We grant the motion
and, as in Jones, certify to the supreme court the following
question of great public importance:

DOES THE HOLDING IN EUTSEY V. STATE, 383 SO.2D 219 (FLA. 1980), THAT THE STATE HAS NO BURDEN OF PROOF AS TO WHETHER THE CONVICTIONS NECESSARY FOR HABITUAL FELONY OFFENDER SENTENCING HAVE BEEN PARDONED OR SET ASIDE, IN THAT THEY ARE "AFFIRMATIVE DEFENSES AVAILABLE TO [A DEFENDANT]," EUTSEY AT 226, RELIEVE THE TRIAL COURT OF ITS STATUTORY OBLIGATION TO MAKE FINDINGS REGARDING THOSE FACTORS, IF THE DEFENDANT DOES NOT AFFIRMATIVELY RAISE, AS THE DEFENSE, THAT THE QUALIFYING CONDITIONS PROVIDED BY THE STATE HAVE BEEN PARDONED OR SET ASIDE?

ERVIN and ZEHMER, JJ., CONCUR.