IN THE SUPREME COURT OF FLORIDA

LEO SALTERS,

Petitioner,

vs. CASE NO. 95,663

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court. He will be referred to as petitioner in this brief. The record on appeal, transcript and supplemental record consists of 5 volumes.

The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses. The trial transcripts which were filed as a supplemental record on appeal are consecutively numbered. All references to the trial transcripts will be by the symbol “T” followed by the appropriate page number in parenthesis. The transcript that was originally filed with the record on appeal contains the hearing on motion for new trial and sentencing hearing. It is numbered independently from the trial transcripts. All references to this transcript will be by the symbol “H”followed by the appropriate page number in parenthesis.

All emphasis has been added by petitioner unless otherwise noted.

STATEMENT OF THE CASE

Petitioner was charged by information filed in the Seventeenth Judicial Circuit with strong arm robbery (R 1-2). Petitioner was alleged to have take Pepto Bismol bottles from a Winn Dixie Store (R 1).

The state filed a notice of intent to seek to have petitioner declared an habitual felony offender, habitual violent felony offender and/or a violent career criminal (R 5-6).

Petitioner proceeded to jury trial (R 17). During the state's presentation of evidence, the defense moved for a mistrial on at least five occasions because the prosecutor's questions were tantamount to testimony (T 200, 210, 241-242, 268, 292).

At the close of the state's case in chief, petitioner moved for judgment of acquittal on the ground that the state had not established the corpus delicti of robbery. Independent of petitioner's statement, there was no proof of a taking (T 270). Further, the state did not establish that the Pepto Bismol bottles were the property of Winn Dixie (T 271). The motion was denied (T 273). Petitioner's renewed motion for judgment of acquittal was also denied (T 300).

The jury returned a verdict finding petitioner guilty of strong armed robbery as charged in the information (T 372 R 20).

Petitioner was adjudicated guilty (T 375 R 21-22).

A motion for new trial was filed (R 24-25). Petitioner renewed his objection to the prosecution's exercise of peremptory challenges to strike 5 black members of the venire (H 4). Petitioner also renewed his motion for judgment of acquittal on the ground that the state failed to prove a taking independent of his admission (H 4). The court denied the motion in open court and in writing (H 5 R 26).

A guideline scoresheet was prepared which reflected a sentence of 27 minimum state prison months, 36 state prison months and 45 maximum state prison months (R 27-28). The court declared petitioner to be a violent career criminal and entered a written order (R 31-33; H 26). The court sentenced petitioner to a 35 year term of imprisonment with a 30 year mandatory minimum (R 34-36; H 26).

On direct appeal to the Fourth District Court of Appeal, petitioner's conviction and sentence were affirmed. On motion for rehearing, the appellate court issued a substituted opinion. The court determined that petitioner lacked standing to challenge the constitutionality of the career criminal statute where the offense occurred on April 27, 1997, after the career criminal statute had been reenacted. The Fourth District Court of Appeal certified

conflict with Thompson v. State, 708 So. 2d 315 (Fla. 2d DCA) rev. granted , 717 So.2d 538 (Fla. 1998). Salters v. State, 731 So.2d 826 (Fla. 4th DCA 1999).

Notice of Intent to Seek Discretionary review was filed by petitioner on May 19, 1999. On May 28, 1999, this Court issued an order postponing decision on jurisdiction and briefing schedule. This merits brief follows.

STATEMENT OF THE FACTS

At petitioner's jury trial, the state presented the testimony of two witnesses. The defense also presented the testimony of two witnesses. Petitioner did not testify. A non-cumulative recitation of the evidence follows.

Esaak Mohamed, an assistant manager at Winn Dixie, was standing at the service counter at approximately 1:15 p.m. when he saw petitioner walk past him toward the exit door (T 189, 190, 215). Mr. Mohamed had not seen petitioner enter the store (T 215). Mr. Mohamed did not see petitioner remove any merchandise from the shelves of the store (T 215). He did not see petitioner place any merchandise inside of his clothing (T 192).

Mr. Mohamed saw the outline of a package in the back of petitioner's windbreaker (T 191, 193). Mr. Mohamed followed petitioner out of the store (T 195). When Mr. Mohamed said "Excuse me, sir," petitioner ran to a bicycle leaning against the wall of the store (T 195). Mr. Mohamed pursued petitioner who stumbled when he reached the bicycle (T 195). Mr. Mohamed grabbed petitioner (T 195). Petitioner moved away in an effort to break free and Mr. Mohamed backed away (T 197).

Petitioner picked up his bicycle and began pushing it with Mr. Mohamed in pursuit (T 198). Mr. Mohamed testified that as he was

about to catch petitioner, petitioner shoved the bicycle in his path (T 198). Mr. Mohamed fell when he tried to avoid the bicycle (T 198-199, 202,227). Mr. Mohamed did not know if he was hit by the bicycle or if petitioner touched him (T 231). When he fell to the ground, he bruised his knee, tore his pants and injured his left hand (T 201, 233).

Edward Scerbbo, a customer, was in the parking lot and saw Mr. Mohamed chase petitioner (T 246-247). He testified that petitioner tried to get on the bicycle and fell (T 249). Mr. Mohamed grabbed petitioner (T 249). Petitioner stood up and spun the bicycle between himself and Mr. Mohamed (T 249). Mr. Mohamed had already stopped running at the moment the bicycle came between them (T 266-267). When the bicycle came between them, Mr. Mohamed fell (T 250). Petitioner did not actually push the bicycle to the ground (T 265).

Mr. Mohamed stood up and returned to the store (T 206). Petitioner picked up his bicycle (T 206). Petitioner tried to get on the bicycle but the chain had fallen off (T 250-251).

