IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,663

LEO SALTERS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S ANSWER BRIEF ON THE MERITS
On review from the
District Court of Appeal, Fourth District

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court below and the appellant in the Fourth District Court of Appeal and will be referred to herein as "Petitioner." Respondent, the State of Florida, was the prosecution in the trial court below and the appellee in the Fourth District Court of Appeal and will be referred to herein as "Respondent" or "the State." Reference to the record on appeal will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to Petitioner's brief will be by the symbol "IB," followed by the appropriate page numbers.

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Administrative Order of this Court dated July 13, 1998, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced.

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statements of the case and facts for purposes of this action, subject to the additions, corrections, and/or clarifications which follow both here and in the brief:

1. Juror Blissett was stricken because her husband was presently in jail for murder. (T-35-37; 138). In fact, Juror Blissett testified that she still keeps in contact with her husband, who is currently in prison. (T-37). Ms. Blissett's husband was prosecuted in Broward County, where Petitioner was also prosecuted. (T-37).

2. Juror Roberts testified that he would not be able to give the case much serious thought considering that Petitioner was only accused of stealing Pepto Bismol. (T-74). Mr. Roberts thought that his job was a higher priority. (T-74).

3. Juror Femrite also testified that she would be wasting her time when it is only Pepto Bismol that was stolen. (T-72). Ms. Femrite testified that she would not give the case her full undivided attention. (T-72). Ms. Femrite was stricken for cause. (T-136).

4. The prosecutor asked a general question concerning whether anyone would have a hardship serving on the jury. (T-71). Ms.

Femrite raised her hand, where a discussion ensued. (T-72). Another general question was asked regarding the same issue, at which point Mr. Roberts raised his hand and a discussion ensued. (T-72-73).

5. During voir dire, Juror Beauchamp stated that police officers will sometimes give you a ticket because of the way you look or because of your accent. (T-55). Mr. Beauchamp also stated that police officers had picked on him in the past. (T-55). Mr. Beauchamp also felt that sometimes officers do things just because they can. (T-56).

6. In responding to a general question concerning any feelings on the Pepto Bismol issue, Juror Maxwell/Powell raised her hand and asked a question concerning the amount of force to be used. (T-75).

7. The store manager testified that he saw Petitioner leaving the store, walking very briskly. (T-189, 218). The clear outline of a package was visible in Petitioner's clothing. (T-181). There was a bulge in Petitioner's jacket, large enough to make the manager nervous. (T-191, 193). Petitioner started to run as soon as the manager approached him and said, "Excuse me, sir." (T-195). Petitioner ran about twenty-five, before reaching the bicycle. (-221-222). After reaching the bicycle, Petitioner ran forty feet and then the bike fell and he stumbled. (T-222). At the point, the store manager caught up with Petitioner. (T-222).

8. The store manager stopped Petitioner by holding onto his hand. (T-195). Petitioner started to fight back, so the manager backed off. (T-195). As soon as Petitioner started resisting, the manager let him go. (T-197). Petitioner picked up his bicycle and started to run again. (T-227). The manager followed. (T-198). Then Petitioner shoved his bike into the manager's path. (T-198). The manager tried to avoid the bike and fell. (T-199, 202). The manager was injured when he fell. (T-201-202).

9. Once Petitioner was stopped by another store employee and a customer in the parking lot, he attempted to run again after he was released. (T-234, 252). The manager saw Pepto Bismol bottles fall out the second time Petitioner tried to escape. (T-234). The manager and another witness saw the items drop from Petitioner's coat pocket. (T-234, 253).

10. Edward Scerbo testified that he saw Petitioner and the store manager running from the store. (T-248). After the manager went back into the store to call the police, Scerbo went over to Petitioner to stop him from leaving. (T-251). Another store employee helped Scerbo. (T-252). Scerbo held Petitioner until security arrived. (T-253). Petitioner admitted stealing the Pepto Bismol. (T-254, 260).

SUMMARY OF THE ARGUMENT

POINT I

If this Court holds that Chapter 95-182 violates the single subject provision of the Florida Constitution, it should also find that the legislature's reenactment of the "Gort Act" in Chapter 96-388 Laws of Florida cured, or mooted, any single subject problem of Chapter 95-182. This Court should adopt the position taken by the Fourth District in Salters v. State, 731 So. 2d 826 (Fla. 4th DCA May 5, 1999)

Alternatively stated, this Court should find that the significant amendments to the Gort Act by Chapter 96-388 Laws of Florida created a new statute which obviated any problems of Chapter 95-182 and makes the issue of the window period for the Gort Act irrelevant, because career criminal sentencing for all offenses committed after October 1, 1996 is controlled by Chapter 96-388 Laws of Florida.

POINT II

The trial court properly denied Petitioner's motions for judgment of acquittal, as enough evidence existed to demonstrate that Petitioner committed strong arm robbery. Evidence was presented concerning the fact that Petitioner was seen walking briskly away from the store, with a bulge in his jacket and that

Petitioner fled when the store manager attempted to stop him. The store manager was also injured in the process. Based upon these facts, corpus delicti existed. Therefore, the trial court properly admitted Petitioner's statement that he stole the Pepto Bismol bottles from the store. As such, the State provided substantial, competent evidence to support a jury finding that Petitioner took the Pepto Bismol bottles from Winn Dixie without permission.

POINT III

The trial court properly allowed the State's peremptory challenges of prospective jurors, as the reasons for striking the African-American jurors were genuine.

POINT IV

The trial court properly denied Petitioner's motion for mistrial, where the questions were not so prejudicial as to vitiate the entire trial. Based upon the evidence presented, the jury could reasonably find that Petitioner committed a robbery, in absence of the questions, which the witnesses were not allowed to answer.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY SENTENCED PETITIONER AS A VIOLENT CAREER CRIMINAL

Petitioner contends that the trial court erred in sentencing Petitioner to 35 years in prison with a 3-year mandatory minimum, where the offense occurred between October 1, 1995 and May 24, 1997. In the proceedings below, Petitioner asserted that the Gort Act, as enacted violates the subject requirement of the Florida Constitution. The State disagrees and contends that the trial court properly sentenced pursuant to the Violent Career Criminal statute.

Standing

Only a defendant who committed his offense within the period of unconstitutionality has standing to challenge the constitutionality of the Gort Act. Because the single subject provision applies only to chapter laws; Florida Statutes are not required to conform to the provision. State v. Combs, 388 So. 2d 1029 (Fla. 1980). Once reenacted, a chapter law is no longer subject to challenge on the grounds that it violates the single subject provision of Article III, § 6, of the Florida Constitution. State v. Johnson, 616 So.2d 1, 2 (Fla. 1993). The reenactment of a statute cures any infirmity or defect. State v. Carswell, 557

So.2d 183, 184 (Fla. 3d DCA 1990); Honchell v. State, 257 So.2d 889 (Fla. 1972); Alterman Transport Lines, Inc. v. State, 405 So.2d 456 (Fla. 1st DCA 1981). Thus, with single subject issues an important question is whether the incident being prosecuted arose prior to the constitutional problem being cured by reenactment.

