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IN THE SUPREME COURT OF FLORIDA

DENNIS GARLAND BAXTER,

Petitioner,

v. FSC NO. 79,993

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENT

1. The First District's decisions in Hodges v. State and Anderson v. State, infra, are inconsistent with both the rationale and express holding of Eutsey v. State, infra. Eutsey stands for the propositions that: 1) introduction of uncontradicted certified copies of judgments or a PSI showing such convictions satisfies the preponderance of the evidence test for showing that the predicate felonies exist, and 2) the failure to raise the affirmative defenses waives any issue of whether the predicate felonies have been pardoned or set aside.

This principle has become well established in the decisional law of courts of this state. Although Eutsey was decided in 1980 the provisions interpreted in that decision have remained unchanged. The defendant is the party in the better positian to assert affirmative defenses and courts of this state have repeatedly held that it is proper to place the burden of proving an affirmative defense on the defendant.

It is almost impossible for a crime which has been pardoned to serve as a basis for habitualization. In addition, post-conviction relief is rare and the defendant is best able to show a conviction has been set aside. Eutsey reaffirms the settled presumption of validity accorded to final judgments and sentences. The habitual offender statute protects the defendant's due process rights by providing notice of the state's intent to seek a habitual offender sentence and the opportunity to challenge such a sentence at a hearing.

However, the findings and hearing available under the habitual offender statute may be waived. Finally, a trial court's failure to specifically find a defendant has not been pardoned or had his conviction set aside is harmless error because the error does not injuriously affect the rights of the appellant.

2. This issue has been defaulted for failure to comply with the contemporaneous objection rule. Otherwise, the Petitioner's sentence should be affirmed on the authority of King v. State, infra. The King court concluded that the trial court retains the discretion to exercise leniency in sentencing a habitual offender and may impose a sentence less severe than the maximum permitted by section 775.084(4)(a), Florida Statutes.

3. The State moves to adopt the brief submitted on this issue in Coleman v. State, 599 So.2d 1285 (Fla. 2d DCA 1992). In that brief the State argues that the appellant cannot raise the challenge for the first time on appeal since no fundamental error has occurred. The provisions of Chapter 89-290 are congently related and do not violate the single subject rule. Also, legislative re-enactment of the 1989 changes to the Florida Statutes, through Chapter 91-44, Laws of Florida, cures any two subject problem in Chapter 89-290. Finally, no substantive rights of the appellant (Petitioner here) could have been violated by any two-subject violation. A copy of that brief is attached to this brief.

ARGUMENT

POINT I.

THE TRIAL COURT PROPERLY FOUND THE PETITIONER TO BE A HABITUAL FELONY OFFENDER AND NEITHER THE TRIAL COURT NOR THE STATE WAS REQUIRED TO PROVE OR FIND THAT HIS CONVICTIONS HAD NOT BEEN PARDONED OR SET ASIDE BECAUSE THE BURDEN WAS ON THE PETITIONER TO RAISE THESE ISSUES AS AFFIRMATIVE DEFENSES AND THE FAILURE TO DO SO RESULTED IN A WAIVER OF THE RIGHT TO THE FINDINGS.

The state contends that the the First District's decisions in Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992) and Anderson v. State, 592 So.2d 1119 (1st DCA), on rehearing, 592 So.2d 1120 (Fla. 1st DCA 1992) are inconsistent with both the rationale and express holding of Eutsey v. State, 383 So.2d 219 (Fla. 1980).

In rejecting Eutsey's claim that there was no evidence to support the trial court's finding that his prior convictions had not been pardoned or set aside, this court clearly held that in habitual offender sentencing proceedings the burden is on a defendant to show that his predicate felony offenses were no longer valid. This court also determined that the complete spectrum of due process rights, required in the guilt phase of the trial, was not required in the sentencing phase.

This court held that the State was nat required to prove all the information used in the sentencing process beyond a reasonable doubt; rather, the State may rely on pre-sentence investigation reports and other hearsay in showing that a defendant should be sentenced as a habitual felony offender. This court placed the burden on the defendant to specifically challenge the

accuracy of the hearsay as well as come forward with evidence and witnesses as appropriate.

