IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CURTIS LEE MCCRAY,

Respondent.

Case No. 80,966

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The jurisdiction of this court is invoked based on the same question as that certified in Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991), *rev. pending*, case nos. 79,150 and 79,204. Johnson was argued on November 2, 1992.

STATEMENT OF THE CASE AND FACTS

McCray was convicted for discharging a firearm in public, aggravated assault with a deadly weapon, and battery. (R 16-18). He was classified as a habitual violent felon, and sentenced to 8 years with concurrent 5 and 3 year minimum sentences for aggravated assault with a deadly weapon. (Sen. T 11-13). The State relied on one prior conviction for aggravated battery to obtain McCray's classification. (Sent. T. 6).

Before the First District, McCray challenged only his sentence. That court reversed, on the ground that the 1989 changes to the habitual felon statute, enacted as ch. 89-280, Laws of Florida, violated the one-subject requirement of Art. III, §6, Fla. Const. (slip op., p. 2).[1] The court implicitly rejected the State's argument that the issue was not preserved. *Id.*

The First District certified the same question as the one certified in Johnson.[2] The opinion below was issued on December 7,

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[1] The opinion below is attached as App. A.

[2] The question reads: "Whether the chapter 89-280 amendments to section 775.084(1)(a)1, Florida Statutes (1989), were unconstitutional prior to their reenactment as part of the Florida Statutes, because in violation of the single subject rule of the Florida Constitution?"

1992. The State filed its notice to invoke this court's discretionary jurisdiction on December 22, 1992.

SUMMARY OF THE ARGUMENT

ISSUE I: Preservation of Substantive Issue

Whether ch. 89-280, Laws of Florida, violates the one-subject rule in Art. III, §6 of the Florida Constitution was not raised before the trial court. The number of subjects in a legislative act cannot be fundamental error. Therefore, McCray improperly raised the issue for the first time before the First District.

The First District had no authority to entertain a non-fundamental error challenge for the first time on appeal. Its decision must be vacated, thereby upholding McCray's sentence.

ISSUE II: One-Subject Challenge to Chapter 89-280, Laws of Florida

Chapter 89-280, Laws of Florida, contains two components, one addressing habitual felons and career criminals; the other, repossession of automobiles. Both components logically relate to controlling crime. Chapter 89-280 does not violate Art. III, §6 of the Florida Constitution.

ARGUMENT

ISSUE I

WHETHER A CRIMINAL DEFENDANT'S RIGHT TO DUE PROCESS CAN BE DENIED MERELY BY THE NUMBER OF SUBJECTS IN A LEGISLATIVE ACT

The number of subjects in an otherwise proper legislative act (i.e., ch. 89-280, Laws of Florida) cannot be fundamental error. McCray's failure to raise a one-subject challenge before the trial court precluded review by the First District. Consequently, that court's decision on the merits must be vacated, thereby affirming McCray's sentence.

Chapter 89-280, Laws of Florida, contains nine substantive sections. These nine sections form, in essence, two components. The first component (§§1-3, ch. 89-280) addresses the habitual felon and career criminal statutes. McCray has never maintained these two topics constitute more than one subject. The second component (§§4-9, ch. 89-280) addresses repossession of motor vehicles. These two components relate to the single subject of controlling crime.

This court need and should not reach the merits of the constitutionality of the statute. McCray did not raise this issue before the trial court. Therefore, the district court was without authority to rule on the merits, as violation of the one-subject rule cannot be fundamental error.[3] It is a settled rule of

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[3] The opinion below speciously circumvents the issue, by relying on Claybourne v. State, 600 So.2d 516 (Fla. 1st DCA 1992). In Claybourne, the court said that the "statute affected a critical, central issue in the litigation; i.e., Claybourne's term of

appellate review that "[e]xcept in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court. [citations omitted]." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