In the proceedings below, the State argued that Petitioner could not challenge the statute, as Petitioner committed the offense after October 1, 1996, the effective date of Chapter 96-388 Laws of Florida, which cured, or mooted any single subject problem of Chapter 95-182. The Fourth District Court of Appeal agreed with the State's argument, found that Petitioner did not have standing to challenge the statute and certified conflict with the Third District Court of Appeal's decision in Thompson, as to the window period to challenge the constitutionality of the Gort Act. The State asserts that the Fourth District Court of Appeal properly held that Petitioner did not have standing to challenge the constitutionality of the act.

In chapter 95-182, the legislature made significant changes to the habitual offender statute and created a category of offenders called violent career criminals This provision was codified into § 775.084 Fla. Stat. (1995) and was referred to as the "Gort Act". In Thompson v. State, 708 So. 2d 315 (Fla. 2d DCA 1998), the

district court held the chapter law violated the single subject provision. It also stated that the "window" period for defendants to challenge chapter 95-182, LAWS OF FLORIDA, on the basis that it violates the single subject provision of the Florida Constitution, began on the effective date of the law, October 1, 1995, and ended on May 24, 1997. Thompson v. State, 708 So.2d 315, n.1 (Fla. 2d DCA 1998). On this later date, the Gort Act was reenacted as part of the Florida Statutes biennial reenactment. See Chapter 97-97, Laws of Florida. The State acknowledges that if no intervening action had occurred, Thompson would be correct and this biennial reenactment would end the window period. State v. Johnson, 616 so.2d 1 (Fla. 1993)

However, in Salters v. State, 731 So. 2d 826 (Fla. 4th DCA 1999), the Fourth District held that the window period closed on October 1, 1996, when chapter 96-388 *Laws of Florida* became effective. It held that in chapter 96-388, the Florida legislature readdressed the provisions of the habitual offender statutes and that this repassage of the provisions of the violent career criminal section (the Gort Act) without the arguably civil provisions identified in Thompson cured the single subject problem found in Chapter 95-182 Laws of Florida.

Respondent argues that any error was not cured, because

Chapter 96-388 Laws of Florida was not a biennial reenactment of the statute. However, the position of the Fourth District in Salters is supported by both case law and logic. In Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991), this Court found a single subject violation occurred when the legislature combined workers compensation legislation with international trade legislation. In determining the effective dates, this Court held that the problem was cured by the legislature in a special session reenacting the legislation in a manner which separated these two distinct concepts. Id. at 1169 Thus, this Court has recognized that the biennial reenactment of the statutes is not the only way to close the window. The State asserts that what happened in this case is analogous to what transpired in Scanlan. In the 1996 legislative session, the legislature reenacted the career criminal portions of chapter 95-182 without including the objectionable civil damage provisions. Applying Scanlan, the legislative action should be held to have cured the problem. Therefore, the State maintains that this Court should follow the decision of the Fourth District and hold the window period ended on October 1, 1996.

Approving this cure would be an appropriate resolution of the problems presented by this single subject violation. This Court has long held that the purpose of the single subject provision is

to prevent logrolling. Martinez v. Scanlan, 582 So.2d 1167, 1172 (Fla. 1991); State v. Lee, 356 So.2d 276, 282 (Fla. 1978) The evil that the single subject provision protects against is the attaching of unrelated legislation onto popular measures, thereby, bootstrapping the passage of the unrelated legislation upon the popularity of the primary legislation. Advisory Opinion to the Atty. Gen. re Fish and Wildlife Conservation Com'n, 705 So.2d 1351, 1353 (Fla. 1998)

When a statutory section created in this manner is ratified by subsequent legislative reenactment, any prior "logrolling" has been mooted.

It is also appropriate to hold that the subsequent modification and readoption cures a single subject problem because of other Constitutional requirements placed on the passage of legislative bills. Article III Section 6 Fla. Const. requires, when a bill is passed which amends a law in existence, that the sections being amended must be set out in full. Additionally, the enacting clause of the legislation must state, Be it enacted. By complying with the constitutional requirements, the legislature reenacts the statutory provision when it makes modifications. In this case, the legislature reenacted the provisions of the Gort Act by passage of chapter 96-388 Laws of Florida. Thus, the State

maintains that the date of October 1, 1996, closes the window period for the purposes of a single subject challenge to the "Gort Act" provisions found in chapter 95-182 Laws of Florida. Petitioner committed his offense on April 27, 1997, well after reenactment of the act. Based upon the foregoing, Petitioner's opportunity to challenge his sentence ended on October 1, 1996. Therefore, Petitioner cannot challenge the constitutionality of the statute.

The other reason that the problem is cured by subsequent legislative enactment is obvious. A criminal defendant must be sentenced in accordance with the law in effect when he committed the crime. When a statutory section is modified, a defendant is not prosecuted or sentenced under the original statute, but, under the version in effect at the time of the commission of the crime. Thus for those individuals who committed their crimes after October 1, 1996, the governing law is Chapter 96-388 Laws of Florida. As to them, Chapter 95-182 Laws of Florida and its manner of passage is irrelevant. Based upon the reenactment of the statute in Chapter 96-388 Laws of Florida, prior to the commission of Petitioner's offenses, Petitioner does not have standing to challenge the act.

In his brief, Petitioner only affords cursory attention to this issue as argued by the State above. Petitioner, very briefly states that the window period does not close on October 1, 1996

because the enactment of Chapter 96-388 Laws of Florida was not a biennial adoption. As set out above, this argument fails. The brunt of Petitioner's argument is that the issue regarding the window period is moot because Chapter 96-388, Laws of Florida also violates the single subject rule, rendering the session law unconstitutional.

The State notes that this issue is being raised for the first time here in the Florida Supreme Court based upon this Court's discretionary jurisdiction. And although the State recognizes the decision in State v, Johnson,616 So. 2d 1 (Fla. 1993), which states that single subject violations are fundamental errors, such violations should not be raised upon the discretionary review of this Court. This is even more so where Petitioner raises the issue, after almost completely ignoring the issue for which conflict has been certified. The proper vehicle for this issue is at the district or trial court level, where an opinion has been set forth on the issue. As such, this Court could then properly review an opinion or decision of a lower court in reaching its decision. Based upon the above, the State would ask that this Court either recede from its decision in Johnson, or at the very least decline to accept jurisdiction in this case.

CONSTITUTIONALITY OF CHAPTER 96-388

The crux of Petitioner's argument is that the issue regarding the window period of Chapter 96-388 is moot because Chapter 96-388 also violates the single subject provision of Article III, Section 6. The State disagrees and contends that Chapter 96-388 does not violate the single subject provision, and therefore, is not unconstitutional.

