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IN THE SUPREME COURT OF FLORIDA

JAMES BYRON GOODSON,
Petitioner,

v.

STATE OF FLORIDA,
Respondent,

S. CT. CASE NO. 81,051

ON DISCRETIONARY REVIEW FROM A QUESTION CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE BY THE THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

JAMES BYRON GOODSON, Petitioner,	)	
v.	)	S. CT. CASE NO. 81,051
STATE OF FLORIDA, Respondent,	)	

STATEMENT OF THE CASE AND FACTS

Petitioner, JAMES BYRON GOODSON, was charged by amended information with one count of burglary of a structure with a battery therein, a first degree felony punishable by life in violation of Florida Statutes § 810.02(1), and § 810.02(2) (1990), and two counts of sexual battery, second degree felonies in violation of Florida Statutes § 794.011(5) (1990) (R452, 453).[1] The charged offenses were alleged to have occurred on October 11, 1990 in Seminole County (R452, 453). After a jury trial held on May 7th and 8th, 1991, before the Honorable Newman D. Brock, Petitioner was convicted of all three counts as charged in the information (R315, 316, 506-508).

The State filed a timely notice of its intent to seek enhanced punishment as a habitual offender on June 19, 1991 (R515). Petitioner's sentencing hearing was held on July 26, 1991, before the Honorable Newman D. Brock (R336-446). In an

[1] The original information charged only one count of sexual battery, and the amended information, not included in the record on appeal, included two counts of sexual battery.

attempt to establish Petitioner's status as a habitual offender, the State introduced the following certified copies of judgments and sentences: a judgment filed September 23, 1982, reflecting an Oklahoma conviction of "first degree rape" (R600-604); a judgment filed July 26, 1976, reflecting a Florida conviction of burglary of a dwelling (R605).

The State also introduced a copy of a Florida judgment in case number 90-3152 entered on May 3, 1991, for offenses which had allegedly occurred on October 10, 1990 (R606). The judgment for these offenses, however, had been entered after the date of the offense in the instant case, numbered 90-3292, and was the subject of an appeal in the Fifth District Court of Appeal, district court case number 91-1915 (R606-607).

Based on these convictions, Petitioner was found to be a habitual offender pursuant to Florida Statutes § 775.084 (1990) (R540). As to count one, Petitioner was sentenced to life imprisonment as a habitual offender, and as to counts two and three, the trial court sentenced Appellant to two thirty year terms of incarceration as a habitual offender, to run concurrent with the sentence imposed in count one (R537-541).

Petitioner appealed the imposition of this sentence to the Fifth District Court of Appeal, arguing that his classification as a habitual offender was in error. The basis for this argument was that Chapter 89-280, Laws of Florida, amending § 775.084, was violative of the single subject rule of the Florida Constitution. Art. III, § 6, Fla. Const. (1968).

The Fifth District Court of Appeal affirmed the sentence, and certified the following question as being of great public importance:

> 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 THEY WERE IN VIOLATION OF THE SINGLE SUBJECT RULE OF THE FLORIDA CONSTITUTION?

Goodson v. State, 17 Fla. L. Weekly D2708 (Fla. 5th Dec. 4, 1992) (Appendix A).

The same question was certified by the First District Court of Appeal in Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991), by Fourth District Court of Appeal in Gilmore v. State, 17 Fla. L. Weekly D986 (Fla. 4th DCA Apr. 15, 1992), and by the Fifth District Court of Appeal in Butler v. State, 17 Fla. L. Weekly D1460 (Fla. 5th DCA June 12, 1992).

This Court answered the certified question in the affirmative in Johnson v. State, 18 Fla. L. Weekly S55 (Jan 14, 1993) (Appendix B), and in Bulter v. State, 18 Fla. L. Weekly S79 (Fla. Jan 21, 1993) (Appendix C), finding that Chapter 89-280, Laws of Florida, was violative of article III, section 6, of the Florida Constitution.

SUMMARY OF THE ARGUMENT

As this Court held in Johnson v. State, 18 Fla. L. Weekly S55 (Fla. Jan. 14, 1993), Chapter 89-280, Section 775.084, Florida Statutes, violates the one subject rule of the Florida State Constitution. The law in Chapter 89-280 embraces two subjects. These subjects are the habitual felony offender and the repossession of motor vehicles. The amendment to the habitual offender statute was specifically applied to Petitioner's case, as Petitioner could not have been classified as a habitual offender but for the amendment to Section 775.084 contained in Chapter 89-280. Petitioner requests that this Honorable Court answer the certified question in the affirmative, vacate his sentence, and remand for resentencing within the guidelines.

ARGUMENT

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 THEY WERE IN VIOLATION OF THE SINGLE SUBJECT RULE OF THE FLORIDA CONSTITUTION?

The trial court erred in sentencing Petitioner as a habitual offender. The habitual offender statute, § 775.084, Florida Statutes (1989), as amended and applied to Petitioner's sentence and classification as a habitual offender, is violative of the one subject rule of the Florida Constitution. Art. III, § 6, Fla. Const. (1968); Ch. 89-280, § 12, Laws of Fla. Petitioner's offenses occurred on October 11, 1990, after the October 1, 1989 effective date of Section 775.084, Florida Statutes (1989), Chapter 89-280, Laws of Florida, and prior to May 2, 1991, the effective date of Chapter 91-44, Laws of Florida, which re-enacted the 1989 amendments to Florida Statutes.

In particular, the section of the habitual offender statute concerning the use of out of state convictions in establishing a defendant as a habitual offender was amended in Chapter 89-280, § 1, Laws on Florida. Section 775.084(1)(a)1, was amended in part as follows:

> (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</u>

offenses;

Chapter 89-280, § 1, Laws of Florida. The "other qualified offenses" were thereafter defined in the amendment to include out-of-state convictions. Prior to this amendment, only Florida convictions could be considered. Importantly, this change was specifically applied to Petitioner's case, as the State relied on evidence of one prior Oklahoma conviction from 1982, and one remote judgment from Florida, entered in 1976, in moving to have Petitioner classified as a habitual offender. Petitioner was released from prison in Florida on December 7, 1989, after being convicted of the felony case in Oklahoma while on parole from Florida (R390, 391, 396-398).

