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IN THE

SUPREME COURT OF FLORIDA

THOMAS JAMES GILMORE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 79,877

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender

DEBRA MOSES STEPHENS
Assistant Public Defender
Florida Bar No. 709890
15th Judicial Circuit of Florida
Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner, Thomas James Gilmore, was the Appellant and Respondent, State of Florida, was the Appellee in the Fourth District Court of Appeal.

In the brief, the parties will be referred to as they appear before this Court.

STATEMENT OF THE W E

An information was filed against Petitioner on October 23, 1990, charging him with Possession of a Firearm by a Convicted Felon, and Resisting Arrest without Violence on October 1, 1990. R 187. On May 16, 1991 the State of Florida filed Notice of Intent to Rely on Enhanced Penalties. R 213. The Petitioner pled not guilty and was given a trial by jury. He was found guilty of Possession of a firearm by a Convicted Felon. R 212.

On May 29, 1991, Petitioner was declared a habitual offender by the trial court, and sentenced to 30 years in prison. The petitioner had five prior felony convictions, however, four of those convictions took place on September 6, 1988, and the other occurred on June 22, 1989. R 177-174.

Petitioner filed a timely Notice of Appeal on June 7, 1991, (R 229) and this appeal follows.

STATEMENT OF THE FACTS

Three witnesses testified for the state. The first was Danny Williams an officer with the Fort Pierce Police Department. Williams was with the crime scene and identification division. The defense stipulated to his expertise in this area. R 81-83. Williams compared a known sample of Petitioner's prints to five prior judgements with fingerprints on them and determined that Petitioner was the person contained in those convictions. R 85-89.

Officer Charles Scavuzzo testified that he was a police officer with the Fort Pierce Police Department. He received a call early on October 1, 1990 to be on the look out for a yellow Nissan Maxima station wagon with temporary tags, in reference to an incident unrelated to the trial of this case. R 90-92. The officer said that he knew this car from past traffic stops. R 92. Scavuzzo pulled behind the car and activated his blue lights. Both cars were traveling at about 20 miles per hour. The car sped up and the pulled over. This all took place in a matter of seconds. Then Petitioner and two other young men jumped out of the car and ran. Petitioner looked back before he ran. Scavuzzo was able to recognize him as someone he had stopped on several occasions before. R 93-97. He was abaut to chase the suspects when he noticed something shiny on the floor of the passenger seat of the car. He decided to try and catch the young man on the passenger side of the car, but then thought better of it and returned to the car to secure the weapons left on the passenger side floor board. R 99-101. when he returned to look for the young man he discovered

that he had dropped the weapon as he was running. He retrieved that gun and placed it into evidence with the other guns. R 102.

John Spiller was the last to testify. He told the jury that he was an Assistant State Attorney for the Nineteenth Circuit, and that he had been assigned to this case from the beginning, During that time he took a statement from the Petitioner. The statement was freely and voluntarily given with Petitioner's lawyer present. In this statement Petitioner said that he knew nothing about the burglary and theft of the guns but that the passenger in the car owned the car. Petitioner did not know that the guns were in the car and only drove because his friends had been drinking. Petitioner said that the passenger tried to sell him a gun. He walked up to Petitioner on the street and tried to sell him the gun. R 122-134.

SUMMARY OF THE ARGUMENT

POINT I

The court erred when it allowed the state to introduce Petitioner's statement made during plea negotiations in the trial of that case.

POINT II

Section 775.084, of the Florida Statutes (1989), Chapter 89-280, Laws of Florida, violates the one subject rule of the Florida Constitution.

ARGUMENT

POINT I

THE PETITIONER WAS DENIED A FAIR TRIAL DUE TO THE INTRODUCTION OF PETITIONER'S STATEMENT MADE DURING PLEA NEGOTIATIONS, DURING HIS TRIAL.

The last person to testify in this case was John Spiller. Mr. Spiller was the prosecutor on the case up until the day of trial. At that time he announced his intention to let another prosecutor try the case as he intended to testify in the case. He testified that he was a prosecutor for the state of Florida and he was assigned to the case on trial today. He also testified that the transcript had been reviewed and was accurate. However, he noted on several occasions that what the Petitioner had to say was inaudible. R 122, 126, 127, 130. He placed the Petitioner under oath and took a statement from him. R 121. He then read into evidence a transcript of a taped statement that he took from the Petitioner. Mr. Spiller filled in all of the inaudible portions with his own memory. The tape was a part of a plea negotiation which fell through. R 136.

Section 90.410 states specifically: Evidence of a plea of guilty, later withdrawn ... to a crime charged or any other crime is inadmissible in any ... criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible. ... Section 90.410 aids in promoting both the efficiency and fairness of our system. Dawson v. State, 16 F.L.W. 2279 (Fla. 4th DCA 1991). "Guilty pleas are an essential part of our criminal justice system and candor in plea discussions aids

greatly in the reaching of agreements between the defendant and the state." As cited in Dawson, supra, Landrum v. State, 430 So.2d **549, 559 (Fla.** 2d DCA 1983) (quoting State v. Trujillo, 93 N.M. **724, 727**, ***605*** **P.2d 232,** 235 (1980)). We agree that "the purpose of section 90.410 is of such importance that **...** violation of that section cannot be **deemed** harmless." Landrum, supra, at 550 as cited in Dawson.

