IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

vs.

CASE NO. 80,157
DCA CASE NO.: 91-1472

TYRONE M. CLAYBOURNE,

Respondent.
_____/

STATE OF FLORIDA,

Petitioner,

vs.

TYRONE M. CLAYBOURNE,

Appellee.
_____/

APPELLANT/PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This is an appeal of right on the merits. By notice filed July 10, 1992, the State invoked this Court's mandatory jurisdiction[1] to review a district court decision declaring a legislative act (i.e., ch. *89-280,* Laws of Florida) invalid. This act is a "state statute" for purposes of this Court's mandatory jurisdiction. *See* Pinellas County Veterinary Medical Society, Inc. v. Chapman, 224 So.2d 307 (Fla. 1969) (directly reviewing trial court judgment holding a **special act** unconstitutional under Art. V, §4, Fla. Const. (1885), which conferred jurisdiction to review final judgments passing upon the validity of a "state statute"). In the same notice, the State invoked this Court's discretionary jurisdiction[2] to review a question certified to be of great public importance.

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[1] Art. V, §3(b)(1), Fla. Const.; Fla.R.App.P. 9.030(a)(1)(A)(ii).

[2] The notice was filed December 30, 1991; and invoked this Court's jurisdiction pursuant to Art. V, §3(b)(4), Fla. Const., and Fla.R.App.P. 9.030(a)(2)(A)(v).

STATEMENT OF THE CASE

Appellee/Respondent, Tyrone M. Claybourne [herein "Appellee"] pled nolo to several offense (R 259), and was sentenced as an habitual, violent felon. (R 255).

Before the First District, Appellee challenged only his sentence. That court reversed on the ground that ch. 89-280, Laws of Florida, violated the one-subject rule in Art. 111, §6 of the Florida Constitution. It certified the same question of great public importance[3] as was certified in Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991).

Notice of direct appeal, invoking this Court's mandatory jurisdiction, was filed July 10, 1992. That notice also invoked this court's discretionary jurisdiction to review the certified question.

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[3] The question reads:

> Whether the ch. 89-280 amendements to section 775.084(1)(a)1, Florida Statutes (Supp. 1988) were unconstitutional prior to their re-enactment as part of the Florida Statutes, because in violation (sic) of the single subject rule of the Florida Constitution.

STATEMENT OF THE FACTS

Appellee pled nolo to four counts of sale of cocaine, four counts of possession of cocaine, and one count of sale of a counterfeit controlled substance. (R 250, 259). He was sentenced as an habitual felon to 30 years on the first count of cocaine sale, with all other sentences running concurrently. (R 242-9, R 253-5). He did not challenge the constitutionality of the habitual felony offender statute before the trial court. (R 250-67).

SUMMARY OF ARGUMENT

Issue I: Preservation of Substantive Issue

Whether ch. 89-280, Laws of Florida, violates the one-subject rule in Art. 111, §6 of the Florida Constitution was not raised before the trial court. The number of subjects in a legislative act cannot be fundamental error. Therefore, Appellee improperly raised the issue for the first time before the First District.

The First District had neither jurisdiction nor the discretion to entertain a non-fundamental error alleged for the first time on appeal. Its decision must be vacated, thereby upholding Appellee's sentence.

Issue 11: One-Subject Challenge to Chapter *89-280*, Laws of Florida

Chapter 89-280, Laws of Florida, contains two components, one addressing habitual felons and career criminals; the other, repossession of automobiles. Both components logically relate to controlling crime. Chapter 89-280 does not violate Art. III, §6 of the Florida Constitution.

ARGUMENT

ISSUE I

WHETHER A CRIMINAL DEFENDANT'S RIGHT TO DUE PROCESS CAN BE DENIED MERELY BY THE NUMBER OF SUBJECTS IN A LEGISLATIVE ACT.

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 precluded review by the First District. Consequently, that court's decision on the merits must be vacated, thereby affirming Apapellee's sentence.

Chapter 89-280, Laws of Florida, contains nine substantive sections. These nine sections form, in essence, two components. The first component (§§1-3, ch. 89-280) addresses the habitual felon and career criminal statutes. Appellee has never maintained these two topics constitute more than one subject. The second component (§§4-9, ch. 89-280) addresses repossession of motor vehicles. These two components relate to the single subject of controlling crime.