Although the State introduced evidence of a Florida felony conviction in case number 90-3152, this prior judgment was not determinative in finding Petitioner to be a habitual offender. This judgment, apparently filed May 3, 1991, could not have been considered in ascertaining whether Petitioner was to be classified as a habitual offender. It was not even clear whether Petitioner had yet been sentenced in this case. The convictions in case number 90-3152 were entered after the offense date in the instant case, and were not final as they were the subject of an appeal at the time of sentencing (R606-607). Convictions entered after the offense date for which a defendant is being sentenced cannot be considered in determining whether a defendant qualifies as a habitual offender. § 775.084, Fla. Stat. (1990); See Brooks v. State, 578 So. 2d 893 (Fla. 1st DCA 1991) (habitual offender

sentence reversed where crimes for which defendant currently being sentenced occurred prior to the simultaneous convictions used to support the habitual offender classification); Palmore v. State, 584 So. 2d 135 (Fla. 1st DCA 1991) (habitual offender sentence reversed where the offenses for which the defendant was sentenced occurred before the date of the convictions upon which the lower court relied as "prior convictions"); Furthermore, the conviction must be final in order to be considered as a requisite conviction for imposing a habitual offender sentence. See Martin v. State, 592 So. 2d 1219 (Fla. 1st DCA 1992) (a conviction must be final before it can be constitute a "prior conviction" for purposes of the habitual offender statute; conviction subject to appeal could not be considered). Frazier v. State, 452 So. 2d 1015 (Fla. 5th DCA 1984).[2]

Petitioner could therefore not have qualified as a habitual offender prior to the effective date of this amendment to the habitual offender statute, as the offenses used in this classification were from a 1976 Florida conviction, and a 1982 Oklahoma conviction, for which Petitioner was released from

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[2] The Second District Court of Appeal's decision in Smith v. State, 584 So. 2d 1107 (Fla. 2d DCA 1991), rev. denied, 595 So. 2d 557 (Fla. 1992), held that Florida Statutes § 775.084(1)(b)(1) (Supp. 1988), "does not preclude a conviction occurring after the conviction for which defendant is being habitualized from providing such a basis if, as here, the prior conviction occurred before the defendant's sentencing for the offense for which he is being habitualized." Smith, 584 So. 2d at 1108. The decision in Smith, however, concerning an interpretation of the habitual violent felony offender statute, as opposed to the instant case, and the cases cited herein, which dealt with the habitual felony offender statute.

prison in Florida in 1989.

Just as this court held in Johnson v. State, 18 Fla. L. Weekly S55 (Fla. Jan. 14, 1993), Chapter 89-280, Laws of Florida clearly embraces more than one subject through its coverage of both the habitual offender statute and repossession requirements, and is in violation of Article III, section 6 of the Florida Constitution. The subjects included in the act "are simply to dissimilar and lack the logical and rational relationship to the legislature's stated purpose [of an act relating to criminal law and procedure] ... to pass constitutional muster." Martinez v. Scanlan, 582 So. 2d 1167, 1172 (Fla. 1991). Accordingly, this court answered the same question certified in the instant case in Johnson, supra, and the ruling in Johnson controls in the case sub judice. Petitioner's offense date fell after the effective date of Chapter 89-280, Laws of Florida, of October 1, 1989, and prior to the statute's reenactment in Chapter 91-44, Laws of Florida, on May 2, 1991. Furthermore, the unconstitutional amendment to the habitual offender statute was specifically applied to Petitioner's case, in allowing Petitioner to be "habitualized" through the use of an out-of-state conviction.

Petitioner requests that this Honorable Court answer the question certified in the instant case in the affirmative, based on this Court's ruling in Johnson, supra, and Butler, supra.

CONCLUSION

BASED ON the argument contained herein, and authorities cited in support thereof, Petitioner requests that this Honorable Court answer the certified question in the affirmative, vacate Petitioner's sentence, and remand this cause for resentencing within the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal; and mailed to Mr. James B. Goodson, Jr., No. A 055091, Central Florida Reception Center, P. O. Box 628040, Orlando, FL 32862-8040 on this 8th day of February, 1993.

SOPHIA B. EHRINGER
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

JAMES B. GOODSON, JR., Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 81,051

A P P E N D I C E S

A Goodson v. State, 17 Fla. L. Weekly D2708 (Fla. 5th DCA Dec. 4, 1992).

B Johnson v. State, 18 Fla. L. Weekly S55 (Jan. 14, 1993).

C Butler v. State, 18 Fla. L. Weekly S79 (Fla. Jan. 21, 1993).

registration desk for the service of auctioning the car and because the injuries occurred during the service-related transport of the car through the auction by an employee of the Auction.

Following the Florida Supreme Court's rationale in *Michalek*, we find no reason to distinguish between types of service when applying the automobile service exception and hold that under the facts in this case the auctioning of an automobile is a service which falls within the exception. In this case, the record shows that after Mullen registered the car, the Auction had exclusive control over the car and that Barbara's injuries occurred during the service-related transport of Mullen's car by another Auction employee. Therefore, we hold that the trial court properly entered summary judgment in favor of Mullen. Because our decision is dispositive, we do not address the remaining issues raised by the Foughts.

AFFIRMED. (DAUKSCH and HARRIS, JJ., concur.)

* * *

Criminal law—Sentencing—Habitual offender—Question certified 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 they were in violation of the single subject rule of the Florida constitution

JAMES BYRON GOODSON, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 92-185. Opinion filed December 4, 1992. Appeal from the Circuit Court for Seminole County, Newman D. Brock, Judge. James B. Gibson, Public Defender, and John S. Lynch, Special Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Nancy Ryan, Assistant Attorney General, Daytona Beach, for Appellee.

