IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

VS. : CASE NO. 81,082

MICHAEL WHITE, :

Respondent. :

_____/

RESPONDENT'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

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STATE OF FLORIDA,	:	
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RESPONDENT'S BRIEF ON THE MERITS

I STATEMENT OF THE CASE AND FACTS

Respondent accepts 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

Respondent does 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 sentencing judge made absolutely no findings in the instant case, and did not address any of the statutory criteria. Moreover, the judgments and sentences in the record contain different names, and the state never connected them up to respondent. The brief discussion of respondent's prior record at the sentencing hearing does not satisfy the statute, so 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?

Respondent argues 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.

Respondent does 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.

The only finding made by the sentencing judge in the instant case was that respondent had a "terrible criminal history" (T 202). The two notices of habitual offender sentencing (R 15; 86) do not specify the prior convictions upon which the state would rely.

No exhibits were entered into evidence at the sentencing hearing, yet in the record there are four prior judgments and sentences. The problem with them is that they contain different names -- Henri Prichon White (R 66); Henri White (R 73); Henry P. White (R 77); and Henri Prichon White again (R 81). They were never connected up to respondent, who was sentenced in this case under the name Michael Bethea (R 87)[1].

This case demonstrates the need for particularized statutory findings, especially where the prosecutor sloppily neglects to connect respondent to the names on the required documents.

The historical findings 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.

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[1]The notice of appeal contains the name Michael White (R 105), but the certificate of the Governor contains the name Henri P. White (R 63).

IV CONCLUSION

Respondent 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,
NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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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 respondent, this 31st day of March, 1993.

P. DOUGLAS BRINKMEYER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

MICHAEL WHITE, a/k/a MICHAEL BETHEA, a/k/a HENRI WHITE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

CASE NO. 91-1672

Opinion filed December 14, 1992.

An Appeal from the Circuit Court for Alachua County. Thomas Elwell, Judge.

Nancy A. Daniels, Public Defender; Carol Ann Turner, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellee.

SHIVERS, Judge.

Michael White appeals his judgment and sentence as a habitual offender. Of the issues raised, one has merit. We agree that this case must be remanded for the trial court to make specific findings regarding whether White's prior felonies were pardoned or set aside pursuant to subsections 775.084(1)(a)(3) and (4). See Anderson v. State, 592 So. 2d 1119 (Fla. 1st DCA

1991); Jones v. State, 17 F.L.W. 2375 (Fla. 1st DCA Oct. 14, 1992). As in Anderson, we certify the following question to the supreme court as one 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]', 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?

REVERSED and REMANDED.

MINER and ALLEN, JJ., CONCUR.