The meaning of "fundamental error" has been frequently addressed by this Court and the district courts. In Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970), this Court reviewed the Third District's holding that a challenge to the constitutionality of a special act[4] was cognizable for the first time on appeal as fundamental error. Specifically, the district court held the act was unconstitutional because its title did not fully reflect the act's contents, contrary to Article III, §16 of the Florida Constitution of 1885. (Note: section 16 is now embodied in the current constitution as Art. III, §6, the provision at issue here.)[5] The Court rejected the proposition that constitutionality

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imprisonment." The court could not have been more wrong -- the length of Claybourne's imprisonment has never been at issue. The only matter at issue was the number of subjects in ch. 89-280. Claybourne relied on two cases: Parker v. Town of Callahan, 115 Fla. 266, 156 So. 334 (1934); and Town of Monticello v. Finlayson, 156 Fla. 568, 23 So.2d 843 (1945). Both cases involved legislation authorizing municipalities to assess properly for sidewalks, etc.; and arose from the era before home rule, when town and counties had to have everything authorized by the Legislature. Claybourne did not attempt to explain the relevance of these two cases, and certainly made no effort to discern how the number of subjects in a Legislature act could rise to fundamental error.

[4]The State notes that the legislative act at issue in Sanford was not a "statute" in the commonly used sense; that is, a portion of the codified general law of Florida. At issue was a special act, which by definition is not of statewide applicability and not codified.

[5] Section 6 reads in pertinent part:

Laws.--Every law shall embrace but one subject and

of the statute was fundamental and could be raised for the first time on appeal.

The Sanford court made two general points which deserve close attention. First, "'[f]undamental error,' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." *Id.* Second, an "[a]ppellate [c]ourt should exercise its discretion under the doctrine of fundamental error very guardedly." *Id.*

Sanford was a civil case. The same doctrine is applied in criminal cases. In Castor v. State, 365 So.2d 701 (Fla. 1978), the Court reaffirmed the rule that contemporaneous objections were required and rejected the argument that the error was fundamental. In the context of jury reinstruction, the court reiterated that the doctrine of fundamental error must remain a "limited exception." *Id.* at 704. This court also declared that the error, to be fundamental, must "amount to a denial of due process." *Id.*, citing State v. Smith, 240 So.2d 807 (Fla. 1970).

This court has consistently limited the scope of fundamental error. *See*, Clark v. State, 363 So.2d 331, 333 (Fla. 1978)("We have consistently held that even constitutional errors, other than those constituting fundamental error, are waived unless timely

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Laws.--Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.

raised in the trial court. Sanford.") It was even more emphatic in Ray v. State, 403 So.2d 956, 960 (Fla. 1981):

> [F]or error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process. [citing *Castor, supra*].
>
> * * *
>
> We agree with Judge Hubbart's observation that the doctrine of fundamental error would be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. Citing *Porter v. State*, 356 So.2d 1268 (Fla. 3d DCA)(Hubbart, J., dissenting), *remanded*, 364 So.2d 892 (Fla. 1978), *rev'd on remand*, 367 So.2d 705 (Fla. 3d DCA 1979).[6]

The cases holding and applying the above principles are many, and of long standing. Representative decisions include: Ellis v. State, 74 Fla. 215, 76 So. 6998 (1917)("[I]t is suggested that the statute is unconstitutional. This question was not raised in the trial court, and, as the statute is not patently in conflict with organic law, the suggestions . . . do not properly present the validity of the law for consideration by this court."); Silver v. State, 188 So.2d 300, 301 (Fla. 1966)(This Court strongly criticized and refused to condone decision of district court to address constitutionality of statute when constitutionality not

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[6] In Porter, the issue was whether an unchallenged to comment on a defendant's exercise of his right to remain silent was fundamental error. The district court, J. Hubbart dissenting, originally held that it was, but reversed itself after remand for reconsideration in light of Clark. The point for this court to recognize is that the right to silence is unquestionably a fundamental constitutional right in the sense of "important" or "basic." However, in the context of unobjected to error, "fundamental error" is a legal term-of-art of exceptionally narrow scope.

