IN THE SUPREME COURT OF FLORIDA

WILLIAM DAVID ALBRECHT,

Petitioner,

vs. Case No. 80,427

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JENNIFER Y. FOGLE
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 628204

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ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

PAGE NO.

ARGUMENT 1

ISSUE

WHETHER CHAPTER 89-280, LAWS OF FLORIDA, WHICH AMENDED SECTION 775.084, FLORIDA STATUTES (1989), VIOLATES THE SINGLE SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION? 1

CERTIFICATE OF SERVICE 3

TABLE OF CITATIONS

CASES | PAGE NO.

CASES	PAGE NO.
Miller v. Florida, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987)	1
State v. Johnson, 18 Fla. L. Weekly S55 (Fla. January 14, 1993)	1
State v. McGriff, 537 So. 2d 107 (Fla. 1989)	1

OTHER AUTHORITIES

§ 775.084, Fla. Stat. (1989)	1-2
Ch. 89-280, Laws of Florida	2

ARGUMENT

ISSUE

WHETHER CHAPTER 89-280, LAWS OF FLORIDA, WHICH AMENDED SECTION 775.084, FLORIDA STATUTES (1989), VIOLATES THE SINGLE SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION?

A state motion for rehearing and a respondent's motion for clarification have been filed in State v. Johnson, 18 Fla. L. Weekly S55 (Fla. January 14, 1993). The state here contends that language in Johnson provides that defendants who committed offenses during the October 1, 1989 and May 1, 1991 window would not be eligible for relief if sentenced after May 1, 1991.

The Petitioner responds that such an interpretation would constitute an application of law in violation of the ex post facto clauses of the Florida and United States Constitutions. See Miller v. Florida, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987); State v. McGriff, 537 So. 2d 107 (Fla. 1989). *See also*, State v. Johnson, Case Nos. 79,150, 79,204, Respondent's Response to Motion for Rehearing and Motion for Clarification (attached).

Also in the instant case, the state erroneously contends that no portion of the amended statute was applicable to the Petitioner. As previously argued and reiterated here, there was no constitutionally valid habitual offender statute at the time of Petitioner's crimes that allowed the use of the out-of-state convictions to qualify as prior convictions for habitual offender treatment.

Section one of Chapter **89-280**, Laws of Florida, amends section 775.084, Florida Statutes, 1988 Supplement, and reads in pertinent part:

> (1) As used in this act:
> (a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if it finds that:
> 1. The defendant has previously been convicted of <u>any combination of</u> two or more felonies in this state <u>or other qualified offenses</u>;

(Amendments underscored)

Based on the arguments presented in the Initial Brief of Petitioner on the Merits and his Reply Brief, Mr. Albrecht's habitual offender sentence must be reversed.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Peggy A. Quince, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 19th day of February, 1993.

Respectfully submitted,

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JYF/mlm

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA?

Petitioner ,

v.

CASE NOS. 79,150, 79,204

CECIL B. JOHNSON,

Respondent.

****

STATE OF FLORIDA,

Appellant,

v.

CECIL B. JOHNSON,

Appellee.

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RESPONSE TO MOTION FOR REHEARING
MOTION FOR CLARIFICATION

COMES NOW, Respondent, by and through the undersigned attorney and moves this Honorable Court deny Petitioner's "Motion for Rehearing", and grant Respondent's "Motion for Clarification" of the Court's January 14, 1993 opinion in this case.

Rehearing

1. Petitioner's "Motion for Rehearing" improperly reargues the merits. A motion for rehearing is only proper where the court has "overlooked or misapprehended" a point of law. Whipple v. State, 431 So.2d 1011 (Fla. 2d DCA 1983); State v. Green, 105 So.2d 817, 818-19 (Fla. 1st DCA 1958).

Appellant reargues in his motion that violation of the single subject rule does not constitute fundamental error. This is precisely the point rebutted in the Respondent's answer brief and at oral argument. Accordingly, this Court should deny Appellant's "Motion for Reheating."

Clarification

1. This Court's opinion contains language which may permit an *ex* past facto application of law, to wit:

> Johnson was sentenced before the reenactment of Chapter 89-280 and during the window period in which that chapter was subject to attack as being violative of the constitution's single subject requirement. ... Consequently, Johnson had standing to raise the single subject violation.

(slip op., p. 4). And,

> [W]e conclude that Chapter 91-44's biennial reenactment of chapter 89-280, effective May 2, 1991, cured the single subject violation as it applied to all defendants sentenced under section 775.084 after that date.

(slip op., p. 8). And,

> We realize that this decision will require the resentencing of a number of individuals who were sentenced ... for the period of October 1, 1989, to May 2, 1991.

(slip op., p. 9).

This language suggests defendants who committed offenses during the October 1, 1989 and May 1, 1991 window would not be eligible for relief if sentenced-after May 1, 1991. Such an interpretation would constitute an *ex* post facto application of law in violation of Article I, Section 9, Clause 3, U.S. Constitution; Article I, Section 10, Clause 1, U.S.

Constitution; Amendments 5 & 14, U.S. Constitution; Article I, Section 9, Florida Constitution.

2. However, certain language of the opinion suggests the contrary, and the only constitutionally permissible interpretation, that is that all defendants who were affected by the *89-280* amendments are eligible for relief regardless of their date of sentence.

> However, the resentencing requirement will apply only to those defendants affected by the amendments ...(emphasis in original)

(slip op., p. 9).

The lower court's opinion contained language which adopts this interpretation, as well.

> [1,2] Since the instant offense was committed within the time period between the October 1, 1989, effective date of the 1989 amendments to the habitual felony offender provisions and their re-enactment, effective May 2, 1991, as a part *of* the Florida Statutes, we address appellant's argument ....(emphasis added)

Johnson v. State, 589 So.2d 1370, 1371 (Fla. 1st DCA 1991).

3. The *test* for determining whether a law is ex post facto is whether a) it applies retroactively to events which occurred before its enactment, and b) it disadvantages the offender affected by it. See Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, *96* L.Ed. 2d 351, 355 (1987) (Application of the revised guidelines law to petitioner, whose crimes occurred before the law's effective date, violates the Ex Post Facto Clause of Article I of the Federal Constitution.)

4. To sentence a defendant pursuant to Chapter 91-44, Laws of Florida (the reenactment chapter) for a crime committed before 91-44 became effective constitutes retroactive application. Since 91-44 permits a sentence in excess of the guidelines and, in every case, increases the actual time of incarceration, the offender is adversely affected by it. Hence, a sentence pursuant to Chapter 91-44 far a crime committed before the enactme'nt of that law would violate State and Federal guarantees against *ex post facto* laws.

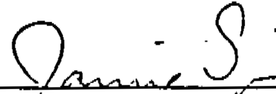
5. Consequently, to clarify the conflicting language and to avoid potential *ex post facto* violations in other cases, this court should grant this motion for clarification.

WHEREFORE, Respondent moves this Court to deny Petitioner's "Motion far Rehearing."

WHEREFORE, Respondent moves this Court clarify its opinion to state: to have standing for relief, the offender's crime must have been committed between the dates of October 1, 1989 and May 2, 1991, and that the date of sentence is not controlling.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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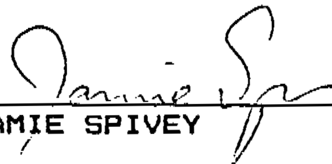
CERTIFICRTE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing ha5 been furnished to Charlie McCoy, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, on this 28 day of January, 1993.



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