As Mr. Mohamed was proceeding to his office, he encountered an associate, Mr. Labolt (T 207). Mr. Mohamed related the incident to Mr. Labolt and pointed to petitioner who was still in the parking lot (T 207). Mr. Labolt left the store to detain petitioner (T

207-208). Mr. Mohamed telephoned police.

Mr. Scerbbo grabbed petitioner (T 251). Mr. Scerbbo and Mr. Labolt held petitioner on the ground until Mr. Mohamed returned to the parking lot and told them to let petitioner stand up (T 208, 236, 251-252). Petitioner got up, ran another 25 to 30 feet and was grabbed Mr. Scerbbo (T 237-238, 252-253). Pepto Bismol bottles fell out of the back of petitioner's windbreaker (T 242, 253).

According to Mr. Mohamed, eight bottles of Pepto Bismol were recovered from petitioner (T 209). According to Pompano Beach police officer Hanrahan, petitioner had three bottles of Pepto Bismol (T 295). Mr. Mohamed testified that items such as the Pepto Bismol bottles depicted in a photograph are sold at Winn Dixie (T 209). However, the bottles did not have any price tags on them (T 239). They did not have any markings indicating that they were Winn Dixie items (T 239).

On cross-examination, Mr. Mohamed testified that he did not tell the responding officer that petitioner threw the bicycle at him and hit him with the bicycle (T 239-240). Pompano Beach police officer Hanrahan testified as a defense witness that Mr. Mohamed reported that he saw petitioner remove property from the store and conceal it on his person (T 290). Mr. Mohamed also stated that

petitioner threw the bicycle at him (T 291). Petitioner was arrested based upon Mr. Mohamed's statement (T 297).

Mr. Mohamed testified on cross-examination that he did not tell Dr. Simon that he slipped and fell (T 241). Dr. Simon testified as a defense witness, that Mr. Mohamed stated that he slipped and fell while chasing a shoplifter (T 281).

On redirect examination, Mr. Mohamed testified that the merchandise belonged to Winn Dixie (T 243). On recross-examination, Mr. Mohamed again agreed that the bottles did not have any Winn Dixie markings (T 244). He did not see petitioner take the bottles from the shelves at Winn Dixie (T 244). He "assumed" that they were on the Winn Dixie shelves (T 244).

Over defense objection (R 254-260), Mr. Scerbo testified that when petitioner was first allowed to stand up, he stated that he had stole from the store (T 260).

SUMMARY OF ARGUMENT

Point I. Petitioner was illegally sentenced as a violent career criminal pursuant to Section 775.084(4)(c)2, Florida Statute (1997). The statute is unconstitutional as it was enacted in contravention of the single subject rule embodied in article III, section 6 of the Florida Constitution. Consequently, petitioner's illegal violent career criminal sentence must be set aside.

Point II. Petitioner was charged with robbery and accused of taking Pepto Bismol from a Winn Dixie store. Aside from petitioner's statement, the state did not present any evidence that the Pepto Bismol bottles were stolen from Winn Dixie. There was no evidence that petitioner removed the bottles from the shelves of Winn Dixie or that the bottles were missing from the Winn Dixie store. Further, the bottles, themselves, did not have any price tags or markings on them to indicate that they were Winn Dixie merchandise. As there was no proof of corpus delecti independent of petitioner's statement, his conviction for robbery must be set aside and his discharge ordered.

Point III. Over defense objection, the prosecution was permitted to use 5 of its 6 peremptory challenges to excuse black venirepersons from serving on the jury. The reasons furnished by the prosecutor were not genuine. In two instances, the prosecutor singled out the

black jurors during questioning and elicited specific responses which were then used to excuse them from service. In other instances, white jurors who gave the same responses remained on the jury. In a third situation, the reason was not related to the evidence in the case. Thus, it was reversible error to overrule the defense objections.

Point IV. Reversible error occurred where the court denied petitioner's numerous motions for mistrial based upon the prosecutor's questions which related facts otherwise unsupported by the evidence. Through innuendo and inference in questioning, the prosecutor made it appear that the evidence that petitioner stole merchandise from Winn Dixie was stronger than the actual proof. The prejudice was so pervasive as to require a new trial.

ARGUMENT

POINT I

PETITIONER'S SENTENCE AS A VIOLENT CAREER CRIMINAL IS ILLEGAL WHERE THE VIOLENT CAREER CRIMINAL STATUTE WAS ENACTED IN CONTRAVENTION OF THE SINGLE SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION

The trial court sentenced petitioner as a violent career criminal to 35 years in prison with a 30 year mandatory minimum based upon his taking Pepto Bismol from Winn Dixie. The robbery was alleged to have occurred on April 27, 1997 (R 1, 31-36). As the offense occurred between October 1, 1995 and May 24, 1997, imposition of sentence as a violent career criminal pursuant to Section 775.084(4)(c)2 is illegal where the statute violates the single subject requirement of article III, section 6 of the Florida Constitution. Thompson v. State, 708 So. 2d 315 (Fla. 2d DCA 1998) review granted, 717 So. 2d 538 (Fla. 1998).

Preliminarily, this court may reach the merits of petitioner's claim despite the lack of an objection below. Petitioner challenges the facial constitutionality of the statute. A challenge to the facial constitutionality of a statute which results in fundamental error may be raised for the first time on appeal. Trushin v. State, 425 So. 2d 1126 (Fla. 1982). In State v. Johnson, 616 So. 2d 1 (Fla. 1993), this Court determined as a matter of fundamental error that the amendments to the habitual offender act violated the

single subject rule. The statute resulted in a far longer sentence than the defendant would have otherwise had to serve under the guidelines. This Court held that the provision involved the defendant's " fundamental 'liberty' due process interests." 616 So. 2d at 3. See also, State v. Mancino, 714 So. 2d 429 (Fla. 1998) ("A sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal'")

The violent career criminal provision, like its sister, the habitual offender provision, affects the defendant's fundamental liberty due process interests. Upon conviction for a second degree felony, otherwise punishable by a term of 15 years, the court shall sentence the defendant to a term of years not exceed 40 with a 30 year mandatory minimum term. §775.084(4)(c)2, Fla. Stat. Thus, the facial constitutionality of the violent career criminal statute is reviewable by this court as a matter of fundamental error.