raised in trial court); Whitted v. State, 362 So.2d 668, 672 (Fla. 1978)(failure of defendant to raise constitutionality of statutory provision under which convicted precludes appellate review). This Court's attention is invited to Eutzy v. State, 458 So.2d 755 (Fla. 1984). There, the court held that the constitutionality of statutory authority to override jury recommendation in death penalty case was not cognizable for first time on appeal. *Id.* at 757. If constitutionality of a statute providing for judicial override of a recommended life sentence is not fundamental error, then certainly the mere number of subjects in a legislative act cannot possibly be such.

Davis v. State, 383 So.2d 620, 622 (Fla. 1980), is particularly instructive. It involved a nolo plea which purported to reserve the right to appeal the trial court's denial of motions to dismiss. On appeal, Davis challenged the constitutionality of the statute under which he was convicted. This Court, relying on Silver, *supra*, held there was no jurisdiction to consider the challenge:

> In the case *sub judice* the defendant entered a plea of nolo contendere and did not reserve any right to raise the constitutionality question on appeal. The statute was not attacked at the trial level. Defendant has exercised his right to one appeal. If he had desired to appeal to this Court, he only had to raise a constitutional question before the trial court and, in event of an unfavorable ruling, could have appealed directly to this Court. Not having followed this course, he is clearly wrong in his effort to activate the jurisdiction of this Court.
>
> For the reason stated, jurisdiction is declined and the judgment of the circuit court is not disturbed.

Id. *See*, Brown v. State, 376 So.2d 382, 385 (Fla. 1979)(reserved issue must be totally dispositive and that the constitutionality of a controlling statute is an appropriate issue for reservation). Brown necessarily implies that the constitutionality of a controlling statute must be preserved.

The above holdings are also reflected in the First District's case law. *See*, State v. McInnes, 133 So.2d 581, 583 (Fla. 1st DCA 1961)("It is fundamental that the constitutionality of a statute may not generally be considered on appeal unless the issue was raised and directly passed upon by the trial court."); Randi v. State, 182 So.2d 632 (Fla. 1st DCA 1966)(constitutionality of statute may not be raised for first time on appeal).

The above holdings apply to the constitutionality of statutes under which the defendants were convicted. The same rule applies to sentencing statutes. *See*, Gillman v. State, 346 So.2d 586, 587 (Fla. 1st DCA 1977)(constitutionality of sentencing statute not cognizable when raised for first time on appeal). *See also*, Knight v. State, 501 So.2d 150 (Fla. 1st DCA 1987)(*ex post factor* and equal protection challenges to sentencing statutes not cognizable when raised for first time on appeal).

It is uncontroverted that McCray did not raise, or otherwise preserve, the issue of whether ch. 89-280, Laws of Florida, was enacted in violation of the single subject rule in Art. III, §6 of the Florida Constitution. Thus, the question is whether violation of the single subject rule is fundamental, thereby justifying consideration of the issue although not raised below.

The question answers itself. As declared by the decisions above, error that is fundamental deprives the defendant of due process. The number of subjects in a legislative act does not remotely implicate any procedural or substantive due process rights.

Due process takes two forms, substantive and procedural. Substantive due process requires only that there be a rational basis for the relevant changes in ch. 89-280. State v. Saiez, 489 So.2d 1125, 1129 (Fla. 1986); State v. Olson, 586 So.2d 1239 (Fla. 1st DCA 1991). The rational basis for habitual offender statutes is that society requires greater protection from recidivists and sentencing as habitual felons provides greater protection. Eutsey v. State, 383 So.2d 219, 223-4 (Fla. 1980). McCray has not, and cannot, reasonably maintain the mere number of subjects in ch. 89-280 has anything to do with this unassailable purpose.

