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SUPREME COURT OF FLORIDA

CHARLES EUGENE COLEMAN,)
Appellant,)
v.) Case No. 80,109
STATE OF FLORIDA,)
Appellee.)

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ERICA M. RAFFEL
Assistant Attorney General
WESTWOOD CENTER
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-3749

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant 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 13775.084 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) No where does the record reflect that the instant claim was raised before the trial court.

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 mandatory upon habitualization. Only then did Appellant plead guilty, knowing he was to be sentenced as a habitual violent felony offender. (R92-95)

SUMMARY QE THE ARGUMENT

Appellant argues the instant statute violates the one subject rule. Appellant **raised** this challenge for the first time on **direct** appeal, **claiming** fundamental error had 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, cured any one 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 SECTION 775.084 FLORIDA STATUTES (1989) CHAPTER 89-280 LAWS OF FLORIDA ARE COGENTLY XELATED

Respondent's failure to raise a one-subject challenge before the trial court precludes review by this Court, since neither the opinion of the Secand District Court of Appeal, nor the cases cited in that opinion address fundamental error.

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 protection 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 one-subject challenge raised on appeal for the first time, and the challenges allowed in Trushin, are critical. Trushin addressed vagueness, overbreadth, and equal protection attacks on the facial validity of the statute. Contrasting these to Appellant's situation, it is obvious that no fundamental error has occurred.

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

Petitionernever 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.

Petitioner cannot, and does not, maintain that the changes to Ch. 493 or 8775.084 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 **Trushin** court addressed **only** out of caution, despite concerns that it had been waived. 425 So.2d at 1131.

In short, Petitioner'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 Petitioner to have raised this issue before the trial court would not be to **approve** a sentence grounded on fundamental error.

Equally important, Petitioner's challenge goes not to his conviction, but only his classificatioc as an habitual, violent felon. Whether Petitioner 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 was unabashedly raised for the first time on direct appeal after acknowledging a waiver of all appellata 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 Petitioner, again for the first time on appeal, to bring a two-subject challenge -- 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).

Designed to prevent abuse of the legislative process, Art. 111, §6 creates no persanal rights. It has nothing to do with the substance (i.e., facial validity) of legislation, only the number of subjects in a single enactment. Moreaver, a two-subject challenge is not brought against a statute, but against a legislative act before its codification,

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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.).

This Court need not and should not reach the merits of the constitutionality of the statute. Petitioner did not raise this issue before the trial court, and this Court is not confronted 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 fundamental error, an appellate court will not consider an issue unless it was presented to the lower court. Steinhorst v. State, 412 So.2d 332, 338 (Fla.1982)

Although he challenged it below, Petitioner's attack on the constitutionality of Ch. 89-280 was not specifically, or even close to the point now raised, as required. In Henderson v. State, 569 So.2d 925 (Fla. 1st DCA 1990), the 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 Petitioner. 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).
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> * * *
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> "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]

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[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.

[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

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.")

In Silver v. State, 188 So.2d 300, 301 (Fla. 1966) the court strongly criticized and refused to condone the decision of the district court to address the constitutionality of a statute when constitutionality not raised in trial court); In Whitted v. State, 362 So.2d 668, 672 (Fla. 1978; the court held that the 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 statutary authority to override a jury recommendation in a death penalty case was not cognizable for the first time on appeal. Id. at 757. If constitutionality of a

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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.

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 such.

Davis v. State, **383** So.2d 620, 622 (Fla. 1980) is particularly instructive when cast against the instant record of Petitioner'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 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.

See Brown v. State, **376** So.2d 382, 385 (Fla.1979), (reserved issue must be totally dispositive and that the constitutionality of a controllinq statute is an appropriate 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** 1987) (ex post facto and equal protection challenges to sentencing statutes not cognizable when raised for first time on appeal).

It is uncontroverted that Petitioner 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 of Art. 111, 96 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 DCA 1991). The rational basis for habitual offender statutes is that society requires greater protection from recidivists and sentencing them as habitual felons provides greater protection. Eutsey v. State, 383 So.2d 219, 223-224 (Fla.1980). Petitioner has not, and cannot, reasonably maintain the mere number of subjects in Ch. 89-288 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, Petitioner was given reasonable notice and a fair opportunity to be heard. He has never maintained otherwise, nor 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 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 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 or an argument not presented below unless the alleged error is fundamental or goes to the facial validity of the statute, Petitioner may not challenge the constitutionality of Ch. 89-280. As the Supreme Court held in Davis, supra there is no jurisdiction to entertain such appeals.

Assuming Petitioner can raise this issue, he is wrong on the merits. Preliminarily, Ch. 89-280 has ten substantive sections. Section 1 amends B785.084, Florida Statutes (habitual felony offenders); section 2 amends g785.0842 (career criminals); section 3 amends §785.0843 (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 on punishment and prosecution efforts on those criminals who repeatedly commit serious offenses. Petitioner 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 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

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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.

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.

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. Petersburq, 302** So.2d **756, 758** (Fla. 1974) ("For a legislative enactment to fail, the conflict between it and the Constitution must be palpable."

Respondent 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 information; obviously membership in an organizatiun 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 incidents 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 ORB upheld in Burch, supra. Ch. ***89-280*** contains but one subject.

If Petitioner 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 (91a.1980). The reason

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[7] The State acknawledges 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.**

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 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.

In 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.

CONCLUSION

The habitual, violent felony offender statute, as amended through 1989 and under which Petitioner was sentenced, is constitutional in every respect. The opinion of the Second District Court of Appeal and Petitioner's sentence should be affirmed.

Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

Erica Raffel

ERICA M. RAFFEL
ASSISTANT ATTORNEY GENERAL
FLA BAR NO. 329150
WESTWOOD CENTER
2002 N. LOIS AVENUE, SUITE 700
TAMPA, FLORIDA 33607
(813) 873-4739
COUNSEL FOR APPELLEE

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 3rd day of November, 1992.

Erica Raffel
COUNSEL FOR APPELLEE