The single subject provision, Article III, Section 6 of the Florida Constitution provides:

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

The single subject requirement of Article III, Section 6 of the Florida Constitution simply requires that there be "a logical or natural connection" between the various portions of the legislative enactment. State v. Johnson, 616 So. 2d 1, 4 (Fla. 1993) (approving the lower court's pronouncement in Johnson v. State, 589 So. 2d 1370 (Fla. 1st DCA 1991)). The single subject requirement is satisfied if a "reasonable explanation exists as to why the legislature chose to join the two subjects within the same legislative act...." Id. at 4. Similarly, this Court has spoken of the need for a "cogent relationship" between the various sections of the enactment. Bunnell v. State, 453 SO. 2d 808, 809 (Fla. 1984). "The act may be as broad as the legislature chooses provided

the matters included in the act have a natural or logical connection." Martinez v. Scanlan, 582 So. 2d 1167, 1172 (Fla. 1991).

Also, the purpose of Article III, Section 6 is the prohibition against a plurality of subjects in a single legislative act to prevent "logrolling", Martinez v. Scanlan, 582 So.2d 1167, 1172 (Fla. 1991); State v. Lee, 356 So.2d 276, 282 (Fla. 1978). Logrolling is a practice wherein several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue. In re Advisory Opinion to the Attorney General--Save Our Everglades, 636 So.2d 1336, 1339 (Fla. 1994).

While logrolling is improper, an act may be as broad as the legislature chooses, provided the matters included in the act have a natural or logical connection. Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981); Board of Pub. Instruction v. Doran, 224 So.2d 693, 699 (Fla. 1969). Broad and comprehensive legislative enactments do not violate the single subject provision. *See* Smith v. Department of Ins., 507 So.2d 1080 (Fla. 1987). The test to determine whether legislation meets the single subject provision is based on common sense. Smith, 507 So.2d at 1087.

The Florida Supreme Court has accorded great deference to the

legislature in the single subject area and the Court has held that the legislature has wide latitude in the enactment of acts. State v. Lee, 356 So.2d 276 (Fla. 1978); State v. Leavins, 599 So.2d 1326, 1334 (Fla. 1st DCA 1992). Examples abound where this Court has held that Acts covering a broad range of topics do not violate the single subject provision. The single subject provision is not violated when an Act provides for the decriminalization of traffic infractions and also creates a criminal penalty for willful refusal to sign a traffic citation, State v. McDonald, 357 So.2d 405 (Fla. 1978); the provision is not violated where an Act covers both automobile insurance and tort law, State v. Lee, 356 So.2d 276 (Fla.1978); nor is the provision violated where an Act covers a broad range of topics dealing with medical malpractice and insurance because tort litigation and insurance reform have a natural or logical connection, Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981), Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987); nor is the provision violated where an Act establishes a tax on services and includes an allocation scheme for the use of the tax revenues. In re Advisory Opinion to the Governor, 509 So.2d 292 (Fla. 1987). Finally, this Court has found that an act which deals with (1) comprehensive criminal regulations, (2) money laundering, and (3) safe neighborhoods is valid since each of these

areas bears a logical relationship to the single subject of controlling crime. Burch v. State, 558 So.2d 1 (Fla. 1990).

The State contends that this natural, logical relationship exists. Initially, the State reiterates that 1996 Fla. Laws ch. 388, § 44, states in pertinent part:

> Effective October 1, 1996, paragraphs (a)(b) and (c) of subsections (1), and subsections (2), (3), and (4) of section 775.084, Florida Statues are amended and subsection (6) of said section is reenacted . . . .

96 Fla. Laws ch. 388 § 44, which was approved by the Governor on May 31, 1996, omitted sections 8-10. Sections 8-10 were the sections of Ch. 95-182 which dealt with offensive civil domestic violence sanctions. As such, enactment of ch. 388 effectively severed the civil sanctions provided for in 95-182. As the offending civil provisions were severed from the act, then the act is clearly constitutional.

Petitioner does not adequately address the argument set out above, but makes a general statement that ch. 96-388 violates the single subject provision, regardless of the changes to section 775.084, concerning violent career criminals. Petitioner's argument is in error.

There are seventy-four sections of Chapter 96-388. A careful

reading of the provisions of Chapter 96-388, Laws of Florida, compels the conclusion that the requisite natural or logical connection between the various sections exists. Chapter 96-388 is titled “An act relating to public safety.” Chapter 96-388, Laws of Florida. All portions of the statute concern methods in which to increase public safety across the state. All portions of the statute share a common goal, a common purpose: “public safety.”

1. Section One establishes an eight-year revision cycle for the criminal code. The effect of the act in this regard is clearly criminal in nature.

2. Section Two sets forth the policy for public safety. The goals enumerated in this plan include: a) the protection of the public by preventing, discouraging, and punishing criminal behavior; b) lowering the recidivism rate; c) maintenance of safe and secure prisons; d) combatment of organized crime; etc.

3. Sections Three through Sixteen are all related to the information systems for public safety agencies. The effect of these perspective sections, included the creation of the criminal and juvenile justice information systems council. The purpose of this council is to facilitate the identification, standardization, sharing and coordination of criminal and juvenile justice data. Sections Three through Sixteen obviously promote the goal of

protection of the public. The sections facilitate the sharing of information amongst various criminal and juvenile justice agencies in an effort to minimize the danger to society of criminals and juveniles who have become a risk to society. Such information will help to identify recidivism amongst the adult population who have and continue to commit crimes. Similarly, Sections Seventeen through Twenty One relate to the maintenance of juvenile records. These sections have amended the statutes which govern the procedures relating to fingerprinting and photographing a child who has committed an offense, the circumstances under which a juvenile's criminal history information may be obtained from the Department of Law Enforcement, the sharing of information on a juvenile who has been arrested, the merging of records for a minor who has been adjudicated as an adult for a forcible felony. These sections obviously promote the protection of the public as the sections relate to the sharing and dissemination of information concerning minors who have committed crimes or delinquent act. The sharing of such information will facilitate public safety because the various agencies are provided important information concerning crimes that have been committed by juveniles. Such information will help to control and prevent recidivism amongst juvenile offenders.

4. Section 22 revised the language relating to sentence

guidelines scoresheets. Sections 50 through 53 also include a revision to the sentencing guidelines. These sections relate to the common theme of the act (public safety) by providing guidance for the preparation of sentencing guideline scoresheets, i.e, providing guidance for the sentencing and punishment of those who have been convicted of crimes, and the scoring of offenses for victim injury, severity of offenses, etc. As such, these sections determine when a person may be released back into society after being convicted and sentenced for commission of a crime. Again, protection of the public and an attempt to reduce the recidivism rate are key here.