Procedural due process, in turn, has two aspects: reasonable notice and a fair opportunity to be heard. State v. Beasley, 580 So.2d 139 (Fla. 1991); Goodrich v. Thompson, 96 Fla. 327, 118 So. 60, 62 (1928). Here, Respondent was given reasonable notice and a fair opportunity to be heard. He has never maintained otherwise, or that the number of subjects in ch. 89-280 affected the fairness of his sentencing. Had Respondent thought differently, "he only hade to raise a constitutional question before the trial court and, in the event of an unfavorable ruling, could have appealed directly to this Court. Not having followed this course, he is clearly wrong in his effort to activate the jurisdiction of this Court." Davis, 383 So.2d at 622.

The State recognizes that the facial validity of a statute may be challenged for the first time on appeal. Trushin v. State, 425 So.2d 1126 (Fla. 1983). However, this is a very narrow exception to the rule that issues not raised before the trial court may not be raised on appeal. There are two aspects to the facial challenge: overbreadth and vagueness. Overbreadth only arises when the statute in question impinges on behavior protected by the First Amendment to the United States Constitution and by Article I, §4 of the Florida Constitution. State v. Olson, 586 So.2d at 1243-44. There can be no suggestion here that the number of subjects in ch. 89-280 impinges on First Amendment rights. The same conclusion applies to facial vagueness. Nothing in the mere number of subjects in ch. 89-280 would cause a person of common intelligence to guess at the meaning of any particular substantive possession. Therefore, the exception noted in Trushin is factually and legally inapplicable.

Other rules and points of law support the proposition that a single subject challenge does not meet the criteria for fundamental error or facial invalidity. Single subject and title defects under Art. III, §6 are cured by the biennial reenactment of the Florida Statutes. State v. Combs, 388 So.2d 1029 (Fla. 1980); Belcher Oil Co. v. Dade County, 271 So.2d 118, 121 (Fla. 1972). If violation of Art. III, §6 were fundamental error, or constituted facial invalidity, reenactment could not cure either error.

In Rhoden v. State, 448 So.2d 1013 (Fla. 1984), this court held that the total absence of statutorily mandated findings

essential to the legal imposition of the sentence was fundamental error which rendered the sentence illegal and cognizable for the first time on appeal. This error was equivalent to the imposition of a death penalty or a sentencing guidelines departure with no written order because it was not merely erroneous, it was illegal. Grossman v. State, 525 So.2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071 (1989). Unfortunately, in dicta which has been widely misapplied outside the Rhoden context of a missing mandatory sentencing order, the Court recommended:

> The purpose of the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge. If the state's argument is followed to its logical end, a defendant could be sentenced to a term of years greater than the legislature mandated and, if no objection was made at the time of sentencing, the defendant could not appeal the illegal sentence.

Rhoden, 448 So.2d at 1016.

This Court receded from the expansive Rhoden dicta in State v. Whitfield, 487 So.2d 1045, 1046 (Fla. 1986):

> *Rhoden, Walker,* and *Snow* all concern instances where the trial court sentenced in reliance on statute but failed to make the specific findings which the statutes in question mandatorily required as prerequisite to the sentence. An alternative way of stating the ground on which *Rhoden, Walker,* and *Snow* rest is that the absence of the statutorily mandated findings rendered the sentences illegal because, in their absence, there was not statutory authority for the sentences. Thus, as the district court surmised, *Snow* makes clear that *Rhoden* is grounded on the failure to make mandatory findings and not on the proposition that contemporaneous objections serve no purpose in the sentencing process.[2] Sentencing errors which do not produce an illegal sentence or an

unauthorized departure from the sentencing guidelines still require a contemporaneous objection if they are to be preserved for appeal. (e.s.)

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[2] Our *Rhoden* dicta that the purpose of the contemporaneous objection rule is not present in the sentencing process does not apply in every case. It is true that sentencing errors can be more easily corrected on appeal than errors in the guilt phases, but it is still true that all errors in all phases of the trial should be brought to the attention of the trial judge particularly where there is a factual issue for resolution.