This principle has become well established in the decisianal law of courts of this state. See Johnson v. State, 564 So.2d 1174 (4th DCA), review denied, 576 So.2d 288 (Fla. 1991) (where the defendant did not dispute any of the prior convictions and his attorney admitted the convictions were shown by certified copies of the prior convictions and the PSI, he was properly sentenced as a habitual felony offender); Robinson v. State, 551 So.2d 1240 (1st DCA), review denied, 562 So.2d 347 (Fla. 1990) (where the State's failure to corroborate a defendant's 1986 conviction was held harmless as he did not dispute the accuracy of his 1984 conviction which satisfied the statutory requirement for habitualization); Lewis v. State, 514 So.2d 389 (4th DCA), cause dismissed, 518 So.2d 1276 (Fla. 1987) (where the defendant failed to attack the truth of the documents relied upon to establish his prior convictions, he was properly sentenced as a habitual offender); Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1987), jur. discharged, 520 So.2d 575 (Fla. 1988) (where the defendant did not dispute the truth of the State's hearsay, the trial court was not required to order the State to produce corroborating evidence); Wright v. State, 476 So.2d 325 (Fla. 2d DCA 1985) (where the defendant did not dispute the truth of the listed convictions, the State was not required to come forward with corroborating evidence).

It is noteworthy that Eutsey was decided in 1980. Despite the numerous changes to section 775.084, Florida Statutes over

the years, as Hodges acknowledged, none have changed the relevant provisions which Eutsey interpreted. Thus, the subsequent legislative amendments and reenactments are presumed to approve Eutsey. See Burdick v. State, 594 So.2d 267 (Fla. 1992) ("It is a well-established 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.")

Obviously, the defendant is the party in the better position to assert affirmative defenses. That was one of the major points at issue in Eutsey. Eutsey 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 satisfies the preponderance of the evidence test for showing that the predicate felonies exist, and 2) the failure to raise the affirmative defenses waives any issue of whether the predicate felonies have been pardoned or set aside.

Courts of this state have repeatedly held that it is proper to place the burden of proving an affirmative defense on the defendant. See State v. Cohen, 568 So.2d 49 (Fla. 1990); Strickland v. State, 588 So.2d 269 (Fla. 4th DCA 1991); Gonzalez v. State, 571 So.2d 1346 (3d DCA), review denied, 584 So.2d 998

(Fla. 1991). Because affirmative defenses are so rarely at issue, allowing or requiring evidence showing that no affirmative defenses are available to a defendant in each case would be irrelevant, confusing, unnecessarily time consuming, and if such evidence became a feature of the trial, possibly even erroneous. Such a practice is equivilant to requiring the state to prove a negative. As stated by the United States Supreme Court, "Proof of the nonexistence of all affirmative defenses has never been constitutionally required ..." Patterson v. New York, 432 U.S. 197, 211, 97 S.Ct. 2319,2327, 53 L.Ed.2d 281,292 (1977).

A requirement that the State prove a defendant's predicate convictions have not been pardoned is unrealistic and unnecessary, It is virtually impossible that a crime which has been pardoned could serve as a predicate for habitualization. Under the Rules for Executive Clemency, Section 5.A, a person may not even apply for a pardon unless the sentence for that conviction has been expired for 10 years. In contrast, a conviction which may be used to support a habitual offender sentence must have occurred not more than 5 years from the date of the offense for which the defendant is now being sentenced. Thus, any conviction which qualifies for use in habitual offender sentencing is not "ripe" for purposes of a pardon.

Although this "impossibility" argument does not apply with equal force to convictions which are set aside, the State submits that the defendant is still the best person upon whom to place the burden of establishing that a conviction has been set aside. Again, post-conviction reversal of actual convictions are rare.

Particularly where a defendant has convictions from jurisdictions outside the State of Florida, the State's task in tracking down each such conviction and determining the result of every state and federal post-conviction proceeding involving that conviction would be time consuming and and could result in sentencing delays. As the only convictions which are at issue are those which were committed within 5 years of the offense for which the defendant is currently being sentenced, the burden placed on the defendant is merely that he come forward with evidence which is clearly within his knowledge and recent memory.