On the merits, this court should set aside petitioner's violent career criminal sentence and remand the cause for resentencing. In Thompson, the Second District Court of Appeal examined the bill and reviewed the legislative history which culminated in the enactment of the violent career criminal provision as part of Chapter 95-182. A combination of criminal and

civil subjects were contained within the law. Relying upon caselaw from this court, the Thompson court correctly concluded that the law violates the single subject rule because it joins unrelated criminal and civil provisions. The court concluded:

> Harsh sentencing for violent career criminals and providing remedies for victims of domestic violence, however laudable, are nonetheless two distinct subjects. The joinder of these two subjects in one act violates article III, section 6, of the Florida Constitution; thus, we hold that chapter 95-182, Laws of Florida is unconstitutional.

708 So. 2d at 317.

The Thompson court determined that the window period to challenge the constitutionality of the statute began on October 1, 1995, the effective date of the Chapter 95-182 and closed on May 24, 1997, the date of the reenactment of the 1995 amendments as part of the biennial adoption of the Florida Statutes. 708 So. 2d 317 n.1.

In petitioner's cause, the Fourth District Court of Appeal disagreed with the Thompson court as the parameters of the window period. The Fourth District incorrectly concluded that the window closed on October 1, 1996, the effective date of Chapter 96-388, Laws of Florida. Section 44 of Chapter 96-388 contains an amended version of the career criminal statute. It is not a biennial adoption of the Florida Stature. Like Chapter 95-182 Laws of

Florida, Chapter 96-388 violates the single subject rule set forth in article III, section 6, of the Florida Constitution.

Article III, section 6, of the Florida Constitution includes a limitation on the passage of new legislation in Florida which is commonly called "the one subject rule":

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

"The purpose of the requirement that each law embrace only one subject and matter properly connected with it is to prevent subterfuge, surprise, `hodge-podge' and log rolling in legislation." Santos v. State, 380 So. 2d 1284, 1285 (Fla. 1980). See also Brown v. Firestone, 382 So. 2d 654, 663 (Fla. 1980); State v. Lee, 356 So. 2d 276, 282 (Fla. 1978); Williams v. State, 459 So. 2d 319, 320 (Fla. 5th DCA 1984). Where legislation fails the article III, section 6 "one subject rule", the courts must strike it down.

In the analysis of what constitutes "one subject," this Court has held that "wide latitude must be accorded the legislature in the enactment of laws, and this Court will strike down a statute only when there is a plain violation of the constitutional requirement that each enactment be limited to a single subject which is briefly expressed in the title." State v. Lee, 356 So. 2d

at 282. A bill's subject may be broad as long as there is a "natural and logical connection" among the matters contained within. Id.

But the "wide latitude" standard does not place legislation beyond review. Courts must balance the deference due the legislative branch with the duty to protect the state constitution and proper governmental process. There are, therefore, definite limits to how broad a scenario the legislature may envision when passing multiple matters and subjects under the title and vote of one bill. For example, in Colonial Investments Co. v. Nolan, 131 So. 2d 178 (Fla. 1930), provisions requiring a sworn tax return and a provision prohibiting deed recording without the stating of the grantor's address were held too independent and unrelated to satisfy the constitutional requirement. Similarly, the prohibition of the manufacture and trafficking of liquor and a provision criminalizing voluntary intoxication failed the "one subject rule." Albritton v. State, 89 So. 360 (Fla. 1921).

Chapter 82-150, Laws of Florida, is yet another example of a law which violated the single subject rule. It contained just four (4) subsections, which can be summarized as follows:

> 1. created the new crime of "prohibiting the obstruction of justice by false information."
>
> 2. changed membership rules for the Florida

> Council on Criminal Justice.
>
> 3. repealed certain sections of the Florida Criminal Justice.
>
> 4. provided an effective date for the bill.

This legislation was found violative of the "one subject rule." The Fifth District Court of Appeal in Williams v. State, 459 So. 2d 319 (Fla. 5th DCA 1984) reasoned:

> The bill in question in this case is not a comprehensive law or code type of statute. It is very simply a law that contains two different subjects or matters. One section creates a new crime and the other section amends the operation and membership of the Florida Criminal Justice Council. The general object of both may be to improve the criminal justice system, but that does not make them both related to the same subject matter.

459 So. 2d at 320.

This Court agreed. In Bunnell v. State, 453 So. 2d 808 (Fla. 1984), Justice Shaw wrote for a unanimous Court:

> We recognize the applicability of the rule that legislative acts are presumed to be constitutional and that courts should resolve every reasonable doubt in favor of constitutionality. Nevertheless, it is our view that the subject of section 1 has no cogent relationship with the subject of sections 2 and 3 and that the object of section 1 is separate and disassociated from the object of section 2 and 3. We hold that section 1 of 82-150 was enacted in violation of the one-subject provision of article III, section 6, Florida Constitution. [citations omitted].

453 So. 2d at 809.

More recently in State v. Johnson, 616 So. 2d at 1, this Court held that Chapter 89-280, Laws of Florida, violated the single subject requirement because it addressed two unrelated subject: "the habitual offender statute, and...the licensing of private investigators and their authority to repossess personal property." 616 So.2 d at 4. This Court adopted the district court's description of Chapter 89-280:

> 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 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.

Id. (citation omitted).

