IN THE SUPREME COURT OF FLORIDA

DWIGHT ROBERTS,

Petitioner,

v. Case No. SC11-2567

STATE OF FLORIDA,

Respondent.
_____/

BRIEF FOR PETITIONER

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STATEMENT OF THE FACTS AND CASE

1. On December 27, 1990, Dwight Roberts committed the crime of "aggravated battery." On October 6, 1992, he was convicted of that offense and was sentenced to 15 years.

2. He later was charged with attempted murder, robbery, and attempted kidnapping in Pinellas County. These crimes arose out of one continuous incident that took place on September 14, 1991. He was tried before a jury and was acquitted on the attempted murder charge, but was convicted of Count II – robbery, and Count III – attempted kidnapping.

3. When he was sentenced for these two crimes, on January 10, 1996, the court said:

> …Mr. Robert [sic] was sentenced as a career criminal. He qualified then and he certainly qualifies now.
>
> I will, realizing that Mr. Roberts could be sentenced to a maximum sentence of life imprisonment on the robbery, hereby sentence Mr. Roberts to a term of 40 years in prison as a career criminal on the robbery charge.
>
> *I will find based on his conviction of aggravated battery that he qualifies as an habitual violent felony offender and impose a 15 year minimum mandatory sentence on Count II.*

> I will sentence Mr. Roberts to 30 years in the Department of Corrections as a career criminal on Count III, the kidnapping, find also that *he qualifies as an habitual violent [sic] and impose a 10 year minimum mandatory on that count*.
>
> Both counts – both term of year sentences and the minimum mandatory sentences running concurrent with each other …
>
> (Emphasis added. A copy of this transcript excerpt is included in the Appendices and made a part hereof as **Appendix A**.)

4. Thus, Mr. Roberts was given a 40-year sentence for the robbery conviction, and a 30-year sentence on the attempted kidnapping conviction. In addition, the December 27, 1990 "aggravated battery" was the "predicate offense" which the court used as the basis for sentencing Roberts as an habitual violent felony offender for each of the two September 14, 1991 "principal offenses." He received a mandatory minimum of 15 years for being an habitual violent felony offender for the robbery, and a 10-year minimum as an habitual violent felony offender for the attempted kidnapping. All of the sentences were to run concurrently.

5. The statute relied on by the state to establish that the December 27, 1990 aggravated battery could be used as a predicate offense during the 1996 sentencing was Chapter 89-280, Laws of Florida, enacted to take effect on October

1, 1989. A copy is included in the Appendices and made a part thereof as **Appendix B**.

6. Chapter 89-280 was held unconstitutional in *State v.Johnson*, 616 So.2d 1 (Fla. 1993) for violating the Florida single subject rule. Roberts' aggravated battery had taken place on December 27, 1990, during the period while 89-280 was unconstitutional.

7. During the "window period" while Ch. 89-280 was unconstitutional, the previous valid statute on the same subject sprang into effect and became applicable. A copy of that previous statute, Section 775.084, the law which was in place in 1988 and the first part of 1989, is found in the 1988 Supplement to the Florida Statutes, 1987, and is included in the Appendices and made a part hereof as **Appendix C**. That statute did not list aggravated battery as an offense which could be used as a predicate for an habitual violent felony offender sentence. Aggravated battery was not added to the list of predicate offenses until the adoption of Chapter 89-280.

8. Chapter 89-280 was reenacted by the Legislature in 1991, as part of the biennial reenactment of the Florida Statutes. The reenactment statute stated that it was to take effect upon "publication" of the 1991 Florida Statutes. (See **Appendix D**, the reenactment statute, Chapter 91-44, Laws of Florida, 1991).

The subject of this proceeding is a post-conviction motion, based on Rule 3.800 of the Florida Rules of Criminal Procedure, which was filed on December 16, 2009, in the Pinellas Circuit Court. A copy of the motion is included in the Appendices as **Appendix E**.

No hearing was provided by the Circuit Court on the motion. Instead, on April 13, 2010, an order was issued by the Circuit Court denying the motion. A copy of that court order is included in the Appendices as **Appendix F**.

