FILED
SID J. WHITE
AUG 7 1992
CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE **SUPREME COURT OF FLORIDA**

STATE OF FLORTDA,

Appellant,

vs.

FSC CASE NO. 80,277

DCA CASE NO.: 91-2356

EMANUEL PRIDE,

Respondent.
_____/

STATE OF FLORIDA,

Petitioner,

vs.

EMANUEL PRIDE,

Appellee.
_____/

APPELLANT/PETITIONER'S INITIAL **BRIEF ON THE MERITS**

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PRELIMINARY STATEMENT

This is an appeal of right. By notice filed July 31, 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 Caunty 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.

The opinion below relies directly upon Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991). That case is pending before this court, and has been assigned case numbers 79,150/79,204. Oral argument is scheduled for November 2, 1992.

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

[2] Art. V, §3(b)(4), Fla. Const., and Fla.R.App.P. 9.030(a)(2)(A)(v).

STATEMENT OF THE CASE

Appellee/Respondent, Emanuel Pride [herein "Appellee"] pled nolo to several offenses (R 30), and was sentenced as an habitual felon. (R 104-13, 184, 187).

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. III, §6 of the Florida Constitution. In an opinion issued July 15, 1992, 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); and Claybourne v. State, 17 F.L.W. D1478 (Fla. 1st DCA June 11, 1992), rev. pending (case no. 80,157).

Notice of appeal invoking this Court's mandatory jurisdiction was filed July 31, 1992. That notice also invoked this court's discretionary jurisdiction to review the certified question.

STATEMENT OF THE FACTS

The opinion below sets forth all the facts necessary for this appeal. Otherwise, Appellee pled nolo to two counts of

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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.

attempted second-degree murder with a firearm and one count of shooting into a building (R **30,** R **148-51).** Based on one Florida and one Michigan felony he was classified as an habitual felon (R 172), and sentenced to 30 years (with a three year minimum for firearm use). All other sentences ran concurrently. (R 174). He did not challenge the constitutionality of the habitual felony offender statute before the trial court. (R **148-77).**

SUMMARY OF ARGUMENT

Issue I: Preservation of Substantive Issue

Whether ch. 89-280, Laws of Florida, violates the one-subject rule in Art. III, §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) has nothing to do with an individual defendant's right to due process, and 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 Appellee's sentence.

Following Claybourne v. State, 17 F.L.W. D1478 (Fla. 1st DCA June 11, 1992) without explanation, the opinion below implicitly holds that violation of the two subject rule is fundamental error. In Claybourne, the First District reasoned that the one-subject challenge to ch. 89-280 could be raised for the first time on appeal, since that act "affects a central issue in the litigation." **Id.** **The** central **issue,** for **the** Claybourne panel, was **the** "term of imprisonment." Id. The mere length[4] of Claybourne and Appellee's sentences has never been at issue.

Claybourne relied on two old civil cases that have no relevance. The first case, Parker v. Town of Callahan, 115 Fla.

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[4] The length of Appellee's sentence would be at issue, for example, he had received a 50 year sentence despite the 30 year maximum under §775.084(4)(a)2, Florida Statutes.

266, 156 So. 334 (Fla. 1934), involved a special act validating the town's tax rolls. The act's title did not give sufficient notice of the act's substance. Id. at 395. The second case, Town of Monticello v. Finlayson, 156 Fla. 568, 23 So.2d 843 (Fla. 1945) involved a general law authorizing a town to assess property for street and sidewalk improvements. How either of these decisions relates to a statute imposing enhanced sentences on recidivist felons is a mystery, How either decision relates to an individual defendant's right to due process is a greater mystery still. Claybourne made no attempt to answer the State's points as to what constitutes fundamental error; the opinion below blindly follows that case. For the reasons set forth herein, the mere number of subjects in a legislative act cannot be fundamental error.

