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FILED
SID J. WHITE
JAN 24 1992
CLERK, SUPREME COURT
By Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ISAIAH PERKINS,

Petitioner

v.

CASE NO.: 78,613

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Isaiah Perkins, appellant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred herein as either "Respondent" or "the State." References to the record on appeal will be by the symbol "R" followed by the appropriate page number. References *to* the transcripts of proceedings will be by the symbol "T" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

Issue I:

The record establishes that the petitioner has not properly preserved the issues presented in this brief. The first issue presented by the petitioner was not raised in the trial court. Because, the issue was not properly preserved and does not amount to fundamental error, this court should deny further review. The second issue presented by petitioner has never been raised before. Because it is not fundamental error, this court should deny review.

Issue 11:

It is well settled law that habitual offender legislation is constitutional. Over the decades, it has withstood challenge after challenge. Petitioner's claims that the habitual offender statute violates the due process clause, the prohibition against double jeopardy, and are *ex post facto*, have been repeatedly rejected.

Petitioner's attempts to revitalize his argument by using certain principles of statutory construction to bolster his argument. His attempt to redefine the meaning of the statute must also be rejected. Petitioner's argument ignores the fundamental principle of statutory construction that courts must give unambiguous statutory language its plain meaning.

Therefore, this court should deny petitioner the relief he requests.

Issue 111:

The question of whether the legislative enactment violated the single subject rule was not preserved. Moreover, petitioner presents this issue without argument asking this court to apply a lower court decision to this case. Such a presentation is not proper. Moreover, the lower court decision improperly applied this Court's precedent. This court should deny petitioner the relief he requests.

ARGUMENT

ISSUE I

WHETHER CONSTITUTIONALITY OF A SENTENCING STATUTE MAY BE RAISED FOR THE FIRST TIME ON APPEAL

Petitioner has presented this court with two issues. Neither of which is properly preserved for review. This court should dismiss the case on the ground that review was improvidently granted.

A. Jurisdictional Problems With Petitioner's First Issue.

Totally absent from petitioner's attack upon the habitual violent felon statute is any reference to the manner in which this issue was raised in the trial court. Upon review of the record the reason for the omission becomes clear. Trial counsel[1] did not challenge the constitutionality of the statute. The first issue of this brief is not properly preserved and this court should decline to review it.

The State acknowledges that it did not raise the preservation issue in the First District. *See* State v. Wells, 539 So.2d 464, 468 n. 4 (Fla. 1989)(state waived issue of

[1] The sentencing documents including the guidelines scoresheet establish petitioner's prior convictions. (R 37-44). Petitioner's record includes three prior felonies, one of which is the aggravated battery against the same victim which was used to habitualize him. (R 5, 12).

defendant's standing to assert privacy interest in luggage found in car trunk and later searched, when defendant's standing was not raised at trial or on appeal), *affirmed,* 109 L.Ed.2d 1 (1990).

However, petitioner's waiver through lack of preservation at trial has jurisdictional implications. In Davis v. State, 383 So.2d 620, 622 (Fla. 1980), this Court held that a defendant who pled nolo without reservation of the constitutionality of a controlling statute was "clearly wrong in his effort to activate the [court's] jurisdiction." [e.s.] Therefore, the petitioner here is equally wrong in activating this Court's jurisdiction through an issue not raised before the trial court. Any waiver by the State is immaterial, as subject matter jurisdiction cannot be conferred on the court by waiver or the parties' failure to object. Florida Nat'l Bank of Jacksonville v. Kassewitz, 25 So.2d 271 (Fla. 1946)(jurisdiction cannot be infused in the court through error or inadvertence by the parties), *See* Thomas v. State, 16 F.L.W. D2320, 2324 (Fla. 1st DCA Aug. 30, 1991)(Miner, J., dissenting)("Since the absence of a contemporaneous objection renders the appellate court unable to address the alleged error, I believe it totally irrelevant whether or not the state raises the absence of a defense objection below in its answer brief.").

It is a settled rule of appellate review that "[e]xcept in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court. [cites

omitted]." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Therefore, unless petitioner can show fundamental error, he has not established a basis for this court to exercise its jurisdiction.

B. Jurisdictional Problems With Petitioner's Second Issue.

Petitioner acknowledges that his second issue, the alleged unconstitutionality of 9775.084 for violation of the one-subject rule, was never presented to any lower tribunal. Oblivious to the settled rule of law that issues not raised and preserved in the trial court may not be raised on appeal, appellate counsel asserts (without citation to any authority) that since illegal sentences can be raised at any time he can raise this issue now. Be then requests reversal without any analysis of the question of whether the alleged unconstitutionality of 9775.084 for violation of the one-subject rule may be raised for the first time on appeal, and, without any significant analysis of the merits of his position.