The Eutsey decision also reaffirms the settled presumption of validity accorded to final judgments and sentences. Stevens v. State, 409 So.2d 1051 (Fla. 1982). Recently, this court in State v. Beach, 592 So.2d 237 (Fla. 1992) held that a defendant's affidavit, alleging that he had neither been provided nor offered counsel, was insufficient to shift the burden ta the State or overcome the presumption that his prior convictions were valid and had been entered after he had been afforded the appropriate constitutional protectians. The State submits that the same principle should apply 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. To hold otherwise is to suggest that the State must also prove the current validity of every conviction appearing in a PSI or on a sentencing guidelines scoresheet.

Especially where, as here, the Petitioner did not contest the information contained in the PSI or the convictions scored on

his guidelines scoresheet except for an alleged 1982 burglary conviction which was deleted. (R. 235) The Petitioner, as the lower court noted, conceded that he had the requisite felony record for habitualization. (R. 231,238) Under the circumstances requiring the Petitioner, rather than the State, to come forward with evidence that his prior convictions have been set aside is neither illogical nor unreasonable.

Under the provisions of the habitual offender statute, the State is required to give a defendant advance natice of the State's intent to seek a habitual offender sentence. The purpose of this notice is to give the defendant an opportunity to prepare his challenge to imposition of such a sentence, either by showing that he did not commit the predicate convictions, or that they are too remote, or that they have been pardoned or set aside. By providing the defendant advance notice of the State's intention to seek a habitual offender sentence and an opportunity to prepare and present a challenge to the imposition of such a sentence, even though the burden of proof is placed an him, the State submits that a defendant's due process rights are preserved and protected.

The Second District's opinion in Baxter is consistent with its decision in Stewart v. State, 385 So.2d 1159 (Fla. 2d DCA 1980). There, the trial court made findings that the defendant had previously committed a felony for which he had been released within 5 years of the current offense and that habitual offender sentencing was necessary for protection of the public. Stewart contended that the trial court erred in not finding that he had not been pardoned or his sentence 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 unrebutted. 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. C.f., McClain v. State, 356 So.2d 1256 (Fla. 2d DCA 1978).

Stewart, 385 So.2d at 1160. In the instant case, as in Stewart, the evidence that the Petitioner had been released from prison less than five years prior to the instant conviction was unrebutted. The record would amply support findings that the Petitioner had not been pardoned nor had his conviction set aside.

Likewise, in Myers v. State, 499 So.2d 895,898 (1st DCA, jur. discharged, 520 So.2d 575 (Fla. 1988) the defendant challenged the trial court's acceptance of a PSI, an affidavit, and copies of judgments as hearsay and contended the trial court committed error in failing to make a finding regarding the status of his prior convictions. The First District rejected this hearsay argument and absence of findings because, "as settled by Stewart v. State, [citations omitted], 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 from the face of the record." Id. at 58.

Similarly, in Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979) (relied on by this Court in Eutsey) the First District held:

> Turning to the facts of this case, we see that the sentencing judge faund 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).

Id. at 58. Section 775.084 (1)(a) which was referred to in Adams included the pardon and set aside provisions at issue here.

Finally, in Likely v. State, 583 So.2d 414 (Fla. 1st DCA 1991), Caristi v. State, 578 So.2d 769 (Fla. 1st DCA 1991), and Jefferson v. State, 571 So.2d 70 (Fla. 1st DCA 1990), the First District held that a defendant could waive any or all of the findings and hearings prerequisite to habitual offender sentencing as part of a plea bargain. The State submits that Petitioner also knowingly waived the right to challenge the absence of these habitual offender findings, by appearing in open court, accepting the validity of all hearsay information showing the predicate felony convictions, and offering no legal reason why he should not be sentenced.

Section 924.33, Florida Statutes (1991) provides that an appellate court may not reverse a judgment, even where error occurs, unless that error "injuriously affected the substantial rights of the appellant." As applied here, an appellate court may not reverse a habitual felony offender sentence unless the

defendant makes a colorable showing that he has suffered an injury from the claimed error. See State v. Beach, 592 So.2d 237 (Fla. 1992). The Petitioner has never made a claim or showing of an actual injury here, and the State suggests that he cannot in good faith allege that his predicate felonies have been pardoned or set aside.