An appeal was taken to the District Court of Appeal for the Second District of Florida and that the court issued its opinion on November 30, 2011. A copy of the opinion can be found in **Appendix G** of the Appendices. The court decided against Dwight Roberts and in favor of the state for the reason that it was "bound by the clear language of *Johnson* [*State v. Johnson*, 616 So.2d 1, 4 (1993)], which provides that the 1989 amendment of section 775.084 became effective on May 2, 1991 . . . . " Thus, the District Court of Appeal had no choice because of language in *Johnson,* even though that language had not been fully explained in that decision and was not the result of analysis. The District Court of Appeal then certified to this Court the following question as one of great public importance:

> DOES THE ANNUAL OR BIENNIEL REENACTMENT OF FLORIDA STATUTES BECOME EFFECTIVE ON THE DATE THAT THE BILL PROVIDING FOR SUCH REENACTMENT BECOMES LAW—WITH OR WITHOUT THE GOVERNOR'S SIGNATURE—WHEN THE LEGISLATION INCLUDES LANGUAGE THAT

THE LAW SHALL TAKE EFFECT IMMEDIATELY UPON PUBLICATION?

Petitioner filed a Notice to Invoke Jurisdiction of the Supreme Court of Florida on December 19, 2011. This Court accepted jurisdiction of this case by order dated February 29, 2012.

SUMMARY OF THE ARGUMENT

In December, 2009, a 3.800 motion was filed in Roberts' behalf by undersigned counsel. In that motion this issue was raised:

> If it can be established that the window period during which the habitual violent felony offender statute was unconstitutional on single subject grounds did not close until *after* the commission of the principal offenses in this case, should the sentencing court have been allowed to sentence the defendant under that statute?

Although Florida case law precedent has not allowed resentencing in a situation where the *predicate offense* took place during the window period while the statute allowing it to be used as a predicate is unconstitutional, resentencing is required if the *principal offense* or *offenses* were committed during the window period. The reenactment statute in our case provides that the reenactment of the unconstitutional law would take place upon *publication*, which was on December 30, 1991. Thus, the window period did not close until then. And, since Roberts' principal offenses were committed on September 14, 1991, they took place within the window period, and Roberts is entitled to be resentenced in accordance with valid sentencing laws in effect at the time he committed those principal offenses.

ARGUMENT
ON
ISSUE ONE

DWIGHT ROBERTS SHOULD NOT HAVE BEEN SENTENCED AS AN HABITUAL VIOLENT FELONY OFFENDER WHEN HIS PRINCIPAL OFFENSES WERE COMMITTED DURING THE "WINDOW PERIOD" WHILE THE STATUTE ALLOWING AGGRAVATED BATTERY TO BE A PREDICATE FOR AN HABITUAL VIOLENT FELONY OFFENDER SENTENCE WAS UNCONSTITUTIONAL.

Standard of Review: ***De Novo***

A. The Statute Allowing Aggravated Battery as a Predicate Offense Was Unconstitutional During the Window Period of 1989-1991, When That Crime Was Committed.

The statute making the December 27, 1990 aggravated battery conviction the *predicate offense* in this case was unconstitutional during the time of the commission of that offense. Also, it is our position that that statute was unconstitutional at the time of the commission of the *principal offenses* in this case – the robbery and the attempted kidnapping. The statute relied on by the state to establish that the December 27, 1990 aggravated battery offense could be used as a predicate offense during the 1996 sentencing was Chapter 89-280, Florida Laws. That statute specified that it was to take effect on October 1, 1989. A copy of the statute has been included in the Appendices as **Appendix B**. That statute allowed the use of "aggravated battery" as a predicate for an habitual violent felony

offender sentence. However, Ch. 89-280 was held unconstitutional in *State v. Johnson*, 616 So. 2d 1 (Fla. 1993) for violating the Florida single subject rule.

During the period while Chapter 89-280 was invalid and unconstitutional, and before it was revived by the 1991 biennial reenactment, the previous valid statute on the same subject, the statute which had been replaced by Chapter 89-280, sprang into use again. *See Tims v. State*, 592 So. 2d 741 (Fla. App 2 Dist. 1992); and *Brown v. State*, 609 So. 2d 730 (Fla. App 1 Dist. 1992), review denied, 618 So. 2d 1369 (1992). That previous statute, Section 775.084, is found in the 1988 Supplement to Florida Statutes, 1987, and has been included in the Appendices as **Appendix C**. *See also Montanez v. State*, 746 So.2d 1141 (Fla. App. 3 Dist. 1999), involving a resentencing under *State v. Johnson*. The court in *Montanez* said that the defendant should be resentenced under the 1988 version of Florida Statutes, § 775.084, the law which was in place before the invalid version of 1989-1991 was enacted by the legislature.

The previous statute, **Appendix C**, allows *aggravated assault* to be used as a predicate but *not aggravated battery*. Aggravated battery was not added to the list of predicate offenses until the adoption of Chapter 89-280. Thus, the statute that *could* apply in this case, the statute that preceded and was replaced by 89-280, did not allow an aggravated battery offense to be used as a predicate for an habitual violent offender sentence. The Second District Court of Appeal has no held, in *Pearce v. State*, 638 So. 2d 113 (Fla. App. 2 Dist. 1994).