It is a settled rule of appellate review that "[e]xcept in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court. [cites omitted]." Steinhorst v. State, *supra.* Therefore, unless he can show fundamental error, petitioner is **not** entitled to have this issue reviewed.

Fundamental Error

The meaning of "fundamental error" has been frequently addressed by the Florida Supreme Court and the various district courts. In Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970), the district court held that a challenge to the constitutionality of a statute was cognizable on appeal as fundamental error even though the constitutionality of the statute had not been raised and preserved in the trial court. More specifically, the district court held a special act was unconstitutional because the title of the act did not fully reflect the contents of the act. This was contrary to Article 111, f16 of the Florida Constitution of 1885. (It should be noted that then §16 is now embodied in §6 of the Florida Constitution of 1968, the constitutional section at issue here.)[2] The Florida Supreme Court rejected the proposition that constitutionality of the statute was fundamental and could be raised for the first time on appeal. The court made two general points which deserve attention. First, "'[f]undamental error,' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." *Id.* Second, an

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[2] Section 6 reads in pertinent part:

> **Laws,--Every law** shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.

"Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly." Id.

Sanford was a civil case. The same doctrine is applied to criminal cases. In Castor v. State, 365 So.2d 701, 704 (Fla. 1978), in the context of jury reinstructions, the Court reaffirmed the rule that contemporaneous objections were required and rejected the argument that the error was fundamental, reiterating that the doctrine of fundamental error must remain a "limited exception." *Id.* The court also reaffirmed that the error must be so fundamental as to "amount to a denial of due process. State v. Smith, 240 So.2d 807 (Fla. 1970)." Id., fn. 7.

This Court has consistently limited the scope of fundamental error. See Clark v. State, 363 So.2d 331, 333 (Fla. 1978)("we have consistently held that even constitutional errors, other than those constituting fundamental error, are waived unless timely raised in the trial court. Sanford.")

The Court was even more emphatic in Ray v. State, 403 So.2d 956, 960 (Fla. 1981):

> [F]or error to be so fundamental that it may be urged on appeal, though not properly raised below, the error must amount to a denial of due process. *Castor.*
>
> * * * *
>
> We agree with Judge Hubbart's observation that the doctrine of fundamental error should be

> applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. ***Porter*** *v.* ***State,*** 356 So.2d 1268 (Fla. 3d DCA)(Hubbart, J., dissenting), ***remanded,*** **364 So.2d** 892 (Fla. **1978),** ***rev'd*** on ***remand,*** ***376*** So.2d ***705*** (Fla. 3d **DCA 1979).** *Id.*[3]

The cases holding and applying the above are legion. Representative cases include:

(1) Ellis v. State, **74** Fla. 215, 76 So. **698** (1917)("[I]t is suggested that the statute is unconstitutional. This question was not raised in the trial court, and, **as** the statute is not patently in conflict with organic law, the suggestion made in the **brief** do not properly present the validity of the law for consideration by this court". ***Id.***

(2) Silver v. State, 188 So.2d 300, **301** (Fla. 1966)(Court strongly criticizes and refuses to condone decision of district court to indulgently address constitutionality of statute where constitutionality not raised in trial court).

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[3] In Porter, the issue was whether an unobjected to comment on a defendant's exercise of his right to silence was fundamental error. The district court, J. Hubbart dissenting, originally held that it was but reversed itself after remand for reconsideration in light of Clark. The point for this Court to recognize is that the right to silence is unquestionably a fundamental constitutional right in the English language sense of "fundamental," but, in the context of an unobjected to error, "fundamental error" is a legal term-of-art of exceptionally **narrow scope.** ***See*** cases **above** and **below.** This Court should reject the ubiquitous tendency of contemporary defense lawyers to debase the legal language by seeing "fundamental error" everywhere.

(3) Whitted v. State, 362 So.2d 668, 672 (Fla. 1978) (Failure of defendant to raise constitutionality of statutory provision under which convicted precludes appellate review.)

(4) Eutzy v. State, 458 So.2d **755**, 757 (Fla. 1984)(Issue of constitutionality of statutory authority to override jury recommendation in death penalty case not cognizable for first **time on appeal.)**

The case of **Davis v.** State, *supra,* is particularly instructive because it involved a nolo plea which purported to reserve the **sight** to appeal the denial of motions to dismiss. On appeal, Davis challenged the constitutionality of the statute under which he was convicted. The Florida Supreme Court, relying on Silver, held there was no jurisdiction to consider the challenge:

> In the case ***sub judice*** the defendant entered a plea of *nolo contendere* and did not reserve any right to raise the constitutional question on appeal. The statute was not attacked at the trial level. Defendant has exercised his right to one appeal. If he had desired to appeal to **this** Court, he only had to raise a constitutional question **before** the trial court and, in event of an unfavorable ruling, could have appealed directly to this Court. Not having followed this course, he is clearly wrong in his effort to activate the jurisdiction of this Court.
>
> For the reason stated, jurisdiction is declined and the judgment of the circuit court is not disturbed.

