IN THE SUPREME COURT OF FLORIDA



RONALD CARSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

DCA CASE NO.98-2281
CASE NO. 95,765

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

# PETITIONER'S JURISDICTIONAL BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 765910
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

## TABLE OF CITATIONS

## STATEMENT OF THE CASE AND FACTS

In case no. CR96-2981, the State Attorney for the Ninth Judicial Circuit (Orange County) filed an information charging the petitioner with several felony offenses, all alleged to have been committed on February 10, 1996. (R 40-44) The petitioner, Ronald Carson, was convicted, after a jury trial, of four of those offenses, i.e., burglary with a battery and a firearm (Count I), attempted second degree murder with a firearm (Count II), attempted robbery with a firearm and a mask (Count III), and possession of a firearm during commission of a felony. (R 53-56) Mr. Carson appealed his judgment and sentence and the Fifth District Court of Appeal, in its case no. 97-259, vacated one of the convictions (Count IV) and declined to address various sentencing issues which had not been preserved for appeal. Carson v. State, 707 So. 2d 898 (Fla. 5th DCA 1998). (R 68-70)

On remand to the Circuit Court, the trial court resentenced Mr. Carson on Counts I-III pursuant to a sentencing guidelines scoresheet that omitted reference to the former conviction on Count IV. (R 22-23, 57, 80) The trial court also entertained, and rejected, various defense arguments addressed to computation of the scoresheet. (R 3, 22-24, 27) Mr. Carson again appealed, arguing in appeal no. 98-2281 that the objections he had made on remand to computation of the scoresheet should have been sustained. Mr. Carson also argued in his second appeal, for the first time, that the 1995 sentencing guidelines had been enacted unconstitutionally; he based that argument on the opinion issued in Heggs v. State, 718

So. 2d 263 (Fla.2d DCA), review granted no. 93,851 (Fla. October 1, 1998). (See appendix "A" to this brief) The Fifth District Court affirmed the resentencing order per curiam, with an opinion that read, in its entirety, as follows:

> AFFIRMED. *See* Sections 921.0012, 775.0845, 777.04; *Lamont v. State*, 610 So. 2d 435 (Fla. 1992); *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA), *rev. granted*, 718 So. 2d 169 (Fla. 1998); *Sanders v. State*, 621 So. 2d 723 (Fla. 5th DCA 1993).

Carson v. State, 24 Fla. L. Weekly D1091 (Fla. April 30, 1999) (Attached as Appendix "B" to this brief).

The petitioner timely filed his Notice to Invoke Discretionary Jurisdiction in the Fifth District Court on June 1, 1999.

## SUMMARY OF ARGUMENT

The decision in this case was "paired for review" by the District Court with a case now pending in this court. That case, Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA), rev. granted, 719 So. 2d 169 (Fla. 1998), has to do with the scope of jurisdiction in criminal appeals. One of the issues argued on the merits in the appeal of this case, the constitutionality of the 1995 sentencing guidelines, is also pending review in this court. This court has jurisdiction to resolve the substantive matter which was raised but not resolved in this appeal.

## ARGUMENT

THE DECISION IN THIS CASE WAS "PAIRED FOR REVIEW" BY THE DISTRICT COURT WITH THE PENDING CASE MADDOX v. STATE, 708 SO. 2D 617 (FLA. 5TH DCA), REV. GRANTED 719 SO. 2D 169 (FLA. 1998).

In Jollie v. State, 405 So. 2d 418 (Fla. 1981), this court held that similarly situated litigants should have similar avenues of review in the Florida court system. Pursuant to the procedure outlined in Jollie, the Fifth District court in this case "paired" this case for review with the pending case Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA), rev. granted, 719 So. 2d 169 (Fla. 1998), and this court should take jurisdiction for that reason. Maddox, as this court well knows, involves interpretation of the Criminal Appeal Reform Act and will determine to a great extent the scope of review in criminal cases in the District Courts of Appeal.

One of the issues argued on the merits in the appeal of this case, the constitutionality of the 1995 sentencing guidelines, is also pending review in this court in Heggs v. State, 718 So. 2d 263 (Fla.2d DCA), review granted no. 93,851 (Fla. October 1, 1998). This court should take jurisdiction of this case to resolve both the procedural and substantive matters at issue.