This Court need and should not reach the merits. 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 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 111, section 16 of the Florida Constitution of 1885. (Note: section 16 is now embodied in the current constitution as Art. 111, §6, the provision at issue here.)[6] This Court rejected the proposition that constitutionality of the statute was fundamental and could be raised for the first time on appeal.

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[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.

The Sanford court made two general points 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*].

* * *

> 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).[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, 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

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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.

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 an 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.

Id. *See* Brown 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 far 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 111, 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. 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.).

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 mare than one subject is involved").

The repossession provisions of ch. 89-280 amend past 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 of 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* 8493.321 (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. III, § 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 districts courts have **agreed.** Beaubrum v. State, 595 So.2d 254 (Fla. 3d DCA 1992); Jamison v. State, 583 So.2d 413 (Fla. 4th DCA 1991), rev. den., 591 So.2d 182 (Fla. 1991); McCall v. State, 583 So.2d 411 (Fla. 4th DCA 1991), juris. accepted, 593 So.2d 1052 (Fla. 1992).

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 §11.2421, 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

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12 The State acknowledges that Appellant's current offenses were committed on September 9, 1990; which date falls between the effective date of ch. 89-280 (10/1/89) and the effective date (5/2/91) of ch. 91-44.

original act. State v. Combs, 388 So.2d 1029 (Fla. 1980). The reason is obvious. Art. I, § 6 applies to acts of the Legislature, nat 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, §775.084, Florida Statutes (1989), is no longer subject to a two-subject challenge.

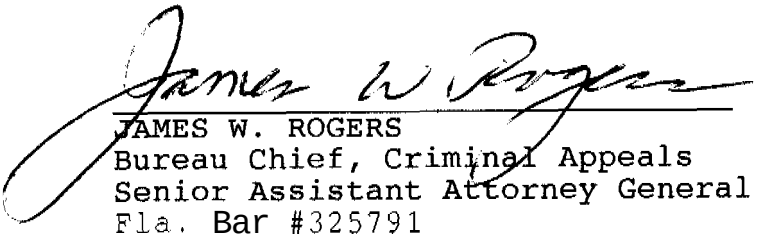
To sum: this issue is not preserved for review, as it was no't raised below and does not involve fundamental error. If preserved, ch. *89-280* includes only one subject. Moreover, the Legislature has cured any two-subject problem. The State specifically requests this Court, should it agree with Appellee 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 11, 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,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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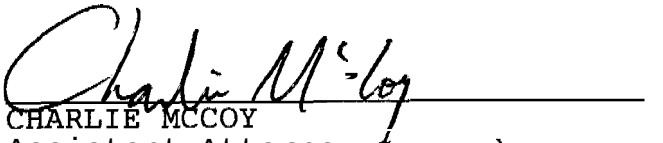

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COUNSEL FOR PETITIONER/APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JOHN DIXON, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 13th day of August, 1992.

Charlie McCoy
Assistant Attorney General

IN THE SUPREME **COURT** OF **FLORIDA**

STATE OF FLORIDA,

Appellant,

vs.

FSC CASE NO. _____

DCA CASE NO.: 91-2356

EMANUEL PRIDE,

Respondent.

STATE **OF FLORIDA,**

Petitioner,

vs.

EMANUEL PRIDE,

Appellee.

APPENDIX

Opinion Below

91-1115 01-TR

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

EMANUEL PRIDE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 91-2356

Docketed
7-12-92
Florida Attorney General

JUL 1 1992

Opinion filed July 15, 1992.

An Appeal from the Circuit Court for Okaloosa County.
G. Robert Barron, Judge.

Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, John R. Dixon, Certified Legal Intern, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Charlie McCoy, Assistant Attorney General, Tallahassee, for Appellee.

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Division of General Legal Services

PER CURIAM.