Id. In this connection, see the rule of Brown v. State, 376 So.2d 382, 385 (Fla. 1979), that the reserved issue must be totally dispositive and that the constitutionality of a controlling statute is an appropriate issue for reservation, i.e. must be reserved.

The above holdings are also reflected in other court's case law. *See* State v. McInnes, 133 So.2d 581, 583 (Fla. 1st DCA 1961)("It is fundamental that the constitutionality of a statute may not generally be considered on appeal unless the issue was raised and directly passed upon by the trial court."); Randi v. State, 182 So.2d 632 (Fla. 1st DCA 1966)(constitutionality of statute may not be raised for first time on appeal).

It might be suggested that the above holdings apply only to the constitutionality of statutes under which a defendant is convicted and not to statutes under which he is sentenced. Such a suggestion would be improper because it would illogically elevate sentencing issues to a position of supremacy over guilt issues. In any event, the courts apply the same rule to sentencing statutes. *See* Gillman v. State, 346 So.2d 586, 587 (Fla. 1st DCA 1977)(Constitutionality of sentencing statute not cognizable when raised for first time on appeal). ***See,*** *also,* Knight v. State, 501 So.2d 150 (Fla. 1st DCA 1987)(*ex post facto* and equal protection challenges to sentencing statutes not cognizable when raised for first time on appeal).

Applying the above law to the case at hand, it is uncontroverted that appellant did not challenge the constitutionality of the statute in the trial court. Further, he never raised, or otherwise preserved, the issue of whether §775.084, Fla. Stat. (1989), was unconstitutionally enacted in violation of the single subject rule of Article 111, §6 of the Florida Constitution. Pursuant to the case law above, the issues are whether the constitutionality of the habitual violent offender statute, or a violation of the single subject rule is so fundamental as to violate due process and to justify consideration of the issue although not raised below? The answer of absolutely not fairly leaps out.

Due process takes two forms, substantive and procedural. Substantive due process requires only that there be a rational basis for the legislative enactment of the habitual offender statute. State v. Saiez, 489 So.2d 1125, 1129 (Fla. 1986); State v. Olson, 586 So.2d 1239 (Fla. 1st DCA 1991). The rational basis for habitual offender statutes is that society requires greater protection from recidivists and sentencing as habitual felons provides greater protection. Eutsey v. State, 383 So.2d 219, 223-224 (Fla. 1980).

Procedural due process has two components: reasonable notice and a fair opportunity to be heard. State v. Beasley, 580 So.2d 139 (Fla. 1991); Goodrich v. Thompson, 96 Fla. 327, 118 So. 60, 62 (1928). There can be no suggestion here that appellant

was not given reasonable notice and a fair opportunity to be heard. As the Florida Supreme Court said in, e.g., Davis, 383 So.2d at 622:

> [H]e only had to raise a constitutional question before the trial court and, in the event of an unfavorable ruling, could have appealed directly to this Court. Not having followed this course, he is clearly wrong in his effort to activate the jurisdiction of this Court.

In addition to the doctrine of fundamental error/due process, the facial validity of a statute may be challenged for the first time on appeal. Trushin v. State, 425 So.2d 1126 (Fla. 1983). This is also a very narrow exception to the rule that issues not raised in the trial court may not be raised on appeal. There are two aspects to the facial challenge: overbreadth and vagueness. Overbreadth only arises when the statute in question impinges on behavior protected by the first amendment to the United States Constitution and by Article I, §4 of the Florida Constitution. State v. Olson, 586 So.2d at 1243-1244. There can be no suggestion here that the statute or the single subject rule somehow facially impinges on first amendment rights. The same conclusion applies to facially void-for-vagueness. Nothing in the statute would cause a person of common intelligence to guess at its meaning. Moreover, courts have repeatedly upheld the constitutionality of the statute against challenges. See, e.g., Burdick v. State, 584 So.2d 1035 (Fla. 1st DCA 1991), Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), and cases cited therein.

Other rules and points of law support the proposition that a single subject challenge does not meet the criteria for fundamental error or facial invalidity. Single subject and title defects under Article 111, §6 are cured by the biennial reenactment of the Florida Statutes. State v. Combs, 388 So.2d 1029 (Fla. 1980); Belcher Oil Co. v. Dade County, 271 So.2d 118, 121 (Fla. 1972). If violation of Article 111, §6 was fundamental error or facially invalid, it is readily apparent that reenactment would not cure either fundamental or facial invalidity. In this connection, §6 contains requirements concerning the title and substantive content of legislation. Note that in the seminal case of Sanford v. Rubin, the Florida Supreme Court held that a constitutional challenge to the title of an act was not fundamental error which could be raised for the first time on appeal. Consistent with the preceding, there is no equivalent in the United States Constitution to Article 111, §6. Clearly, if inclusion of more than one subject in a legislative act constituted fundamental error or facial invalidity, federal legislation routinely encompassing more than one subject would violate due process and be subject to facial challenge. It is not, of course.