## CONCLUSION

This court has discretionary jurisdiction to review the decision of the District Court of Appeal, and it should exercise that jurisdiction to consider the substantive matter raised but not resolved in his appeal.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER

NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 765910
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR PETITIONER

## CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on Robert A. Butterworth, Attorney General, of 444 Seabreeze Blvd., 5th FL, Daytona Beach, FL 32118, by way of his in-basket at the Fifth District Court of Appeal, and mailed to Mr. Ronald Carson, No. X02081, Sumter C. I., P. O. Box 667, Bushnell, FL 33513-0667 this 10th day of June, 1999.

NANCY RYAN
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF THE STATE OF FLORIDA

| | | |
|---|---|---|
| RONALD CARSON, JR. | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. |
| | ) | DCA No. 98-2281 |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

A P P E N D I X

A: Appellate Briefs

B: DCA decision

PETITIONER'S JURISDICTIONAL BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NANCY RYAN
ASSISTANT PUBLIC DEFENDER
FL BAR # 0769510
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
Phone: 904/252-3367

ATTORNEY FOR PETITIONER

F

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FIFTH DISTRICT

| | | |
|---|---|---|
| RONALD CARSON, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| vs. | ) | DCA CASE NO. 98-2281 |
| | ) | |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Appellee. | ) | |
| | ) | |

ON APPEAL FROM THE CIRCUIT COURT,
NINTH JUDICIAL CIRCUIT,
ORANGE COUNTY, FLORIDA

# APPELLANT'S INITIAL BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 765910
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR APPELLANT

A

## TABLE OF CONTENTS

## TABLE OF CITATIONS

## TABLE OF CITATIONS cont'd

## STATEMENT OF THE CASE AND FACTS

This appeal is from a resentencing order, entered after a remand from this court, on Counts I, II and III charged in this case.

On March 5, 1996, the State Attorney for the Ninth Judicial Circuit (Orange County) filed an information in case no. CR96-2981 charging the appellant, Ronald Carson, with one count of burglary with a firearm with an assault or battery committed during the burglary (Count I); one count of attempted first-degree murder with a firearm (Count II); one count of attempted robbery with a firearm while wearing a mask (Count III); one count of use of a firearm while committing a felony (Count IV); and one count of possession of a firearm by a person adjudicated delinquent (Count V). (R 40-44) The offenses were alleged to have taken place on February 10, 1996. (R 40-44)

Specifically, the State charged on Count I that

> RONALD CARSON, JR., ...did...enter or remain in a dwelling...the property of SANDY HICKSON...with the intent to commit an offense therein...and in the course of committing said offense did make an assault or battery upon SANDY HICKSON, and during the commission of said offense did possess and carry, display, use, threaten or attempt to use a firearm, to-wit: a handgun.

(R 40) Count II charged that the defendant

> did...from a premeditated design to effect the death of another human being, attempt to murder another human being by shooting a gun and thereby striking DERRICK HICKSON with a projectile or projectiles from the gun,and in the course of committing said offense RONALD CARSON, JR., did possess and carry, display, use, threaten or attempt to use a firearm.

(R 41) The State charged on Count III that the defendant

> did...by force, violence, assault or putting in fear, attempt to take away from the person or custody of SANDY HICKSON and/or DERRICK HICKSON, certain property, to-wit: UNITED STATES MONEY CURRENT, and in the course of committing said offense RONALD CARSON, JR., did possess and carry a firearm or destructive device, to-wit: a handgun, and RONALD CARSON, JR. did wear a hood, mask or other device that concealed [his] identity.