In this direct criminal appeal, appellant seeks review of his sentences for the offenses of attempted second-degree murder with a firearm and shooting into a building, claiming that the evidence introduced at his sentencing hearing was legally insufficient to support the trial court's finding that he qualified as an habitual felony offender. Although the state concedes the validity of appellant's argument on the merits, it

takes the position that appellant may not raise that argument for the first time on this appeal. We disagree with the state and, therefore, reverse.

The information charged appellant with two counts of attempted first-degree murder with a firearm, and one count of shooting into a building. All three offenses were alleged to have occurred on September 9, 1990.

On March 15, 1991, appellant and the state executed a written plea agreement, pursuant to which appellant agreed to plead no contest to two counts of attempted second-degree murder with a firearm and one count of shooting into a building. The agreement reflected that the state would have the right to request that the trial court classify appellant as an habitual felony offender. However, the state agreed that, regardless of whether the trial court classified appellant as an habitual felony offender, it would not request a sentence greater than thirty years in prison, with a 3-year mandatory minimum period of incarceration.

At the hearing held to determine whether appellant qualified as an habitual felony offender, the state offered into evidence properly authenticated copies of a 1990 Florida judgment adjudicating appellant guilty of aggravated battery, and of documents establishing that appellant had been convicted of the felony of carrying a concealed weapon in Michigan in 1988. The trial court found that appellant qualified as an habitual felony offender, pursuant to Section 775.084(1)(a), Florida Statutes

(1989). Accordingly, the trial court adjudicated appellant guilty of the three offenses to which he had entered no-contest pleas; and sentenced appellant on each count, as an habitual felony offender, to thirty years in prison, the three sentences to run concurrent with each other, subject to a 3-year mandatory minimum period of incarceration.

In Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991), a case decided after appellant had been sentenced, this court held that Chapter 89-280, Laws of Florida, was unconstitutional, because it violated the single-subject rule contained in Article 111, Section 6, of the Florida Constitution. The relevancy of that holding to the present appeal is that Section 1 of Chapter 89-280 substantially amended Section 775.084, effective October 1, 1989. In particular, it amended subsection (1)(a)1., which had required that a defendant have had at least two prior felony convictions in Florida to qualify as an habitual felony offender. The amendment 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 a 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."

One consequence of the Johnson decision is that a defendant being sentenced for offenses committed prior to May 2, 1991 (the effective date of Chapter 91-44, Laws of Florida, which reenacted the 1989 amendments as a part of the Florida Statutes), cannot qualify as an habitual felony offender unless he or she had previously been convicted of two or more felonies in Florida. The offenses for which appellant was sentenced were all committed prior to May 2, 1991. Therefore, the state correctly concedes that, because evidence of only one prior felony conviction in Florida was presented to the trial court, on the merits, appellant should not have been sentenced as an habitual felony offender.

However, the state points out, correctly, that appellant did not raise the argument he now makes in the trial court. The state argues that a violation of the single-subject rule is not a fundamental error. Therefore, the state argues, such an issue may not be raised for the first time on appeal. This court has recently squarely addressed the state's argument and rejected it, concluding that a violation of the single-subject rule is a fundamental error in a case such as this, which may be raised for the first time on appeal. Claybourne v. State, 17 F.L.W. D1478 (Fla. 1st DCA June 11, 1992).

Based upon the foregoing discussion, we vacate appellant's sentence; and we remand to the trial court for resentencing

consistent with this opinion. However, as we did in Johnson and Claybourne, we' certify to the Supreme Court the following question, as one of great public importance:

> WHETHER THE CHAPTER 89-280 AMENDMENTS TO SECTION 775.084, FLORIDA STATUTES (SUPP. 1988), WERE UNCONSTITUTIONAL PRIOR TO THEIR REENACTMENT AS PART OF THE FLORIDA STATUTES, BECAUSE IN VIOLATION OF THE SINGLE-SUBJECT RULE OF THE FLORIDA CONSTITUTION.

VACATED and REMANDED, with directions.

BOOTH, WIGGINTON and WEBSTER, JJ., CONCUR.