4. Sections 23 and 24 concerned regulation of the Juvenile Justice Advisory Board and the Justice Administrative Commission. Section 25 related to the insurance commissioner's ability to contract for the prosecution of criminal violations of the Worker's Compensation Law. Such action definitely relates to the protection of the public or public safety, as prosecution of Worker's Compensation fraud is a serious problem which affects all persons in society.

5. Sections 26 through 31 repealed certain statutes. Statutes which were repealed included, the statute relating to: (1) the Council on Organized Crime; (2) crime prevention information; (3)bail bond advisory council; (4) unfunded drug program; (5)

negligent treatment of children. Each of these perspective subjects concern the protection of the public. For instance, organized crime and drugs are undisputed problems facing society as a whole. The State would even venture to say that these problems are one the major dangers to society. And of course crime prevention and bail bond information further the protection of the public. For instance, bail bond information controls the ability of those who have been accused of committing crimes to venture back onto the streets of society.

6. Section 32 related to the Department of Law Enforcement. Law enforcement is synonymous with protecting the public.

7. Sections 33 through 43 relate to the Street Gang Prevention Act. These sections are geared toward “public safety” to protect the public from organized, street gangs. In fact, the purpose of this section is to ensure that every person be “secure and protected from fear, intimidation, and physical harm caused by he activities of street gangs and their members.” As facilitated by Sections 3 through 21, these provisions also include considerations of a street gang member’s prior record and criminal history, and therefore the recidivism of those who have committed crimes in the past.

8. Sections 44 through 46 redefine the violent career

criminal, habitual offender and habitual felony offender. These provisions relate to the protection of the public as it concerns recidivism of violent criminals.

9. Sections 47 through 49 relate to the definition of burglary, trespass and theft. These sections relate to public safety because they expand the definitions of burglary, trespass and theft, and therefore, focus on the prevention of persons from becoming victims of these crimes.

10. Section 54 amends the trafficking statute. Again, this section falls within the umbrella of protection of the public from illegal drugs.

11. Sections 55 and 57 render certain convicted felons ineligible for early release. Here, the legislature sought to protect citizens from certain types of criminals, thereby, abolishing these criminals' ability to obtain early release from prison.

12. Section 56 relates to the unlawful taking of a police officer's weapon. Of course, the effort to protect the public is clearly evident here, as the public is put in great danger where criminals unlawfully deprive an officer of his weapon.

13. Section 58 makes grammatical corrections to the restitution statute. Restitution directly relates to protection of

the public, as victims of crimes have the right to obtain compensation for their injuries and losses.

14. Section 59 amends the gain time statute. This statute relates to the ability of prisoners to receive gain time, and therefore an earlier release. As such, the section relates to the protection of the public, as it concerns a prisoner's ability to obtain release back into society.

15. Sections 60 through 67 concerns the Jimmy Ryce Act, which relates to public notification of a sexual offender's release into a certain community. This act concerns protection of the public as it puts communities on notice that a sexual offender has been released from prison and is now living in their neighborhoods.

16. Section 68 relates to the security and arrest surrounding injured apprehendees. Such a provision is vital to the public's safety, as one does not desire that a person who has committed a crime is injured, but escapes due to the lack of security or proper procedures.

17. Sections 69 through 71 concern prosecution for computer pornography. This of course has become a widespread problem, especially where young teenage girls have become the major targets of this crime. Therefore, these sections of the act obviously falls within the umbrella of protection of the public.

18. Section 72 concerns the loss of privileges for persons who loses civil actions arising from the commission of a forcible felony. Again, protection of the public is key here as the legislature attempts to protect and compensate victims of forcible felonies.

19. Section 73 concerns the effective date of the bill relating to security alarms. Such a provision also is key in protection of the public, as security alarms are instrumental in protecting households and businesses from burglaries, robberies, etc.

20. Finally, Section 74 contains the effective date of the act.

Based on a review of all the sections of this act and their purposes, it is obvious that the sections are all committed to one theme: "Public Safety." Contrary to Petitioner's argument, the various sections of the act achieve this common theme or goal. There is a natural and logical connection between the sections of this act, as all of these sections meet and provide for one common theme: public safety, protection of the public.

Petitioner's reliance upon State v. Johnson, 616 So.2d 1 (Fla. 1993) and Bunnell v. State, 453 So.2d 808 (Fla. 1984) is misplaced. In Johnson, 616 So.2d 1 (Fla. 1993), this Court held that a chapter

law violated the single subject provision because it addressed two subjects: “the first being the habitual offender statute, and the second being the licensing of private investigators and their authority to repossess personal property." 616 So. 2d at 4. The court stated that the two matters had absolutely no cogent connection. Sentencing for repeat offenders and licensing private investigator have no common core.

Similarly, in Bunnell v. State, 453 So.2d 808 (Fla. 1984), this Court held that a session law violated the single subject provision when the law created the criminal offense of obstruction of justice by false information and made amendments concerning membership of the Florida Council on Criminal Justice. The Thompson Court characterized these amendments as noncriminal and dealing with an executive branch function.

By contrast to Johnson, the instant amendments do have a common core. They concern repeated criminal offenders, street gang prevention, sharing of criminal history information for both adult and juvenile criminals, etc. Moreover, in contrast to Bunnell, which dealt with amendments that involved both legislative and executive functions, these amendments concern traditionally legislative matter. Setting punishment for recidivist offenders and compensating victims are both legislative branch matters.

Additionally, as shown all sections of Chapter 96-388 address public safety or protection of the public. Thus, the legislative enactment at issue in this case is significantly different from the acts at issue in Johnson and Bunnell.

Moreover, Petitioner relies upon the Fifth District Court of Appeal's decision in Williams v. State, 459 So. 2d 319 (Fla. 5th DCA 1984). There, the Fifth District held that Chapter 82-150 was unconstitutional as it violated the single subject provision of the Florida Constitution, where one section created a new crime and the other section amended the operation and membership of the Florida Criminal Justice Council. The Fifth District noted that the act was not a comprehensive law or code type of statute. Accordingly, Petitioner argues that Chapter 96-388 is unconstitutional based upon Williams.

Contrary to Petitioner's position, the State directs this Court's attention to its decision in Burch v. State, 558 So.2d 1 (Fla. 1990). In Burch, this Court held that the Crime Prevention and Control Act did not violate the single subject provision of the Florida Constitution. The Act dealt with (1) comprehensive criminal regulations, (2) money laundering, (3) drug abuse education, (4) forfeiture of conveyances, (5) crime prevention studies, and (6) safe neighborhoods. Id. The Court held that there

was a logical and natural connection among these subjects because all of the parts were related to its overall objective of crime control. The Court noted that the sections were intended to control crime, whether by providing for imprisonment or through taking away the profits of crime. The taking away profits language is a reference to the forfeiture section of the Act. A forfeiture proceeding is civil and independent of any criminal action. Kern v. State, 706 So.2d 1366 (Fla. 5th DCA 1998). All civil forfeiture cases are heard before a circuit judge of the civil division and the rules of civil procedure govern. § 932.704(2), Fla. Stat. (1997). Thus, the legislature may combine criminal sentencing and civil remedies for crimes without violating the single subject provision.

