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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

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Chief Deputy Clerk

CASE NO. 80-168

WILLIE FRANK THOMAS  
Petitioner

THE STATE OF FLORIDA  
Respondent.

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

INITIAL BRIEF OF PETITIONER

✓  
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## INTRODUCTION

The Petitioner was the appellant in the district court below, and the Respondent was the appellee in the proceedings below. The parties will be referred to by their names respectively or by Petitioner or Respondent,

The reference to the portions of the record are attached in the appendix and will be referred to by the symbol ("A") in parenthesis followed by the appropriate page number .

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## STATEMENT OF THE CASE AND FACTS

The Petitioner was charged with criminal violations of Florida Statute, in the Circuit Court of the Sixth Judicial Circuit of Florida.

The Petitioner was convicted and sentenced under s.775.084 (amended) (1989). The trial court imposed said sentence under the statute and exceeding the sentencing guidelines.

The Petitioner subsequently filed a Motion for relief of the illegal Sentence pursuant to Florida Rules of Criminal Procedures, in the trial court alleging the claim that s.775.084 violated the single-subject rule of the Florida Constitution, Article III, section 6, and therefore due process and equal protection of the law. (App. 1)

The trial court denied the Motion and the Petitioner filed his timely appeal to the District Court of Appeal for the Second District.

The District Court of Appeal issued its opinion affirming the decision of the trial court by citing on rehearing the decision of the Fourth District Court of Appeal in McCall v. State, (cite omitted) (see App. pg. ) and therefore holding that section 775.084 did not violate the single subject rule of Article III, section 6, Florida Constitution. The Petitioner then filed his Notice of

Discretionary Review in this Court of the decision of the Second District Court on the basis of conflict of decisions between district: court of appeals and the granting of review In McCall, supra., by this court,

This brief follows.

#### SUMMARY OF THE ARGUMENT

It is the position of the Petitioner that s.775.084., F.S., violates the single-subject rule of Article III, Section 6., Florida Constitution.

The First District Court of Appeal in Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991) holds that the statute in question here does violate the applicable law under Burch v. State, (cite omitted) and therefore unconstitutional.

The Petitioner submits that the statute in question violates the single-subject rule of the Florida Constitution and the due process clause of the Florida and United States Constitution.

**ISSUE:**

THAT FLORIDA STATUTE SECTION 775.084 (AMENDED 1989) VIOLATES THE SINGLE SUBJECT RULE OF THE FLORIDA CONSTITUTION.....

The Second District Court's decision in Thomas v. State, So.2d (17 FLW ) (Fla. 2nd DCA 1992), clearly and expressly held that s.775.084., Florida Statute, (amended 1989) does not violate the single-subject rule of Article III, Section 6, Florida Constitution.

The defendant submits that his sentence is illegal and therefore subject to collateral attack due to the basis that said statute, i.e., s.775.084 F.S., violates the single subject rule of the Florida Constitution.

The defendants sentence was imposed after the October 1, 1989 effective date of section 775.084., Florida Statutes, (1989). Chapter 89-280., Laws of Florida. Defendant was sentenced to a term of years in the Department of Corrections as to the count involved in this case pursuant to the Statute.

Petitioner contends that section 775.084., Florida Statutes, Chapter 89-280., Laws of Florida violates the one subject rule of Article III, Section 6, of the Florida Constitution, which provides:



Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection. The enacting clause of every law shall read: "Be It Enacted by the Legislature of the State of Florida".

Chapter 89-280 embraces two subjects: habitual felony offenders and the repossession of motor vehicles. The first three sections of Chapter 89-280 amended Section 775.084 (habitual offender statutes), 775.0842 (career criminal statute), and 775.0843 (policies for career criminals), Florida Statutes, section four of Chapter 89-280 created section 493.30(16), Florida Statutes, defining "repossession"<sup>1</sup>. Section five amended section 492.306(6), adding license requirements of repossessors. Section six created section 493.317(7) and (8) prohibiting repossessors from failing to remit money or deliver negotiable instruments. Section seven created section 493.3175, regarding the sale of property by repossessor. Section

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<sup>1</sup>Section 493.30(16) states: "repossession" is the legal recovery of a motor vehicle or motorboat as authorized by the legal owner, lienholder, or lessor to recover, or to collect money payment in lieu of recovery of, that which has been sold or leased under a security agreement that contains a repossession clause. A repossession is complete when a licensed repossessor is in control, custody, and possession of such motor vehicle.

eight amended section 493.318(2), requiring repossessioners to prepare and maintain inventory. Section ten created section 493.3176, requiring certain information be displayed on vehicles used by repossessioners.