B. The Principal Offenses in this Case Took Place During the Window Period

It is our position that *the principal offenses in this case also were committed during the window period while 89-280 was unconstitutional* and for that reason Dwight Roberts is entitled to be resentenced. In *Lowe v. State*, 612 So. 2d 625 (Fla. App. 1 Dist. 1993), the defendant's principal offense was committed on October 25, 1990. (The Court in the *Johnson* case had said that the window period during which 89-280 was unconstitutional began as of the effective date of the law, October 1, 1989, and so defendant's offense in *Lowe* took place well within the two-year window period.) The predicate offenses in *Lowe* were out-of-state convictions for crimes that had occurred in 1977, 1985 and 1988. The previous statute, **Appendix C**, had not allowed out-of-state convictions to be used as predicate offenses. The court held that Lowe was entitled to a resentencing in view of the fact that the *principal offense* was committed during the period of the unconstitutionality of Chapter 89-280. In *State v. Johnson,* the predicate offense of aggravated battery took place on July 16, 1987. The principal offense occurred on July 5, 1990, during the 1989-1991 window period while Chapter 89-280 was unconstitutional. The Court found that under those facts Johnson's sentence as a habitual violent felony offender was invalid, and his case was remanded to the Circuit Court for resentencing. In *State v. Thompson*, 750 So. 2d 643 (Fla. 1999), Section 775.084, the statute authorizing sentencing of defendants as habitual

violent felony offenders had been amended by Chapter 95-182, which, pursuant to the specific language of that act, had taken effect on October 1, 1995. That statute violated the single subject rule and was found to be unconstitutional. The defendant's principal offenses were committed on November 16, 1995. The statute was reenacted in 1997. The principal crimes clearly were committed during the window period and because of this it was not necessary, according to this Court, to determine the exact date on which the window closed. Since the principal offenses took place during the window period, the sentence was invalid, and this Court sent the case back to the trial court for resentencing in accordance with valid laws in effect at the time he committed the principal offenses. Similarly, in *Viere v. State*, 833 So. 2d 264 (Fla. App. 3 Dist. 2002), the defendant was sentenced on the basis of a 1995 sentencing guidelines score sheet. The court pointed out that the principal offenses had been committed during the window period while the guidelines were unconstitutional. "Accordingly" said the court, "he is entitled to be resentenced. …" *Id.* at 265. *See also Webb v. State,* 767 So. 2d 481 (2d DCA 2000); *Kinsey v. State,* 831 So. 2d 1253 (Fla. App. 2 Dist. 2002); and *Stubbs v. State*, 673 So. 2d 964, 965 (Fla. App. 1 Dist. 1996).

Therefore, under Florida case law, if the principal offense is committed during the window period, while the statute allowing the predicate offense is unconstitutional, the defendant's sentence should be set aside and he should be returned to the trial court for resentencing. If the principal offenses in the present

case were committed during the window period while 89-280 was unconstitutional (and this is our position), clearly Dwight Roberts is entitled to be resentenced.

C. The Confusion Over the Time of Closing of the Window Period

We know that the principal offenses in this case were committed on September 14, 1991, well after the beginning of the window period, which began when Chapter 89-280 took effect, on October 1, 1989, pursuant to language in that law specifying that that was to be its effective date. But when did the window period end, and did the September 14, 1991 principal offenses take place before or after the window period closed? In the *Johnson* case the Court made the bald statement that the reenactment of 89-280, through Chapter 91-44, **Appendix D**, the reenactment statute that was *passed* on May 2, 1991, "cured the single subject violation as it applied to all defendants sentenced *after that date*." (Emphasis added). This statement is inconsistent with the Court's statement in that case that the window period *began* on October 1, 1989, the *effective date* of Chapter 89-280. Why would the window period begin on the *effective date* of the relevant statute yet end on the *passage date* of the reenacting statute? This makes no sense. Also, the above quoted statement was not necessary to the holding of the case. In *Johnson* the principal offense took place during July, 1990, well within any possible resolution of the question of when the window period ended, clearly before May, 1991, so there was no necessity for the Court to decide whether May

2, 1991, or a later date was the date for the closing of the window period. The statement by the Court failed to take into account and to discuss the differences between *passage* or enactment of a bill by the legislature and the date on which that law *takes effect*. We submit that the effective date, not the date of passage by the Legislature or signing or failure to sign by the Governor, should be the critical date in any analysis of when the window period has closed. After all, until the reenactment became effective, the previous statute, 89-280, was still unconstitutional, null and void.