(R 42)

A jury trial was held on all five counts on November 12 and 13, 1996. (R 53-56) Judgment of acquittal was entered as to Count V (R 56), and the jury returned verdicts of guilty as charged as to Count I (burglary with a battery and a firearm), Count III (attempted robbery with a firearm and a mask) and Count IV (possession of a firearm during commission of a felony). (R 54-56) As to Count II the jury found the defendant guilty of the lesser included offense of attempted second degree murder with a firearm. (R 55)

On January 21, 1997, the trial judge, the Honorable Michael F. Cycmanick, Circuit Judge, sentenced Mr. Carson to 194 months (17 ½ years) in the Department of Corrections on Count II (attempted second-degree murder), with a three-year minimum mandatory sentence for use of a firearm and with concurrent five-year prison terms on each of Counts I, III, and IV. (R 59-63) An appeal was filed from the January 21, 1997 judgment and sentencing orders, and this court, in its case no. 97-259, issued a decision and opinion on March 6, 1998, affirming the sentence in part, reversing it in part, and remanding for further proceedings. (R 67-70) Carson v. State, 707 So. 2d 898 (Fla. 5th DCA 1998). In its opinion this court vacated the conviction entered on Count IV (firearm possession) on double jeopardy grounds, and declined to address various sentencing issues which had not been preserved for appeal. (R 68-70)

On remand to the trial court, the Honorable Reginald K. Whitehead convened a

resentencing hearing on July 6, 1998. (R 1-39) At the hearing the court removed 3.6 points from the sentencing guidelines scoresheet to reflect this court's decision vacating the conviction entered on Count IV. (R 80, 57, 22-23) Defense counsel made additional arguments against the State's scoring of Counts I and III. (R 3-4, 22-24, 26-28) Specifically, the defense argued that both Count I (burglary of a dwelling with a firearm and with an assault) and Count III (attempted robbery with a firearm while wearing a mask) should have been scored as level eight, rather than level nine, offenses. (R 3, 22-24, 27) The court left both on the scoresheet as level nine offenses. (R 26-28, 80)

Judge Whitehead entered an amended order of judgment which did not include the conviction on Count IV which this court had earlier vacated, and sentenced Mr. Carson to seventeen years in prison on each of Counts I, II and III, all of the terms to run concurrently and each of the terms to include a three-year minimum mandatory sentence. (R 77-79, 82-85, 34-38)

Timely notice of appeal from the July 6, 1998 resentencing order was filed on July 31, 1996. (R 90)

## SUMMARY OF ARGUMENT

**Point one.** Counts I and III, which are scored as "additional offenses" on the sentencing guidelines scoresheet used in this case, should have been scored at level eight rather than level nine. The error should be corrected on remand.

**Point two.** The 1995 sentencing guidelines, used to sentence the appellant, were enacted in an unconstitutional manner; the error is fundamental and the appellant should be resentenced on remand under the 1994 guidelines.

## ARGUMENT

### POINT ONE

### THE TRIAL COURT ERRED BY SCORING COUNTS I AND III ON APPELLANT'S SENTENCING GUIDELINES SCORESHEET AS "LEVEL NINE" OFFENSES.

On Count I, the defendant was convicted of armed burglary of a dwelling with a firearm and with an assault taking place during the burglary. On Count III, he was convicted of attempted armed robbery with a firearm while wearing a mask. The State successfully argued below that both offenses should be scored on his sentencing guidelines scoresheet as level nine offenses. As the defense correctly argued below, both should have been scored as level eight offenses.

The incident this case arose out of took place on February 10, 1996, and accordingly the sentencing guidelines as amended effective October 1, 1995 control the case. Under the 1995 guidelines, both armed burglary and burglary with an assault are specifically designated as level eight offenses. See Section 921.0012(h), Florida Statutes (1996 supp.), and Sections 810.02(2)(a) and (2)(b), Florida Statutes (1996 supp.). The State took the position below that use of a firearm "bumped" the burglary offense involved in this case up to the next scoring level. That argument was a reference to Section 775.087(1) of the Florida Statutes, which provides that

> [f]or purposes of sentencing under chapter 921...a felony offense which is reclassified under this section is ranked one level above the ranking under s. 921.0012.

An offense is reclassified (i.e., from a second-degree felony to a first-degree felony) under Section 775.087 whenever a weapon is used in the course of committing that offense, *except* when the offense has *as an essential element* use of a weapon. See Section 775.087(1). A number of cases construe the "essential element" language, although not in the context of guidelines offense levels.