Here, as in Burch, the legislature has provided for protection of the public through sharing of criminal record information, recidivism control, notice to the public of sexual predators living in their neighborhoods, sentencing guidelines amendments, etc. In Burch, the legislature sought to control crime in different ways. Here, the legislature also sought to protect the public by utilizing several methods, working together. The legislature set forth a comprehensive plan to protect the public, provide for public safety. The legislature may properly set forth a goal of

protecting the public. When the legislature does so, the sections have a natural and logical connection and do not violate the single subject provision.

Finally, the Final Bill Analysis and Economic Impact Statement of SB 156 (Appendix)supports the State's position that Chapter 96-388 does not violate the single subject provision of the Florida Constitution.

In the Bill Analysis, the legislature notes that "the bill seeks to improve the overall effectiveness, efficiency, and accountability of Florida's public safety system." SB 156 achieved the above goals by:

1. Requiring the Department of Corrections to prepare all sentencing guidelines scoresheets.

2. Providing that any legislation which amends the sentencing guidelines scoresheet must have an effective date of January 1.

3. Expanding the duties of the criminal and juvenile justice information systems council and codifying the council's guiding principles for the state's management of public safety system information technology.

4. Requiring the Justice Administrate Commission to itemize and explain each of its duties and functions to the Legislature by January 1, 1997.

(SB 156 Analysis, page 3).

Additionally, by enactment of the bill, the legislature intended to address statutory glitches and correct barriers which hindered the effective implementation of current laws. (SB 156 Analysis, page 3). In implementing this bill, the legislature desired to address the public safety system's "big picture." (SB 156 Analysis, page 2). The bill made several substantive changes including:

1. allowance of law enforcement agencies to use juvenile criminal history information for law enforcement purposes and expansion of the public's access to juvenile criminal history records.

2. establishment of an eight-year revision cycle for laws and statutes dealing with public safety.

4. clarification of language making of technical corrections to various statutes (such as the definition of dwelling in the burglary and trespass statutes).

5. revision of statutes concerning street gangs and the Florida Sexual Predator Act.

(SB 156 Analysis, page 1). When one reviews the Senate Bill Analysis, the sections of the bill and the case law concerning single subject violations, Chapter 96-388 does not violate the

single subject provision of the Florida Constitution. The bill has as its common goal or theme, public safety, i.e., protection of the public. All sections of the bill work in conjunction to achieve this purpose. Therefore, Chapter 96-388 is proper. Petitioner's crime was committed after Chapter 96-388 was enacted. As Chapter 96-388 does not violate the single subject provision of the Florida Constitution, Petitioner's conviction and sentence must stand.

Remedy

If this act is found to be unconstitutional, the State would reassert that Section 95-182 is not unconstitutional as violating the single subject provision of the Florida constitution. However, if this Court finds that Chapter 95-182, Laws of Florida is also unconstitutional, the correct remedy is to resentence the defendant in accordance with the sentencing law in effect at the time the offense was committed, not at sentencing. *But see* Johnson, 616 So.2d at 5 (remanding for resentencing in accordance with the valid laws in effect at the time of the original sentencing); Thompson, 708 So.2d 315 (same).

Summary

The legislature's reenactment of the "Gort Act" in Chapter 96-388 cured the single subject problem. Thus, this Court should adopt the position taken by the Fourth District below in Salters v.

State, 731 So. 2d 826 (Fla. 4th DCA 1999). There, the Fourth District Court of Appeal held that Petitioner could not challenge the statute as the window of opportunity had passed.

Alternatively, this Court should find that the significant amendments to the Gort Act by Chapter 96-388 makes the issue of the window period for the Gort Act irrelevant. For, career criminal sentencing for all offenses committed after October 1, 1996, is controlled by Chapter 96-388 Laws of Florida.

Assuming this Court disagrees and finds that Petitioner falls within the confines of Chapter 95-182, Respondent's sentence must stand as the "Gort Act" does not violate the single subject provision of the Florida Constitution. There is a natural and logical connection among sections of the Gort Act. The first part concerns sentencing for aggravated stalking and other forms of violent conduct. The second provides a remedy for the victims of this conduct when the conduct occurs in a relationship. These provisions have a cogent relationship to each other. Thus, the Gort Act does not violate the single subject provision of Florida's Constitution.

POINT II

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

Petitioner was charged and tried pursuant to §§ 812.13 and 812.13(2)(c), (6), Fla. Stat., the strong arm robbery statute. (R-1). At the close of the State's case and the close of the defense's case, the lower court denied Petitioner's Motions for Judgment of Acquittal, concluding that enough evidence existed to submit the case to the jury for consideration. (T- 270-273). On appeal, Petitioner argues that the trial court erred in denying his motion, asserting that the state did not prove that the Pepto Bismol bottles were taken from Winn Dixie. (IB- 9). The State disagrees and contends that the lower court properly denied the motion and appropriately submitted the case to the jury.

It is a well-settled principle of Florida law that in a Motion for Judgment of Acquittal, a defendant admits all facts stated in the evidence adduced and the court draws every conclusion favorable to the state which is fairly and reasonably inferable from that evidence. Spinkellink v. State, 313 So. 2d 666, 670 (Fla. 1975), cert denied, 428 U.S. 911 (1976); Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974); T.J.T. v. State, 460 So. 2d 508, 510 (Fla. 3d DCA 1984); McConnehead v. State, 515 So. 2d 1046, 1048 (Fla. 4th DCA 1987). A motion for judgment of acquittal should not be granted

unless it is apparent that no legally sufficient evidence has been submitted under which a jury could legally find a verdict of guilty. Busch v. State, 466 So. 2d 1075, 1079 (Fla. 3d DCA 1984); Lynch v. State, supra. Because conflicts in the evidence and the credibility of the witnesses have to be resolved by the jury, the granting of a motion for judgment of acquittal cannot be based on evidentiary conflict or witness credibility. Lynch v. State, supra. A judgment should not be reversed if there is competent evidence which is substantial in nature to support the jury's verdict. Welty v. State, 402 So. 2d 1159 (Fla. 1981). Any conflicts in the evidence are properly resolved by the jury. Jent v. State, 408 So. 2d 1024 (Fla. 1982); Hampton v. State, 549 So. 2d 1059 (Fla. 4th DCA 1989).