This Court also agreed with the district court that "it is difficult to discern a logical or natural connection between career criminal sentencing and repossession of motor vehicles by private investigators." Id. (citation and internal quotes omitted). This Court found these to be "two very separate and distinct subjects" which had "absolutely no cogent connection [and were not] reasonably related to any crisis the legislature intended to

address." Id. The Court "reject[ed] the State's contention that these two subjects relate to the single subject of controlling crime." Id.

Johnson – like Bunnell – was a unanimous decision. Concurring, Justice Grimes noted:

> 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 [citation omitted], 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 [citation omitted] rather than Burch.

616 So. 2d at 5 (Grimes, J., concurring).

These cases establish the following principles: provisions in a statute will be considered as covering a single subject if they have a cogent, logical, or natural connection or relation to each other. The legislature will be given some latitude to enact a broad statute, provided that statute is intended to be a comprehensive approach to a complex and difficult problem that is

currently troubling a large portion of the citizenry. However, separate subjects cannot be artificially connected by the use of broad labels like “the criminal justice system” or “crime control”.

Based upon these principles, Chapter 96-388, Laws of Florida is unconstitutional. It is loosely titled, “Public Safety.” Its 74 sections run the gamut from implementing a continuous revision cycle for the criminal code, coordinating information systems resources, enacting the Street Gang Prevention Act of 1996", enacting the “Jimmy Ryce Act” relating to sexual predators as well as redefining various crimes and attendant punishments. More specifically:

Section 1	-	Creates an 8 year revision cycle to maintain uniformity in the criminal code.
Section 2	-	Defines the legislatures goals vis a vis public safety.
Sections 3-16	-	Relates to information systems of various public safety agencies.
Sections 17-21	-	Maintenance of juvenile records.
Section 22	-	Revising language relating to preparation of guideline scoresheet
Section 23	-	Repealing law relating to youthful offender study.
Section 24	-	Setting deadline for legislative report by Justice Administration Committee.

Section 25	-	Amending provision relating to payment for prosecution of workman compensation violations.
Section 26	-	Repealing statue relating to Council on Organized Crime.
Section 27	-	Repealing statute relating to crime prevention information.
Sections 28-29	-	Repealing and amending statutes relating to Bail Bond Advisory Council.
Section 30	-	Repealing chapter relating to unfunded drug program.
Section 31	-	Repealing statute relating to negligent treatment of children.
Section 32	-	Amending provision in chapter relating to Department of Law Enforcement.
Sections 33-43	-	“Criminal Street Gang Prevention Act of 1996"
Section 39	-	Creates a civil cause of action for a violation of the Criminal Street Gang Prevention Act.
Sections 44-46	-	Redefines violent career criminal, habitual offender and habitual violent felony offender.
Sections 47-49	-	Expands definitions of burglary, trespass and theft.
Sections 50-53	-	Revises sentencing guidelines.
Section 54	-	Amends trafficking statute.
Sections 55,57	-	Renders certain convicted felons ineligible for early release.

Section 56	-	Cross references statute relating to taking of police officer's weapon.
Section 58	-	Grammatical corrections to restitution statute.
Section 59	-	Amends gain time statute.
Sections 60-67	-	"Jimmy Ryce Act".
Section 68	-	Handling of injured apprehendees.
Sections 69-71	-	Provisions relating to prosecution of computer pornography.
Section 72	-	Loss of privileges where person also loses civil action arising during commission of forcible felony.
Section 73	-	Effective date of bill relating to security alarm systems.
Section 74	-	Effective date of this act.

Chapter 96-388 thus encompasses a multitude of unrelated subjects that have separate and disassociated objectives. It is the variegated nature of the subject matters of the Act which preclude the title from complying with the constitutional mandate that its subject be "briefly expressed in the title."

The proof of constitutional violation in Chapter 96-388 is evident. The only arguable connection among all sections of the bill is "public safety." But the courts have ruled such a broad, general area may not be considered a single subject or the constitutional mandate would become meaningless. Thus, in

Albritton v. State, 89 So. at 380, the dissent pointed out that there is a logical connection between all the provisions, if the subject was broadly viewed as implementing the Eighteenth Amendment to the United States Constitution. However, the majority thought the substantive crime of voluntary intoxication was not germane to the separate prohibitions against the sale and manufacture of liquor. Bunnell and Williams also rejected the contention that many separate matters may be included together in one bill if all relate "somehow" to a broad general subject area, such as "criminal justice" or "crime prevention and control," as contended by the state in those cases. The Fifth District in Williams v. State, highlighted the flaw of such a position:

> The Bunnell court [referring to the Second District decision] reasoned that although not expressed in the title, it could infer from the provisions of the bill, a general subject, the criminal justice system, which was germane to both sections. Even if that subject was expressed, for example, in a title reading "Bill to Improve Criminal Justice in Florida," we think this is the object and not the subject of the provisions. Further, approving such a general subject for a non-comprehensive law would write completely out of the constitution the anti-logrolling provision of article III, section 6.

459 So. 2d at 321. [footnote omitted].

Thus, the inclusion in the Public Safety provisions which hop, skip, and jump all over the playing field of legislative options

cannot be saved, for purposes of the single subject rule, by resort to the general, very general, rubric of "crime control." Since the act clearly includes a great many more than one subject, Chapter 96-388 violates article III, section 6 of the Florida Constitution and must be invalidated.

As the career criminal statute was unconstitutionally enacted by both chapters 95-182 and 96-388, the window period to challenge the constitutionality of the statute remained opened until May 24, 1997, the date of the biennial adoption of the amendments to the Florida Statutes. See State v. Johnson, 616 So. 2d at 2. Where the instant offense arose on April 27, 1997, Petitioner was entitled to attack the facial constitutionality of his career criminal sentence and the contrary conclusion of the Fourth District Court of Appeal should be quashed.