This error requires reversal, because they destroy the essential fairness of the case. What makes this error difficult is that counsel failed to object to it. Petitioner contends that this error was so egregious that even without the objection it constituted fundamental error. In **Dukes v. State**, 356 So.2d 873 (Fla. 4th DCA 1978) the totality of the circumstances led the court to reverse because Petitioner did not receive a fair trial. They note, "A reversal of this case is **made** more difficult because of the failure of the Public Defender to timely object to many of the improprieties now charged against the prosecutor. However if the errors complained of destroy the essential fairness of a criminal trial, they cannot be countenanced regardless of **lack** of objection." In the **case sub** judice, the counsel **for** defense failed to object to the introduction of this statement that was sure to adversely affect Petitioner during his trial. The error, introduction of a statement made during plea negotiations, did not allow Petitioner to receive a fair trial. In addition the fact that Petitioner identified himself as an Assistant State Attorney who had been working on the case, and Petitioner's attorney was

present when the statement was given, could only lead the jury to believe that the Petitioner had been ready to plead to this case. This infers that Petitioner is guilty. Thus the case should be reversed and remanded far a new trial.

POINT 11

SECTION 775.084, FLORIDA STATUTES (1989), CHAPTER *89-280,* **LAWS** OF FLORIDA, VIOLATES THE ONE SUBJECT RULE OF THE FLORIDA CONSTITUTION

Petitioner's offense date was October 1, 1990, which was after the October 1, 1989, effective date of Section 775.084, Florida Statutes (1989), Ch. 89-280, Laws of Florida. Petitioner was sentencedto thirty years in the Department of Corrections pursuant to this statute. R 3-4. Petitioner contends that Section 775.084, Florida Statutes (1989), Ch. 89-280, Laws of Florida violates the one subject rule of Article 111, Section 6 of the Florida Constitution which provides:

> Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection. The enacting clause of every law shall read:
> "Be It Enacted by the Legislature of the State of Florida."

Chapter 89-280 embraces two subjects: habitual felony offenders and the repossession of motor vehicles. The first three sections of Chapter 89-280 amended Sections 775.084 (habitual offender statute), 775.0842 (careercriminal statute), and 775.0843 (policies for career criminals), Florida Statutes. Section four of Chapter 89-280 created Section 493.30(16), Florida Statutes,

defining "repossession."[1] Section five amended Section 493.306(6), adding license requirements for repossessor. Section six created Section 493.317(7) and (8), prohibiting repossessor from failing to remit money or deliver negotiable instruments. Section seven created Section 493.3175, regarding the sale of property by repossessor. Section eight amended Section 493.318(2), requiring repossessor to prepare and maintain inventory. Section nine amended Section 493.321, providing penalties. Section ten created Section 493.3176, requiring certain information be displayed on vehicles used by repossessor.

In State v. Burch, 558 So.2d 1 (Fla. 1990), the Florida Supreme Court quoted the following from State v. Thompson, 120 Fla. 860, 163 So. 270 (1935):

> Where duplicity of subject-matter is contended for as violative of Section 16 of Article III of the constitution relating to and requiring but one subject to be embraced in a single legislative bill, the test of duplicity of subject is whether or not the provisions of the bill are designed to accomplish separate and disassociated objects of legislative effort.

Burch, supra, at 2.

The Busch Court also quoted from Chenowith v. Kemp, 396 So.2d

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[1] Section 493.30(16) states:

"Repossession" is the legal recovery of a motor vehicle or motorboat as authorized by the legal owner, lienholder, or lessor to recover, or to collect money payment in lieu of recovery of, that which has been sold or leased under a security agreement that contains a repossession clause. A repossession is complete when a licensed repossessor is in control, custody, and possession of such motor vehicle or motorboat.

1122 (Fla. 1981):

> [T]he subject of an act "may be as broad as the Legislature chooses as long as the matters included in the act have a natural or logical connection."

Burch, supra, at 2.

The different targets of the act must be naturally and logically connected Blankenship v. State, 545 So.2d 908 (Fla. 2nd DCA 1990). Petitioner submits that there is no "natural or logical connection" between recidivists and repossessor of cars and boats. Half of Chapter 89-280 addresses the prosecution and sentencing of recidivists, while the other half addresses the regulation of a lawful occupation. It is therefore clear that the law is "designed to accomplish separate and disassociated objects of legislative effort."

In Burch the Florida Supreme Court upheld Chapter 87-243. In doing so, however, the Burch Court distinguished Bunnell v. State, 453 So.2d 808 (Fla. 1984):

> In Bunnell this Court addressed chapter 82-150, Laws of Florida, which contained two separate topics: the creation of a statute prohibiting the obstruction of justice by false information and the reduction in the membership of the Florida Criminal Justice Council. The relationship between these two subjects was so tenuous that this court concluded that the single-subject provision of the constitution had been violated. Unlike Bunnell, chapter 87-243 is a comprehensive law in which all of its parts are directed toward meeting the crisis of increased crime.