In State v. Burch, 558 So.2d 11, 2, (Fla. 1990), the Florida Supreme Court quoted as follows from State v. Thompson, 163 So.2d 270 (1985):

Where duplicity of subject-matter is contained for as violative of Section 6 of Article III of the Constitution relating to and requiring but one subject to be embraced in a single legislative bill the test of duplicity of subject is whether or not the provisions of the bill are designed to accomplish separate and disassociated objects of legislative effort.

The Burch court also quoted from Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981):

[T]he subject of an act "may be as broad as the Legislature chooses as long as the matters included in the act have natural or logical connections"

State v. Burch, 558 So.2d at 2.

Defendant submits that there is no "natural or logical connections" between recidivits repossessioners of cars and boats. Half of Chapter 89-280 addresses the prosecution and sentencing of recidivits, while the other half addresses the regulation of a lawful occupation. It is therefore clear that the law is "designed to accomplish separate and

disassociated objects of legislative effort" as prohibited by Burch and Thompson.

In Burch this Florida Supreme Court upheld Chapter. 243. In doing so, however, the Burch court distinguished Bunnell v. State, 453 So.2d 808 (Fla. 1984), as follows:

In Bunnell, this court addressed Chapter 82-150., Laws of Florida, which contained two separate topics: "the creation of a statute prohibiting the obstruction of justice by false information and the reduction in the membership of the Florida Criminal Justice Council. The relationship between these two subjects was so tenuous that this court concluded that the single-subject provision of the constitution had been violated. Unlike Bunnell, Chapter 87-243 is a comprehensive law in which all of its parts are directed toward meeting the crisis of increased crime,

State v. Burch, 558 So.2d at 3,

Like the law in Bunnell, Chapter 89-280 is a two-subject law: it is not a comprehensive one. The relationship between recidivists and repossessors of cars and boats is even more tenuous than the relationship between the obstruction of justice by providing false information and reduction in the membership of the Florida Criminal Justice Council. Accordingly, the inescapable conclusion is that Chapter 89-280 violates the one-subject rule and is

unconstitutional<sup>2</sup>

Section A.

THE STATUTE IS FACILLY UNCONSTITUTIONAL  
BECAUSE IT PENALIZES DEFENDANTS FOR THEIR  
STATUS AS HABITUAL FELONY OFFENDERS.

Section 775.084 (4) (e), Florida Statutes, penalizes defendants for their status of being habitual offenders and is therefore facially unconstitutional. Fifth, Eighth Amendments of the United States Constitution; Article I Sec. 9 and 17, Florida Constitution, It is well-settled that one may not be penalized for one's status. Potts v. State, 526 So. 2d 104 (Fla. 4th DCA 1987) (cannot be penalized for status of being under indictment); L.S. v. State, 553 So. 2d 345 (Fla. 45th DCA 1989) (cannot punish for status of merely being arrested); Robinson v. California, 379 U.S. 660, 82 S.Ct. 11417, 6 L.Ed.2d 768 (1962) (cannot penalize for status of being a narcotic addict,,).

Section 775.064 (4) (e), which provides for the

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<sup>2</sup>A facially unconstitutional statute may be challenged for the first time on appeal and by collateral attack, Cf. Trushin v. State, 425 So.2d 1126 (Fla. 1983); Potts v. State, 526 So.2d 104, 105 (Fla. 4th DCA 1987) and Trushin, progeny. The Florida First District Court of Appeal has already declared the statute unconstitutional in Johnson v. State, which is now certified to this Supreme Court as a question of great public importance regarding the violation of the single-subject rule of the Florida Constitution.

deprivation of gain-time and parole for those classified as habitual offenders, reads as follows:

(e) A sentence imposed under this section shall not be subject to the provisions of s.921.001. The provisions of Chapter 947 shall not be applied to such person. A defendant sentenced under this section shall not be eligible for gain-time by the Department of Corrections, except that the department may grant up to 20 days of incentive gain-time each month as provided for ins.944.27(4) (b).