Finally, respondent notes that there is no legal basis for petitioner's claim of jurisdiction based on an assertion that the sentence is illegal. Respondent acknowledges that a defendant is statutorily authorized to appeal an "illegal

sentence". However, this provision of 8924.06, Fla. Stat., applies only to sentences which facially exceed the statutory maximum sentence. Infante v. State, 197 So.2d 542 (Fla. 3rd DCA 1967); Bouie v. State, 360 So.2d 1142 (Fla. 2nd DCA 1978). In Gonzalez v. State, 392 So.2d 334 (Fla. 3rd DCA 1981), the court explained that challenges to sentences which exceed the authorized statutory maximum, or, are not authorized by statute can be raised for the first time on appeal. However, petitioner is not in that position, for, the statute authorizes the sentence he received. Petitioner is attempting to use the phrase "illegal sentence" to bootstrap his unpreserved challenge to the constitutionality of the statute. This is a claim relating to the application of the statute to the particular facts and circumstances of his case, and, not a claim that the sentence exceeded the penalty provided by statute. Therefore, it would not be reviewable on direct appeal and certainly is not cognizable an discretionary review. Infante, *supra.*

In any event, the case petitioner is relying on Johnson v. State, 16 F.L.W. D2876 (Fla. 1st DCA Nov. 15 1990), does not provide him the basis for a claim that his sentence is illegal. Johnson, did not invalidate the statute. It created a window of nonapplicability, but, recognized that the statutory problem had been cured. The case has been accepted for review in this court, therefore, the lower tribunal's decision relating to the proper preservation of this issue and its decision on the merits is subject to modification or reversal.

Finally, petitioner's sentencing guideline sheet shows three prior felony convictions. Thus, petitioner qualifies for treatment as a regular habitual offender. Under the regular habitualization process he could have received the same maximum sentence as can imposed under the habitual violent sentencing. Therefore, his sentence does not exceed the statutory maximum and this court should not review this issue.

Conclusion as to petitioner's first issue

Applying the above law to the case at hand, it is uncontroverted that petitioner did not raise, or otherwise preserve, the issue of whether the habitual, violent felon statute is constitutional. Pursuant to the case law above, the issue is whether the definition of "habitual violent felony offender" is fundamental, as to violate due process and to justify consideration of the issue although not raised below. Given the great latitude and deference accorded the Legislature in defining statutory terms, the answer leaps **out** at the reader. That answer is "NO."

By failing to raise the jurisdictional issue before the trial court, petitioner waived it. The State's failure to argue preservation before the First District, although embarrassing in hindsight, does not vitiate petitioner's initial failure. Moreover, jurisdiction cannot be established through waiver. Since this Court accepted jurisdiction based **on** a non-preserved issue, this appeal must be dismissed outright.

If not dismissed, this Court should decline consideration on the merits. The State requests such; and strongly urges this Court to issue an opinion declaring that non-preserved, non-fundamental errors can not be the basis for appellate review.

Conclusion as to petitioner's second issue.

In summary, then, assuming arguendo that chapter 89-280 violates Article 111, §6, the error is not fundamental and does not cause either the statute or the act to be facially invalid. Thus, in view of the settled law that an appellate court will not entertain an issue or an argument not presented below unless the alleged error is fundamental or to the facial validity of the statute, appellant here may not challenge the constitutionality of §775.084. Moreover, petitioner had not received a facially illegal **sentence,** thus no jurisdiction exists to review this issue. Therefore, Respondent requests this court to determine that review was improvidently granted and dismiss the case. Alternatively, this court should issue an opinion declaring that non-preserved, non-fundamental errors can not be the basis for appellate review.

ISSUE II

WHETHER THE LOWER TRIBUNAL PROPERLY HELD THAT THE HABITUAL VIOLENT FELONY OFFENDER PROVISIONS OF SECTION 775.084, FLA. STAT. (1989), MAY CONSTITUTIONALLY ENHANCE THE SENTENCE OF A DEFENDANT WHOSE CURRENT OFFENSE IS NOT AN ENUMERATED VIOLENT FELONY. (restated)

Although the State maintains its position that acceptance of jurisdiction would be improvident because petitioner failed to preserve the issue in the trial court below, the State will address the issues raised on their merits.

Statutory Construction

Initially, petitioner claims that the habitual violent felony offender provisions "suffer from internal conflict" because the title employs the term "habitual violent felony offender," while the body of the statute defines a habitual violent felony offender as one who has previously committed an enumerated violent felony within five years of the instant nonviolent felony. (Brief of Petitioner at 6). In other words, the premise of petitioner's argument is that the term "habitual" modifies the term "violent" in the title, so that the instant offense must also be a violent felony in order for one to be a "habitual violent" felony offender deserving an enhanced penalty.

