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IN THE SUPREME CORUT OF FLORIDA

JOSEPH BURTON,

Petitioner,

v. Case No. 80,071

STATE OF FLORIDA,

Respondent.

______________________________/

ON DISCRETIONARY REVIEW FORM THE DISTRICT
COURT OF APPEAL FOR THE SECOND DISTRICT
STATE OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Respondent hereby provides Notice of Similar Issue in the following cases:

1. McCall v. State, Case No. 78,536
2. State v. Johnson, Case No. 79,150
3. State v. Johnson, Case No. 79,204
4. Savoury v. State, Case No. 79,715
5. Coon v. State, Case No. 80,151

STATEMENT OF THE CASE AND FACTS

Respondent can give no statement of the case and facts as respondent has no record with which to work. Below this was, apparently, an appeal from a summary Rule 3.800 denial.

SUMMARY OF THE ARGUMENT

As to Issue I: The court should not consider appellant's attack on the validity of the statute as it was an issue that could have been raised on direct appeal,

The concerns that prompted the single subject rule are not implicated by the bill that created the revised habitual offender statute, The provision relating to repossession of automobile is of criminal significance and was properly included with the statute that is now subject to question.

As to Issue II: The habitual offender statute punished far conduct not status. In California v. Robinson, the Court was careful to distinguish between the two, It has no application to this statute. The other cases relied on by the appellant are likewise distinguishable.

As to Issue III: The statute does not run the risk of enhancement being premised on uncounaeled convictions. The case law is clear that the offender must be given the opportunity to show this to the sentencing court,

ARGUMENT

ISSUE I

WHETHER CHAPTER *89-280*, LAWS OF FLORIDA VIOLATED THE SINGLE SUBJECT PROVISION OF THE FLORIDA CONSTITUTION? (As restated by Respondent)

Appellant contends that the chapter **89-280,** Laws of Florida amending the habitual offender statute is unconstitutional on the ground that it violates **the** single subject rule of the constitution, Appellant also makes other constitutional attacks **as** well. Aside **from** the fact that these attacks are without merit, this court should not consider them. The facial validity of **a** statute is one of those issues that can be raised on direct appeal regardless of whether it was presented to the trial court. Thrushin v. State, **425** So.2d 1126 (Fla. 1983). Because **it** is a matter that could have been raised on direct appeal and was not, it has been procedurally defaulted, **E.g.,** Thomas **v. State, 486 So.2d** *577* **(Fla. 1986).**

Although the merits should not be reached, the State will address the **issue.** To withstand an attack alleging the inclusion of more than one subject, various topics within **a** legislative enactment must be "properly connected." **Art.** 111, ***56,* 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"[1] 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.[2] 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), ***dismissed,*** **458** So.2d **274** (Fla. 1984). **See,** Burch, supra at 2 (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),

At the outset, the problems of logrolling 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

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

2 ***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." **25A** Fla. Stat. Annon. 656 (1991 ed.)

that act. *See* id. at 3 (simply because "several different [e.s.] statutes are amended does not mean that one subject is involved").

The repossession provisions of Ch. **89-280** amend Part I of Ch. 493, Florida Statutes.[3] 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 repossession conducted by private individuals. The problems rose to criminal significance, as violations of Part I of Chapter 493 are first-degree misdemeanors. See, §493.321, Fla. Stat. (1989).

Chapter 493, Part I, is also designed **to protect** the public against abuse by repossessors, etc., and provides criminal penalties. The habitual **felon** statute is also designed **to** protect the public against repeat felons.

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3 Chapter 493 was repealed, 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.

4 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.

This Court has consistently held **that the** Legislature must be accorded wide latitude in the enactment of laws. Therefore, Art. 111, §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. 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; bath 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 Busch, *supra*. Chapter **89-280** contains but one subject,

ISSUE II

WHETHER SECTION 775.084(4)(e), FLORIDA STATUTES (1991) IS FACIALLY UNCONSTITUTIONAL AS PUNISHING A PERSON BASED ON HIS OR HER STATUS? (As restated by Respondent)

Appellant contends that the habitual offender statute punishes him for his status. He relies on Robinson v. California, 370 U.S. 660, 82 L.Ed.2d 1417, 8 L.Ed.2d 758 (1962) and certain state cases. Neither Robinson nor the state cases he cites compel a finding that appellant is being punished for his status.

The short answer is that he is being punished for his offense not his status. The Fourth District summarily rejected a similar challenge in Mitchell v. State, 575 So.2d 798 (Fla. 4th DCA 1991). This court should do likewise. It is not violation of the constitution to make punishment for recidivist more sever. Eutzy v. State, 458 So.2d 755 (Fla. 1984).

The kind of status that can not be criminalized was set out in Robinson. It held that California cauld not criminalize a person's simply being addicted to narcotics. In addressing the statute in question the Supreme Court was careful to distinguish between acts and status. Robinson, 370 U.S. at 662. This distinction is crucial. It is a offender's act, criminal offense, that is being punished in light of his previous acts, criminal offenses,

Neither L.S. v. State, 553 So.2d 345 (Fla. 4th DCA 1989) nor Potts v. State, 526 So.2d 104 (Fla. 4th DCA 1987) require a different result. L.S. is simply an application of the principle

that a revocation *of* probation can not be based on a simple arrest. Potts held a statue making the penalty for carrying a concealed firearm more sever for a person under indictment. Neither case is authority for finding the being a habitual felony offender a the kind of status that can not be criminalized.

ISSUE III

WHETHER SECTION 775.084, FLORIDA STATUTES (1991) IS FACIALLY UNCONSTITUTIONAL AS A VIOLATION OF ARTICLE I, SECTION 9, OF THE FLORIDA CONSTITUTION? (As restated by Respondent)

Appellant contends that section 775.084 denies him due process of law, The specific contention is that it could condone the use of unconstitutional convictions, The truth of the matter is that it specifically excludes pardoned or improperly secured convictions from consideration-

Sections 775.084(1)(a) 3 and 4 specifically provide that the court find the "qualified offense" not have been pardoned or set aside in any post-conviction proceeding. The appellant's concern that an unconstitutionally obtained conviction might be used is not worth any consideration by this court, It is the offender that is in the best position to know if a conviction is subject to collateral attack, That he or she has not successfully collaterally attacked a conviction is reason enough for it to be considered. Appellant's concern about uncounseled convictions being used was addressed in Broderick v. State, 564 So.2d 622 (Fla. 4th DCA 1990). Broderick ruled that a defendant must be given the right at sentencing to show that he did not have counsel for convictions for which he or she had a right to counsel and did not waive it. Appellant's concern that a uncounseled conviction might be used as a basis for a habitual offender sentence is illusory,

CONCLUSION

WHEREFORE Respondent asks the court to affirm the decision of the district court on the basis of the above and foregoing reasons, arguments, and authorities.

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 JOSEPH BURTON, DC#718725, Desoto Correctional Inst., P. O. Drawer 1072, Arcadia, Florida 33821, this 23rd day of November, 1992.

OF COUNSEL FOR RESPONDENT