In fact, Petitioner did not contest the information contained in his PSI or the convictions scored on his guidelines scoresheet except for a 1982 burglary conviction which was deleted from the guidelines scoresheet. The Petitioner admitted his prior record to the extent that in 1986 he got *two* six-year sentences and that he was, at the time of sentencing, currently doing ten years. The end result is that the Petitioner cannot show that he suffered any injury as a result of the trial court's failure to find that his prior convictions had not been pardoned or set aside. The Second District's decision affirming the Petitioner's habitual offender sentence is correct and should be affirmed.

POINT II.

THE SENTENCE IMPOSED BY THE TRIAL COURT SHOULD BE AFFIRMED BECAUSE THE PETITIONER PROCEDURALLY DEFAULTED THE ISSUE BY FAILING TO OBJECT TO PROBATION AT SENTENCING; OTHERWISE, THE SENTENCE SHOULD BE UPHELD BECAUSE THE TRIAL COURT HAS THE DISCRETION TO EXERCISE LENIENCY WHEN SENTENCING A HABITUAL FELONY OFFENDER.

The State submits that this issue has been procedurally defaulted for failure to comply with the contemporaneous objection rule. Tillman v. State, 471 So.2d 32,35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332,338 (Fla. 1982); Black v. State, 367 So.2d 656 (3d DCA), cert. denied, 378 So.2d 342 (Fla. 1979). In order to be preserved far review by a higher court, an issue must be presented to the lower court. The specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved. Tillman, 471 So.2d at 35.

The requirement of a contemporaneous objecti n is based on practical necessity and fairness in the operation of the judicial system. It places the trial judge on notice that error may have been committed and gives him or her an opportunity to correct it at an early stage of the proceedings. Neil v. State, 457 So.2d 481 (Fla. 1984); Castor v. State, 365 So.2d 701 (Fla. 1978). In the instant case the trial court was never put on notice that a sentencing error may have been committed. There was no objection and therefore the issue has not been preserved for review.

Otherwise, the Petitioner's sentence should be affirmed on the authority of King v. State, 597 So.2d 309 (Fla. 2d DCA 1992) (an banc). In King the Second District concluded that the trial

court retains the discretion to exercise leniency and to sentence a defendant found to be a habitual felony offender to a sentence less severe than the maximum sentence that is permitted by subsection 775.084 (4)(a), Florida Statutes (1991). Id. at 314. See also Henry v. State, 581 So.2d 928 (Fla. 3d DCA 1991). A "habitual felony offender" is "a defendant for whom the court may impose an extended term of imprisonment ..." Fla. Stat. §775.084 (1)(a) (1991). The operative word is "may" which implies sentencing discretion.

The trial court had the discretion to sentence the Petitionerr to a term of years up to but not exceeding ten years. However, the court exercised leniency and sentenced him to four years incarceration followed by six years probation. As it was not improper to impose such a sentence the State respectfully requests that the Petitioner's sentence be affirmed.

POINT 111.

MOTION TO ADOPT BRIEF SUBMITTED BY THE STATE IN COLEMAN V. STATE, 599 SO.2D 1285 (FLA. 2D DCA 1992) AND REQUEST THAT THE COURT AFFIRM ON THIS ISSUE FOR THE REASONS RECITED IN THAT BRIEF.

The Second District decided this issue adversely to the Petitioner in Coleman v. State, 599 So.2d 1285 (Fla. 2d DCA 1992). The Fourth District has decided the issue adversely to the Petitioner in Jamison v. State, 583 So.2d 413 (4th DCA), review denied, 591 So.2d 182 (Pla. 1991) and McCall v. State, 583 So.2d 411 (Fla. 4th DCA 1991), jur. accepted, 593 So.2d 1052 (Fla. 1992).

In view of the Second District's Coleman decision, the State moves to adopt the brief filed in that case as argument on this issue. A copy of the brief is attached hereto. The State respectfully requests that this court grant its motion to adopt the brief in the instant case.

CONCLUSION

Based upon the foregoing facts, arguments and authorities the Petitioner's judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Julius Aulisio, Assistant Public Defender, Polk County Courthouse, P.O. Box *9000*, Drawer PD, Bartow, Florida 33830 on this 27th day August, 1992.