Petitioner's reliance on the dictionary definition of "habitual" is misplaced. In his brief, he leaps into an argument

on statutory construction without even acknowledging its fundamental principle. The first and foremost principle of statutory construction is that courts do not engage in statutory construction unless the statute is ambiguous. State v. Egan, 287 So.2d 1 (Fla. 1973); Bewick v. State, 501 So.2d 72 (Fla. 5th DCA 1987). The second principle is just as important. It is that statutory construction principles cannot be used to create ambiguity. Egan.

The Legislature has defined the meanings of "habitual violent felony offender" and "habitual felony offender." See §775.084(1)(a),(b), Fla. Stat. (1989). A habitual violent felony offender is a currently convicted felon whose previous record includes one or more of eleven specified violent felonies for which the defendant was sentenced to or released from incarceration within five years of the current offense. The distinction between a habitual violent felony offender and a habitual felony offender is that habitual felony offender status requires two previous felony convictions, neither of which have to be for violent offenses. In other words, a previous violent felony counts as two nonviolent felonies when determining the appropriate habitual offender status. Because of the Legislature's plenary authority in defining and punishing crime, there is no constitutional impediment to the legislature's definitions. It may require one prior felony, violent or otherwise, or two prior felonies, or three, or any other number,

as the defining characteristics of "habitual." If it desired to do so it could extend the definition to include those individuals who commit multiple acts of violence in one criminal episode. These definitions are not ambiguous, they need no clarification.

Petitioner's tactics turn the principles of statutory construction on their head. Besides ignoring the legislative definition, petitioner ignores what the legislature defined. What it defined was the phrase, "habitual violent felony offender". Petitioner cites no authority for the proposition that to interpret what the legislature meant you break the phrase defined into individual words and analyze them. Petitioner's basic problem is that he dislikes the threshold chosen by the legislature for the recidivist statute. Under our government with its separation of powers, *see* Chiles v. Children, **16** F.L.W. S708 **(Fla.** Oct. 29, **1991),** neither his disagreement nor even a courts disagreement as to the wisdom of the statute provides a basis for invalidation. Barnes v. B.K. Credit Service, **461** So.2d 217 **(Fla. 1st DCA 1984).** Petitioner's attempts to distort the plain meaning of this section should be rejected.

Constitutionality

Turning to issue of Constitutionality, petitioner refers to the questions certified in Tillman v. State, 586 So.2d 1269 (Fla. **1st DCA** 1991), **and claims that "the** habitual violent felony provisions fail the due process test of 'a reasonable and

substantial relationship to the objects sought to be obtained,'" because the statute does not attain the object sought: "to enhance the punishment of those who habitually commit violent felonies." (Brief of Petitioner at 9). Again, petitioner's argument is premised on a **false** assumption. As noted above, the clear and unambiguous language of the statute indicates that the Legislature intended to punish more severely those recidivist felony offenders with a previous violent felony. As previously stated, one prior violent felony is the functional equivalent of two nonviolent felonies for the purpose of habitualization.

In attempting to discredit an interpretation of the statute by the First District Court of Appeal, petitioner takes issue with the court's use of the word "propensity." (Brief of Petitioner at 10)(citing to Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991), *rev. pending*, Fla. S. Ct. No. 78,179, wherein the First District stated, "In our view, just as the state is justified in punishing a recidivist more severely than it punishes a first offender, its even more severe treatment of a recidivist who has exhibited a propensity toward violence is also reasonable."). Correctly noting that the term connotes a tendency or inclination, petitioner then spuriously concludes that "a single, perhaps random act of violence **does** not fit within the common understanding of the word." *Id.* Quite the contrary, a "tendency" is "[a] demonstrated inclination to think, act, or behave in a certain way." The **American Heritage**

Dictionary 1252 (2d Ed. 1985). It is certainly reasonable for the Legislature to decide that a single act of violence, when coupled with at least one other act of lawlessness, constitutes a sufficient basis for enhanced penalties, including mandatory minimum terms of imprisonment.

In rejecting his due process argument, the First District stated:

> Although the burglary for which [the defendant] is now sentenced is not one of the enumerated violent offenses, section 775.084(1)(b) does not require that the current offense be violent, The appellant argues that this application of the statute is not sufficiently related to the apparent purpose of the enactment, thereby offending the requirements of due process. Habitual offender provisions are generally designed to allow an enhanced penalty when new crimes are committed by recidivist offenders. See e.g., Eutsey v. State, 383 So.2d 219 (Fla. 1980). Section 775.084(1)(b) encompasses the general objective of providing additional protection to the public from certain repetitive felony offenders. When the statute is considered as a whole, section 775.084(1)(b) effectuates this objective by providing additional protection from repetitive felony offenders who have previously committed a violent offense. The decision to allow an enhanced sentence after only two felonies, and when only the prior felony is an enumerated violent offense, is a permissible legislative determination which comports with and is rationally related to this statutory purpose, so as to satisfy the requirements of due process.