See, e.g., State v. Tinsley, 683 So. 2d 1089 (Fla. 5th DCA 1996), which holds that whether use of a weapon is an "essential element" of an offense depends on the wording of the statute that creates the offense, not on the wording of the charging document filed in any individual case. As the defense argued below, the Florida Supreme Court has held that use of a weapon is an essential element of the armed burglary offense created by Section 810.02. Lamont v. State, 610 So. 2d 435, 438-39 (Fla. 1992). Accordingly the armed burglary offense involved in this case should not have been "bumped" to level nine, and the sentence entered below on the incorrectly computed scoresheet should be vacated and the case remanded for resentencing pursuant to a correct scoresheet.

As to the attempted armed robbery count (Count III), the defense made a similar argument below, citing Ellis v. State, 608 So. 2d 514 (Fla. 5th DCA 1992). In Ellis this court held that armed robbery has as an essential element use of a weapon. 608 So. 2d at 515-16. The completed offense of armed robbery, under the 1995 sentencing guidelines, is specifically designated as a level nine offense, and the attempt to commit any offense is to be scored one level below the completed offense. See Section 777.04, Florida Statutes (1996 supp.). The defense accordingly argued that the attempted armed robbery offense involved in this case, because of Ellis, should be scored at level eight; the State took the position that since the defendant was charged with and convicted of attempted armed robbery *while wearing a mask*, the offense should be "bumped" back up to level nine because of Section 775.0845(2), Florida Statutes (1996 supp.) That statute provides as follows:

> **775.0845. Wearing mask while committing offense; enhanced penalties.**
>
> The penalty for any criminal offense...shall be increased as provided in this section if, while committing the offense, the offender was wearing a hood, mask, or other device that concealed his identity.
>
> ...(2)(b) A felony of the second degree shall be punishable as if it were a felony of the first degree.
>
> For purposes of sentencing under Chapter 921...a felony offense which is reclassified under this subsection is ranked one level above the ranking under s. 921.0012.

The last quoted paragraph of Section 775.0845 was added by Chapter 95-184, Laws of Florida, s. 21, which applies by its terms to offenses committed on or after October 1, 1995. The question whether Chapter 95-184 was enacted in a constitutional fashion is now before the Florida Supreme Court in Heggs v. State, 23 Fla. L. Weekly D2053 (Fla. 2d DCA September 4, 1998), which certified directly to the supreme court the question whether that chapter of the Laws violated the constitutional requirement that such chapters must treat only a single subject. The appellant requests this court to hold that Chapter 95-184 did violate the single-subject requirement, see Point Two infra, and to hold accordingly that Count III as well as Count I should have been scored as a level eight offense.

If this court disagrees with the appellant on the single-subject-rule argument, the sentencing order imposed below must still be vacated because Count I (burglary) was improperly scored. Lamont v. State, supra. The case must be remanded so that the appellant can be sentenced pursuant to a properly computed scoresheet. In general, "[a] trial court must have the benefit of a properly prepared scoresheet before it can make a fully informed decision" as to an appropriate sentence. Rubin v. State, 697 So. 2d 161, 162 (Fla. 3rd DCA 1997). This case is not similar to

State v. Mackey, 23 Fla. L. Weekly S485 (Fla. September 24, 1998), or to Hines v. State, 587 So. 2d 620 (Fla. 2d DCA 1991), where the appellants' respective sentences were upheld despite scoresheet errors; in Mackey, a correct scoresheet would have recommended a greater sentence than the incorrect scoresheet the trial judge was given, and in Hines, the Second District Court concluded that the trial judge would still have imposed a departure sentence based on extreme brutality and severe permanent injuries to the victim if he had been provided with a correctly computed scoresheet. This case is not controlled by Mackey, and accordingly Judge Whitehead should reconsider whether the sentence he imposed is appropriate in light of a correct guidelines scoresheet.

