

2-22

FILED

SID J. WHITE

FEB 1 1993

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

WALTER LEE PEARCE,

Petitioner,

v.

Case No. 80,379

STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

PEGGY A. QUINCE
Assistant Attorney General
Florida Bar No. 0261041

DONNA PROVONSHA-LENTZ
Assistant Attorney General
Florida Bar No. 0768979
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR RESPONDENT

/ahp

TABLE OF CONTENTS

PAGE NO.

SUMMARY OF THE ARGUMENT.....1

ARGUMENT.....2

ISSUE.....2

WHETHER THE 1989 AMENDMENTS TO THE HABITUAL
OFFENDER STATUTE VIOLATES THE SINGLE SUBJECT RULE
OF ARTICLE 111, SECTION 6, OF THE FLORIDA
CONSTITUTION. (Restated)

CONCLUSION.....4

CERTIFICATE OF SERVICE.....4

TABLE OF CITATIONS

PAGE NO.

State v. Johnson.
18 Fla. L. Weekly S55 (Fla. Jan. 14. 1993).....1-2

OTHER AUTHORITIES

Amendments to 3775.084, Fla. Stat. (1989)ch. 89-280.....2
Article 111. Section 6. of the Florida Constitution.....1-2

SUMMARY OF THE ARGUMENT

While Respondent acknowledges this Honorable Court's opinion in State v. Johnson, 18 Fla. L. Weekly S55 (Fla. Jan. 14, 1993), Respondent respectfully suggests that to allow a challenge to a statute as applied to a particular person, such challenge needs to be preserved to allow review. Notwithstanding the foregoing, however, Respondent submits that even if Petitioner is not required to preserve such a challenge and consequently may not be sentenced as a habitual violent felony offender under **Johnson**, supra, Petitioner could properly be sentenced **as a** nonviolent felony offender. The trial court found that Petitioner qualified **as** a habitual felony offender **as** well **as** a habitual violent felony offender. Under **Johnson** Petitioner's classification **as** a nonviolent habitual felony offender will withstand scrutiny.

ARGUMENT

ISSUE

WHETHER THE 1989 AMENDMENTS TO THE HABITUAL
OFFENDER STATUTE VIOLATES THE SINGLE SUBJECT
RULE OF ARTICLE 111, SECTION 6, OF THE
FLORIDA CONSTITUTION. (Restated)

The Respondent acknowledges this Honorable Court's recent opinion in State v. **Johnson**, 18 Fla. L. Weekly S55 (Fla. Jan. 14, 1993) wherein it was found that the Amendments to 8775.084, Fla. Stat. (1989), ch. 89-280, violate the single subject rule. Notwithstanding the foregoing, Respondent respectfully suggests that to allow review of the habitual offender statute, **as** applied to Petitioner, the issue should have been properly preserved. Such simply was not the case at bar.

Respondent further acknowledges that Petitioner was sentenced under ch. 89-280 and at the time of his sentencing the statute had not been reenacted. Just because Petitioner **may** have had standing in the trial court to raise the single subject issue, that standing did not preserve the issue for appeal. This Honorable Court in Johnson, supra, acknowledged that only those defendants whose sentences depend on ch. 89-280 will require resentencing. In essence, only those defendants adversely affected by ch. 89-280 as applied to them can ever obtain any relief. Thus, it is clear that a defendant must challenge the factual application of ch. 89-280 before the trial court in order to raise the issue on direct appeal or through other avenues.

At bar had Petitioner raised his single-subject challenge before the trial court, the trial court could have resolved any doubt in his favor and foreclosed any future challenge, simply by sentencing him as a nonviolent habitual felon. At Petitioner's sentencing the trial court specifically found he qualified as a habitual felony offender and also qualified **as** a habitual violent felony offender. Petitioner at bar committed the instant offenses on June 23, 1990 and he was sentenced on February 8, 1991. It is abundantly clear that Petitioner could have received the same maximum sentence **as** he received **as** a habitual violent felony offender but only his minimum mandatory sentence would have been eliminated. The Respondent respectfully submits that if Petitioner is granted a resentencing based on Johnson, this is the result that will be achieved.

CONCLUSION

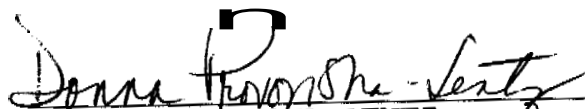
Based on the foregoing facts, arguments, and citation of authority, Respondent respectfully requests this Honorable Court find that Petitioner did not properly preserve this issue for review since his challenge is a constitutional challenge as applied to him. If this Honorable Court is not so inclined, Respondent then respectfully requests that Petitioner's cause be remanded for resentencing but the resentencing shall only delete the minimum mandatory portion of his sentence.

Respectfully submitted,

ROBERT A, BUTTERWORTH
ATTORNEY GENERAL



PEGGY A. QUINCE
Assistant-Attorney General
Florida Bar No. 0261041

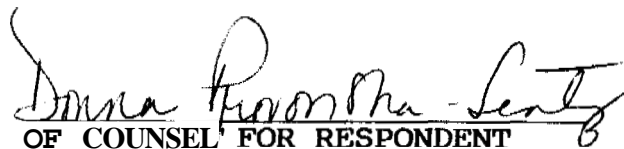


DONNA PROVONSHA-LENTZ
Assistant Attorney General
Florida Bar No. 0768979
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

OF COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to WALTER LEE PEARCE, #755135 1798, P. O. BOX 1100, Avon Park Correctional Institution, Avon Park, Florida 33825-1100, this 28th day of January, 1993.


OF COUNSEL FOR RESPONDENT