IN THE SUPREME COURT OF FLORIDA

WILLIE EARL BUTLER,

Petitioner,

v. CASE NO. 80,060

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM A QUESTION CERTIFIED BY THE FIFTH DISTRICT COURT OF APPEAL TO BE OF GREAT PUBLIC IMPORTANCE

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts for purposes of argument on the issue before this Court.

SUMMARY OF ARGUMENT

Chapter 89-280, Laws of Florida, amending Section 775.084, Florida Statutes (1989), the habitual offender statute, did not violate the single subject rule of Article 111, Section 6 of the Florida Constitution. Even assuming arguendo that the Chapter should not have contained provisions relating to both habitual offenders and repossessions, the defect was cured when the repossession provisions were repealed effective October 1, 1990. Petitioner's offenses did *not* take place until February, 1991.

ARGUMENT

CHAPTER 89-280, LAWS OF FLORIDA, AMENDING SECTION 775.084, FLORIDA STATUTES (1989), DID NOT VIOLATE THE SINGLE SUBJECT RULE, **ARTICLE 111, SECTION** 6, **FLORIDA CONSTITUTION.**

Petitioner was sentenced as an habitual felony offender on August 27, 1991 for crimes he admitted committing in February, 1991. Chapter 89-280, Laws of Florida, amending the habitual offender statute to provide for the use of "qualified offenses" from other jurisdictions in defining the term "habitual felony offender", had an effective date of October 1, 1989. Petitioner contends that, because his crimes were committed within the "window period" between the effective date of Chapter 89-280 and May 2, 1991, the effective date of Chapter 91-44, Laws of Florida, which reenacted the 1989 amendments as part of the Florida Statutes, he could not be sentenced as an habitual felony offender. He cites Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991), for the proposition that Chapter 89-280, Laws of Florida, violated the single subject rule of Article 111, Section 6 of the Florida Constitution. That chapter amended Section 775.084, Florida Statutes, to allow convictions from foreign jurisdictions to be considered as predicate offenses for purposes of designating an individual to be an habitual felony offender.

The First District Court of **Appeal** in Johnson concluded that there was a viable question as to the legitimacy of the 1989 amendments between their effective date, October 1, 1989, and the date of their reenactment, May 2, 1991. The District Court certified the question to the Florida Supreme Court, That case

is pending in Florida Supreme Court Case No. 79,204 and oral argument is scheduled for November 2, 1992, Respondent would submit that the decision of the First District in Johnson, Supra, is incorrect and that this question has been correctly decided in the State's favor in the Third, Fourth and Fifth District Courts of Appeal.

In Jamison v. State, 583 So.2d 413 (Fla. 4th DCA 1991), review denied 591 So.2d 182 (Fla. 1991), and in McCall v. State, 583 So.2d 411 (Fla. 4th DCA 1991), jurisdiction accepted 593 So.2d 1052 (Fla. 1992), the Fourth District ruled contrary to the First District and found that the amendments did not violate the single subject rule. See Gilmore v. State, 597 So.2d 374 (Fla. 4th DCA 19921, Claybourne v. State, 17 FLW D1478 (Fla. 1st DCA June 11, 1992) and Pride v. State, 17 FLW D1737 (Fla. 1st DCA July 15, *1992).* Likewise, in Beaubrum v. State, 595 So.2d 254, 255 (Fla. 3rd DCA 1992), the Court said that there was no constitutional violation of the one subject rule, citing Jamison and McCall, as well as the opinion of the Florida Supreme Court in Burdick v. State, 594 So.2d 267 (Fla. 1992).

In Burch v. State, 558 So.2d 1, 2-3 (Fla. 1990), this Court said that the purpose of the constitutional prohibition against a plurality of subjects in a single legislative act is to prevent the act from serving as a "cloak" for dissimilar legislation. The Court went on to state, however, that that provision was not designed to deter or impede legislation by requiring it to be unnecessarily restrictive in scope. The Court concluded that "...wide latitude must be accorded the legislature in the

enactment of laws...". There is nothing in Chapter 89-280 to indicate any legislative attempt to "cloak" dissimilar legislation or engage in legislative "log rolling".