This Court need and should not reach the merits of the constitutionality of the statute. Appellee did not raise this issue before the trial court. Therefore, the district court was without authority to rule on the merits, as violation of the one-subject rule cannot be fundamental error. It is a settled rule

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[4] The opinion below speciously circumvents the issue, by noting

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. [citations omitted]." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

The meaning of "fundamental error" has been frequently addressed by this Court and the district courts. In Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970), this Court reviewed the Third District's holding that a challenge to the constitutionality of a **special act**[5] was cognizable for the first time on appeal as fundamental error. Specifically, the district court held the act was unconstitutional because its title did not fully reflect the act's contents, contrary to Article III, section 16 of the Florida Constitution of 1885. (Note: section 16 is now embodied in the current constitution as Art. III, §6, the provision at issue here.)[6] This Court rejected the

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that the "statute affected a critical, central issue in the litigation; i.e., Claybourne's term of imprisonment," (slip op., p. 3). The court could not have been more wrang -- the length of Claybourne's imprisonment has never been at issue. The only matter at issue has been the number of subjects in ch. 89-280.

[5] The State notes that the legislative act at issue in Sanford was not a "statute" in the commonly used sense; that is, a portion of the codified general law of Florida. At issue was a special act, which by definition is not of statewide applicability and not codified.

[6] Section 6 reads in pertinent part:

> Laws.--Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.

proposition that constitutionality of the statute was fundamental and could be raised for the first time on appeal.

The Sanford court made two general paints which deserve close attention. First, "'[f]undamental error,' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." *Id.* Second, an "Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly." *Id.*

Sanford was a civil case. The same doctrine is applied in criminal cases. In Castor v. State, 365 So.2d 701 (Fla. 1978), the Court reaffirmed the rule that contemporaneous objections were required and rejected the argument that the error was fundamental. In the context of jury re-instruction, the court reiterated that the doctrine of fundamental error must remain a "limited exception." *Id.* at 704. This Court also declared that the error, to be fundamental, must "amount to a denial of due process." *Id.*, citing State v. Smith, 240 So.2d 807 (Fla. 1970).

This Court has consistently limited the scope of fundamental error. *See* Clark v. State, 363 So.2d 331, 333 (Fla. 1978) ("We have consistently held that even constitutional errors, other than those constituting fundamental error, are waived unless timely raised in the trial court. Sanford.") It was even more emphatic in Ray v. State, 403 So.2d 956, 960 (Fla. 1981):

> [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, *supra]*.
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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) (Hubbast, J., dissenting), remanded, 364 So.2d 892 (Fla. 1978), rev'd, on remand, 367 So.2d 705 (Fla. 3d DCA 1979).[7]

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. 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) (This 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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[7] In Porter, the issue was whether an unchallenged to 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 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 jury recommendation in death penalty case not cognizable for 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 such.

Davis v. State, 383 So.2d 620, 622 (Fla. 1980) is particularly instructive. 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. This 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.
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> For the reason stated, jurisdiction is declined and the judgment of the circuit court is not disturbed.

Id. *See* Brawn 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 appropriate issue for reservation). Brown necessarily implies that the constitutionality of a controlling statute must be preserved.

The above holdings are also reflected in the First District's case law. *See* 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 Appellee 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. 111, §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 DCA 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). Appellee 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, Appellee 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. Had Appellee

thought differently, "he only had to raise a constitutional question before the trial court and, in the 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." Davis, 383 So.2d at 622.

The State recognizes that the facial validity of a statute may be challenged for the first time on appeal. Trushin v. State, 425 So.2d 1126 (Fla. 1983). However, this is a very narrow exception to the rule that issues not raised in the trial court may not be raised on appeal. There are two aspects to the facial challenge: overbreadth and vagueness. Overbreadth only arises when the statute in question impinges on behavior protected by the first amendment to the United States Constitution and by Article I, §4 of the Florida Constitution. State v. Olson, 586 So.2d at 1243-1244. There can be no suggestion here that the number of subjects in ch. 89-280 impinges on First Amendment rights. The same conclusion applies to facial vagueness. Nothing in the mere number of subjects in ch. 89-280 would cause a person of common intelligence to guess at the meaning of any particular substantive possession. Therefore, the exception noted in Trushin is factually and legally inapplicable.