(COBB, J.) Affirmed. As in *Butler v. State*, 17 Fla. L. Weekly D[illegible]0 (Fla. 5th DCA June 12, 1992) we certify as being of great public importance the following question to our supreme court:

> 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 THEY WERE IN VIOLATION OF THE SINGLE SUBJECT RULE OF THE FLORIDA CONSTITUTION.

We note that the supreme court has accepted jurisdiction to answer this question. *McCall v. State*, 593 So. 2d 1052 (Fla. 1992).

AFFIRMED; QUESTION CERTIFIED. (COWART and DIAMANTIS, JJ., concur.)

* * *

Appeals—Appeal from amended order on motion to compel discovery treated as petition for writ of certiorari where thrust of argument is that trial court lacked jurisdiction to enter order—Petition denied

THOMAS L. HALL and BARBARA S. HALL, Appellants, v. RUSSELL L. DEVORE, Appellee. 5th District. Case No. 92-928. Opinion filed December 4, 1992. Non-Final Appeal from the Circuit Court for Seminole County, C. Vernon Mize, Jr., Judge. Thomas L. Hall and Barbara S. Hall, Orlando, pro se. No Appearance for Appellee.

(PER CURIAM.) Thomas and Barbara Hall filed a notice of appeal from the amended order on Russell Devore's motion to compel discovery. This order is non-final and nonappealable. However, because the thrust of the appellants' argument is that the trial court lacked jurisdiction to enter the order, the merits of the argument may be addressed by certiorari review. *See Robbins v. Pfeiffer*, 407 So. 2d 1016 (Fla. 5th DCA 1981) (when a trial court allegedly acts without jurisdiction, certiorari is a proper remedy). We therefore elect to treat the notice of appeal as a petition for writ of certiorari and deny the petition.

PETITION DENIED. (GOSHORN, C.J. and SHARP, W., J., concur. GRIFFIN, J., concurs in result only.)

* * *

Criminal law—Search and seizure—Record supports trial court's finding that knife which was clearly visible to police officers peering through windshield was not concealed—Sawed-off shotgun found during search incident to arrest of defendant for carrying concealed weapon properly suppressed

STATE OF FLORIDA, Appellant, v. SOLOMON HARDY, Appellee. 5th District. Case No. 92-541. Opinion filed December 4, 1992. Appeal from the Circuit Court for Seminole County, O. H. Eaton, Jr., Judge. Robert A. Butterworth, Attorney General, Tallahassee, and David G. Mersch, Assistant Attorney General, Daytona Beach, for Appellant. James B. Gibson, Public Defender and Kenneth Witts, Assistant Public Defender, Daytona Beach, for Appellee.

(GOSHORN, C.J.) The State of Florida appeals from the trial court's order suppressing evidence seized from an automobile driven by Solomon Hardy. We affirm.

During the hearing on Hardy's motion to suppress, Officer Anthony Esoff of the Sanford Police Department testified that on May 1, 1991, he stopped Hardy for speeding at approximately 4:00 AM. Officer Esoff ran a license check on Hardy and gave Hardy a verbal warning about speeding, but wrote a citation against Hardy for failing to produce proof of insurance. Officer Esoff asked Hardy to step out of the car to sign the citation.

At about this time, Officer Daryl Brewer arrived at the scene and began conducting a safety search of the car with a flashlight by looking through the windows and the windshield. In the meantime, Hardy signed the citation and Officer Esoff explained to Hardy how to correct the insurance problem. Officer Esoff told Hardy that he had noticed a suspicious looking gym bag on the floorboard and asked Hardy if he could search the car. After being told that the search was voluntary and that he could say no, Hardy said that he did not want his car searched.

At that point, Officer Brewer pulled Officer Esoff aside and told him that a knife in a sheath appeared to be on the floorboard between the driver's seat and the driver's door. At the suppression hearing, Officer Brewer testified:

> A. While Officer Esoff was writing the ticket, I was standing off to the side on the grass to the right of the vehicles just keeping an eye on Mr. Hardy who was a loan [sic] passenger in the vehicle.
>
> After he was requested to get out and go to the back of his car by Officer Esoff. I proceeded to walk around his car shining my light inside the interior looking for any weapons for officer's safety.
>
> Q. Sure.
>
> A. After I got around to the driver's side, I shined my light through the windshield illuminating the area of the floorboard underneath the front seat and then along between where I could see partially between the driver's seat and driver's door.
>
> Q. Was the door to the car at this point open or closed?
>
> A. It was closed.
>
> Q. All right. What did you see?
>
> A. I saw what appeared to be the handle of a large hunting-type knife lying on the floor between the seat and the door.
>
> Q. Okay. What, if anything, did you do at that point?
>
> A. After continuing on looking on around through there, I went back and had Officer Esoff step aside from Mr. Hardy and informed him of what I had seen.
>
> Q. Did you at any time open the door?
>
> A. No.
>
> Q. Did you at any time move that knife and put it in someplace where you could see it?
>
> A. No, sir.

Officer Esoff similarly testified:

> About that time Officer Brewer was walking back towards my car towards us, and he, you know, told me to come to the side, and he had told me that he had—a knife in a sheath appeared to be laying on the floorboard between the driver's seat and the driver's door partially under the door.
>
> Q. Did you go and look at it?
>
> A. Yes, I did.
>
> Q. Explain to the Court exactly where it was in the car in relation to seats and floorboards and doors.
>
> A. We were looking through the front windshield with the aid of a flashlight, and looking through the front windshield you

APPENDIX A

However, having chosen that route, the Commission cannot now re-designate the outcome of that prior proceeding as an "interim award" in order to bypass constitutional due process requirements. The public policy of this state favors traditional due process rights in rate hearings, whether permanent or interim. *Citizens of Fla. v. Mayo*, 333 So. 2d 1, 6 (Fla. 1976). Nor can there be any "compromise on the footing of convenience or expediency . . . when the minimal requirement of a fair hearing has been neglected or ignored." *Florida Gas Co. v. Hawkins*, 372 So. 2d 1118, 1121 (Fla. 1979). In this case, the Commission cannot manipulate its statutory authority to either ignore the 13.3% ROE authorized in Order No. 22377 or to deny United a hearing as to its 1990 overearnings.