D. The Closing of the Window Period in Our Case

Article III, Section 9 of the Florida Constitution provides that "Each law shall take effect on the sixtieth day after adjournment *sine die* of the session of the Legislature in which enacted or as otherwise provided therein. . . ." This means the reenactment statute in our case, Chapter 91-44, which was passed by the Legislature on May 2, 1991, either took effect 60 days after adjournment or at another time if that bill provided for a different effective date. In fact, 91-44 does provide a different effective date. Here is what 91-44 says with regard to its effective date:

> Be It Enacted by the Legislature of the State of Florida:
> Section 1. Sections 11.2421, 11.2422, 11.2424, & 11.2425, Florida Statutes are amended to read:
>
> 11.2421 Florida Statute 1991 adopted – The accompanying revision, consolidation, and compilation of the public statutes of 1989 of a general

> and permanent nature…, prepared by the joint committee under the provisions of s. 11.242, together with corrections, changes, and amendments to and repeals of provisions of Florida Statutes 1989 enacted in additional reviser's bill or bills by the 1991 Legislature, *is adopted and enacted as the official statute law of the state under the title of "Florida Statutes 1991"* and *shall take effect immediately upon publication* …. (emphasis added). (*See* the complete statute, **Appendix D**, included in the Appendices and made a part hereof).

So, Chapter 91-44, the curative statute, took effect as of the date of *publication* of the Florida Statutes of 1991, and that date was December 30, 1991. (See **Appendix H**, included in the Appendices and made a part hereof. This is an email message from the Division of Statutory Revision of Florida explaining that December 30, 1991 was the publication date of the 1991 Florida Statutes. This is part of the record in this case). And, since the principal offenses in Dwight Roberts' case were committed on September 14, 1991, before December 30, 1991 and well within the window period, Roberts should be entitled to be resentenced.

The Supreme Court of Florida did not provide any discussion or analysis regarding the determination of the closing date of a window period in either of the leading cases of *Johnson* or *Thompson*. But the Court did very briefly discuss this in *Salters v. State*, 758 So. 2d 667 (Fla. 2000). In *Salters* the Court was concerned with Chapter 95-182, the same law that had been involved in the *Thompson* case. The Court said that the window period closed on May 24, 1997, "when Chapter 97-97 reenacted the amendments contained in Chapter 95-182 as part of the

biennial adoption process." *Id*. at 671. That was the date on which the legislature *passed* Chapter 97-97, rather than the date it *took effect*. (Like 91-44, Chapter 97-97 also provided that its effective date should be the date of publication of the Florida Statutes for that year. In fact, 97-97 is identical to 91-04 in all material respects.) And, in *Salters*, since the defendant's principal offense had taken place on April 27, 1997, the defendant won, and the case was sent back to the trial court for the resentencing of the defendant.

The Court's statement in *Salters* that the date which happened to be the date of passage is the date the window period closed is unfortunate. For one thing, this contradicts the Florida Constitution, Article III, Section 9, which provides that each law shall take effect on the sixtieth day after adjournment or as otherwise provided in that law. In using the date of passage, the Court in *Salters* may have assumed that passage of the reenactment statute provided notice to the world, at the time of passage, that the unconstitutional law was now valid. But how could that reenactment statute provide notice of that kind when the reenactment through Chapter 97-97 (as in the reenactment in our case, through Chapter 91-44) said nothing whatever about the habitual violent felony offender law, and it declared that Chapter 97-97 would have no effect until *publication* of the 1997 Florida Statutes? It also should be pointed out that in *Salters* the Court did not have to be concerned about whether the closing date of the window should be the date of

passage or publication, because the date of the principal offense very clearly predated both the passage and effective dates of Chapter 97-97.

The statement in *Salters* that the window period in that case ended as of passage also was unfortunate because that assertion is contrary to well established principles of law. A statute may take effect upon the happening of a contingency. Sutherland, *Statutes and Statutory Construction*, § 33.7, p. 22 (Sixth Edition, Norman J. Singer, Editor, December, 2001); *Gauden v. Kirk*, 47 So. 2d 567, 574-575 (Fla. 1950); *City of Long Beach Resort v. Collins*, 261 So. 2d 498, 501 (Fla. 1972). When the legislature provides that publication shall be required for a statute to take effect, the purpose of that requirement is to provide notice to the people of the state. Sutherland, *supra*, at § 33.9, p. 26. Where publication is required by the legislature in order for a statute to take effect, it is a condition precedent which must be complied with before that statute has the force and effect of law. Sutherland, *supra*, at § 33.9, pp. 25-26.