Even assuming arguendo that Chapter 89-280 violated the single subject rule by containing sections amending Chapter 775, Florida Statutes, relating to habitual offenders, and others amending Chapter 493, relating to repossession of automobiles, the State would argue that the defect was cured on October 1, 1990, when Chapter 493 was repealed in its entirety and replaced by a reworded and renumbered Chapter 493. Chapter 90-364, Laws of Florida, ss. 10, 12. Chapter 89-280, s. 11, specifically provided that the amendments to Chapter 493 were repealed effective October 1, 1990.

Therefore, the "window period" referred to in Johnson should have been the one year period in which these amendments were in effect, October 1, 1989 to October 1, 1990. Petitioner's offenses were committed in February, 1991, long after the alleged defect had been cured. By the date of Petitioner's offenses, only the provisions of Chapter 89-280 relating to the single subject of the treatment of career criminals were still in effect. The fact that that chapter contained provisions relating to repossession of automobiles, provisions which were repealed prior to the date of Petitioner's offenses, should have no bearing on his designation as an habitual felony offender, *See* Martinez v. Scanlon, 582 So.2d 1167, 1172 (Fla. 1991).

It should be noted that Petitioner raised this claim for the first time in his direct appeal to the Fifth District Court of

Appeal. It was the State's position before that Court that **Petitioner** waived this alleged error by failing **to raise** it in the trial **court.** Except in cases of fundamental error, an appellate court will not consider issues not presented to the lower court. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). The alleged violation of the single subject rule did not constitute a denial of Petitioner's right to due process of law. See Ray v. *State*, 403 So.2d 956, 960 (Fla. 1981). The per **curiam** affirmance issued **by** the Fifth District Court of Appeal in this case did not specify whether it was based upon a finding that the act in question was constitutional or whether it was based upon Petitioner's failure to preserve a non-fundamental error.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent requests that this Honorable Court answer the certified question in the negative and affirm Petitioner's judgment and sentence in all respects or simply refuse to accept jurisdiction based upon Petitioner's failure to preserve the error alleged.

Respectfully submitted,

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CERTIFICATE OF **SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been furnished to Sophia B. Ehringer, Esquire, Office of the Public Defender, Counsel for Petitioner at **112-A** Orange Avenue, Daytona Beach, Florida 32114, this 7th day of August, 1992.

Anthony J. Golden
Assistant Attorney General

IN THE SUPPREME COURT OF FLORIDA

WILLIE EARL BUTLER,

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STATE OF FLORIDA,

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APPENDIX TO RESPONSE

Respectfully submitted,

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1992

WILLIE BUTLER,

Appellant,

v. CASE NO. 91-2137

STATE OF FLORIDA,

Appellee.

Opinion filed June 12, 1992

Appeal from the Circuit Court
for Orange County,
James C. Hauser, Judge.

James B. Gibson, Public Defender,
and Kenneth Witts, Assistant Public
Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and James N.
Charles; Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM.

ON MOTION FOR REHEARING AND CERTIFICATION

We certify as being of great public importance the following question to our supreme court, the same question as is certified by the First District Court of Appeal and the Fourth District Court of Appeal:

> WHETHER THE CHAPTER 89-280 AMENDMENTS TO SECTION 775.084(1)(A)1, FLORIDA STATUTES (1989), WERE UNCONSTITUTIONAL PRIOR TO THEIR REENACTMENT AS PART OF THE FLORIDA STATUTES, BECAUSE [THEY WERE] IN VIOLATION OF THE SINGLE SUBJECT RULE OF THE FLORIDA CONSTITUTION.

Motion granted, question certified.

DAUKSCH, COWART and GRIFFIN, JJ., concur.