OF COUNSEL FOR RESPONDENT

IN THE DISTRICT COURT OF AF'E'EAL, SECOND DISTRICT
STATE OF FLORTDA

CHARLES EUGENE COLEMAN,)

Appellant,)

v.) Case No. 91-01547

STATE OF FLORIDA,)

Appellee.)

APPEAL FROM THE CIRCUIT COURT
IN THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellent drafted a presentencing memorandum where he contrasted the 1987 and 1989 statutes raising that aspect of the change that no longer required the court to make a finding that the protection *of* the public warranted habitualizing the defendant. (R13-19) Appellant drafted a motion to preclude an application of violent felony offender claiming that 8775.084 Fla. Stat. (1989) violated due process and equal protection rights because it gave the prosecutor unbridled discretion to determine who .the State would seek *to* habitualize, and because this particular trial judge indicated he would habitualize all those who met the criteria. (R10,11)

At the plea hearing, Appellant acknowledged "let me preface by saying this case was *set* for trial this week but we notified the court last week of the change of plea. This was after the court entered the order denying the motion to exclude identification evidence. Entering this plea today would not be anyway to preserve that issue for appeal, and this plea would be waiving issues for appeal and we recognize that up front." (R91-92) Counsel was then assured by the court that a life sentence was not mandatary upon habitualization. Only then did Appellant plead guilty, knowing he was to be sentenced as a habitual violent felony offender. (R92-95)

SUMMARY OF THE ARGUMENT

Appellant argues the instant statute violates the two subject rule. Appellant cannot raise this challenge for the first time on appeal, since no fundamental error has occurred. The provisions of Chapter 89-290 are cogently related and do not violate the single subject rule. Legislative re-enactment of the 1989 changes to the Florida Statutes, through Chapter 91-44, Laws of Florida, cures any two subject problem in Chapter 89-280; and no substantive rights of Appellant could have been violated by any two-subject violation.

ARGUMENT

ISSUE I

WHETHER THE PROVISIONS OF CHAPTER 89-280, LAWS OF FLORIDA, ARE COGENTLY RELATED.

Before responding on the merits, it is necessary to sharpen Appellant's bluntly-stated claim. Me maintains that 5775.084, Florida Statutes (1989), Ch. *89-280*, Laws of Florida violates the one subject rule of *Article* III, Section 6 of the Florida Constitution. Appellant's argument challenges not all of 3775.084, but only those changes enacted in Ch. *89-280*. The number of subjects in an otherwise proper legislative act (i.e., Ch. *89-280*, Laws of Florida) cannot be fundamental error. Respondent's failure to raise a one-subject challenge before the trial court precludes review by this Court.

Appellant's failure to raise this issue below precludes raising it for the first time on appeal. Preliminarily, the State recognizes that challenges to facial constitutionality of statutes are generally allowed to be raised for the first time on appeal from convictions, when fundamental error is present. See, *for* example, Trushin v. State 425 So.2d 1126 (Fla. 1982) (vagueness, overbreadth, and equal protecticn attacks on facial constitutionality *of* statute may be raised for first time on appeal, as conviction under facially unconstitutional statute is fundamental error).

The inherent differences between the two-subject challenge raised here for the first time, and the challenges allowed in Trushin, are crucial. Trushin addressed vaguenees, overbreadth, and equal protection attacks on the facial[1] validity of the subject statute. Contrasting these to Appellant's situation, it is obvious that no fundamental error has occurred. Appellant never claims lack of notice as to what conduct is prohibited. He was not charged under any provision of Ch. 89-280. Even though classified as an habitual violent felon pursuant to that act's changes to §775.084, he never claims those changes elude common understanding.

Appellant cannot, and does not, maintain that the changes *to* Ch. 493 or §775.084 in Ch. *89-280* implicate the First Amendment. Therefore an overbreadth claim is unavailable to him. See State v. Burch, 545 So.2d 279, 281 (Fla. 4th DCA 1989), aff'd with opinion, 558 So.2d 1 (Fla.1990) (overbreadth doctrine not applicable to statute enhancing penalty for sales within 1000 feet of a school); Southeastern Fisheries Association, Inc. v. Department of Natural Resources, 453 So.2d 1351, 1353 (Fla. 1984) (statute prohibiting fish traps does not implicate the First Amendment, therefore overbreadth doctrine not available). Finally, Appellant urges no equal protection claim, which the

[1] The court expressly maintained the long-standing rule that constitutional application of a statute *tc* a given defendant must be raised at the trial level. Id. at 1130.