Subsection (e) eliminates the provision of Sections 921.001 Florida Statutes, from the sentence imposed under the habitual offender statute. Since this part of the provision is applied to the habitual offender sentence, rather than being applied to the person, this limitation is constitutionally sound. However, subsection (e) also provides that a defendant is not eligible for provision of Chapter 947. Thus, the defendant and not merely the sentence, is penalized for the status of being an habitual offender. In other words, if the defendant was serving a sentence other than the one being enhanced, subsection (e) would eliminate gain time from the defendant, thus precluding gain time from being applied to the other sentence. The detriment caused by subsection (e) as it relates to the Defendant's status as an habitual offender is unconstitutional.

As explained in Yager v. State, 437 N.E.2d 454 (Ind. 1982), Punishment for status, of being an habitual offender is a violation of both the double jeopardy clause and the Eighth Amendment: "The judge in this case made the same technical error we have seen reoccurring in several cases recently, in that, he treated the habitual criminal charge as a separate charge and sentenced for thirty years for the charge. As we have previously stated, one convicted of a crime and found to be an habitual criminal is not sentenced separately for being an habitual criminal. Under the statute the defendant receives an additional thirty years for the instant crime because he has been found to be an habitual criminal. It is imperative to understand the deference. If the status of being an habitual criminal were to be considered a separate crime, conviction would be unconstitutional as double jeopardy. When status permits enhancement of the penalty for the instant crime no such impairment exists. To punish for the status of habitual criminal would also violate the Eighth Amendment of the United States Constitution. funk v. State, (1981) Ind., 427 N.E.2d 1081. The trial court therefore erred in assessing a separate sentence of thirty years as an habitual offender. The thirty years provided by the statute should be an

enhancement of one of the instant felonies." 437 N.E.2d 457 (emphasis added). As can be seen, the status of being an habitual offender was given effect separate from the "instant crime" in Yager and was therefore unconstitutional. Id.

Likewise, subsection (e), by eliminating gain-time and parole consideration from the defendant, as opposed to the habitual offender sentence, gives the habitual offender status effect separate from the 'instant crime' and is therefore unconstitutional.

#### Section B.

**THE STATUTE IS FACIALLY UNCONSTITUTIONAL IN VIOLATION OF DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.**

Section 775.084 (1) (a) (3-4), Florida Statute, specifically excludes prior felonies which have either been set aside in post conviction proceedings or pardoned from consideration in habitual offender determination. Since no other exceptions are listed, there are no other exceptions. Thayer v. State, 355 So.2d 814 (Fla. 1976) (expressio unius, est excludio alterius).

By limiting the type of convictions which cannot be

considered, the statute permits inclusion of convictions which are patently unconstitutional. For example, the statute does not exclude prior uncounseled convictions which have not been vacated from consideration. Clearly, it is unconstitutional to utilize a prior uncounseled conviction to increase a sentence for a subsequent conviction even though the prior conviction was never collaterally attacked. Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct 1585, 69 L.Ed 2d 169 (1980); Pilla v. State, 477 So.2d 1088 (Fla. 4th DCA 1985). By permitting the use of uncounseled convictions which has not been collaterally attacked, the habitual offender statute violates due process and is facilly unconstitutional as a matter of Florida and Federal law.<sup>3</sup>

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<sup>3</sup>The sentence that the petitioner received hsrre is apparently the only one noted on the record for purposes of sentencing under s.775.084., (F.S.). (amended)(1989). The amended version of the habitual offender statute was revised to include convictions that are outside of the State of Florida for enhancement. Prior to the amendment the statute required that the convictions in question would be only those within the State of Florida not outside of the state, and the use of the charge of Aggravated Battery for purposes of enhancement, which the prior enhancement statute did not allow. These changes by the legislature dramatically altered the enhancement statute and thus, petitioners circumstances.