A statutory repealing or amending provision (or a reenacting provision, as in this case) with a future effective date will not be operative until the statute itself takes effect. Sutherland, *supra*, at § 33.7, p. 21. When a statute states a time in the future when it shall take effect, it has effect only from that date. *Pinellas County Planning Council v. Smith*, 360 So. 2d 371, 372, fn. 1 (Fla. 1978). *See also* Sutherland, *supra*, at § 33.2, pp. 7 and 8.

There have been some Florida cases decided since *Salters* which have touched on the question of when a "window period" closes as a result of the reenactment. Basically, there are three times when the window period could be considered closed — (1) the time of *passage* of the reenactment bill by the legislature; or (2) the time when the bill becomes law, with or without the Governor's signature; and (3) the *effective date* of the reenactment, the date on which the bill begins to have the force and effect of law. And, under the Florida Constitution, the effective date could be either the sixtieth day after adjournment or such other time as is provided in that bill. And, of course, if the law provides an effective date other than the sixtieth day after adjournment that specified date is the date that should be used. To simplify the discussion which follows in this brief we will refer to these possibilities as either the "enactment" (which includes passage and signing by the Governor or letting the bill become law without signing); or the "effective date."

As to cases following *Salters*, one is *Trapp v State*, 760 So. 2d 924 (Fla. 2000). The facts in *Trapp* are the same, for legal purposes, as those in *Salters*, and the result in *Trapp* is the same as the result in *Salters*. In both cases, when the window closed made no difference because the principal offense involved indisputably took place well within the window period. The window period in *Trapp* began on October 1, 1995 and ended, at the earliest, on May 24, 1997, and the principal crime took place on January 10, 1997, so the defendant's offense took

place well within the window period and the Court held that he was entitled to relief. Determining the exact closing date of the window period was not necessary to the decision. The statement in the opinion to the effect that the window closed at the time that happened to be the date of enactment was not essential to the holding in the case. The same is true in the case of *Diaz v State*, 752 So. 2d 105 (Fla. App. 3 Dist 2000) and in *Tormey v. Moore*, 824 So. 2d 137 (Fla. 2002). In *Diaz* the window period began in 1995 and ended in 1997, and the crime was committed in the middle of that period, on November 1, 1996. In *Tormey* the principal offense also was committed well within any possible resolution of the question of when the closing date of the window period took place, and the statement by the Court indicating that the window closed at the time that happened to be the date of enactment of the reenacting statute was unnecessary. *Id*. at 142.

The case of *Environmental Confederation of Southwest Florida v State*, 852 So. 2d 349 (Fla. App. 1 Dist 2003) supports our position that the *effective date* of the law should determine the closing of the window. A prior statute had allowed environmentalists to intervene at the administrative agency level in adjudications concerning the environment. Then Chapter 2002-261 was adopted, restricting the ability of these groups to intervene in such cases. An environmental group challenged 2002-261 on the ground that it violated the single subject provision of our Constitution. The question before the court was whether the reenactment

statute, Chapter 2003-25, cured such a defect in 2002-261, if that law was defective.

The court said that Chapter 2003-25, the reenactment statute, provided that even though it was passed in May, 2003, it would *take effect* on the sixtieth day after adjournment of the legislature. The legislature adjourned on May 2, 2003 and the court said that therefore the law *took effect* on July 1, 2003. The First District Court of Appeal, on August 13, 2003, denied injunctive and declaratory relief to the environmentalists, dismissing their appeal by saying that since August 13, 2003 was a month and a half after the effective date of the reenactment, their appeal was moot. The court said that under these circumstances, as of the *effective date* of Chapter 2003-25 (July 1, 2003), the single subject defect, if there was such a defect, was cured, and therefore the environmentalists would no longer be entitled to relief. The court said, "they [appellants] have failed to articulate any practical purpose that would be served by allowing this appeal from the denial of declaratory and injunctive relief to continue now that the window period has closed." *Id.* at 350.

Chapter 2003-25 provided that it would take effect sixty days after adjournment, but also that it would take effect immediately upon publication of the 2003 version of the Florida Statutes. Thus, the statute, included in the Appendices as **Appendix I** was confusing — it gave two effective dates. The court chose the sixty day provision, saying that "that same language has been used in prior reenactment acts, and those acts have been construed to make reenactment

effective as of the date on which the act became law." (This statement is confusing, because courts sometimes say that a bill "becomes law" when signed by the Governor even if its effective date is later.) By contrast, the provision in our case, **Appendix D**, does not contain two alternatives. Instead, it says only that the "*publication*" of the "Florida Statutes 1991" should be the effective date. So, Chapter 91-44, unlike Chapter 2003-25, sets forth only one effective date – the date of publication – not the sixtieth day after adjournment as in the *Environmental Confederation* case. The main point to be made is that it was the effective date that was used by the court in *Environmental Confederation* when it had to choose which date to use. *See also Department of Highway Safety and Motor Vehicles v. Johnson*, 980 So. 2d 1118 (Fla. App. 5 Dist. 2008), in which the court used the effective date as the closing date of the window period.