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 So.2d 118, 121 (Fla. 1972). If violation of Article III, section 6 were fundamental error, or constituted facial invalidity, reenactment could not cure either error.

Assuming that chapter 89-280 violates Article III, §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, Appellee here may not challenge the constitutionality of ch. 89-280. As this Court held in Davis, there is no jurisdiction to entertain such appeals. Since the First District had no jurisdiction to review error that was neither fundamental nor preserved, its decision on the merits must be vacated, thereby affirming Appellee's sentence.

ISSUE II

WHETHER ALL THE PROVISIONS OF CHAPTER 89-280, LAWS OF FLORIDA, RELATE TO CONTROLLING CRIME.

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, §6, 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"[8] 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, s.6 of the Florida Constitution.

Elaboration is useful. Article 111, §6 has long been extant in Florida's constitutions.[9] It is "designed to prevent various abuses commonly encountered in the way laws were passed . . . [such as] logrolling, which resulted in hodgepodge or omnibus

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

[9] *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.).

legislation." Williams v. State, 459 So.2d 319 (Fla. 5th DCA 1984), *dismissed,* 458 So.2d 274 (Fla. 1984). *See* Burch v. State, *supra* at 2 (noting that the purpose of Art. III, § 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 log rolling 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 that act. *See id.* at 3 (simply because "several different [e.s.] statutes are amended does not mean more than one subject is involved").

The repossession provisions of ch. 89-280 amend part I of ch. 493, Florida Statutes.[10] 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 af ch. *89-280* 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* §493.321 (1989).

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[10] Ch. 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.

Chapter **493**, Part I, is also designed to protect the public against abuse by repossessors, etc., and provides criminal penalties.[11] The habitual felon statute is also designed to protect the public against 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. 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

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[11] 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.

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*. Chapter 89-280 contains but one subject. Two of three district courts have agreed. Beaubrum v. State, 17 F.L.W. D680 (Fla. 3d DCA March 10, 1992); Jamison v. State, 583 So.2d 413 (Fla. 4th DCA 1991), rev. den., 591 So.2d 182 (Fla. 1991).

If Appellee has identified a two-subject problem in ch. 89-280, that problem was cured by the 1991 Legislature. Chapter 89-280 was enacted, obviously, in 1989. All 1989 changes to the Florida Statutes have been adopted and enacted as the official statutory law. See Ch. 91-44, Laws of Florida, effective May 2, 1991 (attached as Appendix B) (codified in 811.2421, Florida Statutes [1991]).[12]

Through ch. 91-44, the Legislature reenacted all of ch. 89-280, as codified. This re-enactment cured any constitutional defect arising from inclusion of more than one subject in the original act. State v. Combs, 388 So.2d 1029 (Fla. 1980). The reason is obvious. Art. I, § 6 applies to acts of the

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12 The State acknowledges that Appellant's current offense was committed on July 15, 1990 (R 5); and falls between the effective date of ch. 89-280 (10/1/89) and the effective date (5/2/91) of ch. 91-44.

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, section 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 does not involve fundamental error. If preserved, ch. 89-280 includes only one subject. Moreover, the Legislature has cured any two-subject problem. The State specifically requests this Court, should it agree with Appellee on the merits, to recognize the curative effect of ch. 91-44; and to state that any two-subject challenge to ch. 89-280 must be predicated on an offense occurring from October 1, 1989 (effective date of ch. 89-280) through May 2, 1991 (effective date of ch. 91-44). *See* Tims v. State, **592** So.2d **741** (Fla. **1st** DCA Jan. 14, **1992)** (the "narrow holding" of Johnson [supra] is predicated, in part, upon an offense committed between October 1, 1989 and May 2, 1991).

CONCLUSION

Based on the argument in Issue I, the opinion below must be vacated and Appellee's sentence affirmed. Alternatively, based on the argument in Issue II, this court must declare ch. 89-280 not violative of the one-subject rule; answer the certified question in the negative; and affirm Appellee's sentence.

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 ABEL GOMEZ, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 14th day of July, 1992.

Charlie McCoy
Assistant Attorney General