

**FILED**

SID J. WHITE

MAR 15 1993

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT.

By \_\_\_\_\_  
Chief Deputy Clerk

FRED JAMES, :

Petitioner, :

vs. :

Case No. 80,957

STATE OF FLORIDA, :

Respondent. :

\_\_\_\_\_ :

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

DEBORAH K. BRUECKHEIMER  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR NUMBER 278734

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On March 29, 1990, the State Attorney for the Twentieth Judicial Circuit in and for Collier County, Florida, filed an information charging the Appellant, FRED JAMES, with delivery of a controlled substance in violation of section 893.13, Florida Statutes (1987), allegedly occurring on March 9, 1990 (R2, 6). On June 12, 1990, Mr. James entered a plea of no contest with the understanding that the State was seeking to have him habitualized. Mr. James pled to a cap of 10 years as a habitual offender (R50-62). On July 16, 1990, Mr. James was sentenced as a habitual offender to 10 years of imprisonment with credit for 129 days served (R18-23, 37-41). The guidelines in this case would have called for 2 1/2 to 3 1/2 years of prison (R23). Mr. James timely filed his Notice of Appeal on August 8, 1990 (R33).

On appeal Mr. James attacked his habitual offender sentence. On October 11, 1991, the Second District Court of Appeal issued an opinion finding the habitual offender sentence illegal because there was no evidence of two predicate felonies necessary for the habitual offender status. The Court sent the case back to the trial court, giving the State the opportunity to present evidence of the requisite two predicate felonies should they exist (R68-70).

Mr. James was resentenced on December 23, 1991, by the Honorable Charles T. Carlton (R92). At that hearing the State presented evidence of two predicate felonies, and the trial court

resentenced Mr. James to 10 years prison as an habitual with credit for 129 days served (R72-81, 92-104).

Mr. James timely filed his notice of appeal from that sentence on January 3, 1992 (R88); but this time it was on the basis that one of the two priors was an out-of-state conviction that could not be used in his case. Because the amendment to the statute allowing the use of out-of-state convictions was unconstitutional at the time Mr. James committed the crime sub judice, it could not be used to habitualize him. The Second District Court of Appeal rejected this argument and cited to its recent opinion in State v. Sheppard, 17 F.L.W. D1960 (Fla. 2d DCA Aug. 21, 1992) (also pending before this Court as Sheppard v. State, Case No. 80, 418).

SUMMARY OF THE ARGUMENT

The trial court erred in using an out-of-state conviction to habitualize Mr. James in that the amendments to the statute allowing out-of-state convictions was unconstitutional when Mr. James committed the crime sub judice. This Court has recently held these amendments to be unconstitutional as they were implemented in violation of the single-subject rule. State v. Johnson, Nos. 79,150 and 79,204 (Fla. Jan. 14, 1993).

## ARGUMENT

### ISSUE I

DID THE TRIAL COURT ERR IN RESENTENCING APPELLANT AS HABITUAL OFFENDER?

The State in this case had very few priors with which to habitualize Mr. James. It needed to use an old Kansas conviction from 1982 or 1983 in addition with a more recent Florida conviction in order to have the requisite two predicate felonies needed to habitualize Mr. James. Mr. James attacked the use of the Kansas conviction.<sup>1</sup> According to this Court's recent decision, the statute amendment allowing an out-of-state conviction was not constitutional for a certain time period. Mr. James falls into this time period.

According to State v. Johnson, Nos. 79,150 and 79,204 (Fla. Jan. 14, 1993), the 1989 amendment to section 775.084 was unconstitutional from the effective date of the 1989 amendments until its re-enactment effective date (October 1, 1989, through May 2, 1991) because the amendment violated the single-subject rule. Thus, if a defendant committed a crime between October 1, 1989, and May 2, 1991, the State could not use out-of-state convictions to

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<sup>1</sup>In its October 11, 1991, opinion the Second District Court of Appeal said the Kansas conviction could not be used because out-of-state convictions could not be used on crimes committed before October 1, 1989; and the defendant committed the crime on March 9, 1989 (R70). This was apparently a factual error. Mr. James committed the crime at issue on March 9, 1990.

habitualize; because using out-of-state convictions to habitualize was one of the provisions in the 1989 amendment.

The State has acknowledged that Johnson is controlling in this case (see Respondent's Notice of Controlling Authority). Mr. James is entitled to be resentenced.



CONCLUSION

Based on this Court's decision in Johnson, Mr. James is entitled to be resentenced.

APPENDIX

PAGE NO.

1. Opinion filed in the Second District Court  
of Appeal December 9, 1992.

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PD

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

FRED JAMES,  
Appellant,  
v.  
STATE OF FLORIDA,  
Appellee.

CASE NO. 92-00043

Opinion filed December 9, 1992.

Appeal from the Circuit  
Court for Collier County;  
Charles T. Carlton, Judge.

James Marion Moorman,  
Public Defender, and  
Deborah K. Brueckheimer,  
Assistant Public Defender,  
Bartow, for Appellant.

Robert A. Butterworth,  
Attorney General, Tallahassee,  
and Anne Y. Swing,  
Assistant Attorney General,  
Tampa, for Appellee.

Received By

DEC - 9 1992  
Assistant District  
Public Defenders Office

PER CURIAM.

Affirmed. See State v. Sheppard, 17 F.L.W. D1960  
(Fla. 2d DCA Aug. 21, 1992).

RYDER, A.C.J., HALL and BLUE, JJ., Concur.


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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Anne Y. Swing,  
Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on  
this 11<sup>th</sup> day of March, 1993.

Respectfully submitted,

JAMES MARION MOORMAN  
Public Defender  
Tenth Judicial Circuit  
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