Presumably, an argument could be made that the requirement of notice is satisfied *during* the window period, even before the reenactment statute takes effect. However, this view is contrary to the prevailing view that a statute which is unconstitutional is a complete and total nullity. Cooley, *Constitutional Limitations* (7^{th} ed) at page 259 says, "When a statute is adjudged to be unconstitutional, it is as if it had never been. . . ." Justice Stephen Field of the United States Supreme Court, in *Norton v. Shelby County*, 118 U.S. 425, 442, 6 Sup. Ct. Rep. 1121, 30 L. Ed 178 (1886) said:

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

E. Conclusion

The window period during which Chapter 89-280 was unconstitutional began on October 1, 1989 and ended on December 30, 1991. The principal offenses in our case were committed on September 14, 1991, well within the window period. Thus, Dwight Roberts should be returned to the Circuit Court for resentencing under sentencing laws in effect in 1991, the time when the principal offenses took place.

ARGUMENT
ON
ISSUE TWO

THE ANNUAL OR BIENNIEL REENACTMENT OF FLORIDA STATUTES DOES NOT BECOME EFFECTIVE ON THE DATE THAT THE BILL PROVIDING FOR SUCH REENACTMENT BECOMES LAW—WITH OR WITHOUT THE GOVERNOR'S SIGNATURE—WHEN THE LEGISLATION INCLUDES LANGUAGE THAT THE LAW SHALL TAKE EFFECT IMMEDIATELY UPON PUBLICATION. INSTEAD, IN SUCH CIRCUMSTANCES IT TAKES EFFECT UPON PUBLICATION.

Standard of Review: ***De Novo***

A. The Main Issue in This Case Is Whether the Time of Enactment or the Time the Reenactment Statute Took Effect Was the End of the Window Period.

The District Court of Appeal for the Second District certified the following question to this Court as one of great public importance:

> DOES THE ANNUAL OR BIENNIEL REENEACTMENT BECOME EFFECTIVE ON THE DATE THAT THE BILL PROVIDING FOR SUCH REENACTMENT BECOMES LAW—WITH OR WITHOUT THE GOVERNOR'S SIGNATURE—WHEN THE LEGISLATURE INCLUDES LANGUAGE THAT THE LAW SHALL TAKE EFFECT IMMEDIATELY UPON PUBLICATION?

In other words, using the "enactment" versus "effective date" dichotomy we are utilizing in this brief—at what point did the window period involved in this case end? Was it the time of "enactment" of the reenactment statute, during May, 1991, or the time the reenactment statute "took effect," on December 30, 1991? The reenactment statute "became law" (in common parlance) in May, at the time it was enacted, but had no effect until publication that December. It wasn't until December 30, that it gained the force and effect of law. If the December date is the end point of the window period in this case, Dwight Roberts' sentences should be set aside and his case should be returned to the Circuit Court for resentencing.

It should be pointed out that the December 30, 1991 date of publication (see **Appendix H**) has not been controverted by the state in the proceedings in the courts below and this is part of the record in this case. December 30, 1991, is the date on which the 1991 reenactment statute took effect, and that is the date on which the window period ended. Dwight Roberts' principal offenses were committed on September 14, 1991, before the end of the window period.

B. The Legislature Can Specify The Time When A Statute Takes Effect And Has Done So Insofar As This Case Is Concerned.

The Florida Constitution, Article III, Section 9, gives the Legislature a choice when it comes to determining when a newly enacted statute should take effect. A law takes effect either on the sixtieth day after adjournment of the

session of the Legislature "or as otherwise provided therein" (in that particular law). The 1991 reenactment statute at issue in this case was given an effective date different than the sixty (60) day-after-adjournment date. To quote in part from the 1991 reenactment statute (**Appendix D**):

> [All changes and revisions of the Florida Statutes 1989 by the 1991 Legislature are] adopted and enacted as the official statute law of the state under the title of "Florida Statutes 1991" and shall take effect immediately upon publication . . . .

This year, 2012, the Legislature met earlier in the year than it did in 1991, and as a result the "Laws of Florida" and the "Florida Statutes" will be printed and available by October, 2012. (See **Appendix J**, which is an email message from the Division of Statutory Revision of Florida to undersigned counsel, dated March 7, 2012). Also, since 1995 or 1996, the Laws of Florida and the Florida Statutes are available online, as well as in the printed format. (See **Appendix K**, an email message from the Division of Statutory Revision dated March 8, 2012). However, "publication" of the Laws of Florida and Florida Statutes of 1991 did not take place until December 30th of that year.