POINT II

THE EVIDENCE IS INSUFFICIENT TO SUPPORT PETITIONER'S CONVICTION FOR STRONG ARM ROBBERY

Because this Court, in acquiring jurisdiction, has authority to dispose of all contested issues, petitioner submits this argument which was raised by the parties in the district court. See Dania Jai-Alai Palance, Inc., v. Sykes, 450 So. 2d 1114 (Fla. 1984); Bould v. Touchette, 349 So. 2d 1181 (Fla. 1977); Negron v.

State, 306 So. 2d 104 (Fla. 1974); D'Agostino v. State, 310 So. 2d 12 (Fla. 1975) (once Court acquires jurisdiction, the Court may proceed to consider entire cause on the merits).

The state charged petitioner with strong armed robbery and accused him of taking Pepto Bismol bottles from a Winn Dixie store. At the close of the state's case in chief and at the close of the evidence, petitioner moved for judgment of acquittal. He maintained that aside from his statement, the state wholly failed to prove that the Pepto Bismol bottles were the property of or were taken from Winn Dixie (T 270-271, 300). The motions were denied (T 272, 300) and error occurred.

"Sufficient evidence of corpus delicti is not only a predicate to the admission of a confession (citations omitted), but is, as well, the *sin qua non* of conviction (citations omitted)" Knight v. State, 402 So. 2d 435, 436 (Fla. 3d DCA 1981). To support a conviction, the state must produce some evidence independent of the defendant's statement that a crime has been committed. Cf. State v. Allen, 335 So. 2d 823 (Fla. 1976). The state bears the burden of establishing that the act occurred and that it was due to the criminal agency of another. 335 So. 2d at 825; Burks v. State, 613 So. 2d 441 (Fla. 1993); McQueen v. State, 304 So. 2d 501, 502 (Fla. 4th DCA) cert. den. 315 So. 2d 193 (Fla. 1975).

In Golden v. State, 629 So. 2d 109, 111 (Fla. 1993), this Court addressed the concept of corpus delicti in the context of sufficiency of the evidence and succinctly explained:

> The corpus delicti must be proved beyond a reasonable doubt. (footnote and citations omitted). Moreover, when circumstantial evidence is used to prove the corpus delicti, "it must be established by the most convincing, satisfactory and unequivocal proof compatible with the nature of the case, excluding all uncertainty or doubt. (citations omitted) By its very nature, circumstantial evidence is subject to varying interpretations. It must, therefore be sufficient to negate all reasonable defense hypotheses as to cause of death and show beyond a reasonable doubt that the death was caused by the criminal agency of another. (citations omitted).

629 So. 2d at 111.

Robbery, the crime with which petitioner was charged, is defined by Section 812.13, Florida Statute:

> “Robbery” means the taking of money or other property which may be the subject of larceny from the person or custody of another with intent to either permanently or temporarily deprive the person or the owner of the money or other property when in the course of the taking there is the use of force, violence, assault or putting in fear.

In the instant case, the state’s evidence established that petitioner left a Winn Dixie store with a bulge in the back of his windbreaker (T 193). He possessed either 3 or 8 bottles of Pepto Bismol (T 209, 295). There was no testimony that petitioner

removed the bottles from the Winn Dixie shelves. There was no testimony that Winn Dixie was missing any Pepto Bismol bottles. And, the bottles did not have any price tags or other markings to indicate that they were from the Winn Dixie store.

The only evidence that the bottles had been removed from the shelves of Winn Dixie was a statement made by petitioner to a civilian who assisted in his apprehension. Independent of this statement, the state's proof did not establish that the Pepto Bismol bottles were stolen from the Winn Dixie store. Cf. Jones v. State, 705 So. 2d 148 (Fla. 4th DCA 1998).

In Jones, the appellate court reversed a defendant's conviction for grand theft from K-Mart and wrote:

> Appellant appeals the trial court's denial of his motion for judgment of acquittal. Appellant was convicted of grand theft for stealing property from K-Mart. However, there was no testimony from a K-Mart employee that there were any items missing from inventory. Rather, the State's circumstantial evidence was that the merchandise was found in Appellant's car without any customer receipt. This circumstantial evidence was insufficient to negate appellant's reasonable hypothesis of innocence. See State v. Law, 559 So. 2d 187 (Fla. 1989). Accordingly, appellant's conviction is reversed.

705 So. 2d at 148. As in Jones, the state here did not present any independent proof that the Pepto Bismol bottles were missing from the Winn Dixie inventory. While the store manager testified that

petitioner did not have permission to take the Pepto Bismol bottles from Winn Dixie without paying for them, the State did not present any evidence, aside from petitioner's statement, that he did so. See, Helm v. State, 651 So. 2d 142 (Fla. 2d DCA 1995) (absent proof that house seller did not receive down payment buyers had delivered to defendant but only that buyers had to pay additional $3500 to close sale, evidence did not establish grand theft).

As the state never established the corpus delicti of robbery, a taking of property belonging to another, petitioner's conviction must be set aside and his discharge ordered. Golden v. State, 629 So. 2d at 109.

POINT III

THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTION TO EXERCISE 5 OF ITS 6 PEREMPTORY CHALLENGES TO EXCUSE AFRICAN-AMERICAN JURORS OVER DEFENSE OBJECTION.

Because this Court, in acquiring jurisdiction, has authority to dispose of all contested issues, petitioner submits this argument which was raised by the parties in the district court. See Dania Jai-Alai Palance, Inc., v. Sykes, 450 So. 2d 1114 (Fla. 1984); Bould v. Touchette, 349 So. 2d 1181 (Fla. 1977); Negron v. State, 306 So. 2d 104 (Fla. 1974); D'Agostino v. State, 310 So. 2d 12 (Fla. 1975) (once Court acquires jurisdiction, the Court may

proceed to consider entire cause on the merits).