In Order No. 24049, the Commission denied United's request to conduct a separate overearnings review of the company's 1990 financial results, stating that "[t]his Commission does not conduct full reviews of interim periods to determine if interim awards were exactly correct." However, we find that the Commission's designation of the first proceeding as "interim" on the issue of United's appropriate rate of return was inappropriate. As this Court explained in *United Telephone Co. v. Mann*, 403 So. 2d 962, 967 (Fla. 1981), "changes in the cost of common equity are not easily calculable, [and thus] not proper subjects for interim hearings." Indeed, the Commission even styled Order No. 22377 as a "final order" setting United's ROE for purposes of the limited proceeding. Thus, we find that the Commission had a duty to conduct a fair hearing to determine whether United's 1990 earnings exceeded its authorized rate of return.

Accordingly, we quash the Commission's orders and remand with directions to hold a hearing on the issue of United's 1990 earnings.

It is so ordered. (OVERTON, McDONALD, SHAW, GRIMES and KOGAN, JJ., concur. BARKETT, C.J., concurs in result only.)

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[1]Section 364.055(5), Florida Statutes (1989), provides in pertinent part:

(5)(a) The commission, in setting interim rates or setting revenues subject to refund, shall determine the revenue deficiency or excess by calculating the difference between a telephone company's achieved rate of return and its required rate of return applied to an average investment rate base or an end-of-period investment rate base.

(b) For purposes of this subsection:

1. "Achieved rate of return" means the rate of return earned by the company for the most recent 12-month period. The achieved rate of return shall be calculated by applying appropriate adjustments consistent with those which were used in the company's most recent rate case and annualizing any rate changes occurring during such period.

2. "Required rate of return" shall be calculated as the weighted average cost of capital for the most recent 12-month period, using the company's last authorized rate of return on equity, the current embedded cost of fixed-rate capital, the actual cost of short-term debt, the actual cost of variable-cost debt, and the actual cost of other sources of capital which were used in the company's last rate case.

3. In a proceeding for an interim increase, the term "last authorized rate of return on equity" used in subparagraph 2. means the minimum of the range of the last authorized rate of return on equity established in the company's most recent rate case. In a proceeding for an interim decrease, the term "last authorized rate of return on equity" used in subparagraph 2. means the maximum of the range of the last authorized rate of return on equity established in the company's most recent rate case.

[2]Section 364.14, Florida Statutes (1989), provides in pertinent part:

(1) Whenever the commission finds, upon its own motion or upon complaint, that the rates, charges, tolls, or rentals demanded, exacted, charged, or collected by any telephone company for the transmission of messages by telephone, or for the rental or use of any telephone line; any telephone receiver, transmitter, instrument, wire, cable, apparatus, conduit, machine, appliance, or device; or any telephone extension or extension system, or that the rules, regulations, or practices of any telephone company affecting such rates, charges, tolls, rentals, or service are unjust, unreasonable, unjustly discriminatory, unduly preferential, or in anywise in violation of law, or that such rates, charges, tolls, or rentals are insufficient to yield reasonable compensation for the service rendered, the commission shall determine the just and reasonable rates, charges, tolls, or rentals to be thereafter observed and in force and fix the same by order as hereinafter provided. In prescribing rates, the commission shall allow a fair and reasonable return on the telephone company's honest and prudent investment in property used and useful in the public service.

[3]In 1990, the legislature created section 364.058, Florida Statutes (Supp. 1990), which gives the Commission express authority to "conduct a limited proceeding to consider and act upon any matter within its jurisdiction, including any matter the resolution of which requires a telecommunications company to adjust its rates." *See* ch. 90-244, § 11, Laws of Fla.

* * *

Criminal law—Sentencing—Habitual violent felony offender—Amendments to statute unconstitutional prior to reenactment as part of Florida Statutes because in violation of single subject rule of Florida Constitution—Chapter law is no longer subject to challenge on ground that it violates single subject requirement after chapter law has been reenacted as portion of Florida Statutes—Validity of amendments falls within definition of fundamental error, and challenge may be raised on appeal even though claim was not raised before trial court

STATE OF FLORIDA, Petitioner, v. CECIL B. JOHNSON, Respondent. STATE OF FLORIDA, Appellant, v. CECIL B. JOHNSON, Appellee. Supreme Court of Florida. Case Nos. 79,150 & 79,204. January 14, 1993. Two Cases Consolidated: An Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance, First District - Case No. 91-742 (Duval County); and An Appeal from the District Court of Appeal - Statutory/Constitutional Invalidity, First District - Case No. 91-00742 (Duval County). Robert A. Butterworth, Attorney General; James W. Rogers, Assistant Attorney General, Bureau Chief, and Charlie McCoy, Assistant Attorney General, Department of Legal Affairs, Tallahassee, Florida, for Petitioner/Appellant. Nancy A. Daniels, Public Defender; and Steven A. Rothenburg and Jamie Spivey, Assistant Public Defenders, Second Judicial Circuit, Tallahassee, Florida, for Respondent/Appellee.

(OVERTON, J.) We have for review *Johnson v. State*, 589 So. 2d 1370 (Fla. 1st DCA 1991), in which the district court held that the amendments to section 775.084, Florida Statutes (1989) (the habitual violent felony offender statute), contained in chapter 89-280, Laws of Florida, violated the single subject rule of article III, section 6, of the Florida Constitution.[1] The district court acknowledged conflict with *Jamison v. State*, 583 So. 2d 413 (4th DCA), *rev. denied*, 591 So. 2d 182 (Fla. 1991), and *McCall v. State*, 583 So. 2d 411 (Fla. 4th DCA 1991),[2] and certified the following to be a question of great public importance:

> WHETHER THE CHAPTER 89-280 AMENDMENTS TO SECTION 775.084(1)([b])(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.