Trushin court addressed only *out* of caution, despite concerns that it had been waived. 425 So.2d at 1131.

In short, Appellant's two-subject challenge has none of the attributes' of fundamental error of concern in Trushin. A two-subject challenge has nothing to do with the substance, precision, adequacy of notice, or classifications within Ch. 89-280. It focuses only on the number of subjects in the legislative enactment. Facial validity is not involved. Requiring Appellant to have raised this issue before the trial court would not be to approve a sentence grounded on fundamental error.

Equally important, Appellant's challenge goes not to his conviction, but only his classification as an habitual, violent felon. Whether Appellant was properly sentenced has nothing to do with the propriety *of* his arrest or plea. Again, his two-subject challenge does not invoke fundamental error, yet is unabashedly raised for the first time before this court after acknowledging a waiver of all appellate issues. (R91-92) It is one matter to allow for the first time on appeal, a challenge alleging that a statute *is* vague or overbroad, or violates equal protection.. These challenges implicate personal, fundamental rights guaranteed under both the United States and Florida constitutions. It is an altogether different matter to allow an Appellant, again for the first time on appeal, *to* bring a two-

subject cha lenge -- one that has no federal equivalent; cannot relate to adequacy of notice that certain conduct is criminal; and does not relate to fairness of trial or exercise of First Amendment rights. As discussed below, a two-subject problem is cured by legislative reenactment of the session laws into the official Florida Statutes. If fundamental error were involved, later reenactment could not cure that error.

There *is* no provision in the United States Constitution[2] analogous to Art. 111, §6 of the Florida Constitution. That article, long extant in Florida constitutions,[3] was "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, *558* So.2d 1, 2 (Fla. 1990) (noting that *the* purpose of Art. 111, §6 is to prevent duplicity of legislation and to prevent a single enactment from becoming a cloak for dissimilar legislation).

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[2] If inclusion of two subjects in a legislative enactment were fundamental error, then many federal criminal statutes would be of questionable constitutionality. The absence of a single-subject rule in the U.S. Constitution shows that violation of the rule cannot rise *to* fundamental error.

[3] See the Commentary to Art. III, §6, noting that the 1968 version is "close in substance to Sections 15 and 16 of Art. III *of* the 1885 Constitution." 25A Fla. Stat. Annon. 656 (1991 ed.).

Designed to prevent abuse of the legislative process, Art. III, 56 creates no personal rights. It has nothing to do with the substance (i.e., facial validity) of legislation, only the ~~number~~ of subjects in a single enactment. Moreover, a two-subject challenge is not brought against a statute, but against a legislative act before its codification.

This Court need not and should not reach the merits of the constitutionality of the statute. Respondent did not raise this issue before the trial court, and this Court is not ccnfronted with fundamental error, It is axiomatic that absent fundamental error an issue not raised below cannot be raised for the first time on appeal. See, Ray v. State, 402 So.2d *956, 960* (Fla.1981) ("for error to be so fundamental that it may be urged on appeal, though not presented below, the error must amount to a denial of due process.").

It is a settled rule of appellate review that "[e]xcept in cases of fundmental error, an appellate court will not consider an issue unless it was presented to the lower court. [citations omitted]." Steinhorst v. State, 412 So.2d 332, 338 (Fla.1982). Although he challenged it below, Appellant's attack on the constitutionality of Ch. 89-280 was not specifically on this point now raised, as required. In Henderson v. State, 569 So.2d *925* (Fla. 1st DCA 1990), this Court recognized but refused to consider a "constitutional" due process challenge to the facial

validity of the habitual violent- felony offender statute. The challenge was raised below, but not supported by citations of authority, etc. Id. at 927. Henderson is doubly damaging to Appellant. Not only did it refuse to consider a due process challenge based on facial validity, but it did so because the challenge was insufficiently argued although nominally raised below. Here, this aspect was never raised below.