In considering the above standard concerning motions for judgment of acquittal, the prevailing issue in the instant case is whether sufficient evidence existed to prove that Petitioner stole Pepto Bismol from Winn Dixie. Pursuant to sections 812.13, the elements of robbery include: a taking of money or other property; from the person or custody of another, with intent to permanently or temporarily deprive the person or owner of the money or property, when in the course of taking there is use of force, violence, assault, or putting in fear. § 812.13, Fla. Stat.

(1997).

Petitioner argues that the lower court's denial of his motions for judgment of acquittal was improper because there was no proof that Petitioner took the Pepto Bismol bottles from Winn Dixie. In support of this contention, Petitioner cites Jones v. State, 705 So. 2d 148 (Fla. 4th DCA 1998). In Jones, the defendant was convicted of grand theft for stealing property from K-Mart. The State presented circumstantial evidence that the merchandise was found in Petitioner's car without a receipt. Id. In reversing the trial court's denial of defendant's motions for judgment of acquittal, this Court noted that "there was no testimony from a K-Mart employee that there were any items missing from inventory." Id. This Court found that the circumstantial evidence was insufficient to negate the defendant's reasonable hypothesis of innocence. Id.

However, the facts of the instant case are sufficiently distinguishable from Jones, so as to negate its applicability. In Jones, the merchandise was found in the defendant's car without a receipt. Id. There are no facts presented in the opinion concerning the amount of time which had elapsed between when the defendant left the store and the search of the car. Id. Furthermore, there is no evidence concerning whether the defendant was seen leaving

the store with the items. Id. However, the facts of the instant case present more evidence of Petitioner's guilt than the facts of the precedent case.

First, the store manager testified that he saw Petitioner leaving the store, walking very briskly. (T-189, 218). Next, a clear outline of a package was visible in Petitioner's clothing- a bulge in Petitioner's jacket. (T-191). The bulge was quite large and this made the manager suspicious. (T-193). Finally, Petitioner began to run as soon as the manager approached him and said, "Excuse me, sir." (T-195). In fact, Petitioner attempted to run once again, after he was released. (T-234, 252). Petitioner put the bike in the manager's path, causing the manager's injury. And the manager and another witness saw the items drop from Petitioner's coat pocket. (T-234, 253). Based upon such information, a jury may reasonably find that the Pepto Bismol was taken from Winn Dixie.

Petitioner also contends that the trial court improperly admitted into evidence Petitioner's statement that he had stolen the Pepto Bismol from Winn Dixie. It is well-established in Florida that in order for an admission against interest or confession to be admitted into evidence, the State must provide sufficient evidence of corpus delicti. J.B. v. State, 705 So. 2d

1376 (Fla. 1998); Burks v. State, 613 So. 2d 441 (Fla. 1993); State v. Allen, 335 So. 2d 823 (Fla. 1976); Davis v. State, 730 So. 2d 837 (Fla. 4th DCA 1999). One may prove corpus delicti via circumstantial evidence. Sochor v. State, 619 So. 2d 285 (Fla. 1993); Burks, 613 So. 2d at 441; Allen, 335 So. 2d at 825. And although the State has the burden to demonstrate substantial evidence tending to show the commission of the charged crime before evidence is admitted to show the identity of the guilty party, the proof need not be uncontradicted or overwhelming. Id. "It is enough if the evidence tends to show that the crime was committed; proof beyond a reasonable doubt is not mandatory." Meyers v. State, 704 So. 2d 1368 (Fla. 1997); Cox v. State, 711 So. 2d 1323 (Fla. 5th DCA 1998); See also, Wainwright v. State, 704 So. 2d 511, 515 (Fla. 1997), cert. denied, 118 S.Ct. 1814 (1998).

Moreover, the State must prove that a crime was committed by the criminal agency of some person, but not necessarily the defendant. Burks, 613 So. 2d at 443 (the identity of the defendant as the guilty party is not a necessary predicate for the admission of a confession); Mckinney v. State, 579 So. 2d 80 (Fla. 1991) (to establish corpus delicti in order to admit defendant's confessions, State was not required to prove that death was caused by criminal act or agency of defendant); Allen, 335 So.

2d at 825; R.L.B. v. State, 703 So. 2d 1245, 1246 (Fla. 5th DCA 1998). As the Florida Supreme Court stated in Franqui v. State, 699 So. 2d 1312, 1317 (Fla. 1997), cert. denied, 118 S. Ct. 1337 (1998).

> [i]n order to prove corpus delicti, the State must establish: (1) that a crime of the type charged was committed; and (2) that the crime was committed through the criminal agency of another. In regard to the first part -that a crime was committed- each element of the relevant offense must be shown to exist. With respect to the second part -the criminal agency of another- the proof need not show the specific identity of the person who committed the crime. That is, it is not necessary to prove that the crime was committed by the defendant.

See also, McIntosh v. State, 532 So. 2d 1129, 1131 (Fla. 4th DCA 1988)("Corpus delicti" is defined as proof that a crime has been committed by someone, without identifying the person who was responsible. A prima facie showing of corpus delicti is sufficient for the admission of the defendant's confession). Moreover, the Florida Supreme Court has held that confessions and admissions may be considered in connection with other evidence to establish corpus delicti. Hodges v. State, 176 So. 2d 91 (Fla. 1965); See also Baxter v. State, 586 So. 2d 1196 (Fla. 2d DCA 1991); Jackson v. State, 192 So. 2d 78 (Fla. 3d DCA 1966).

Petitioner also argues that the State was required to

establish the corpus delicti of the crime prior to admission of the Petitioner's statements. Even if the State did not formally establish every element of the corpus delicti **before** Petitioner's confessions and admission were introduced into evidence in the case at bar, this was not a fatal error. This Court held in McIntosh that a prima facie showing of corpus delicti "is preferably done prior to the admission of the confession, however a subsequent prima facie showing will cure premature admission." McIntosh, 532 So. 2d 1131; See also Hodges v. State, 176 So. 2d 91 (Fla. 1965). Based upon the requirements for proving corpus delicti, the State proved the prima facie elements of possession of cannabis and possession of a firearm by a convicted felon.

The Florida Supreme Court's decision in Sochor v. State, 619 So. 2d 285 (Fla. 1993), supports the proposition that the State provided enough evidence to prove corpus delicti. In Sochor, a murder victim disappeared on New Year's Eve. It was uncharacteristic for the victim not to come home. The victim had a good relationship with her family and boyfriend and kept in touch. None of her belongings were missing from her apartment. A witness testified that he last saw the victim screaming for help with his brother on top of her. Based upon these facts, the court found that sufficient evidence existed to prove corpus delicti.

Sochor, 619 So. 2d at 289.

