IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,082

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

Respondent.

_____/

REPLY BRIEF OF PETITIONER

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ISSUE (CERTIFIED QUESTION)

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

Respondent (hereinafter White) has raised two arguments, one factual and one legal, each of which will be addressed seriatim.

White states, "No exhibits were entered into evidence at the sentencing hearing, yet in the record there are four prior judgments and sentences." (RAB. 4) White is mistaken in his belief that the exhibits were not admitted in evidence.

Although the court reporter did not include in the transcript of the sentencing hearing any reference to the admission of these documents, the deputy clerk noted on the face of the documents (including those relating to the current sentences) that they were admitted in open court on the date of the sentencing hearing. The notation reads, "Filed in open court 4-30-91, M. Williams, D.C." (R. 63, 64, 81, 87, 95, 97) While not every page of every document has the clerk's notation stamped on it, there are a sufficient number of notations to prove that they were all admitted in evidence in open court. These documents proved that White was previously convicted of the following offenses:

> Case No. 83-2249-CF-A, 1/16/84, trafficking in stolen property, second-degree felony, eighteen months' imprisonment.
>
> Case No. 85-960-CF-B, 10/21/85, I-forgery, II-uttering a forgery, III-forgery, IV-uttering a forgery, third degree felonies, 30 months' imprisonment.
>
> Case No. 86-2749-CF-A, 3/16/87, escape, second-degree felony, one year imprisonment.
>
> Case No. 88-1478-CF-A, 10/10/88, aggravated battery, second-degree felony, four years' imprisonment.

(R. 64-84) There is no record evidence of any objection to the admission of the documentary evidence that was filed in open court.[1]

White also states:

> The problem with [the documents] is that they contain different names -- Henri Prichon White (R. 66); Henri White (R. 73); Henry P. White (R. 77); and Henri Prichon White (R. 81). They were never connected up to respondent, who was sentenced in this case under the name Michael Bethea (R. 87).

(RAB. 4)

White overlooks the following facts: At trial, the arresting officer referred to the defendant as "Mr. Bethea" but testified that White initially identified himself as "Michael White." (TT. 72) The defendant was arrested under the name of

[1] White, who was present at the sentencing hearing, knows perfectly well whether these documents were admitted in open court at the sentencing hearing. If White knew that these documents were admitted in evidence, he has attempted to deceive the court by arguing to the contrary on appeal. White cannot avoid the prohibition against deceiving the court by using a lawyer as a mouthpiece.

"Michael White," but the arrest papers were later changed to reflect the defendant's correct name. (TT. 101-102) The arrest report reflects that the Alachua Detention Center notified the arresting officer that "Michael White" was also known as "Michael Lenard Bethea and Henry Pritchon White." (R. 5) At sentencing, defense counsel argued to the court that the "resisting arrest without violence was nothing more than Mr. White using names that he's used in the past and that he's known by in addition to Henri White." (ST. 199) All four of the certified copies of prior judgments and sentences refer to the defendant as "Henri Prichon White" or "Henri White." (R. 64-80) One of these does refer to the defendant as "Henry P. White," but on the second page of that document underneath the fingerprints section is a certification that the fingerprints are those of "Henri P. White." (R. 77-80) The judgment of conviction for the current offenses is styled, "State of Florida vs. Michael Bethea, a/k/a Henri P. White." (R. 87) After he was found to have a "terrible criminal history" and sentenced as an habitual offender, White told the judge, "I got a bad record, it's true enough, and I put myself in this situation and I'll go with it." (ST. 202-204)

White further argues that State v. Rucker, 18 Fla. L. Weekly S93 (Fla. February 4, 1993) is distinguishable; that is, the facts there revealed that the error was harmless, but here the facts reveal that the error was harmful. The State respectfully disagrees. The facts in the instant case are virtually indistinguishable from those in Rucker.