Perkins v. State, 583 So.2d 1103, 1104 (Fla. 1st DCA 1991). Petitioner's arguments do not provide a basis for reversal of the lower tribunal.

Petitioner's next challenge to the statute is equally specious, as it is likewise based on a false premise. Petitioner claims that the habitual violent felony offender statute violates state and federal constitutional provisions against double jeopardy because "the enhanced punishment is not for the new offense, to which the statute pays little heed, but instead for the prior, violent felony." (Brief of Petitioner at 12). Acknowledging that the United States Supreme Court, this Court, and Florida district courts have rejected similar arguments over the past centuries, petitioner nevertheless maintains his position, relying on a concurring opinion from Judge Zehmer in another case. Petitioner's position lacks only merit.

Although petitioner provides no analysis, he is apparently relying on the third protection provided by the double jeopardy clause, the prohibition against multiple punishments for the same offense. United States v. Di Francesco, 449 U.S. 117, 66 L.Ed.2d 328, 340, 101 S.Ct. 426 (1980). Obviously, the two offenses involved, burglary and aggravated battery, are separate offenses for they have separate elements. *See* §775.021(4), Fla. Stat. (1989). Therefore, the double jeopardy clause could be violated only if the punishment is being imposed is for his prior aggravated battery and not the current offense of burglary. The record is clear, petitioner was sentenced for the offense of burglary and his prior punishment for aggravated battery was not altered in any way. (R 37-42). No double jeopardy violation exists.

Petitioner's argument is that because the penalty for the current offense is being enhanced by the violent nature of the prior offense, the defendant is being twice sentenced for the original offense. If this court were to give credence to such a irrational concept it would have to reject settled case law and reject all cases which denote the scope of the double jeopardy clause. Moreover, this court would be required to invalidate the sentencing guidelines and the capital sentencing procedures which also aggravate the current sentence based on the nature and seriousness of a defendant's prior offenses.

Such radical action is not necessary because as this Court so aptly stated in Cross v. State, 96 Fla. 768, 119 So. 380, 386 (Fla. 1928):

> 'The propriety of inflicting severer punishment upon old offenders has long been recognized in this Country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted.' As was said in People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401: 'The punishment for the second [offense] is increased, because by his persistence in the perpetration of crime he [the defendant] has evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offense.' And as was said by Chief Justice Parker in Ross' Case, 2 Pick. (Mass.) 165: 'The punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself.' The statute does not make it an offense or crime for one to have been convicted more than once. The law simply prescribes a longer sentence for a second or subsequent offense for the reason that

> the prior convictions taken in connection with the subsequent offense demonstrates the incorrigible and dangerous character of accused thereby establishing the necessity for enhanced restraint. The imposition of such enhanced punishment is not a prosecution of or punishment for the former convictions. The Constitution forbids such action. The enhanced punishment is an incident to the last offense alone. But for that offense it would not be imposed.

Id. at 386 (quoting Graham v. West Virginia, 224 U.S. 616 (1912) [citation omitted]). *See also* Washington v. Mayo, 91 So.2d 621, 623 (Fla. 1956); Reynolds v. Cochran, 138 So.2d 500 (Fla. 1962); Conley v. State, No. 90-1745, slip op. (Fla. 1st DCA Jan. 2, 1992); Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990)(again rejecting the same argument raised by Petitioner).

As is evident from the sampling of cases cited to above:

> [recidivist] statutes are neither new to Florida nor to modern jurisprudence. Recidivist legislation . . , has repeatedly withstood attacks that it violates constitutional rights against ex post facto laws, constitutes cruel and unusual punishment, denies defendants equal protection of the law, violates due process or involves double jeopardy.

Reynolds, 138 So.2d at 502-03.

Petitioner's argument ignore other significant facts relating to habitual offender sentencing in Florida. One significant fact overlooked is that the 1988 changes to the habitual offender statute were changes which narrowed the pool of defendants who could be classified as habitual offenders. Under

the statutory scheme approved in Reynolds, and in effect until October of **1988**, any defendant with one prior felony of any type could have been habitualized. Since this court has previously determined that the legislature can constitutionally enhance the sentence of all defendant's based on the commission of one prior felony of any kind, it certainly has the authority to enhance the most serious offenses based on just that one felony. Since, it has been decided that the legislature can without violating the double jeopardy clause distinguish between the nature of the offenses (Felony vs. Misdemeanor) in determining the number of offenses required to habitualize, it certainly can distinguish between violent and nonviolent felons in determining how many offenses it will take to habitualize.

