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IN THE SUPREME COURT OF FLORIDA

FRED JAMES,

Petitioner,

v. FSC NO. 80,957

STATE OF FLORIDA,

Respondent.
_____/

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

BRIEF OF RESPONDENT ON THE MERITS

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SUPPLEMENTATION AND CORRECTION OF STATEMENT OF CASE AND FACTS

Petitioner did *not* enter a plea in return for a *cap* of ten years on his sentence with the understanding that habitual offender sentencing would be *sought* as his brief states. Although the word "cap" appears, the agreement was clearly for a ten-year habitual offender sentence *specifically*. The fact that Petitioner would have to serve in excess of six years due to the gain time limitation was explained by the prosecutor and expressly considered by the judge in agreeing to no probation as Petitioner wanted. (R. 51,53-56)

Petitioner appealed that 1990 sentencing, prevailed, and was resentenced in December of 1991, after the May 2, 1991 statutory reenactment had made the 1989 amendments to the habitual offender statute a valid part of that statute. (R. 77-78) He first challenged the 1989 legislation as violative of the single-sentence rule at the 1991 sentencing. (R. 68-70, 92-95) As Petitioner notes, his offense occurred in 1990, not 1989 as the opinion issued in his initial appeal incorrectly states. (R. 24,26,70)

SUMMARY OF THE ARGUMENT

This Court's decision in State v. Johnson, Case Nos. 79,150 and 79,207, 18 Fla. L. Weekly 55 (Fla. January 14, 1993), is the controlling case on the points where conflict is asserted, but it does not require reversal of Petitioner's sentence.

ARGUMENT

ISSUE

WHETHER PETITIONER IS ENTITLED TO CHALLENGE THE 1989 LEGISLATION AMENDING THE HABITUAL OFFENDER STATUTE FOR VIOLATION OF THE ONE SUBJECT RULE AFTER THE AMENDED STATUTE HAD BECOME VALID

State v. Johnson, Case Nos. 79,150 and 79,207, 18 Fla. L. Weekly 55 (Fla. January 14, 1993), does not appear to require reversal in the instant case, even though the sentence was partially based on an out-of-state conviction and the offense being sentenced was committed during the window period as Petitioner states. According to Johnson, a defendant does not have standing to challenge defects in legislation and chapter laws after the enactments becomes valid statutes, and that occurred seven months prior to the December 1991 sentencing at issue. (R. 77-78) The fact that a challenge is not actually made until the appeal is briefed does not affect the standing even if the statute is valid by the time that occurs. The test stated in Johnson is whether the legislation could have been challenged at the time of the sentencing, which presumably follows from the Court's determination that violations of the single-subject rule do not have to be raised in the trial court to be raised on appeal. Id. at 55-56.

The rule that the defect can only be challenged by defendants actually sentenced under invalid provisions is logical

because it avoids undermining the legislative effort unnecessarily. The single-subject rule is a technical requirement designed to prevent logrolling by special interest groups. Once the provisions are separately codified, they can be separately repealed, and those left in force and reenacted thereby become valid, as is logical since that indicates the legislature did not just pass them because some unrelated part of the bill was desirable. The defect has no effect on notice. The adequacy of the notice the bill and chapter law had to give in the title has not been challenged; the 1989 habitual offender amendments were codified in the appropriate chapter and statute; and any member of the public reviewing either the bill, the chapter law, or the state statutes would have been apprised of the additional factors that would be considered in imposing habitual offender sentences on or after October 1, 1989. Since those committing offenses after that date were on notice as to that aspect of the consequences, the single-subject violation is only significant in challenging such sentences when there was no valid basis for imposing them. After there was a valid statute authorizing sentences which considered the factors, the fact that there had been a period during which such sentences were not authorized is beside the point.

Since the sentencing appealed and affirmed in this case occurred in December of 1991, months after the amended version of

section 775.084, Florida Statutes had been reenacted and become valid, the legislation and chapter law were no longer subject to challenge, and Petitioner had no standing to raise the single-subject violation in his appeal of the sentencing under Johnson. Id. Although he notes that his 1990 sentencing occurred before the reenactment, that is not the proceeding at issue in this appeal, and he did not challenge the bill or chapter law in the appeal of that sentencing. He appealed that sentence on other grounds, prevailed, and then contended that the defect in the bill prevented imposition of a habitual offender sentence in December of 1991, after the provisions authorizing it were a valid part of the statute and the chapter law was no longer in force. (R. 68-70, 77-78, 92-95)

The Court's holding in Johnson that the single-subject violation need not be raised in the trial court to be considered on appeal does not mean that it can be ignored on appeal too, and then raised for the first time at a resentencing on remand after the statute is valid, the sentence authorized, the chapter law no longer in effect, and the 1989 amendments no longer subject to challenge on legislative grounds. Indeed, the Court's decision in Tillman v. State, 591 So. 2d 167 (Fla. 1991) would seem to suggest that challenges not made in the initial appeal are *res judicata* on remand.

Furthermore, the sentence Petitioner is challenging was agreed in connection with the plea. Although Petitioner's brief refers to a "cap" of ten years with an understanding that habitual offender sentencing would be sought, and the judge used the word "cap" in accepting the plea, the agreement negotiated was actually for a ten-year habitual offender sentence specifically. Indeed, the minimum term that gain time restrictions would require Petitioner to serve had been computed by the prosecutor and considered by the judge, who had agreed to forgo probation as Petitioner wanted because of that. (R. 51, 53-56) If the State is deemed to be applying both Johnson and Tillman incorrectly in this situation, the trial court should at least be given the opportunity to impose the agreed sentence or one that is comparable on remand if either a second Florida conviction or a valid reason for departure exists which it was not necessary to establish originally.

CONCLUSION

For the reasons heretofore stated, the district court's decision should be approved or review dismissed, and the trial court's options left open if the holding is otherwise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to DEBORAH K. BRUECKHEIMER, Assistant Public Defender, P.O. Box 9000--Drawer PD, Bartow, Florida 33830 on this 7th day of April, 1993.

OF COUNSEL FOR RESPONDENT