In Rucker, this Court summarized the trial court's findings as follows:

> After "considering the totality of the evidence," the court found by a preponderance of the evidence that Rucker qualified as a habitual felony offender. S93
>
> [T]he trial court expressly found that Rucker met the definition of habitual felony offender by a preponderance of the evidence. S94

Id., at S93, 94.[2]

In the case at bar, after receiving unrebutted evidence from the State proving White's qualification for habitual sentencing, and listening to argument of counsel, the trial court stated:

> Mr. White, you have a terrible criminal history here. I mean you really -- even the most creative judge would be severely handicapped by what he could do to try to structure some sentence for you that would make life a little more meaningful for you. This is terrible. I've seen worse, but this one comes close to being one of the worst.
>
> Saying nothing sufficient, it is the judgment and sentence of the court that you be declared to be a habitual felony offender,
> ....

(T. 203-204)

The trial court's finding in the instant case was no less specific than was the trial court's finding in Rucker, but the

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[2] The trial court's exact words were, "In view of that, I do find that the evidence supports by a preponderance thereof classification of the defendant as a habitual offender and he will be sentenced as such." Rucker, (Sentencing Transcript, 264). The defendant in Rucker was represented by Nancy A. Daniels, Public Defender for the Second Judicial Circuit, and, therefore, counsel for White has access to this transcript.

point is that the findings in both cases were inadequate. This Court held in Rucker that "a court must find by a preponderance of the evidence that the defendant has been convicted of two or more felonies within the requisite time period and that these convictions have not been pardoned or set aside." Id., at S94.

A determination that error occurred does not end the analysis, however. The second step is to determine the nature of the error (harmless vs. harmful). This Court explained in Rucker why the second step was appropriate, stating:

> This ruling is not inconsistent with **Walker**, wherein we stated that findings under section 775.084 are a "mandatory statutory duty":
>
> > We hold that the findings required by section 775.084 are critical to the statutory scheme and enable meaningful appellate review of these types of sentencing decisions. Without these findings, the review process would be difficult, if not impossible.
>
> 462 So. 2d at 454. The finding in issue in **Walker** concerned an earlier version of the habitual offender statute, which had provided:
>
> > [775.084](3) In a separate proceeding, the court shall determine if it is necessary for the protection of the public to sentence the defendant to an extended term as provided in subsection (4) and if the defendant is an habitual felony offender....
>
> §775.084(3), Fla. Stat. (1981). Because of the subjective nature of this "public protection" requirement, any failure to make an express finding would have frustrated meaningful appellate review. Unlike the "public protection" finding, however, which has since been deleted from the statute, the requirement in issue here--that the prior

> convictions have not been pardoned or set aside--is a ministerial determination involving no subjective analysis.

Id., at S94 (e.s.)

The statutory findings currently in the habitual offender statute are all objective in nature--(1) specific number of prior felony convictions, (2) committed within a specific time period, (3) which are still valid, and (4) for which the defendant has never been pardoned. A general finding by the trial court that the defendant qualifies for habitual sentencing, and which is not challenged in the trial court, does not frustrate appellate review.

There is no mandatory requirement in non-capital cases for appellate courts to review all findings and confirm that all non-capital sentences have been legally imposed. If there were, then all convicted criminals would be required to automatically appeal, as capital criminals do. §921.141(4), Fla. Stat.

Respondent reads Rucker much too narrowly by overlooking significant language in the decision.

> In the present case, the State introduced certified copies of Rucker's prior convictions, both of which occurred within the requisite period of time. Rucker conceded the validity of the convictions and the trial court expressly found that Rucker met the definition of habitual felony offender by a preponderance of the evidence. Because this evidence was unrebutted and Rucker does not now assert that his prior convictions were pardoned or set aside, any failure to make more specific findings was harmless. Were we to remand for resentencing, the result would be mere legal churning.

Id. It appears that the Fourth District has also read Rucker much too narrowly. See Robinson v. State, 18 Fla. L. Weekly D510 (Fla. 4th DCA February 17, 1993). Presumably there was a general finding in Robinson, similar to the finding in Rucker and in the instant case, but no specific findings on each statutory factor.