As noted in Reynolds, petitioner's ex post facto argument fairs no better than his other claims. His analysis of the facts and his application of Miller v. Florida, 96 L.Ed.2d 351 (1987), is erroneous. Laws are *ex post facto* if **they** make an act innocent at commission a crime, increase the punishment for a crime after it3 commission, or deprive an individual of a defense which was available when the crime was committed Dobbert v. Florida, 432 **U.S. 282, 53 L.Ed.2d 344,356, 97 S.Ct. 2290 (1977). In** Miller, the court held that a guidelines change which was implemented after Miller had committed his **crime** and which increased his punishment could not be retroactively applied.

In petitioner's case, the statutory amendment occurred prior to his commission of the burglary. Since the only sentence being enhanced is the offense committed after the statutory enactment, there is no retroactive application. Moreover, the limitation of a habitualization based on one prior felony is not a retroactive **increase** because petitioner could have been habitualized under the old statute for committing only one felony. Further, the maximum sentence under the old law is identical to the statutory maximum under the new habitual offender statute. Therefore, as to petitioner there is no enhancement of punishment of the type required for an ex post facto violation to exist. For the continued existence of the habitual offender statute served as an "operative fact" to warn the petitioner of the **sentence** the state could seek if he were convicted of a new felony offense. Dobbert. Therefore, no *ex post facto* claim exists.

This court previously rejected the same ***ex*** post facto argument in both Cross and Reynolds, petitioner's claims identify no changes in the law or the facts which would mandate a different result.

Petitioner's due process, double jeopardy and ex post facto challenges are no more viable now than they were when recidivist statutes were first created,

ISSUE III

WHETHER THE STATUTE UNDER WHICH THE PETITIONER WAS HABITUALIZED WAS NOT ENACTED IN VIOLATION OF FLORIDA'S SINGLE SUBJECT RULE. (restated)

Although the State maintains its position that acceptance of jurisdiction would be improvident because petitioner failed to preserve the issue in the trial court and failed to raise it on direct appeal, the State will address the issue on its merits.

Petitioner is correct that he was affected by Chapter 89-280, Laws of Florida. Thus, he would have had standing to challenge this enactment in the trial court. Even though he did not raise this issue in the trial court, he now claims that this court should vacate his sentence by applying Johnson v. State, *supra*. This court should reject his request.

In Johnson, the issue of the two subject challenge was not raised in the trial court. Based on this failure to preserve the issue, the state made an extensive preservation argument. The lower tribunal failed to discuss the jurisdictional issue and reversed. The lower tribunal did certify the question to this court. This court has accepted jurisdiction and the case is currently pending. Johnson, number 79,150 and 79,204. The case contains several issues pertinent to the instant case. Along with the merits issue, it contains issues of standing and proper preservation.

To withstand an attack alleging the inclusion of more than one subject, various topics within a legislative enactment must be "properly connected," Art. 111, §6, Fla. Const. This term has been addressed many times, most recently in Burch v. State, 558 So.2d 1 (Fla. 1990). In upholding a broad criminal statute, this Court found that each of the "three basic areas"[4] addressed by ch. 87-243, Laws of Florida, bore a "logical relationship to the single subject of controlling crime." *Id.* at 3.

Chapter 89-280 contains two basic areas: (1) policies and penalties as to career criminals and habitual felons; and (2) repossession of motor vehicles. Both relate to controlling crime. They are properly connected and do not violate Art. 111, §6 of the Florida Constitution.

Elaboration is useful. Article 111, §6 has long been extant in Florida's constitutions.[5] It is "designed to prevent various abuses commonly encountered in the way laws were passed . . . [such as] logrolling, which resulted in hodgepodge or omnibus legislation." Williams v. State, 459 So.2d 319 (Fla. 5th DCA 1984), *dismissed*, 458 So.2d 274 (Fla. 1984). See Burch v. State, *supra* at 2 (noting that the purpose of Art. 111, §6 is to

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[4] The three areas were: ((1) comprehensive criminal regulations and procedures, (2) money laundering, and (3) safe neighborhoods. Id. at 3.

[5] *See* the Commentary to Art. 111, § 6, noting that the 1968 version is "close in substance to Sections 15 and 16 of Art. III of the 1885 Constitution." 2SA Fla. Stat. Annon. 656 (1991 ed.).

prevent duplicity of legislation and to prevent a single enactment from becoming a cloak for dissimilar legislation).

At the outset, the problems of log rolling are not so compelling or frequent in criminal legislation. To the contrary, the fact that ch. 87-243 was designed to be a comprehensive response to burgeoning drug crime led the Burch court to uphold that act. *See* id. at 3 (simply because "several different [e.s.] statutes are amended does not mean more than one subject is involved").

The repossession provisions of ch. 89-280 amend part I of ch. 493, Florida Statutes.[6] That part, entitled "Investigative and Patrol Services," addresses private conduct (i.e., investigative and security services) normally provided by law enforcement officers.