The Sixth Amendment of the United States Constitution provides in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury..." Article I, section 16 of the Florida Constitution (1968) also guarantees the right to an impartial jury. The Equal Protection Clause of the Fourteenth Amendment prohibits a prosecutor from using the State's peremptory jury challenges "to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life." Powers v. Ohio, 499 U.S. 400, 409, 111 S. Ct. 1364, 1370 (1991). An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race. Powers v. Ohio, 111 S. Ct. at 1370.

In Melbourne v. State, 679 So. 2d 759 (Fla. 1996), this Court revisited the procedure which a trial court must follow to insure that jury selection is accomplished in a non-discriminatory manner:

> A party objecting to the other side’s use of peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent

> of the strike to explain the reason for the strike.
>
> At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.

679 So. 2d at 764. (Footnotes omitted).

At bar, the circuit court allowed the prosecutor, Alberto Milian, to use 5 of his 6 peremptory challenges to excuse black jurors. Each time the prosecutor exercised a challenge to a black juror, defense counsel objected only to be overruled by the court (T 138-147). Defense counsel renewed his objections at the time the court asked the defense to accept the jury (T 152). The series of rulings which allowed the prosecutor to exercise his challenges in a discriminatory manner requires a new trial.

Ms. Blisset was the first black juror to which the state exercised a peremptory challenge (T 138). Defense counsel advised the court that petitioner was a black American and asked the court to require the prosecutor to furnish a race-neutral reason (T 138).

The prosecutor replied, “Because she’s married to murder (sic) who was prosecuted in this circuit.” (T 138). The court found that this was a genuine non racial reason and overruled the objection (T 138).

Mr. Roberts was the second black juror to which the state exercised a peremptory challenge (T 139). Defense counsel objected and requested that the court require the prosecutor to furnish a race neutral reason (T 139). The prosecutor replied that Mr. Roberts indicated that he would have difficulty giving the case serious attention because Pepto Bismol was the subject of the charge. Further, he was one of two potential jurors who responded that it would be a financial hardship to sit as a juror (T 139). The following discourse ensued between the court and defense counsel:

> MR. HALPERIN [defense counsel]: Think Mr. Milian did nothing but pick on certain people and talk about Pepto Bismol. I think it’s irrelevant. You haven’t given them the law yet. Any taking, by putting in force, violence or fear is robbery. So they don’t know that. Talking about Pepto Bismol in a vacuum, thinking all afternoon I’m wasting a day or two or three to litigate this issue. I think, especially on Mr. Roberts, and a few other people whom are all black. He didn’t question other people, specifically white people, about Pepto Bismol was taken or thousand dollars or whatever. So I don’t think it’s appropriate. I don’t think it’s appropriate. I don’t think it’s nothing to do with the case. He is

> singling out the man because he was black.
>
> THE COURT: I think he may ask questions There's objections that inhibited that from him questioning more on that testimony.
>
> MR. HALPERIN: They were sustained, Judge.
>
> THE COURT: Right. I find that challenge on Mr. Roberts is genuine challenge. I find it's non racial challenge.
>
> He said he couldn't concentrate on this case. He wouldn't take it seriously. He wondered why he wouldn't ask, whether the questions about the case, how is he going to decide the case if he couldn't ask questions. He wondered why someone would steal something. Like he said, he would like to avoid serving on this case. And I find those are all genuine. He was very close to my granting a challenge for cause.

(T 140-141).

The prosecutor's reasons for striking Mr. Roberts are not genuine. First, it was improper for the state to rely upon hardship as a basis to excuse Mr. Roberts, where another juror, Ms. Evans, expressed similar concerns but actually sat on the jury (T 17-18 R 17). Richardson v. State, 575 So. 2d 294 (Fla. 4th DCA 1991); Daniels v. State, 697 So. 2d 959 (Fla. 3d DCA 1997).

Second, when initially asked if he would take the case seriously even though Pepto Bismol was involved, Mr. Roberts replied, "I don't think I have any choice if fact or evidence is there." (T 42). It was only when the prosecutor related the

seriousness of taking Pepto Bismol to the importance of his employment, did Mr. Roberts indicate that his job was a higher priority than taking Pepto Bismol (T 73-74).

In State v. Slappy, 522 So. 2d 18, 22 (Fla.) cert. den. 487 U.S. 1219 (1988), the Supreme Court set forth several factors which may indicate that the prosecution's reasons are a pretext for discriminatory conduct:

> (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel have questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reasons is unrelated to the facts of the case and (5) a challenge based on reasons equally applicable to juror who were not challenged.

As defense counsel maintained, the prosecutor's questioning of Mr. Roberts' runs afoul of the third Slappy factor and thus, reflects that the challenge was not race neutral.

Mr. Beauchamp was the third black juror to be stricken by the state's peremptory challenge. The same objection and request were made by defense counsel (T 141). The following dialogue ensued:

> MR. MILIAN [Prosecutor]: Judge, Mr. Beauchamp also expressed because of nature of the charge and testimony of police officers. Testimony of police officers, he said he was stopped by police officers based on his race, based on his figure of speech. He said people are

arrested for things they didn't do, and based on his experience, you know, he said prejudice against law enforcement and police officers, including police officers who have given him apparently a traffic ticket erroneously.

MR. HALPERIN: Judge, could I respond because I have a good response, I think in case law?

THE COURT: Okay.

MR. HALPERIN: There was a lot of people that was not well and not afford. So, I don't think it is any different than what Mr. Beauchamp said about his tickets. It's just, he just stated fact of life, being black and being in rich neighborhood.

THE COURT: Who else said being black and in rich neighborhood?