C. Significance of the Legislature's Decision To Set the Effective Date at the Time of Publication.

Chapter 89-280 was unconstitutional from the time of enactment. Thus, the statute making the aggravated battery a predicate offense was a nullity from its inception. It did not exist, in legal theory. *See* again *Norton v. Shelby County*,

supra at page 19 and 20 of this brief. Then when the reenactment statute was "enacted" in May, 1991, it "became law" but had absolutely no effect. Those few who were aware of what was taking place knew in May, 1991, that the provisions of 89-280 would go into effect in the future but they also realized that that statute would have no effect whatsoever until December 30th of that year.

The 1991 Legislature could have allowed the biennial reenactment statute to take effect sixty (60) days after adjournment, which would have been in July, 1991. However, the Legislature instead set the date of publication as the effective date. Why was this done? What could have been reasons for setting the effective date at the time of publication, some months after the enactment of the reenactment statute? The answer undoubtedly is that the legislature wanted to provide ample notice to the public before allowing the statute to take effect—to take on the force and effect of law. The sixty (60) day period provided for in the Constitution must not have provided sufficient notice, as far as the Legislature was concerned.

The purpose of the provision stating that statutes should take effect 60 days following adjournment or at such other time specified by the Legislature provides maximum flexibility to the Legislature. If a law is needed to address an emergency situation the Legislature can make that law effective immediately upon its enactment. Or, it can allow the 60-day provision to operate. Or, in a non-emergency situation it can set the effective date at 90 or 120 days after enactment.

And, if the Legislature decides to provide maximum notice to members of the public who will be affected by a law, the Legislature can make publication in the Laws of Florida or Florida Statutes the effective date.

Until the statutes are printed (or, since 1995 or 1996, statutes are available online) there isn't much notice to the public. If a citizen learns that a particular law has been enacted and desires a copy of that law, he or she can phone the Legislature or Division of Statutory Revision and ask that a copy of that law be sent to him or her, but until publication there has been no promulgation of that law. Until publication to the general public there has been very little in the way of notice to the public that a particular law has been enacted. There might be newspaper articles or TV commentaries, but there is no regularized, systematic, official dissemination in the way of notice to the public generally until publication takes place. Obviously, in our situation the Legislature wanted the public to have the greater degree of notice that would be provided by publication of the reenactment statute. It is our position that the intent of the Legislature should be controlling in this case. The reenactment statute should have taken effect as of the time of publication, on December 30, 1991.

D. "Enactment" of the Law in Question Did Not Provide Adequate Notice

As we stated in the previous section, during the period between enactment and publication of the reenactment statute, in 1991, an individual who heard that

such a law had been enacted and who wanted a copy could have phoned Tallahassee and asked that a copy be sent to him or her. In 1991 phone or U.S. Mail probably was the method that would have been used. Email did not come into general use until later.

So, a knowledgeable person could have obtained notice regarding an enacted law and could have accessed that law before it took effect and had the force and effect of law. But that kind of notice would have taken place only in isolated individual situations or transactions, not as a matter of notice to the public generally.

E. Conclusion

The time that a statute takes effect should be the time when the window period in a case such as ours ends. Dwight Roberts' principal offenses took place within the window period.

ARGUMENT
ON
ISSUE THREE

THE HARMLESS ERROR DOCTRINE DOES NOT APPLY IN THIS CASE.

Standard of Review: Clearly Erroneous and *De Novo*

A. Harmless Error?

Dwight Roberts was sentenced to a total of 40 years as a "career criminal" and a minimum of at least 15 years as an habitual violent felony offender. In his order of April 13, 2010, in this post-conviction proceeding, the trial judge below said the following:

> [T]he party seeking relief must show prejudice by demonstrating how the error affected the length of sentence. Wilson v. State, 531 So. 2d 1012, 1013 (Fla. 2d DCA 1989). If the end result, after correcting the error, would yield the same outcome as the original sentence, the error is harmless. Gibbons v. State, 543 So. 2d 860, 861 (Fla. 2d DCA 1989) (pages 1 and 2 of the Order of April 13, 2010 in this case, **Appendix F**.)

In other words, since the defendant Roberts is serving concurrent 40 and 30 career criminal sentences along with the minimum habitual violent felony offender sentences, even if the habitual violent felony offender convictions should be declared to be illegal, the trial court below said that Roberts still would have to serve the 40-year and 30-year concurrent terms, and therefore the illegality would amount to no more than harmless error.