The changes in the second basic area of ch. **89-280** were necessitated **by** problems with repossessions conducted by private individuals. The problems rose to criminal significance, as violations of Part I of Chapter 493 are first-degree misdemeanors. *See* 8493.321 (1989).

Chapter 493, Part I, is also designed to protect the public against abuse by repossessors, etc., and provides criminal

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[6] Ch. 493 was repealed, reenacted and renumbered by ch. 90-364, Laws of Florida. For convenience, all cites ta ch. 493 are to the **1989** version, thus corresponding to the statutory section numbers in ch. **89-280**.

penalties.[7] The habitual felon statute is also designed to protect the public against repeat felons.

This Court has consistently held that the Legislature must be accorded wide latitude in the enactment of laws. Therefore, Art. 111, §6, Fla. Const., must not be used to deter or impede legislation by requiring laws to be unnecessarily restrictive in their scope and operation. State v. Lee, 356 So.2d 276, 282 (Fla. 1978). *See* Smith v. City of St. Petersburg, 302 So.2d 756, 758 (Fla. 1974)("For a legislative enactment to fail, the conflict between it and the Constitution must be palpable.").

In Bunnell v. State, 459 So.2d 808 (Fla. 1984), this Court invalidated §1, ch. 82-150, Laws of Florida, as having "no cogent relationship" (id. at 809) with the remainder of that act. Specifically, the subject law reduced membership of the Florida Criminal Justice Council, and created the criminal offense of obstructing justice through false information. Chapter 89-280, in contrast, includes no such disparity. There is a cogent relationship between its habitual or career felon provisions, and its repossession provisions. Both respond to frequent incidence of criminal activity; both seek to deter repeat offenses. Both

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[7] Part I also addresses investigative and patrol issues, and detection of deception. For example, §493.30(4) defines "private investigation" to include, among other activities, the obtaining of information relating to certain crimes; the location and recovery of stolen property; the cause, origin, or responsibility for fires, etc.; and the securing of evidence for use in criminal (and civil) trials. These duties are quasi-law enforcement in nature.

seek to protect the public. Repossessors and investigators, although private individuals, are performing the quasi-law enforcement duties. The parts of ch. 89-280 are sufficiently related to survive a two-subject challenge, even though ch. 89-280 is not a comprehensive crime bill like the one upheld in Burch, *supra.* Chapter 89-280 contains but one subject.

If Respondent has identified a two-subject problem in ch. 89-280, that problem was cured by the 1991 Legislature. Chapter 89-280 was enacted, obviously, in 1989. All 1989 changes to the Florida Statutes have been adopted and enacted as the official statutory law. See Ch. 91-44, Laws of Florida, effective May 2, 1991 (attached as Appendix B)(codified in g11.2421, Florida Statutes [1991]).[8]

Through ch. 91-44, the Legislature reenacted all of ch. 89-280, as codified. This re-enactment cured any constitutional defect arising from inclusion of more than one subject in the original act. State v. Combs, *supra.* The reason is obvious. Art. I, §6 applies to acts of the Legislature, not to the reenacted (codified) statutes. Id. at 1030. "Once reenacted as a portion of the Florida Statutes, it [the statute at issue] was not subject to challenge under article 111, §6." *Id.* As of May 2, 1991, ch. 89-280 is constitutional as to a two-subject challenge. *See* Thompson v. Inter-County Tele. & Tel. Co., 62

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[8] The State acknowledges that Appellant's current offense was committed on July 15, 1990 (R 5); and falls between the effective date of ch. 89-280 (10/1/89) and the effective date (5/2/91) of ch. 91-44.

So.2d 16 (Fla. 1952)(*en banc*) (tax statute with defective title valid from time of revision). Therefore, §775.084, Florida Statutes (1989), is no longer subject to a two-subject challenge.

To sum: this issue is not preserved for review, as it was not raised below and does not involve fundamental error. If preserved, ch. 89-280 includes only one subject. Moreover, the Legislature has cured any two-subject problem. The State specifically requests this Court, should it agree with Respondent on the merits, to recognize the curative effect of ch. **91-44**; and to state that any two-subject challenge ta ch. **89-280** must be predicated on an offense occurring from October 1, 1989 (effective date of ch. 89-280) through May 2, **1991** (effective date of ch. 91-44). *See* Tims v. State, 17 FLW D___ (Fla. 1st DCA Jan. 14, 1992)(the "narrow holding" of Johnson [opinion below] is predicated, in part, upon an offense committed between October 1, **1989** and May 2, 1991).

CONCLUSION

Based on the above legal citation authorities, Appellee prays this Honorable Court dismiss this case because review was improvidently granted, or, affirm the decision rendered by the lower tribunal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been forwarded by U.S. Mail to MR. GLEN P. GIFFORD, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 24th day of January, 1992.

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