MR. HALPERIN: Nobody because the white people are not black The white people who went and fought a ticket because it was not a well deserved ticket. His perception he got a ticket because he was black. Whatever perception, he never fought the tickets. He is not going to strike all white people that said they fought a ticket.

THE COURT: What you said, they got a ticket because the way they look or their accent or some reason other than being fair?

MR. HALPERIN: He said he paid the tickets because he is black.

THE COURT: This is challenge for cause. This is why it's valid peremptory challenge.

MR. HALPERIN: It's not. To be consistent he would have to strike all the other people who said they fought a ticket because they didn't think it was well deserving.

> **Other thing I want to point out to Court that police officers have nothing to do with this case in terms of determining guilt or innocence.** It's allegedly in light most favorable to State. You are going to have assistant manager from Winn Dixie. He saw my client getting out of the store, chased him and he threw the bike at him, and that's where the force comes in, and that's it.
>
> When police arrives, it's over with. The jury is going to have to determine whether he is guilty or not based on testimony of lay witnesses. None of the police officers that are going to testify going to find anything on issue of guilt or innocence.
>
> THE COURT: I find it's genuine race neutral reason. I grant the peremptory challenge.

(T 141-143). As pointed out by defense counsel, police officers were not involved in the case. Thus, the prosecutor's reliance upon this reason to excuse Mr. Beauchamp runs afoul of the fourth Slappy factor. Again, the record supports petitioner's position that the state improperly used its peremptory challenges in a discriminatory fashion.

Ms. Maxwell/Powell was the fourth black juror to be peremptorily challenged by the prosecutor (T 144). The prosecutor claimed that the strike was race neutral because Ms. Maxwell/Powell had trouble with the "issue of Pepto Bismol." and would require more force than a push or slap to find someone guilty of robbery of Pepto Bismol (T 145). Defense counsel replied:

> MR. HALPERIN: What happens when you allow some lawyer to ask improper questions, you get answers.
>
> You should never ask the woman what kind of violence. He put his foot in his mouth sort (sic) of speak. She gave an answer. You think a push or shove is enough or think I need a bat and baseball?
>
> It's your job and should always be your job to give law. If he takes upon to ask questions, he shouldn't be allowed to use it to strike somebody on pretext that she's black.
>
> She is the only person that he asked about a push and shove as opposed to bat and gun. He never asked one, he never asked that, and he never went to another human being and what did you think about that, Mrs. Sklar, or anyone else. He specifically concentrated on her because she is black.
>
> All the blacks are disappearing on the panel. One time, in twelve years I am working, I find nine blacks on a panel they are all gone.

(T 145). In rejecting defense counsel's argument and finding that the fourth challenge to a black juror was not racially motivated, the court added its own reason to those of the prosecution, that Ms. Maxwell/Powell stated that she was indecisive (T 146).

Setting aside the court's basis for excusing the venire person, the state's reason for striking Ms. Powell/ Maxwell is not genuine. Once again, it is apparent that the prosecutor singled out black jurors to question seriousness of the offense in an effort to elicit a particular response (T 75-78). Having obtained

the desired response, the prosecutor then relied upon it to justify his exercise of peremptory challenges in a discriminatory manner. This tactic is explicitly disapproved in State v. Slappy, 522 So. 2d at 22, ("(3) singling the juror out for special questioning designed to evoke a certain response"). Thus, the objection should have been sustained

Ms. McCall became the fifth black juror to be peremptorily challenged by the prosecutor (T 147). The prosecutor's explanation that Ms. McCall's brother was in prison for lewd and lascivious act on a child was readily accepted by the court as a "pure and active reason" and the defense objection was denied. In response, defense counsel noted that another venireperson, Mr. Koenighaus, had a son charged with DUI and destruction of property in Broward County. Mr. Koenighaus, a white male Winn Dixie employee, was not peremptorily challenged by the prosecutor (T 147-148). The court maintained its ruling.

Interestingly enough, the record reflects that Mr. Koenighaus, not Ms. McCall, indicated that he had a brother who was arrested for lascivious act and the case was still pending in Broward County (T 60-63). Thus, yet another tactic disapproved by the Slappy, court was used to excuse Ms. McCall. As defense counsel emphasized Ms. McCall, a black juror, was excused by the prosecutor because

her brother had committed a crime. Mr. Koenighaus, a white juror, whose son had been charged with crimes was not peremptorily stricken by the state. In addition, although Mr. Loiselle stated that his nephew had been arrested in Broward County, he actually sat on the jury. "[A] challenge based on reasons equally applicable to jurors who were not challenged" should not be accepted as a race neutral reason. Slappy v. State, 522 So. 2d at 22. By failing to reject this explanation, the trial court erred. Richardson v. State, 575 So. 2d at 295. Daniels v. State, 697 So. 2d at 961.

As the record supports the conclusion that the court improperly sanctioned the prosecutor's systematic exclusion of black venirepersons from the jury, petitioner is entitled to a new trial.

POINT IV

THE TRIAL COURT ERRED BY DENYING PETITIONER'S MOTIONS FOR MISTRIAL WHERE THE PROSECUTOR'S QUESTIONS RELATED FACTS OUTSIDE THE EVIDENCE

Because this Court, in acquiring jurisdiction, has authority to dispose of all contested issues, Petitioner submits this argument which was raised by the parties in the district court. See Dania Jai-Alai Palance, Inc., v. Sykes, 450 So. 2d 1114 (Fla. 1984); Bould v. Touchette, 349 So. 2d 1181 (Fla. 1977); Negron v. State, 306 So. 2d 104 (Fla. 1974); D'Agostino v. State, 310 So. 2d 12 (Fla. 1975) (once Court acquires jurisdiction, the Court may proceed to consider entire cause on the merits).