Johnson, 589 So. 2d at 1372. We have jurisdiction. Art. V, § 3(b)(3)-(4), Fla. Const. We answer the certified question in the affirmative and, for the reasons expressed, approve the decision of the district court in this case.

Through an information filed on July 23, 1990, Johnson was charged with the sale or delivery of cocaine. The offense occurred on July 5, 1990. Subsequently, the prosecution filed a notice of intent to classify Johnson as a habitual violent felony offender pursuant to section 775.084. The notice was filed on February 1, 1991, and sought to have Johnson's sentence enhanced on the basis of a prior violent felony conviction on July 16, 1987, for "aggravated battery." On February 21, 1991, Johnson was sentenced to a term of twenty-five years as a habitual violent felony offender, with a ten-year minimum mandatory sentence.

On appeal, Johnson contested his sentence on the grounds that the amendments to the habitual offender statute contained in chapter 89-280 violated the single subject rule of article III, section 6, of the Florida Constitution. Chapter 89-280 contained amendments to sections 775.084, 775.0842, and 775.0843, Florida Statutes (1989), governing sentences for habitual felony offenders, and amendments to chapter 493, Florida Statutes (1989), relating to the repossession of personal property and the licensing requirements of persons authorized to repossess such property. Critical to Johnson's sentencing was the amendment to section 775.084(1)(b)(1)k, which added to the habitual violent felony offender category a defendant who was previously convicted of an "aggravated battery."

Chapter 89-280 was enacted effective October 1, 1989. Chapter 91-44, Laws of Florida, reenacted the 1989 amendments contained in chapter 89-280, effective May 2, 1991, as part of the biennial adoption of the Florida Statutes. The reenactment has

the effect of adopting as the official statutory law of the state those portions of statutes that are carried forward from the preceding adopted statutes. Once reenacted as a portion of the Florida Statutes, a chapter law is no longer subject to challenge on the grounds that it violates the single subject requirement of article III, section 6, of the Florida Constitution. *See Loxahatchee River Envtl. Control Dist. v. School Bd.*, 515 So. 2d 217 (Fla. 1987); *State v. Combs*, 388 So. 2d 1029 (Fla. 1980) (the single subject requirement of article III, section 6, only applies to "chapter laws," and sections of the Florida Statutes need not conform to the requirement); *see also* Linda S. Jessen, *Preface* to Florida Statutes at vi (1991).

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. The window period in this instance ran from October 1, 1989, the effective date of chapter 89-280, to May 2, 1991, the date on which chapter 89-280 was reenacted. Consequently, Johnson had standing to raise the single subject violation. This single subject challenge was not raised before the trial court. Nevertheless, the district court addressed the issue and agreed that the constitutional single subject requirement had been violated, certifying the aforementioned question to this Court.

The State now challenges the district court's decision on two grounds. The State first asserts that Johnson is prohibited from challenging the constitutionality of chapter 89-280's amendments for the first time on appeal because the issue does not constitute fundamental error. Alternatively, the State contends that the amendments contained in chapter 89-280 do not violate article III, section 6, because the amendments all relate to the single subject of controlling crime and, consequently, are properly connected as required by the Florida Constitution.

The Fundamental Error Question

A facial challenge to a statute's constitutional validity may be raised for the first time on appeal only if the error is fundamental. *Trushin v. State*, 425 So. 2d 1126 (Fla. 1982); *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982); *Sanford v. Rubin*, 237 So. 2d 134 (Fla. 1970). In *Sanford*, we reviewed an article III, section 6, constitutional attack on the validity of a chapter law similar to the issue before us here. In that case, we evaluated the question of whether the arguments raised regarding an award of attorney's fees constituted fundamental error so as to allow us to consider a constitutional challenge to the chapter law's title, a challenge that had been raised for the first time on appeal. Because the merits of the case involved an employment retention and compensation question, we determined that the issue of attorney's fees did not go to the merits or the foundation of the case. Consequently, we refused to consider the constitutionality of the chapter law because no fundamental error question was raised. *Sanford*, 237 So. 2d at 138. Subsequently, in reviewing other cases where issues were first being raised on appeal, we concluded that, for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process. *D'Oleo-Valdez v. State*, 531 So. 2d 1347 (Fla. 1988); *Ray v. State*, 403 So. 2d 956 (Fla. 1981).

A review of the chapter law at issue reflects that it affects a quantifiable determinant of the length of sentence that may be imposed on a defendant. Section 775.084 allows a court to impose a substantially extended term of imprisonment on those defendants who qualify under the statute. Under the amendments to section 775.084 contained in chapter 89-280, Johnson was sentenced to a maximum sentence of twenty-five years, with a minimum mandatory sentence of ten years. Had he not qualified as a habitual offender under the new amendments, his maximum sentence under the guidelines would have been three and one-half years. Clearly, the habitual felony offender amendments contained in chapter 89-280 involve fundamental "liberty" due process interests. Contrary to the question raised in *Sanford*, we find the issue in this case to be a question of fundamental error.

We reached a similar conclusion in *Trushin* by finding that the arguments concerning the constitutional facial validity of the statute under which Trushin was convicted raised a fundamental error. 425 So. 2d at 1130. However, we specifically noted in *Trushin* that "[t]he constitutional application of a statute to a particular set of facts is another matter and must be raised at the trial level." *Id.* at 1129-30. We conclude that the validity of chapter 89-280 falls within the definition of fundamental error as a matter of law and does not involve any factual application. Consequently, we hold that the challenge may be raised on appeal even though the claim was not raised before the trial court.