The State contends that Sochor is sufficiently analogous to the instant case, to show that corpus delicti exists in the instant case. In Sochor, the Supreme Court of Florida found that corpus delicti existed, even where there were no eyewitnesses to the murder and the victim's body had not been found. Id. Similarly, in the instant case, no one saw Petitioner take the Pepto Bismol bottles from the shelf of the Winn Dixie store. However, bottles of Pepto Bismol dropped from Petitioner's person after he was apprehended. (T-234, 253). Additionally, in the instant case, other facts tended to prove that a crime had been committed, just as in Sochor. In Sochor, there was evidence of the behavioral characteristics of the victim. In the instant case, the store manager noticed something as amiss by Petitioner's brisk walk toward the exit doors. Additionally, the bulge in Petitioner's jacket also provided evidence that Petitioner was in the process of taking merchandise from the store without paying for it. Accordingly, the fact that Petitioner ran, not once, but twice would all lend credence to the position that Petitioner had stolen the items from the Winn Dixie store. As such, there was sufficient evidence, pursuant to the corpus delicti standard, to demonstrate that Petitioner had stolen the Pepto Bismol from Winn Dixie.

Therefore, Petitioner's statement that he had stolen the Pepto Bismol was admissible. (T-254). In reviewing the case law and the facts in a light most favorable to the State, enough evidence was produced that a jury could reasonably conclude that Petitioner took the Pepto Bismol bottles from the Winn Dixie store.

In moving for judgment of acquittal, Petitioner admitted every conclusion favorable to the State the jury might fairly and reasonably infer from the evidence. The State clearly established a prima facie case, which was properly submitted to the jury. Additionally, the State has provided substantial, competent evidence to support a jury finding that Petitioner took the Pepto Bismol bottles from Winn Dixie without permission. Consequently, the lower court did not err in denying Petitioner's Motions for Judgment of Acquittal.

POINT III

THE TRIAL COURT DID NOT ERR BY PERMITTING THE PROSECUTION TO EXERCISE 5 OF ITS 6 PEREMPTORY CHALLENGES TO EXCUSE AFRICAN-AMERICAN JURORS OVER DEFENSE OBJECTION

Petitioner was charged and convicted in the lower court of strong arm robbery. (R-1-2); On appeal, he contends that this Court should reverse his conviction based upon the fact that the lower court, in its discretion, permitted the State to strike five out of six black prospective venirepersons.

The State disagrees and contends that the trial court properly exercised its discretion in permitting the peremptory strikes where the State presented a neutral reason for striking each of the prospective jurors. State v. Johans, 613 So. 2d 1319, 1322 (Fla. 1993). In assessing whether a peremptory strike is proper, the reason given need not rise to the level justifying challenge for cause. Slappy, 552 So. 2d 18, 22 (Fla. 1988). Moreover, the court noted in Melbourne v. State, 679 So. 2d 759 (Fla. 1996), that no rigid set of rules will work in every case, but that reviewing courts should recognize that peremptory strikes are presumed to be exercised in a non-discriminatory manner and that the trial court's decision should be affirmed unless clearly erroneous. Id. at 764-64; State v. Holiday, 682 So. 2d 1092, 1094 (Fla. 1996). As held in Reed v. State, 560 So. 2d 203, 206 (Fla. 1990):

> Within the limitations imposed by State v Neil, the trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended. State v. Slappy. Only one who is present at the trial can discern the nuances of the spoken word and the demeanor of those involved . . . In trying to achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges, we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a "feel" for what is going on in the jury selection process.

See also Smith v. Coastal Emergency Services, Inc., 538 So. 2d 946, 948 (Fla. 4th DCA 1989) (trial judge is in the best position to determine if reasons relied upon are bona fide and this Court will not second-guess him on appeal); Hall v. Daee, 602 So. 2d 512, 516 (Fla. 1992) (the trial court is in the best position to evaluate the neutrality of the proffered reasons, and its conclusion in this regard will be accorded deference on appeal).

As noted by Petitioner, the Supreme Court of Florida in Melbourne, set forth the procedure applicable to selecting a jury in a nondiscriminatory manner:

> A party objecting to the other side's use of a 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 (step1), 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.

Id. at 764.

In turning our attention to the instant case, the trial court properly exercised its discretion in allowing the State to exercise its peremptory challenges to strike the jurors based upon race-neutral reasons.

Initially, the prosecutor properly struck Juror Blissett as her husband was in prison for murder. Here, Ms. Blissett testified that her husband was convicted of murder in the Broward County courts, the same court where Petitioner was being tried. Ms. Blissett also stated that she continued to keep in touch with her husband. Based upon the analysis in Melbourne, it is obvious that the State presented a valid, race-neutral reason for striking Ms. Blissett.

Next, Petitioner asserts that the trial court improperly allowed the State to exercise a peremptory challenge in striking Juror Roberts. (IB- 13-15). In support of this argument, Petitioner asserts that the prosecutor's reasons for striking juror Robert's were not genuine. The State disagrees. As noted by

Petitioner, the prosecutor sought to strike juror Roberts because Roberts stated that he would find it difficult to give the case serious attention because it concerned the theft of Pepto Bismol. (T-138). Another juror--Femrite was stricken for cause in this case. (T-136). This juror also stated that she would not be able to give the case serious thought because it concerned Pepto Bismol. (T-72).

Furthermore, contrary to Petitioner's contention, there was no specific questioning of certain jurors. A general question was asked concerning whether anyone would have a hardship serving on the jury. (T-71). Ms. Femrite raised her hand, stating that she would be angry to know that she was sitting on a case- wasting her time over Pepto Bismol. (T- 71-72). At that point, the prosecutor asked if anyone else would have a hard time giving the case attention, Mr. Roberts raised his hand. (T- 72-73). After which, the prosecutor questioned Mr. Roberts more closely about his beliefs on the subject. (T- 72-73). The picture is not as Petitioner would paint, that the prosecutor specifically picked out these black jurors to ask them questions concerning Pepto Bismol. These two individuals were the ones who volunteered the information concerning their feelings on the subject--that the case concerned Pepto Bismol. (T-139) As the reasons given were genuine, the trial

judge did not err in allowing the prosecutor to exercise his peremptory challenge to strike Mr. Roberts.

Moreover, Petitioner asserts that the reason given was not genuine concerning employment hardship because another juror, Ms. Evans stated that it would be a hardship to serve, but actually sat on the jury. However, Ms. Evans' statement when asked if it would be a hardship was as follows: "I could serve but- but it - they are not going to be unhappy." This statement is somewhat less assertive than Mr. Roberts' statement that serving as a member of the jury would distract his ability to focus. (T-73). Mr. Roberts also made the comment that he would not lose his job, but people may lose their jobs if his project did not go well. (T-74).

As to Juror Beauchamp, Petitioner asserts that the reason given was not genuine. However, this argument is fallacious. In exercising this strike, the prosecutor stated that it wished to strike Mr. Beauchamp because of his thoughts on police officers. (T-141). During voir dire, Juror Beauchamp stated that police officers will sometimes give you a ticket because of the way you look or because of your accent. (T-55). Mr. Beauchamp also stated that police officers had picked on him in the past. (T-55). Mr. Beauchamp also felt that officers do things just because they can. (T-56). Also, the juror is from Haiti, where he admitted that the

county does not have “good law enforcement traditions.” (T-56).