Burch, supra, at 3.

Like the law in Bunnell, Chapter 89-280 is a two-subject law; it is not a comprehensive one. The relationship between recidivists

and repossessor of cars and boats is even more tenuous than the relationship between the obstruction of justice by providing false information and reduction in the membership of the Florida Criminal Justice Council. Accordingly, Chapter 89-280 violates the one subject rule and is unconstitutional.

A facially unconstitutional statute may be challenged for the first time on appeal. Trushin v. State, 425 So.2d 1126 (1983); Potts v. State, 526 So.2d 104, 105 (Fla. 4th DCA 1987); Alexander v. State, 450 So.2d 1212 (Fla. 4th DCA 1984). An objection in the lower court is needed only when there is a question as to the constitutional application of a statute to a particular set of facts. Trushin, supra. In the instant case, Section 775.084, Florida Statutes (1989), Chapter 89-280, Laws of Florida, is facially unconstitutional. There need be no reference to the facts of a particular case to see that the statute under which Petitioner was sentenced violates the one subject rule of the Florida Constitution.

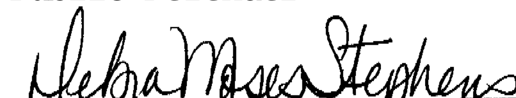
Petitioner's sentence must be reversed and remanded for re-sentencing under the guidelines.

CONCLUSION

Based on the foregoing arguments and the authorities **cited** therein, Petitioner respectfully requests this Honorable Court to **reverse** this **cause and** remand for a new trial.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

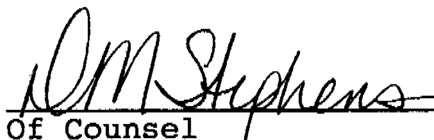


DEBRA MOSES STEPHENS
Assistant Public Defender
Florida Bar **#709890**
15th Judicial Circuit **of** Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Counsel for **Petitioner**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy **hereof** has been furnished to JOSEPH A. TRINGALI, Assistant Attorney General, Elisha **Newton** Dimick Building, Suite **204, 111** Georgia Avenue, **West** Palm Beach, Florida, **33401** by courier this **15th** day of **June, 1992.**



Of Counsel

IN THE

SUPREME COURT OF FLORIDA

THOMAS JAMES GILMORE, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. 79,877

A P P E N D I X

To

PETITIONER'S BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1992

THOMAS GILMORE, Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. 91-1707.

Opinion filed April 15, 1992

Appeal from the Circuit Court for St. Lucie County; Marc A. Cianca, Judge.

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

Richard L. Jorandby, Public Defender, and Debra Moses Stephens, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed. As to the issue of whether section 775.084, Florida Statutes (1989), amendments to the habitual offender statute, violated the one subject rule of the Florida Constitution, we affirm on the authority of this court's opinions in Jamison v. State, 583 So.2d 413 (Fla. 4th DCA), review denied, 591 So.2d 182 (Fla. 1991), and McCall v. State, 583 So.2d 411, (Fla. 4th DCA 1991), review granted, 17 F.L.W. No. 7 (Fla. Feb. 10, 1992). We note that the Third District has likewise held

that the amendments did not violate the single subject rule. Beaubrum v. State, 17 F.L.W. D680 (Fla. 3d DCA Mar. 10, 1992)(citing Jamison and McCall).

However, the First District in Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991), held that section 775.084, as amended by Chapter 89-280, Laws of Florida, violated the one subject rule from October 1, 1989, the effective date of the amendments, to May 2, 1991, the date of their re-enactment.[1]

Therefore, we certify that this opinion is in direct conflict with Johnson and also certify the following question, which we adopt from Johnson, to be of great pubic importance:

> WHETHER THE CHAPTER 89-280 AMENDMENTS TO SECTION 775.084(1)(A)1, FLORIDA STATUTES (1989), WERE UNCONSTITUTIONAL PRIOR TO THEIR RE-ENACTMENT AS PART OF THE FLORIDA STATUTES, BECAUSE [THEY WERE] IN VIOLATION OF THE SINGLE SUBJECT RULE OF THE FLORIDA CONSTITUTION.

AFFIRMED; CERTIFIED CONFLICT; AND CERTIFIED QUESTION.

ANSTEAD, HERSEY, AND GARRETT, JJ., concur.

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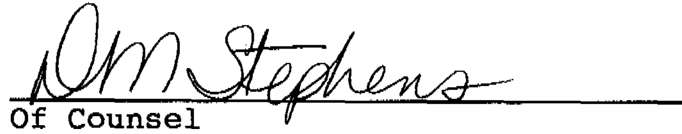
[1] Sub judice, October 1, 1990, the date appellant committed his crimes, falls within the questioned time frame.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to JOSEPH TRINGALI, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 15th day of JUNE, 1992.



Of Counsel