The Single Subject Requirement

Having found that the constitutional challenge is properly before this Court, we now address Johnson's contention that the amendments to the habitual felony offender statute contained in chapter 89-280 violate the single subject requirement of article III, section 6. We recently addressed the purpose of this single subject requirement in *Martinez v. Scanlan*, 582 So. 2d 1167, 1172 (Fla. 1991):

> The purpose of this constitutional prohibition against a plurality of subjects in a single legislative act is to prevent "logrolling" where a single enactment becomes a cloak for dissimilar legislation having no necessary or appropriate connection with the subject matter. *State v. Lee*, 356 So. 2d 276 (Fla. 1978). The act may be as broad as the legislature chooses provided the matters included in the act have a natural or logical connection. *Chenoweth v. Kemp*, 396 So. 2d 1122 (Fla. 1981).

In applying that purpose to chapter 89-280, we note the district court's description of that law:

> The title of the act at issue designates it an act relating to criminal law and procedure. The first three sections of the act amend section 775.084, Florida Statutes, pertaining to habitual felony offenders; section 775.0842, Florida Statutes, pertaining to career criminal prosecutions; and section 775.0843, Florida Statutes, pertaining to policies for career criminal cases. Sections four through eleven of the act pertain to the Chapter 493 provisions governing private investigation and patrol services, specifically, repossession of motor vehicles and motorboats.

Johnson, 589 So. 2d at 1371. As the district court noted, it is "difficult to discern a logical or natural connection between career criminal sentencing and repossession of motor vehicles by private investigators." *Id.* We agree. Chapter 89-280 addresses two very separate and distinct subjects, the first being the habitual offender statute, and the second being the licensing of private investigators and their authority to repossess personal property. These two concerns have absolutely no cogent connection; nor are they reasonably related to any crisis the legislature intended to address. *See Scanlan*; *Burch v. State*, 558 So. 2d 1 (Fla. 1990); *Bunnell v. State*, 453 So. 2d 808 (Fla. 1984). No reasonable explanation exists as to why the legislature chose to join these two subjects within the same legislative act, and we find that we must reject the State's contention that these two subjects relate to the single subject of controlling crime.

We hold that chapter 89-280 violates article III, section 6, of the Florida Constitution. However, we 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. Consequently, the amendments contained within chapter 89-280 became effective on May 2, 1991, rather than October 1, 1989. *See Loxahatchee River Envtl. Control Dist. v. School Bd.*, 515 So. 2d 217 (Fla. 1987); *State v. Combs*, 388 So. 2d 1029 (Fla. 1980).

We realize that this decision will require the resentencing of a number of individuals who were sentenced as habitual felony offenders under section 775.084 as amended by chapter 89-280 for the period of October 1, 1989, to May 2, 1991. However, the resentencing requirement will apply only to those defendants affected by the *amendments* to section 775.084 contained in chapter 89-280, such as the addition of the aggravated battery conviction category at issue here. This result is mandated by the legislature's failure to follow the single subject requirement of the constitution. Had the legislature passed the habitual offender amendments in a single act, this case would not be before

today.

Accordingly, for the reasons expressed, we approve the decision of the district court in the instant case and disapprove the decisions of the Fourth District Court of Appeal in *Jamison v. State*, 583 So. 2d 413 (4th DCA), *rev. denied*, 591 So. 2d 182 (Fla. 1991), and *McCall v. State*, 583 So. 2d 411 (Fla. 4th DCA 1991). This cause is remanded for resentencing in accordance with the valid laws in effect at the time of Johnson's sentencing on February 21, 1991.

It is so ordered. (BARKETT, C.J., and McDONALD, SHAW, KOGAN and HARDING, JJ., concur. GRIMES, J., concurs with an opinion.)

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[1]Article III, section 6, provides: "Every law shall embrace but one subject and matter properly connected therewith . . . ."

[2]*McCall* is a one paragraph opinion in which the Fourth District Court of Appeal held that chapter 89-280 did not violate the constitutional single subject requirement. As such, in *Johnson* the First District acknowledged conflict with *McCall*. However, the record in *McCall* reflects that McCall's sentence is actually outside the scope of this review. McCall was sentenced under section 775.084 because of several prior felony convictions, including delivery of cocaine and grand theft. None of the prior conviction categories under which McCall was habitualized were altered by the amendments to the statute contained in chapter 89-280. Consequently, McCall's sentence is unaffected by this opinion.

(GRIMES., J., concurring.) In *Jamison v. State*, 583 So. 2d 413 (Fla. 4th DCA), *rev. denied*, 591 So. 2d 182 (Fla. 1991), and *McCall v. State*, 583 So. 2d 411 (Fla. 4th DCA 1991), the court relied upon this Court's decision in *Burch v. State*, 558 So. 2d 1 (Fla. 1990), in concluding that chapter 89-280 did not violate the single subject rule. As the author of the *Burch* opinion, I find that case to be substantially different. The *Burch* legislation was upheld because it was a comprehensive law in which all of the parts were at least arguably related to its overall objective of crime control. Here, however, chapter 89-280 is directed only to two subjects—habitual offenders and repossession of motor vehicles and motor boats—which have no relationship to each other whatsoever. Thus, I conclude that this case is controlled by the principle of *Bunnell v. State*, 453 So. 2d 808 (Fla. 1984), rather than *Burch*.

