IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

VS. : CASE NO. 81,081

BELINDA M. DAVIS, :
and
MARY D. WATERS, :

Respondents. :

_____/

RESPONDENTS' BRIEF ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
VS.	:	CASE NO. 81,081
BELINDA M. DAVIS, and MARY D. WATERS,	:	
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RESPONDENTS' BRIEF ON THE MERITS

I STATEMENT OF THE CASE AND FACTS

Respondents accept the state's statement of the case and facts as reasonably accurate. Attached hereto as an appendix is the opinion of the lower tribunal.

II SUMMARY OF THE ARGUMENT

Respondents do not agree that the recent Rucker decision of this Court is dispositive of the issue. That case answered the certified question in the negative, i.e., that Eutsey does not relieve the sentencing judge of his statutory duty to make findings. That case further held the error was harmless, which cannot be true in the instant case, because the only findings made by the sentencing judge in the instant case were that respondents qualified as habitual offenders, without saying how or why, or addressing any of the statutory criteria.

None of the prerequisite prior convictions was entered into evidence at the sentencing hearing of respondent Waters. Only one prior conviction was entered in evidence at respondent Davis' sentencing hearing. The discussion of respondents' prior records at the sentencing hearings is so confusing, it cannot be said the failure to satisfy the statute's requirements was harmless error.

III ARGUMENT

CERTIFIED QUESTION/ISSUE PRESENTED

> 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, 383 So. 2d 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?

Respondents argue that the question certified by the district court, which is the same certified in Jones v. State, 606 So. 2d 709 (Fla. 1st DCA 1992) (en banc), review pending, no. 80,751, should be answered in the negative, and the opinion affirmed.

Respondents do not agree with the observation made in the state's brief that the decision of this Court in State v. Rucker, 18 Fla. L. Weekly S93 (Fla. Feb. 4, 1993), is dispositive of the issue. Rucker answered the certified question in the negative, i.e., that Eutsey does not relieve the sentencing judge of his statutory duty to make findings. Rucker further held the error in his case was harmless because:

> [T]he trial court expressly found that Rucker met the definition of [an] habitual felony offender by a preponderance of the evidence.

Rucker, 18 Fla. L. Weekly at S94.

AS TO RESPONDENT DAVIS

It is important to note that the only findings made by the sentencing judge in the instant case were that respondent Davis qualified as an habitual offender:

> I find that you have been convicted of felonies which make you eligible for habitual felony offender treatment (R 460).

The judge only had before him one prior judgment and sentence (R 467), yet after making the above finding, he said:

> Let's see it should be filed in her case the exhibits here that the state had offered earlier (R 461).

One may assume that the judge was referring to the prior judgment and sentence, but if he was, why did he say the singular "it" and then the plural "exhibits?" He may have been referring to an unrelated probable cause affidavit which the state attempted to introduce (R 456-57). One prior conviction is not enough. The court also failed to address any of the other statutory criteria. This case demonstrates the need for particularized statutory findings, especially where the prosecutor sloppily neglects to introduce the required documents.

AS TO RESPONDENT WATERS

No exhibits were entered into evidence. There is much discussion in the record about a federal kidnapping conviction, but even the prosecutor wondered whether she was released from that sentence within five years of the present offense (R 482). He did not introduce any evidence to show what her release date was.

In sentencing respondent Waters as an habitual offender, the judge merely said: "I don't need to tell you what your prior record is" (R 500). Maybe not, but he needs to tell those who are reading the appellate record and trying to determine if the sentence was legal. There is nothing in this record, not even a presentence investigation, to show that respondent Waters was ever convicted of anything.

Again, this case demonstrates the need for particularized statutory findings, especially where the prosecutor sloppily neglects to introduce the required documents.

The historical findings in both cases are woefully inadequate, and do not satisfy the requirements of Section 775.084, Florida Statutes, and this Court's prior opinion in Walker v. State, 462 So. 2d 452 (Fla. 1985), even under the relaxed harmless error standard expressed by this Court in Rucker.

IV CONCLUSION

Respondents respectfully requests that this Court answer the certified question in the negative and affirm the district court decision, because a harmless error analysis cannot be performed based upon this confusing record.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Carolyn Mosley, Assistant Attorney General, by delivery to Plaza Level, The Capitol, Tallahassee, Florida, and a copy has been mailed to each respondent, this 31st day of March, 1993.

P. DOUGLAS BRINKMEYER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

BELINDA M. DAVIS, and
MARY D. WATERS,

Appellants,

v.

STATE OF FLORIDA,

Appellee.

_____/

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

CASE NO. 91-2868

Opinion filed December 16, 1992.

An appeal from the Circuit Court for Escambia County.
William Anderson, Judge.

Carol Ann Turner, Assistant Public Defender, Tallahassee, for appellants.

Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for appellee.

PER CURIAM.

Appellants' sentences are reversed in accordance with this court's opinion in Jones v. State, 17 F.L.W. D2375 (Fla. 1st DCA Oct. 14, 1992) (en banc). We certify to the Florida Supreme Court as a question of great public importance the same question certified in Jones.

JOANOS, C.J., SMITH and MINER, JJ., CONCUR.