IN THE SUPREME COURT OF THE STATE OF FLORIDA

WILLIE EARL BUTLER,

Appellant/Petitioner,

vs.

STATE OF FLORIDA

Appellee/Respondent.

S.CT. CASE NO. 80,060

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF THE ARGUMENT

Petitioner requests that this Honorable Court answer the question certified by the Fifth District Court of Appeal in the affirmative. Chapter 89-280, Laws of Florida, amending Florida Statutes § 775.084, violates the one subject rule of the Florida Constitution. Chapter 89-280 embraces two subjects, namely, habitual felony offenders and repossession of motor vehicles. There is no logical or rational relationship between these two subject areas.

Respondent argues that the one-subject violation was cured by the provision in Chapter 89-280, which states that the amendments to 493 were to be repealed on October 1, 1990. This section does not remedy the constitutional violation of the amendments to the habitual offender statute, as the amendments to § 775.084 were not reenacted until May 1, 1991. It may provide an argument against an individual asserting this challenge who was charged under Chapter 493 after October 1, 1990, the

effective date of Chapter 90-364, but this does not render the amendments to the habitual offender statute consitutional. Furthermore, Respondent's argument that the issue is waived is without merit. A challenge to an act of the legislature based on the facial vaildity of this consitutional provision can be raised for the first time on appeal, as the challenge was made on fundamental grounds.

ARGUMENT

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.

In arguing that the amendments to Chapter 89-280 were not violative of Article 111, Section 6, of the Florida Constitution, the Respondent contends: that this Court should follow the decisions handed down from the Third and Fourth District Courts of Appeal, that the window period in which the section was violative of the one-subject rule closed on October 1, 1990 instead of May 1, 1991, and that Petitioner should be barred from raising this issue for the first time on appeal.

The opinions relied upon in Respondent's brief from the Third and Fourth District Courts of Appeal, which held that the amendments in question do not violate the single subject requirement, provide no basis or reasoning to support Respondent's position. [1] Jamison v. State, 583 So. 2d 413 (Fla. 4th DCA 1991), review denied 591 So. 2d 182 (Fla. 1991), McCall v. State, 583 So. 2d 411 (Fla. 4th DCA 1991), jurisdiction accepted 593 So. 2d 1052 (Fla. 1992), and Beaubrum v. State, 595 So. 2d 254 (Fla. 3d DCA 1992) all summarily reject the argument that the amendments violate Article 111, Section 6, of the

[1] The Fourth District Court of appeal went on to certify the question of the constitutionality of the amendments to this Court in Gilmore v. State, 597 So. 2d 374 (Fla. 4th DCA 1992).

Florida Constitution. The opinions in these cases contain no discussion as to whether the defendant's offense date was within the period before the amendments were reenacted into Florida Statutes, whether the amendments directly led to the defendant's classification as a habitual offender, or the grounds for finding that the amendment was not unconstitutional. In the instant case, Petitioner could not have been classified as a habitual offender but for the amendments included in Chapter 89-280, Laws of Florida. See Pride V. State, 17 F.L.W. 1737 (Fla. 1st DCA July 15, 1992) (defendant's habitual offender sentence vacated where offense committed between October 1, 1989 and May 2, 1991, and the classification was predicated on out-of-state convictions which could not have been considered prior to the amendment contained in Chapter 89-280). The district court decisions in McCall, Jamison, and Beaubrum, supra, do not furnish any information as to the circumstances behind the defendants' habitual offender classification. It is not clear if the amendments actually applied to or affected the defendants' sentences. Furthermore, the rationale for district courts' ruling is not provided. These cases, cannot therefore be relied as genuine support for Respondent's position.

Respondent's argument that the amendment's constitutional infirmities were remedied by the fact that Chapter 493 was repealed and renumbered in Chapter 90-364, Laws of Florida, is without merit. Chapter 89-280, § 11, Laws of Florida, provides, "Each section which is added to chapter 493, Florida Statutes, by

this act is repealed on October 1, 1990, and shall be reviewed by the Legislature pursuant to section 11.61, Florida Statutes." This section in no way restores the constitutionality of the amendments to § 775.084, Florida Statutes, concerning habitual offenders.

First, is well established that "No valid provision can be embodied in an act if it is beyond the range of the subject , as expressed in the title, and matter properly connected therewith." Hillsborough County v. Price, 149 So. 2d 912, 914 (Fla. 2d DCA 1963) (emphasis added) (court held that a statute which violated the title or subject matter requirements of the Florida Constitution is void ab initio). The primary purpose of the requirements contained in Article 111, § 6, of the Florida Constitution "is to establish a means of adequately providing the public with notice as to the contents of the act." Price, 149 So. 2d at 914, 915. The constitutional prohibition is also in place "to insure . . as nearly as possible, that a member of the legislature be able to consider the merit of each subject contained in the act independently of the political influence of the merit of each other topic . . . the reviewing court must examine each subject in the light of the various other matters affected by the act, and not simply compare each isolated subject to the stated topic of the act." State v. Levins, 17 F.L.W. 1203, 1206 (Fla. 1st DCA May 11, 1992). Laws regulating repossessors are not in any way connected with habitual felony offender provisions, and the fact that the amendments to the

repossession laws were to be repealed on October 1, 1990 does not cure the single subject violation of the habitual offender statute amendments. No reference was made to the section providing for the repeal of Chapter 493 in the Respondent's argument to the Fifth District Court of Appeal, making it highly unlikely that the "general public" or member of the legislature would be afforded the constitutional protection provided by the single subject rule solely because of Section 11 of Chapter 89-280, as Respondent suggests. This section does not remedy the constitutional violation.