* * *

Criminal law—Evidence—Statements of defendant—Accident investigation privilege—Statements made by defendant during accident investigation, after he had been read *Miranda* warning, but when he had not been told that he was required to respond to questions, were voluntary statements and were admissible—Evidence that defendant had consumed alcoholic beverages on night of incident was relevant to charge of reckless driving in case of manslaughter by culpable negligence and was properly admitted

STATE OF FLORIDA, Petitioner, vs. ERIC C. NORSTROM, Respondent. Supreme Court of Florida. Case No. 78,568. January 14, 1993. Application for Review of the Decision of the District Court of Appeal—Certified Great Public Importance. Fourth District—Case No. 89-1966 (Palm Beach County). Robert A. Butterworth, Attorney General and Joan Fowler, Senior Assistant Attorney General, West Palm Beach, Florida, for Petitioner. Michael Salnick of Salnick & Krischer, West Palm Beach, Florida, for Respondent,

(OVERTON, J.) We have for review *Norstrom v. State*, 587 So. 2d 1148 (Fla. 4th DCA 1991), in which the district court held that statements made by Norstrom, after he was informed of his *Miranda*[1] rights and signed a waiver form, were not admissible because the statements were made during the accident investigation phase of the incident and were, therefore, privileged under section 316.066, Florida Statutes (Supp. 1988). The district court certified the following to be a question of great public importance:

> WHETHER STATEMENTS MADE IN THE COURSE OF A POST ACCIDENT INVESTIGATION BY AN INDIVIDUAL IN POLICE CUSTODY ARE PRIVILEGED UNDER § 316.066, FLORIDA STATUTES, WHERE MIRANDA WARNINGS HAVE BEEN GIVEN AND THE INDIVIDUAL IS NOT TOLD THAT HE OR SHE IS REQUIRED TO ANSWER THE QUESTIONS.

[1]**1153.** We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We find that, since Norstrom voluntarily made the statements after *Miranda* warnings had been given, there is no evidence that Norstrom's Fifth Amendment rights were violated. Accordingly, we find that his statements were admissible and answer the question in the negative.

The relevant facts, as set forth in the district court's opinion, are as follows:

> According to a statement made by the 16-year-old [Norstrom], on the night of March 25, 1988, he drove to a party attended by fellow high school students. He drank about four eight-ounce cups of beer while there. After the party, the students gathered at the end of High Ridge Road, parking their cars along the side of the road and standing around near them and in the road at the end of the dead-end street. There were no street lights in the area.
>
> Sometime before midnight, [Norstrom] left the High Ridge Road party to take a friend home. He then headed back to pick up another friend. He had difficulty finding the party again. He drove down the street at what he estimated to be seventy to seventy-five miles per hour. By the time he saw the people at the end of the street, it was too late to stop. He slammed on the brakes and lost control of his car. The car struck seven persons, killing one and seriously injuring two others. Several cars were also struck.
>
> Following the accident, [Norstrom] told his friend to find a police officer. The friend found Officer Oliphant who testified that his sergeant had requested him to pick up somebody involved in a traffic accident with injuries. The officer also testified that he could not be certain that he handcuffed [Norstrom], but told him he was under arrest, and believed he told him it was for a traffic accident with injuries. He did not advise [Norstrom] of his rights.
>
> Officer Thomas, who was with Officer Oliphant, subsequently testified that [Norstrom] was not handcuffed, and that he (Thomas) was not aware that [Norstrom] was under arrest. However, he conceded that it was possible that Officer Oliphant told [Norstrom] he was under arrest. The officers took [Norstrom] and his friend to the police station, and (although he did not smell any alcohol), Officer Oliphant later took [Norstrom] to Bethesda Hospital for a blood alcohol test.
>
> Marie Lavoie, the officer in charge of the investigation, spoke with [Norstrom] at the police station, and later testified that he was not under arrest at that time. She testified that he was not in custody and that he gave a taped statement which was part of the accident investigation. Officer Lavoie read Miranda warnings to [Norstrom] prior to questioning him. Officer Lavoie also told him:
>
> > What I need to do here Eric so you understand is read you what we have the rights card here. Anytime we talk to anybody involving an investigation like we are doing it is important that you understand what your rights are. It doesn't mean anything other than that it is important to us that you understand what your rights are. Do you understand that? Okay, this is one of those things is a big deal and I want to make sure we're understanding each other. Okay?
>
> After [Norstrom] told Officer Lavoie and Detective Bean what he could recall about the accident and the events of that night, Officer Lavoie stated:
>
> > Alright, Eric, I'm going to let you know at this point that we're gonna kinda change hats here, ok? It's an accident with serious injuries and we do have a fatality so pending on the results of the blood test that was taken from you at the hospital, if it comes back that you were under the influence of alcohol at the time then proper charges will be filed. I have to let you know that so I'm just going to ask you a few questions that would cover that aspect as far as the DUI charge, driving under the influence charge. Do you understand? ....
>
> The officer then asked [Norstrom] some questions regarding his drinking that night. She later acknowledged that she made the "changing hats" remark as a way to signify to [Norstrom] that she was going from the accident portion of the investigation into the criminal portion of the investigation.
>
> The record does not reflect that the officer ever told [Norstrom] that he was required to answer any questions or otherwise referred to his obligation under the accident investigation statute . . . .

Volume 18, Number 5
January 29, 1993

SUPREME COURT OF FLORIDA

Criminal law—Sentencing—Habitual violent felony offender sentence did not violate due process requirements, protection against double jeopardy, or constitutional prohibition against ex post facto laws—Amendments to statute unconstitutional prior to reenactment as part of Florida Statutes because in violation of single subject rule of Florida Constitution—Resentencing not required where none of amendments affected defendant's sentence

ISAIAH PERKINS, Petitioner, vs. STATE OF FLORIDA, Respondent. Supreme Court of Florida. Case No. 78,613. January 21, 1993. Application for Review of the Decision of the District Court of Appeal - Statutory Validity. First District - Case No. 90-2169 (Suwannee County). Nancy A. Daniels, Public Defender and Glen P. Gifford, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida, for Petitioner. Robert A. Butterworth, Attorney General; and James W. Rogers, Bureau Chief, Criminal Law and Edward C. Hill, Jr., Assistant Attorney General, Tallahassee, Florida, for Respondent.

(OVERTON, J.) We have for review *Perkins v. State*, 583 So. 2d 1103 (Fla. 1st DCA 1991), in which the district court held that Perkins' sentence as a habitual violent felony offender under section 775.084, Florida Statutes (1989), did not violate constitutional due process requirements, the protection against double jeopardy, or the constitutional prohibition against ex post facto laws.[1] We recently approved a similar holding in *Tillman v. State*, No. 78,715 (Fla. Nov. 19, 1992) [17 F.L.W. S707]. Consequently, we approve the district court's holding in this case.