## POINT TWO

## THE 1995 SENTENCING GUIDELINES WERE ENACTED INAN UNCONSTUTITIONAL MANNER AND CANNOT BE APPLIED TO THIS CASE.

In Heggs v. State, 23 Fla. L. Weekly D2053 (Fla. 2d DCA September 4, 1998), a panel of the Second District Court of Appeal concluded that Chapter 95-184, Laws of Florida, was enacted unconstitutionally because it dealt with more than one subject. 23 Fla. L. Weekly at D2054. The court in Heggs declined to declare the statute unconstitutional and instead certified the question of the statute's constitutionality directly to the Florida Supreme Court for resolution. Id. The appellant submits that the court in Heggs reached the correct conclusion; accordingly the sentence imposed below pursuant to the 1995 guidelines should be vacated in its entirety and the case remanded for resentencing pursuant to the 1994 guidelines.

The appellant acknowledges that this argument was not made below, and acknowledges that this court, in Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998) (en banc), held that there are no fundamental sentencing errors which can be addressed on appeal in the absence of an objection at the trial level. A number of district courts have issued opinions certifying conflict with Maddox on that point, see Nelson v. State, 23 Fla. L. Weekly D2241 (Fla. 1st DCA October 1, 1998) (en banc) (citing cases), and the appellant requests this court either to recede from Maddox and to address this issue in this appeal or to certify conflict with the First District Court on the preservation point so that the Florida Supreme Court can take jurisdiction of this case along with other cases which challenge the rule of Maddox and the 1995 guidelines. The issue raised on this point constitutes fundamental error. Heggs v. State, supra, 23 Fla. L. Weekly at D2054.

On the merits, the legal conclusion announced in Heggs is correct. Chapter 95-184 revises

the sentencing guidelines, increasing the points for primary offenses which are scored at levels seven and nine, increasing the points for additional offenses scored at levels six, seven, eight, nine and ten, and increasing the points for prior offenses scored at levels six, seven, eight, nine, and ten. Chapter 95-184, s. 6. That amendment affects the appellant in this case, adding 70.4 points for his additional offenses if they are scored at level nine and adding 54.8 points if they are scored at level eight. Chapter 95-184 also amends various substantive criminal statutes, see ss. 8, 9, and 13-15; amends various criminal sentencing statutes, see ss. 7, 10, 11, 16, 17, and 19-25; amends statutes regulating prisoners' gain time and control release, see ss. 26 and 27; amends statutes which create a civil cause of action in private individuals against convicted offenders, see ss. 28-34; amends a statute which creates a civil cause of action in favor of the government against convicted offenders, see s. 35; creates a civil cause of action in private individuals for whose benefit domestic-violence injunctions have been entered, see s. 36 and cf. Section 741.31, Florida Statutes (1994 supp.); creates a civil cause of action in private individuals who have been the victims of repeated acts of domestic violence, regardless of the existence of an injunction, see s. 37; estabishes a statute of limitations for actions brought pursuant to that cause of action, see s. 37; adds to the duties of the clerks of the Circuit Courts vis-à-vis law enforcement agencies with regard to each petition filed with them for a domestic-violence injunction, see s. 38, and amends a statute which sets out the duties of the clerks of the Circuit Courts vis-à-vis the Division of Criminal Justice with regard to each case in which a minor is convicted of one of various misdemeanors. 95-184, s. 12, and see Section 943.051(b), Florida Statutes (1994 supp.). Chapter 95-184, like the laws involved in State v. Johnson, 616 So. 2d 1 (Fla. 1993), Bunnell v. State, 453 So. 2d 808 (Fla. 1984), and Thompson v. State, 708 So. 2d 315 (Fla. 2d DCA 1998), deals

with more than one subject.

Before the biennial reenactment of the Florida Statutes on May 24, 1997, the defectively enacted law was the sole authority for the 1995 amendments to the sentencing guidelines and for the 1995 amendment to Section 775.0845, enhancing scoring levels for masked offenders, relied on by the State below in this case. This court should declare Chapter 95-184 void ab initio due to its violation of the single-subject rule, see Martinez v. Scanlan, 582 So. 2d 1167, 1174 (Fla. 1991), and should decline to give it effect in this case. The sentence entered below should be vacated for that reason and the appellant resentenced on remand pursuant to laws which were valid when he committed his offenses and was sentenced for them.