It is axiomatic that a prosecutor may not relate to the jury facts which are not supported by the evidence. Ryan v. State, 457 So. 2d 1084, 1089-1090 (Fla. 4th DCA 1984); Pacifico v. State, 642 So. 2d 1178, 1884 (Fla. 1st DCA 1994). This limitation is not confined to closing argument but extends to the contents of the prosecutor's questions. Shorter v. State, 532 So. 2d 1110, 1111 (Fla. 3d DCA 1988). While the trial court's rulings with regard to a prosecutor's comments are subject to an abuse of discretion standard of review, where the conduct " is so prejudicial that it vitiates the entire trial" reversal is required. Taylor v. State, 640 So. 2d 1127, 1133 (Fla. 1st DCA 1994). As the appellate court

emphasized:

> [T]he prosecutor's duty is not to obtain convictions but to seek justice, and he or she must exercise that responsibility with the circumspections and dignity the occasion calls for. The prosecutor's case must rest on evidence, not innuendo. If the prosecutor's case is a sound one, then the evidence should be enough. If it is not sound, the prosecutor has a duty to refrain from innuendo to give the case a false appearance of strength.

DeFreitas v. State, 701 So. 2d 593, 600 (Fla. 4th DCA 1997).

At bar, the state sought to prove petitioner guilty of taking Pepto Bismol from a Winn Dixie store. Its proof that the Pepto Bismol bottles were the property of Winn Dixie was scant at best (see Point I, supra). The state did not present any testimony that petitioner removed the bottles from the shelf. Nor did it present any evidence that the bottles had price tags or markings which linked the property to the store. To fill the void in the evidence, the prosecutor abandoned his responsibility to rely upon the evidence. Instead he injected facts not in evidence and innuendo into his questions.

This strategy began with the first witness and continued throughout the trial. Early on, petitioner's objections were sustained or the prosecutor was directed to rephrase his questions (T 192, 193, 198). As a result of the prosecutor's persistence, however, defense counsel first sought a mistrial when the

prosecutor asked, “Is this the same guy that was removing--” (T 200). The court sustained petitioner’s objection that there was no testimony that petitioner removed anything but denied the motion for mistrial (T 200). Defense counsel asked the court to direct the prosecutor to refrain from testifying (T 200). The court ignored this request and told the prosecutor to ask his next question (T 200). Two questions later, defense counsel again objected to the prosecutor’s testimony, moved to strike the question and to instruct the prosecutor to cease this practice (T 200). The court ordered the prosecutor to rephrase the question (T 200). The prosecutor’s rephrased question, however, was no better and was met with objection (T 201). The court directed him to ask his next question (T 201).

Later during the direct examination of the assistant store manager the following occurred:

> Q. Did you sell items such as this at the store?
>
> A. Yes, we do.
>
> Q. Where did you - how did you come to discover this on or about the person of Mr. Kyles?
>
> A. Someone –
>
> MR. HALPERIN [defense counsel]: I don’t think he testified that he saw - discovered it on him and I move to strike. I move to make Mr.

> Milian stop testifying to the jury.
>
> THE COURT: I grant the - sustain the objection and grant the motion to strike. Ask your next question.

(T 209-210).

The second motion for mistrial based upon the prosecutor's offering facts which were not supported by the evidence occurred during the state's redirect examination of the assistant store manager:

> By Mr. MILIAN [prosecutor]:
>
> Q. Other than your attempting to capture somebody who just shoplifted at your store--
>
> MR. HALPERIN: Objection. There is no testimony that Mr. Kyles shoplifted at the store.
>
> THE COURT: Sustained.
>
> MR. HALPERIN: I'm moving for mistrial. This is going on too long.
>
> THE COURT: Motion for mistrial denied.

(T 241-242).

When the prosecutor called his second witness, a customer who assisted in apprehending petitioner in the parking lot, he continued his attempt to bridge the gap in the evidence by offering testimonial questions. While the first objection was sustained (T 252), the second was overruled. The prosecutor had the customer

participate in a demonstration in which the prosecutor played the store manager and the customer played petitioner (T 267-268). During the course of the demonstration, the prosecutor stated, “you didn’t want to hit me?” (T 268). Defense counsel’s objection to this testimony was overruled thus rendering the third motion for mistrial moot (T 268).

The fourth motion for mistrial came during the prosecutor’s cross examination of the responding police officer who had been called as a defense witness:

> Q. In fact, Officer Hanrahan, because of the suspect, you saw him [the assistant store manager] treated by paramedics that day?
>
> MR. HALPERIN: Objection to the form of the question, implying something that is not in evidence.
>
> THE COURT: Cross-examination, overruled.
>
> BY MR. MILIAN:
>
> Q. Because of the violence at the scene of this crime you had to render treatment, paramedics had to render treatment?
>
> MR. HALPERIN: I am going to object to characterization of defendant as violence. He said what I just said. Victim said he threw the bike at him. So I object to that and since there is no evidence of that from the witness stand, I’m moving for a mistrial.
>
> THE COURT: Denied.

(T 292). Finally, the court sustained petitioner’s objection to

the question, “Because of the violence involved in this particular, during the commission of this crime by the defendant, you had to summon the paramedics to the scene to render first aid treatment for victim, Mr. Mohamed?” (T 292).

The cumulative effect of the prosecutor’s improprieties created the impression that the evidence was much stronger than it actually was. Through innuendo, the prosecutor told the jury that petitioner took the Pepto Bismol from Winn Dixie instead of allowing the jury to make this determination based upon the evidence. Thus, the prejudice so permeated the trial of the cause as to require a new trial.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to reverse the judgment and sentence of the trial court and to remand this cause with proper directions.

Respectfully Submitted,

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_____

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CERTIFICATION OF TYPE FACE

Petitioner certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to Gentry Benjamin, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this _____ day of July, 1999.

_____
MARCY K. ALLEN
Assistant Public Defender