Nevertheless, based on our decision in *State v. Johnson*, Nos. 79,150 & 79,204 (Fla. Jan. 14, 1993) [18 F.L.W. S55], we must remand this cause for resentencing. The record reflects that Perkins was sentenced as a habitual violent felony offender under an amendment to section 775.084 contained in chapter 89-280, Laws of Florida. In *Johnson*, we determined that chapter 89-280 violated the single subject provision of article III, section 6, of the Florida Constitution. As such, Perkins' sentence as a habitual violent felony offender is unconstitutional. Accordingly, we remand this cause for resentencing in accordance with our decision in *Johnson*.

It is so ordered. (McDONALD, SHAW, GRIMES and HARDING, JJ., concur. BARKETT, C.J. and KOGAN, J., concur in result only.)

[1]We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

* * *

Criminal law—Sentencing—Habitual offender—Amendments to statute unconstitutional prior to reenactment as part of Florida Statutes because in violation of single subject rule of Florida Constitution

WILLIE BUTLER, Petitioner, vs. STATE OF FLORIDA, Respondent. Supreme Court of Florida. Case No. 80,060. January 21, 1993. Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. Fifth District - Case No. 91-2137 (Orange County). James B. Gibson, Public Defender and Sophia B. Ehringer, Assistant Public Defender, Seventh Judicial Circuit, Daytona Beach, Florida, for Petitioner. Robert A. Butterworth, Attorney General and Anthony J. Golden, Assistant Attorney General, Daytona Beach, Florida, for Respondent.

(OVERTON, J.) We have for review *Butler v. State*, 599 So. 2d 1295 (Fla. 1992), in which the district court considered the same question we recently answered in *State v. Johnson*, Nos. 79,150 & 79,204 (Fla. Jan. 14, 1993)[1] [18 F.L.W. S55]. In accordance with our decision in *Johnson*, we quash the decision of the district court in the instant case and remand this cause for resentencing.

It is so ordered. (BARKETT, C.J., and McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.)

[1]We have jurisdiction. Art. V, § 3(b)(3)-(4), Fla. Const.

* * *

ROBERT LEE COON, Petitioner, vs. STATE OF FLORIDA, Respondent. Supreme Court of Florida. Case No. 80,151. January 21, 1993. Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions. Second District - Case No. 91-02863 (Hardee County). James Marion Moorman, Public Defender and Julius Aulisio, Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida, for Petitioner. Robert A. Butterworth, Attorney General and Sue R. Henderson, Assistant Attorney General, Tampa, Florida, for Respondent.

(OVERTON, J.) We have for review *Coon v. State*, 605 So. 2d 93 (Fla. 2d DCA 1992), in which the district court addressed the same question we recently answered in *State v. Johnson*, Nos. 79,150 & 79,204 (Fla. Jan. 14, 1993)[1] [18 F.L.W. S55]. In accordance with our decision in *Johnson*, we quash the decision of the district court in the instant case and remand this cause for resentencing.

We decline to consider the other issue raised by Coon.

It is so ordered. (BARKETT, C.J., and McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.)

[1]We have jurisdiction. Art. V, § 3(b)(3),-Fla. Const.

* * *

STATE OF FLORIDA, Petitioner/Appellant, v. TYRONE M. CLAYBOURNE, Respondent/Appellee. Supreme Court of Florida. Case No. 80,157. January 21, 1993. Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. First District - Case No. 91-1472 (Okaloosa County); and An Appeal from the District Court of Appeal - Statutory/Constitutional Invalidity. First District - Case No. 91-1472 (Okaloosa County). Robert A. Butterworth, Attorney General; and James W. Rogers, Senior Assistant Attorney General, Bureau Chief, Criminal Appeals, and Charlie McCoy, Assistant Attorney General, Tallahassee, Florida, for Petitioner/Appellant. Nancy A. Daniels, Public Defender and Abel Gomez, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida, for Respondent/Appellee.

(OVERTON, J.) We have for review *State v. Claybourne*, 600 So. 2d 516 (Fla. 1st DCA 1992), in which the district court addressed the same question we recently answered in *State v. Johnson*, Nos. 79,150 & 79,204 (Fla. Jan. 14, 1993)[1] [18 F.L.W. S55]. In accordance with our decision in *Johnson*, we approve the decision of the district court in the instant case.

It is so ordered. (BARKETT, C.J., and McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.)

[1]We have jurisdiction. Art. V, § 3(b)(1), (3)-(4), Fla. Const.

* * *

STATE OF FLORIDA, Petitioner/Appellant, v. EMANUEL PRIDE, Respondent/Appellee. Supreme Court of Florida. Case No. 80,277. January 21, 1993. Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. First District - Case No. 91-2356 (Okaloosa County); and An Appeal from the District Court of Appeal - Statutory/Constitutional Invalidity. First District - Case No. 91-2356 (Okaloosa County). Robert A. Butterworth, Attorney General; and James W. Rogers, Bureau Chief, Criminal Law and Charlie McCoy, Assistant Attorney General, Tallahassee, Florida, for Petitioner/Appellant. Nancy A. Daniels, Public Defender and John R. Dixon, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida, for Respondent/Appellee.

(OVERTON, J.) We have for review *Pride v. State*, 603 So. 2d 24 (Fla. 1st DCA 1992), in which the district court addressed the same question we recently answered in *State v. Johnson*, Nos. 79,150 & 79,204 (Fla. Jan. 14, 1993)[1] [18 F.L.W. S55]. In accordance with our decision in *Johnson*, we approve the decision of the district court in the instant case.

It is so ordered. (BARKETT, C.J., and McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.)

[1]We have jurisdiction. Art. V, § 3(b)(1), (3)-(4), Fla. Const.

* * *

Reports of all opinions include the full text as filed. Cases not final until time expires to file rehearing petition and, if filed, determined.

APPENDIX C