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FILED
SID J. WHITE
JAN 4 1993
CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,666

ELISAMES HARRIS
Petitioner

-vs-

THE STATE OF FLORIDA
Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL FOR THE THIRD 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 several criminal violations of Florida Statute, in the Circuit Court of the Eleventh Judicial Circuit of Florida (App. pg. 3).

The Petitioner was convicted and sentence under s.775.084 (amended) (1989). (App. pg. 4-7). The trial court imposed said sentence under the statute and exceeding the sentencing guidlines.[1]

The Petitioner subsequently filed a motion for post conviction relief in the trial court, which court denied petitioners motion. (App. pg ,. The petitioner on appeal to the district court of appeal below, and in the trial court alleged that s.775.084 violated he single-subject-rule of the Florida Constitution, Article III, section 6, and therefore due process and equal protection of the law (App.), and hence his sentence was illegally imposed.

District Court of Appeal issued it's opinion affirming the decision of the trial court by citing the decision of

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[1] The trial court, sentence the Petitioner to a term of years under the Habitual Offender Statute, i.e., s.775.084 (1989)(amended) for several felony charges robbery pursuant to Florida Statutes, and exceeded the guidlines as a departure based on the habitual offender sentencing statute as amended in 1989.
It would also appear that the Petitioner would have a claim under this courts decision of Whitehead v. State, (cite omitted). But that issue is not present before the court at this time.

Beaubrum v. State, 595 So.2d ____(Fla. 3rd DCA 1992), which incorporates 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 Third District Court on the basis of conflict of decisions between district court of appeals and the granting of review in McCall, supra., and particularly Beaubrum, supra., by this court.

This brief follows.

SUMMARY CF 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 Third District Court's decision in Harris v. State, ___So.2d___(17 FLW)(Fla. 3rd 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 cluase 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"[2] 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

[2]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 inlieu 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 repossessors to prepare and maintain inventory . Section ten created section 493.3176, requiring certain information be displayed on vehicles used by repossessors.

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 (1935):

> 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 Chenowith 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 repossessors of cars and boats. Half of Chapter 89-280 addresses the prosecution and sentencign 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 Thomerson.

In Burch this Florida Supreme Court upheld Chapter 243. In doing so, however, the Burch court distinquished 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 staute prohibiting the obsturction of justice by false information and the rduction in the membership of the Florida Criminal Justicve Council. The relationship between these two subjects was so tenous that this court concluded that the singl-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 toweard 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 recidivits and repossessors of cars and boates is even more tenuous than the relationship between the obstructio 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[3]

[3]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.

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 unconstitutioal. 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. 45h DCA 1989) (cannot punish for status of merely being arrested); Robinson v. California, 379 U.S. 660, 82 S.Ct. 11417, 8 L.Ed.2d 768 (1962) (cannot penalize for status of being a narcotic addict.).

Section 775.084 (4) (e), which provides for the deprivation of gain-time and parole for those classified as habitual offenders, reads as follows:

> (e) A sentence imposed under this sectiion 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 Stsatutes, from the sentence imposed under the habitual offender statute. Since this part of the provisio 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 cause by subsection (e) as it relates to the Defendants status as an havitual offender is unconstitutional.

As explanied 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 is this case made the same technical error we have seen reoccuring in several cases recently, in that he treated the habitual criminal charge as

a separate charge and sentenced for thrity 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 statue the defendant receives an additional thirth years for the instant crime because he has been found to be an habitual criminal. It is imperative to understand the defference. If the status of being an habitual crimanal were to be considered a separate crime, conviction would be unconstitutinal as double jeopardy. When status permist 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 assesing 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.[4]

[4]A problem that is compelling here, is the fact that the court imposed the instant unconstitutional sentence on the petitioner after an alleged failure to appear in court for sentencing. The record does not show that the court made the statutory findings for habitualization. This supports the position of the petitioner that absent the specific findings by the court for purposes of imposing an enhanced sentence as was done here, the petitioner would never have been sentenced as a habitual offender. It appears that the sentence was strictly for coercive measures only and not deliberately for quarantining the petitioner from our society based on the original sixty-five (65) year sentence that was imposed on the petitioner initially.

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 proir 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) (expresio 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 uncouseled 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.[5]

[5]The sentence that the petitioner received here 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. That change by the legislature dramatically altered the enhancement statute and thus, petitioners circumstances.

CONCLUSION

The Petitioner moves this court to quash the decision of the Third District Court of Appeal and remand to that court for further proceedings not inconsistent with its opinion.

Respectfully submitted

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the afore has been furnished to Counsel for the Respondent, **CONSUELO MAINGOT**, Assistant Attorney General, 401 Northeast 2nd Avenue, Department of Legal Affairs, Miami, Florida, 33128, this 29 day of Dec, 1992, by U.S. Mail.

Elisames Harris, Pro se
Petitioner