It would be peculiar indeed for a court to decline to consider the due process challenge that was raised but inadequately argued in Henderson, yet here allow a two-subject challenge that was not raised below. The former ignores alleged fundamental error, the latter would encourage argument on nonfundamental error for the first time on appeal.[4]

In Ray v. State, 402 So.2d 956, *960* (Fla.1981) the court said:

> "[F]or error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process." [citing Castor v. State, 365 So.2d 701 (Fla.1978).

* *

[4] In this regard the State notes that there are at least eight very recent pending cases raising the same two-subject challenge to Ch. *89-280:* Johnson v. State, No. 91-00742; Foster v. State, No. 90-02945; Strickland v. State, No. 90-03111; McNeil v. State, No. 91-00018; Hale v. State, No. 90-03310; King v. State, No. 90-02968; Gordon v. State, No. 91-00149; and Weatherspoon v. State, No. 90-03109. It appears that the two-subject challenge was not raised at the trial level in any of these cases.

> "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." citing Porter v. State, 356 So.2d 1268 (Fla. 3d DCA) (Hubbart, J., dissenting), remanded, 364 So.2d 892 (Fla. 1978), rev'd on remand, 367 So.2d 705 (Fla. 3d DCA 1979).[5]

The cases holding and applying the above principles are many, and of long standing. Representative decisions include: Ellis v. State, 74 Fla. 215, 76 So.2d 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 suggestions ... do not properly present the validity of the law for consideration by this Court."); Silver v. State, 188 So.2d 300, 301 (Fla. 1966) the court strongly criticized and refused to condone decision of district court to address constitutionality of statute when constitutionality not raised in trial court); Whitted v. State,

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[5] In Porter, the issue was whether an unchallenged 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 sense of "important" or "basic." However, in *the* context of unobjected to error, "fundamental error" is a legal term-of-art of exceptionally narrow scope. This Court must reject the ubiquitous tendency *of* contemporary defense lawyers to debase the legal language by seeing "fundamental error" everywhere.

362 So.2d 668, 672 (Fla. 1978) (failure of defendant to raise constitutionality of statutory provision under which he was convicted precludes appellate review). This Court's attention is invited to Eutzy v. State, 458 So.2d 755 (Fla.1984). There, the court held that the constitutionality of statutory authority to override a jury recommendation in a death penalty case was nat cognizable for the first time on appeal. Id. at 757. If constitutionality of a statute providing for judicial override of a recommended life sentence is not fundamental error, then certainly the mere number of subjects in a legislative act cannot possibly be euch.

Davis v. State, 383 So.2d 620, 622 (Fla. 1980) is particularly instructive when cast against the instant record of Appellant's plea. It involved a nolo plea which purported to reserve the right to appeal the trial court's denial of motions to dismiss. On appeal, Davis challenged the constitutionality of the statute under which he was convicted. The court, relying on Silver, supra, 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 appeai. 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.

See Brown v. State, 376 So.2d 382, 385 (Fla.1979), (reserved issue must be totally dispositive and that the constitutionality of a controlling statute is an apprcpriate issue for reservation). Brown necessarily implies that the constitutionality of a controlling statute must be preserved.

See also 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).

The above holdings apply *to* the constitutionality of statutes under which the defendants were convicted. The same rule applies 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 1387) *(ex* post facto and equal protection challenges to sentencing statutes not cognizable when raised for first time on appeal).

It is uncontroverted that Appellant did not raise, or otherwise preserve, the issue of whether Ch. *89-280*, Laws of Florida was enacted in violation of the single subject rule in Art. III, §6 of the Florida Constitution. Thus, the question is whether violation of the single subject rule is fundamental thereby justifying consideration of the issue although not raised below.

The question answers itself. As declared by the decisions above, error that is fundamental deprives the defendant of due process. The ~~number~~ of subjects in a legislative act does not remotely implicate any procedural or substantive due process rights.

Due process takes two forms, substantive and procedural, Substantive due process requires only that there be a rational basis for the relevant changes in Ch. *89-280.* State v. Saiez, 489 So.2d 1125, 1129 (Fla.1986); State v. Olson, *586* So.2d 1239 (Fla. 1st GCA 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). Appellant has not, and cannot, reasonably maintain the mere number of subjects in Ch. *89-280* has anything to do with this unassailable purpose.