Id.

Despite having been affirmed in Whitfield, the First District Court of Appeal thereafter adopted the inconsistent rule that there is an absolute right to appeal everything which occurs during the sentencing phases regardless of whether a sentencing issue is preserved, or even identifiable. Ford v. State, 575 So.2d 1335 (Fla. 1st DCA), *rev. denied*, 581 So.2d 1318 (Fla. 1991). The court regressed into the Rhoden dicta by circularly reasoning that (1) there is a right to appeal an illegal sentence and (2) illegal sentences are sentences, therefore, (3) there is a right to appeal all sentences because all sentences are presumptively illegal until the completion of the appellate process demonstrates that they are legal.

Castor v. State, 365 So.2d 701, 703 (Fla. 1978), holds contrary to respondent's position:

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It placed the trial judge on notice that error may have been

> committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

Id. The State urges the Court to make it very clear that routine sentencing issues must be preserved in the trial court in order to obtain the right to appeal, or to raise the issue on appeal if appeal is otherwise permitted. The Court should declare that Rhoden applies only to sentences for which there is no statutory authority. If the constitutionality of a substantive criminal statute could not be raised for the first time on appeal in Davis v. State, 383 So.2d 620 (Fla. 1980); it would be incredible to allow such for a sentencing statute.

McCray's sentence is not illegal, as it is within the range of punishment authorized by statute. *See*, Infante v. State, 197 So.2d 542, 544 (Fla. 3d DCA 1967)(statute allowing appeal of "illegal" sentence means a sentence that exceeds the statutory maximum or is a type of punishment not prescribed by law). Therefore, McCray cannot avail himself of the cases allowing illegality of a sentence, or of a sentencing statute, to be raised for the first time on appeal. This issue was not preserved, and should not have been considered by the First District. Its opinion must be vacated.

Assuming that ch. 89-280 violates Art. III, §6, the error is not fundamental and does not cause either the statute or the act to be facially invalid. In view of the settled law that an appellate court will not entertain an issue or an argument not presented

below unless the alleged error is fundamental or goes to the facial validity of the statute, McCray here may not challenge the constitutionality of ch. 89-280. As this Court held in Davis, there is no jurisdiction to entertain such appeals. Since the First District had no authority to review error that was neither fundamental nor preserved, its decision on the merits must be vacated, thereby affirming McCray's sentence.

ISSUE II

WHETHER ALL THE PROVISIONS OF CHAPTER 89-280, LAWS OF FLORIDA, RELATE TO CONTROLLING CRIME

Although the merits should not be reached, the State will address the issue. To withstand an attack alleging the inclusion of more than one subject, various topics within a legislative enactment must be "properly connected." Art. III, §6, Fla. Const. This term has been addressed many times, most recently in Burch v. State, 558 So.2d 1 (Fla. 1990). In upholding a broad criminal statute, this Court found that each of the "three basic areas"[7] addressed by ch. 87-243, Laws of Florida, bore a "logical relationship to the single subject of controlling crime." *Id.* at 3.

Chapter 89-280 contains two basic areas: (1) policies and penalties as to career criminals and habitual felons; and (2) repossession of motor vehicles. Both relate to controlling crime.

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[7] The three areas were: (1) comprehensive criminal regulations and procedures, (2) money laundering, and (3) safe neighborhoods. *Id.* at 3.

They are properly connected and do not violate Art. III, §6 of the Florida Constitution.

Elaboration is useful. Article III, §6 has long been extant in Florida's constitutions.[8] It is "designed to prevent various abuses commonly encountered in the way laws were passed . . . [such as] logrolling, which resulted in hodgepodge or omnibus legislation." Williams v. State, 459 So.2d 319 (Fla. 5th DCA), *dismissed*, 458 So.2d 274 (Fla. 1984). *See*, Burch v. State, *supra* at 2 (noting that the purpose of Art. II, §6 is to prevent duplicity of legislation and to prevent a single enactment from becoming a cloak for dissimilar legislation).