Based upon the statements made by Mr. Beauchamp during voir dire, the prosecutor could reasonably have thought that if the juror had such ill-feelings toward the police in general, that the juror may think that the police officers who arrested Petitioner did not have valid cause to do so. This includes the fact that the juror felt that police officers wrongfully issued him tickets. The fact that police officers did not testify in the case is not dispositive. Police officers had to arrest Petitioner, and the juror’s attitude could quite easily have affected that subject.

In the questioning of Juror Maxwell/Powell, Petitioner asserts that the prosecutor singled-out black jurors to question about Pepto/Bismol. However, a review of the record shows this not to be the case. Juror Maxwell/Powell responded to a general question, directed at everyone, concerning any feelings on the Pepto-Bismol issue. (T-75). Ms. Powell raised her hand and asked a question concerning the amount of force to be used. (T-75). Therefore, Petitioner’s contention that the prosecutor singled-out this prospective juror is without merit. As such, the trial court properly allowed the State to exercise a peremptory challenge, where the juror indicated that she would require a certain amount of force before she could find Petitioner guilty of the crime. The

prosecutor was simply responding to questions asked by the juror. It could not be said that he was discriminatory in his questioning.

Finally, the reason for striking Ms. McCall was that her brother was in prison for lewd and lascivious act on a child. (T-148). Petitioner, asserts that the strike was genuine, as another prospective juror was not stricken where his son was charged with DUI and destruction of property. In the proceedings below, the trial judge reasoned that McCall's brother's charges were pending, while Mr. Koenighas' son's charges were over. (T-148). Therefore, the fact that Mr. Koenighaus was not peremptorily stricken on this ground is without merit. There is no pretense here, the prosecutor attempted to challenge juror Koenighaus for cause, twice. (T-136). However, these challenges were denied. (T- 136-137) Furthermore, the juror was peremptorily stricken by Petitioner. (T-147). Any error was harmless. Based upon the foregoing, Petitioner is not entitled to a new trial and his conviction and sentence must stand.

POINT IV

THE TRIAL COURT DID NOT ERR BY DENYING PETITIONER'S MOTIONS FOR MISTRIAL

Next, Petitioner contends that the trial court improperly denied his motions for new trial, where the prosecutor's questions related to questions outside the evidence. (IB-20). As noted by Petitioner, a prosecutor may not refer to facts which are not supported by the evidence. Ryan v. State, 457 So. 2d 1084, 1089-1090 (Fla. 4th DCA 1984). However, the Florida Supreme Court has recognized that control of prosecutorial comments is within the trial court's discretion. Durocher v. State, 596 So. 2d 997 (Fla. 1992). Accordingly, a trial court's ruling will not be overturned unless an abuse of discretion is shown. Id. In determining whether prosecutorial comments are improper, the court must inquire as to whether they are so prejudicial as to vitiate the entire trial. Stubbs v. State, 673 So. 2d 964 (Fla. 1st DCA 1996). Additionally, the improper comments must be of such a nature as to poison the minds of the jurors or to influence the jury to return a more severe verdict than otherwise warranted. Wasko v. State, 505 So. 2d 1314 (Fla. 1987).

In turning our attention to the instant case, the State contends that the prosecutor's comments did not constitute error. The prosecutor's question, concerning whether Petitioner was the

person removing merchandise from the shelves, was simply a question asked by the prosecutor to ascertain whether Petitioner stuffed merchandise from the store into his jacket. Next, Petitioner claims that the prosecutor's question "how did you come to discover this on or about the person of Mr. Kyles," was inappropriate because there was no testimony that the merchandise was actually discovered on Petitioner's person. However, the State submits that although the question could have been more artfully formed, the question was not inappropriate when one considers that the merchandise fell out of Petitioner's pocket when he tried to escape.(T- 234, 253). The State further notes that Petitioner failed to move for mistrial here. Next, Petitioner claims that mistrial should have been granted where the prosecutor referred to Petitioner's attempt to shoplift from the store. The jury knows that Petitioner is charged with robbery. As a result, the fact that the prosecutor asks such a question does not prejudice the jury in the least. The third motion for mistrial was properly denied where the prosecutor was simply engaged in a dialogue where he attempted to clarify the witness' testimony. In the next two motions, Petitioner objects to the prosecutor's classification of him as violent and that Petitioner had committed a crime. However, there was evidence that Petitioner threw or shoved a bicycle at the store manager. The jury

could decide rather this constituted violence. Finally, the jury could properly decide whether a crime had been committed. The fact that the prosecutor used those words in asking a question does not render the trial fundamentally unfair.

As such, the judge did not abuse his discretion in denying the motions for mistrial. The comments which are complained of were not of such a nature to poison the minds of the jurors or to influence the jury to return a more severe verdict than otherwise warranted. In fact, the evidence standing alone would tend to prove Petitioner's guilt. As set forth earlier in the State's brief, the facts support Petitioner's conviction and sentence. The Winn Dixie store manager witnessed Petitioner briskly walking toward the exit, attempting to leave the store. (T-218). As Petitioner attempted to exit the store, the manager saw that there was a bulge in Petitioner's jacket. (T-191-193). And once the manager asked Petitioner to stop, Petitioner attempted to run, not once but twice. (T-195, 234, 252). The Pepto-Bismol bottles fell from Petitioner's pocket when he tried to escape. (T-234, 252). And most importantly, the defendant admitted that he had stolen the Pepto-Bismol bottles from the Winn Dixie store. (T-254). Based upon these facts, the comments or questions which Petitioner now complains did not lead the jury to the conclusion that Petitioner

was guilty. The facts, in and of themselves, proved defendant's guilt. And contrary to Petitioner's contention, the comments or questions did not make the evidence appear stronger than it was. Finally, Appellant failed to request curative instructions where necessary. Robinson v. State, 656 So. 2d 190 (Fla. 1995); McCall v. State, 463 So. 2d 425, 426 (Fla. 3d DCA 1985). As such, the trial court properly denied Petitioner's motions for mistrial.

Moreover, during cross-examination of the witnesses, defense counsel cleared any doubt concerning whether the manager saw Petitioner take the bottles off the store's shelf, whether the manager could see what created the bulge in Petitioner's clothing. from the store. (T- 215-216, 244-245). Many of the contested issues were cleared on cross-examination of the witness. As such, the trial court properly denied Petitioner's motions for mistrial.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests that this honorable Court AFFIRM Petitioner's convictions and sentences below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Answer Brief on the Merits" has been furnished to: MARCY K. ALLEN, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on May 12, 2000.

_____
Of Counsel

APPENDIX