Procedural due process, in turn, has two aspects: 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). Here, Appellant was given reasonable notice and a fair opportunity to be heard. He has never maintained otherwise, or that the number of subjects in Ch. 89-280 affected the fairness of his sentencing.

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 III, §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, 271 118, 121 (Fla.1972). If violation of Article III, §6 were fundamental error, or constituted facial invalidity, reenactment could not cure either error.

Assuming that Ch. 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. In view of the settled law that an appellate court will not entertain an issue ox an argument not presented below unless the alleged error is fundamental or *goes* to the facial validity of the statute, Respondent here may not challenge the constitutionality of Ch. *89-260.* A5 the Supreme Court held in Davis, supra there *is* no jurisdiction to entertain such appeals.

Assuming Appellant can raise this issue, he is wrong on the merits. preliminarily, Ch. *89-280* has ten substantive sections. Section 1 amends 8785.084, Florida Statutes (habitual felony offenders); section 2 amends §785.0842 (career criminals); section 3 amends 6785.0843 (policies as to career criminals). Section 4-10 amend Chapter 493, Part I, Florida Statutes. The first three sections amend closely-related statutes which focus punishment and prosecution efforts on those criminals who repeatedly commit serious offenses. Appellant cannot reasonably maintain these statutes have no "natural or logical connection," Burch, supra, *558* So.2d 2, because such an argument could not withstand close inspection. The repossession provisions all, amend part I of Ch. 493, Florida Statutes. That part, entitled "Investigative and Patrol Services," addresses private conduct (i.e., investigative and security services) normally provided by law enforcement officers. In fact, §493.30(2) defines "watchman, guard, *or* patrol agency" to include, among other things, an entity "which, for consideration, transports prisoners."

"Repossessors" are defined as persons who recover (seize) vehicles and boats due to default in payments. Section

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

493.030(6). The changes in Ch. 89-280 relate to licensing and conduct of repossessors (e.g., prohibiting the failure to remit money collected in lieu of repossession; requiring repossessors to give notice to the owner of the property seized). These changes 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). Part I, as amended through 1989, specifically concerns 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. Chapter 493, Part I, is designed to protect the public against "abuse" by repeat felons.

The Florida Supreme Court has consistently held that the legislature must be accorded wide latitude in the enactment of laws. Therefore, Art. III, §6 of the Florida Constitution must not be used to deter or impede legislation by requiring laws to be unnecessarily restrictive in their scope and operation. State v. he, 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."

Appellee would point *to* Bunnell v. State, 459 So.2d 808 (Fla. 1984) which 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 infornation, and obviously membership in an organization and creation *of* a penal statute cover disparate areas. Ch. 89-280, in contrast, includes no such disparity. There is a cognent 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 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. Ch. 89-280 contains but one subject.

If Appellant has identified a two-subject problem in Ch. 89-280, that problem has been cured by the legislature. Ch. 89-280 was enacted, obviously, in 1989. All 1989 changes to the Florida

Statutes have been adopted and enacted as the official statutory laws. *See* Ch. 91-44, Laws of Florida, effective May 2, 1991.[7]

Through Ch. 91-44, the Legislature reenacted all of *Ch.* 89-280, as codified. This reenactment cured any constitutional defect arising from inclusion of more than one subject in that chapter. State v. Combs, 388 So.2d 1029 (Fla.1980). 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 III, §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 So.2d 16 (Fla. 1952) (en banc) (tax statute with defective title valid from time of revision). Therefore, 8775.084, 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 doe6 *not* involve fundamental error. If preserved, Ch. 89-280 includes only one subject. Moreover, the Legislature has cured any two-subject problem.

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[7] The State acknowledges that Appellant's current offense was committed on October 2, 1990 (R4); and falls between the effective date of Ch. *89-280* (10/1/89) and the effective date (5/2/91) of Ch. 91-44.

CONCLUSION

The habitual, violent felony offender statute, as amended through 1989 and under which Appellant was sentenced, is constitutional in every respect. His sentence must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to TIMOTHY J. FERRERI, Esquire, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000-Drawer PD, Bartow, Florida 33830 this 27th day of March, 1992.

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