At the outset, the problems of logrolling are not so compelling or frequent in criminal legislation. To the contrary, the fact that ch. 87-243 was designed to be a comprehensive response to burgeoning drug crime led the Burch court to uphold that act. *See id.* at 3 (simply because "several different [e.s.] statutes are amended does not mean more than one subject is involved").

The repossession provisions of ch. 89-280 amend part I of ch. 493, Florida Statutes.[9] That part, entitled "Investigative and

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[8] *See* the Commentary to Art. III, §6, noting that the 1968 version is "close in substance to Sections 15 and 16 of Art. III of the 1885 Constitution." 25 A Fla.Stat.Anot. 656 (1991 ed.).

[9] Ch. 493 was repealed, reenacted and renumbered by ch. 90-364, Laws of Florida. For convenience, all cites to ch. 493 are to the 1989 version, thus corresponding to the statutory section numbers in ch. 89-280.

Patrol Services," addresses private conduct (i.e., investigative and security serves) normally provided by law enforcement officers.

The changes in the second basic area of ch. 89-280 were necessitated by problems with repossessions conducted by private individuals. The problems arose to criminal significance, as violations of part I of ch. 493 are first-degree misdemeanors. *See* §493.321, Fla. Stat. (1989).

Chapter 493, part I, is also designed to protect the public against abuse by repossessors, etc., and provides criminal penalties.[10] For example, ch. 89-280 creates a new crime -- a felony -- for improper sale, or distribution of proceeds from a sale, of repossessed property. *See*, §7, ch. 89-280.

This Court has consistently held that the Legislature must be accorded wide latitude in the enactment of laws. Therefore, Art. III, §6 of the Florida Constitution must not be used to deter or impede legislation by requiring laws to be unnecessarily restrictive in their scope and operation. State v. Lee, 356 So.2d 276, 282 (Fla. 1978). *See*, Smith v. City of St. Petersburg, 302 So.2d 756, 758 (Fla. 1974)("For a legislative enactment to fail, the conflict between it and the Constitution must be palpable.").

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[10] Part I also addresses investigative and patrol issues, and detection of deception. For example, §493.30(4) defines "private investigation" to include, among other activities, the obtaining of information relating to certain crimes; the location and recovery of stolen property; the cause, origin, or responsibility for fires, etc.; and the securing of evidence for use in criminal (and civil) trials. These duties are quasi-law enforcement in nature.

In Bunnell v. State, 459 So.2d 808 (Fla. 1984), this Court invalidated §1, ch. 82-150, Laws of Florida, as having "no cogent relationship" (*id.* at 809) with the remainder of that act. Specifically, the subject law reduced membership of the Florida Criminal Justice Council, and created the criminal offenses of obstructing justice through false information. Chapter 89-280, in contrast, includes no such disparity. There is a cogent relationship between its habitual or career felon provisions and its repossession provisions. Both respond to frequent incidence of criminal activity; both seek to deter repeat offenses. Both seek to protect the public. Repossessors and investigators, although private individuals, are performing the quasi-law enforcement duties. The parts of ch. 89-280 are sufficiently related to survive a two-subject challenge, even though ch. 89-280 is not a comprehensive crime bill like the one upheld in Burch, *supra*. Chapter 89-280 contains but one subject. Two of three district courts have agreed. Beaubrum v. State, 17 F.L.W. D689 (Fla. 3d DCA March 10, 1992); Jamison v. State, 583 So.2d 413 (Fla. 4th DCA 1991), *rev. denied*, 591 So.2d 182 (Fla. 1991).

If McCray has identified a two-subject problem in ch. 89-280, that problem was cured by the 1991 Legislature. Chapter 89-280 was enacted, obviously, in 1989. All 1989 changes to the Florida Statutes have been adopted and enacted as the official statutory law. *See*, ch. 91-44, Laws of Florida, effective May 2, 1991 (codified in §11.2421, Florida Statutes [1991]).