Where no unresolved claims of error are made in the trial court and the criminal appellant does not make a good faith assertion on appeal that the predicate felonies are invalid, it would be "mere legal churning" to remand for resentencing. In this connection, two points should be noted. First, there is an unfortunate and growing tendency to dismiss the importance of the contemporaneous objection rule in the sentencing process in the belief that remand and resentencing is a low cost procedure. Resentencing is a critical stage of a criminal prosecution requiring the presence of court personnel, the trial judge, counsel, and, of course, the convicted criminal. Fla. R. Crim. P. 3.180, 3.700, 3.720, and 3.721. Normally, as here, resentencing will also require transporting the criminal from state prison to the trial court, which is not inconsequential, particularly when multiplied by hundreds and thousands. Second, this Court explicitly disavowed certain language in State v. Rhoden, 448 So. 2d 1013 (Fla. 1984) suggesting that the contemporaneous objection rule did not apply to sentencing, admonished trial and appellate counsel for failure to preserve sentencing errors at trial and for raising them for the first time on appeal, and created an entirely new rule, 3.800(a), for

the express purpose of raising and correcting illegal sentencing in the trial court, not on appeal. State v. Whitfield, 487 So. 2d 1045 (Fla. 1986). This Court should reiterate Whitfield and return to the historical rule, which serves the process so well, that unpreserved errors, with rare exceptions, cannot be raised for the first time on appeal.

White asserts that 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." (RAB. 4) To the contrary, the instant case demonstrates the critical need to return to a system of honoring the contemporaneous objection rule and to the ethical principle that no member of The Florida Bar will argue an issue unless it is based on a good-faith belief, after consulting with his client and trial counsel, that the client has suffered prejudice from the alleged error, which prejudice will be corrected by reversal and remand. The frivolous appeal of a case, such as here, hurts everyone involved. It gives the criminal false hope, it wastes everyone else's valuable time and energy, and it costs taxpayers unnecessary money (Public Defender's Office just moved to withdraw from fifty-one cases in First District), and, generally, it fosters abuse of the system. No paying client would ever pursue an appeal of this issue under the circumstances of this case.

Justice Scalia recently commented on the remedy for abusive appeals of "sentencing errors" in his testimony before the House Appropriations Subcommittee on Supreme Court Funding:

REP. JAMES MORAN, D. VA.: I'd like to know how many of these cases get turned down because if there, if it's unlikely the sentence is going to get changed then there is going to be less incentive to appeal it, and do we have any figures on that? If we don't, maybe we could put it in the record because the word's going to get out if the frivolous appeals are being, about 90% of them are being, rejected, maybe 100%. Then eventually that may not be as much of an increase in case load. And I just wanted to see if you have a quick reaction now or if we could get some figures.

JUSTICE KENNEDY: Well, of course, the criminal appeal is usually cost-free if the defendant is indigent. And we'll certainly get some figures to see if we can throw some light on the question you ask as to the specific numbers.

JUSTICE SCALIA: Yes, my, my, I think you may be optimistic about the rationality of the pro se criminal defendant.

REP. MORGAN: Just got to keep appealing because he's got nothing to lose.

JUSTICE SCALIA: Nothing to lose.

REP. MORAN: And so that figure is going to continue to increase.

JUSTICE SCALIA: I think that's the problem. There really is nothing to lose. It doesn't cost anything and even if you lose, you've maybe stuck your thumb in the eye of the system. I don't know, there's a --

REP. MORAN: There's, so somehow there has to be some disincentive, some cost to make frivolous appeals if it's not likely that it's going to be reversed. But it nevertheless has to take up your time to review everyone of them.

JUSTICE SCALIA: Yeah, the, you know, what has generally protected the courts from frivolous cases, and a lot of people do not realize how essential the practicing attorney

> is to our system of justice. We call attorneys "Officers of the Court" and we don't understand what that means. They are a great asset to the system of justice because they screen out the frivolous cases. If they bring a frivolous case, you can discipline the attorney but you, there is nothing you can do to the pro se applicant for bringing a frivolous case. So we're without any protection against that kind of appeal.
>
> REP. MORAN: Thank you very much. Thank you, Mr. Chairman.

"America and the Courts," C-Span, 20 February 1993.

As it did in its initial brief, the State urges this Court to make clear to members of The Florida Bar that it is unprofessional and unethical to argue issues to an appellate court when there is no basis for a good-faith belief that prejudice has occurred. The initial burden for preventing legal churning, as was recognized by Justice Scalia, rests on the legal conscience of appellate counsel.

CONCLUSION

Based on the foregoing discussion, the First District's decision should be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief has been furnished 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 12th day of March, 1993.

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