B. There Would Be No Harmless Error Problem if This Case is Remanded For Resentencing

If the Court agrees with us that Dwight Roberts' principal offenses were committed within the "window period," this case presumably would be returned to the Circuit Court for resentencing. In such event Roberts would be sentenced under the valid sentencing laws that were in affect at the time of the principal offenses, September 14, 1991. He would not be sentenced as an habitual violent felony offender.

C. Loss of Gain-Time, and Disabilities Which Flow From an Habitual Violent Felony Sentence While Incarcerated Increase the Severity of Punishment.

Roberts' principal offenses were committed in 1991, and the sentencing statutes that were applicable to him are found in Section 775.084 of the Florida Statutes. Section 775.084 (4)(e) provided that:

> (e) A sentence imposed under this section shall be subject to the provisions of s. 921.001. … [A] defendant sentenced under this section shall not be eligible for gain-time granted by the Department of Corrections except that the department may grant up to 20 days of incentive gain-time each month as provided in s. 944.275(4)(b).

Under this statute, as much as 20 days of gain-time per month was available for habitual violent felony offenders but only for exceptionally meritorious behavior. A convicted defendant such as Roberts, serving an habitual violent felony offender sentence is not eligible for ordinary gain time.

Also, persons serving these sentences are subject to other disabilities. Each inmate goes through a classification process upon entering the correctional system, and the classification for a convicted person serving a sentence as a recidivist would be less favorable to him than the classification of an ordinary offender. Housing and job assignments would not be as favorable as those of inmates serving ordinary sentences. Thus, the type of punishment they receive while in the correctional system is harsher, less favorable, more severe than punishment received by ordinary offenders. And, of course, they serve longer periods in prison because of ineligibility for ordinary gain time. In view of the fact that Roberts is under these disabilities it cannot reasonably be asserted that the imposition of the concurrent habitual violent felony offender sentences in this case amounted to harmless error.

CONCLUSION

It is not uncommon for the following statements to be made in everyday conversations:

"The Legislature passed a law today."

"The Governor signed that bill into law today"

"That bill was signed today and has become law."

In making such comments the speaker and the person to whom the remarks are addressed commonly assume that the law now is in effect. However, "passage" of a bill by the Legislature, or the signing of a bill by the Governor or decision to allow it to "become law" without signing does not necessarily put that "law" into effect. It may have no effect, no consequences, no coercive power whatever at this point in time. Instead, it may become an operative law 60 days after adjournment of the legislature, or at some other time, at the direction of the Legislature.

Many of us, lawyers and those legally trained as well as lay persons tend to group together the terms "passage," "signing by the Governor," "becoming law," and "effective date," as if these words or terms are roughly synonymous. Often, grouping them together as if interchangeable will not have any adverse effect on anyone, but there are instances, such as in the present case, in which it becomes extremely important to separate and clearly define each of these words or phrases and to pause and carefully reflect on the meaning and significance of each of them.

"Passage" of a bill by the Legislature does not make it a "law." The signing of a bill by the Governor, thereby "making it law" does not mean that it yet has any binding effect on anyone or anything. It is a "law" in name only, not in any actual sense. It only becomes a real law at the point in the future when it takes effect. Only on its "effective date" does it truly "become" a "law."

In cases such as ours, where the freedom, the liberty, of a man depends on the meaning of such words or terms it is imperative that we most carefully and thoughtfully assess the meaning of the 1991 Legislature of Florida when it set "publication" as the time for reenactment to take effect. We submit that the intent of the Legislature was to provide the maximum period of notice to the public generally before closing the window period, and that the window period did not close until December 30, 1991.

The window period in this case closed as of the effective date of the 1991 reenactment statute on December 30th of that year. Dwight Roberts' sentences as an habitual violent felony offender are unlawful because his principal offenses took place during the window period while the statute allowing the aggravated battery conviction to be used as a predicate for enhanced sentencing was unconstitutional. Dwight Roberts should be entitled to be resentenced under the valid sentencing

statutes which existed at the time of his principal offenses.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a copy of this BRIEF FOR PETITIONER, by U.S. Mail, this _____ day of March, 2012, upon Pam Bondi, Attorney General of Florida, the Capitol PL-01, Tallahassee, FL 32399-1050..

_____
BRUCE R. JACOB

CERTIFICATE OF COMPLIANCE WITH FONT SIZE REQUIREMENTS

I HEREBY CERTIFY that this brief was prepared using 14-point Times New Roman font size, thus satisfying the requirements of Rule 9.100.

_____
Bruce R. Jacob