The amendments to the habitual offender statute in Chapter 89-280 still co-existed with the repossession provisions until their re-enactment in Chapter 91-44, Laws of Florida. The repossession amendments were re-enacted in 90-364, Laws of Florida, under the title "Private Investigative, Private Security, and Repossession Services," effective October 1, 1990. Any challenge to the violation of the one-subject rule requirement from someone charged under the repossession amendments in Chapter 89-280 would be inapplicable if the offense occurred after October 1, 1990, but Chapter 90-364 does not make any reference to the habitual offender amendments. The violation of Article 111, § 6 of the Florida Constitution existing in the habitual offender statute amendments were not cured until the May 1, 1991, effective date of Chapter 91-44, where the amendments were adopted into law.

Moreover, Chapter 89-280, § 11, Laws of Florida, is in place

to provide for legislative review of regulatory functions pursuant to § 11.61, Florida Statutes. It was not included in order to cure any possible one subject rule requirement. The section provides for legislative review of the laws regulating the occupations and business of repossessors. Section 11.61 lists criteria which must be considered to ensure that a business is not regulated unless such regulation is to necessary to protect the public health, safety and welfare from harm or damage. It has nothing to so with the recidivists statutes, and in fact provides further evidence that Chapter 89-280 contains dissimilar legislation with no natural or logical connection.

Lastly, Respondent argued that this constitutional issue in waived because it was raised for the first time on appeal. Because the issue concerns the facial validity of a statute, the issue need not be argued at the trial level for the matter to be preserved for appeal. As this Court has said in Trushin v. State, 425 So.2d 1126 (Fla. 1982):

> The facial validity of a statute, including an assertion that the statute is infirm because of overbreadth, can be raised for the first time on appeal even though prudence dictates that it be presented at the trial level to assure that it not be considered waived.

Id. at 1129. The constitutionality of the statute was attacked on fundamental grounds and, as a result, Petitioner never waived the right to argue the single subject violation for the first time on appeal. Fundamental errors may be argued on appeal without objection, and without having been raised at the trial

level, and they are not waived for purpose of appeal. Recent cases have rejected Respondent's argument, where this exact issue has been raised for the first time on appeal. Pride, supra; Claybourne V. State, 17 F.L.W. 1478 (Fla. 1st DCA June 11, 1992) (court found that "[i]t has long been recognized that a facial invalidity challenge to an act of the legislature based on violation of the foregoing provision [Art. 111, § 6, Fla. Const.] can be raised for the first time on appeal, so long as the challenged act effects a central issue in the litigation").

It is clear that the act challenged in the instant case directly effected Petitioner's sentence. Petitioner's habitual offender sentence, as in Pride, supra, was based on out-of-state convictions. The First District Court of Appeal aptly noted,

> The amendment [contained in Chapter 89-280] broadened considerably the category of prior convictions which could be considered in determining whether a defendant qualified as an habitual felony offender. It provided that previous convictions 'of any combination of two or more felonies in this state or other qualified offenses' would constitute sufficient predicate. It defined 'qualified offense' as any offense which was a violation of the law of any other jurisdiction, domestic or foreign; which, at the time it was committed, was punishable under the law of the jurisdiction in which it was committed by death or imprisonment for more than one year; and which was 'substantially similar in elements and penalties to an offense in this state.

Pride, 17 F.L.W. at 1738. Following the rule set forth in Pride, Petitioner in the case sub judice should not have been sentenced as a habitual offender because he had not been convicted of the requisite Florida convictions.

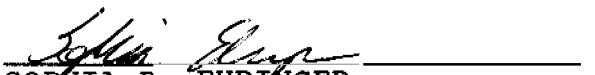
The inescapable conclusion is that Chapter 89-280 violates the on-subject rule and is unconstitutional. Petitioner requests that this Honorable Court answer the question certified by the Fifth District Court of Appeal in the affirmative, and order that Petitioner's sentence as a habitual offender be vacated.

CONCLUSION

BASED ON the argument contained herein, and authorities cited in support thereof, Petitioner requests that this Honorable Court answer the certified question in the affirmative, and find the amendments to Section **775.084,** Florida Statutes, contained in Chapter 89-280, Laws of Florida, unconstitutional during their effective date prior to their reenactment as part of Florida Statutes.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER



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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, Florida **32114,** in his basket at the Fifth District Court of Appeal; and mailed to Willie Earl Butler, Inmate No. 101263, #B-25, Polk Corr. Inst., **3876** Evans Road, Box 50, Polk City, Fla. 33868-9213, on this 27th day of August, 1992.

SOPHIA B. EHRINGER
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