Through ch. 91-44, the Legislature reenacted all of ch. 89-280, as codified. This reenactment cured any constitutional defect arising from inclusion of more than one subject in the original act. State v. Combs, 388 So.2d 1029 (Fla. 1980). The reason is obvious. Art. I, §6 applies to acts of the Legislature, not to the reenacted (codified) statutes. *Id.* at 1030. "Once reenacted as a portion of the Florida Statutes, it [the statute at issue] was not subject to challenge under article III, section 6." *Id.* As of May 2, 1991, ch. 89-280 is constitutional as to a two-subject challenge. *See*, Thompson v. Inter-County Tele. & Tel. Co., 62 So.2d 16 (Fla. 1952)(*en banc*)(tax statute with defective title valid from time of revision). Therefore, §775.084, Florida Statutes (1989), is no longer subject to a two-subject challenge.

To sum: this issue is not preserved for review, as it was not raised below and does not involve fundamental error. If preserved, ch. 89-280 includes only one subject. Moreover, the Legislature has cured any two-subject problem. The State specifically requests this Court, should it agree with McCray on the merits, to recognize the curative effect of ch. 91-44; and to state that any two-subject challenge to ch. 89-280 must be predicated on an offense occurring from October 1, 1989 (effective date of ch. 89-280), through May 2, 1991 (effective date of ch. 91-44). *See*, Tims v. State, 592 So.2d 741 (Fla. 1st DCA 1992)(the "narrow holding" of Johnson [*supra*] is predicated, in part, upon an offense committed between October 1, 1989 and May 2, 1991).

CONCLUSION

Based on the argument in Issue I, the opinion below must be vacated and McCray's sentence affirmed. Alternatively, based on the argument in Issue II, this Court must declare ch. 89-280 not violative of the one-subject rule; answer the certified question in the negative; and affirm McCray's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Initial Brief has been furnished by U.S. Mail to **MS. LYNN WILLIAMS**, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 5th day of January, 1993.

For James W Rogers

CHARLIE MCCOY
ASSISTANT ATTORNEY GENERAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 80,966

CURTIS LEE MCCRAY,

Respondent.

APPENDIX TO
PETITIONER'S INITIAL BRIEF

APPENDIX	DOCUMENT	DATE ISSUED
A	Opinion Below	Dec. 7, 1992

91-111725-TRC

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CURTIS LEE McCRAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

* NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

* CASE NO. 91-2828

Opinion filed December 7, 1992.

Appeal from the Circuit Court for Gadsden County, Charles D. McClure, Judge.

Nancy A. Daniels, Public Defender, and Lynn A. Williams, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Charlie McCoy, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

The appellant challenges a habitual violent felony offender sentence, asserting that chapter 89-280, Laws of Florida, violates the single subject requirement of article III, section 6, Florida Constitution. We found chapter 89-280 to be unconstitutional on this basis in Johnson v. State, 589 So.2d

1370 (Fla. 1st DCA 1991), juris. accepted, Nos. 79,150 and 79,204 (Fla. May 19, 1992). In accordance with Johnson and Claybourne v. State, 600 So.2d 516 (Fla. 1st DCA 1992), petition for review filed, No. 80,157 (Fla. July 10, 1992), we therefore vacate the sentence and remand for resentencing. However, we acknowledge conflict with decisions such as State v. Sheppard, 17 FLW D1960 (Fla. 2d DCA August 21, 1992); Beaubrum v. State, 595 So.2d 254 (Fla. 3d DCA 1992) juris. accepted, No. 79,669 (Fla. September 18, 1992); and McCall v. State, 583 So.2d 411 (Fla. 4th DCA 1991), juris. accepted, 593 So.2d 1052 (Fla. 1992). We also certify the same question of great public importance as was certified in Johnson and Claybourne.

ALLEN, WOLF and WEBSTER, JJ., CONCUR.