## CONCLUSION

The appellant requests this court to vacate the sentences entered below and to direct the trial court, on remand, to correct the sentencing guidelines scoresheet to reflect the correct scoring levels for Counts I and III.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER

NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 765910
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR APPELLANT

## CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on Robert A. Butterworth, Attorney General, of 444 Seabreeze Blvd., 5th FL, Daytona Beach, FL 32118, by way of his basket at the Fifth District Court of Appeal, and mailed to Mr. Ronald Carson, Jr., No. X02081, Sumter C. I., P. O. Box 667, Bushnell, FL 33513-0667 on this 5th day of November, 1998.

NANCY RYAN
ASSISTANT PUBLIC DEFENDER

(17)
98-8:
NR

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT



RONALD CARSON

Appellant,

v.

CASE NO. 98-2281

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

REBECCA ROARK WALL
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618586
444 Seabreeze Blvd.
5th Floor
Daytona Beach, FL 32118

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES:



OTHER AUTHORITIES:

## STATEMENT OF THE CASE AND FACTS

The State offers the following additional facts which are relevant and important to the issues raised by the Defendant, and are needed in order to provide a full and fair account of the case.

The Fifth District Court of Appeal affirmed three of the Defendant's four convictions. (R.68-70). This court then remanded the case back to the trial court to resentence the Defendant based on this court's holding. This court upheld the Defendant's convictions for: Count I - burglary of a dwelling with an assault pursuant to §810.02(2)(a), Fla. Stat. (1995); Count II - attempted first degree murder pursuant to §§782.04 & 777.04, Fla. Stat. (1995); and Count III - attempted robbery with a firearm pursuant to §§812.13, 775.087, and 777.04, Fla. Stat. (1995). (R.68-70).

At the Defendant's resentencing, the trial court made the appropriate findings to support the decision to sentence the Defendant as an adult. (R.28-29).

## SUMMARY OF ARGUMENTS

**POINT I:** The trial court correctly sentenced the Defendant according to the scores on the guideline scoresheet. Based on the charges for which the Defendant was convicted, both Count I and Count III were properly scored as level nine. Each was increased one level based on a statutory level-enhancement.

Even if the scoresheet was incorrect, there is no reason to resentence the Defendant. The record clearly shows that the trial court would have imposed the 17-year sentence even if the Defendant's score was a little lower. The trial court expressed that he would not go above 17 years because he could not exceed the Defendant's first sentence (which was overturned on appeal). But he clearly identified the reasons why he was imposing the sentence he gave, implying that he may even have gone higher if he could have done so. Therefore, any error in the scoresheet does not warrant a new sentence.

*POINT II:* The Defendant failed to preserve this issue for appellate review. By failing to argue or raise the issue below, the Defendant waived any challenge to the constitutionality of the statute on appeal. Furthermore, there has not yet been any finding in any appellate court that the statute is unconstitutional. There is no reason for this court to make that determination, especially when the Defendant failed to preserve the issue.

## ARGUMENT

### POINT I

THE TRIAL COURT CORRECTLY SENTENCED THE DEFENDANT ACCORDING TO THE SCORE ON THE GUIDELINE SCORESHEET.

The trial court correctly assessed the Defendant's convictions on Count I and Count III as level nine on the guideline scoresheet. The Florida Supreme Court, in *Lamont v. State*, 610 So. 2d 435 (Fla. 1992), very clearly stated that a firearm is **not** an essential element of burglary if it is charged as a burglary with an assault or battery under §810.02(2)(a), Fla. Stat. (1995). That is exactly how the Defendant was charged and convicted. (R.40, 54, 57). Burglary with an assault or battery does not include a firearm as an essential element of the crime. Therefore, the trial court correctly applied the enhancement under §775.087(1), Fla. Stat. (1995).

*With regard to Count III, the trial court correctly enhanced* the conviction one level to level nine based on the use of a mask. Robbery with a firearm is a level nine. Attempted robbery, for which the Defendant was convicted, lowers it to level eight. However, since the Defendant used a mask, §775.0845 allowed the trial court to bump it back up one level to level nine. Because the statute clearly allows such a scoring increase, the trial court properly assessed the points as a level nine offense.

Even if the scoresheet was improperly scored, there is no need to re-sentence the Defendant. The Florida Supreme Court has very clearly stated that scoresheet errors do **not** automatically require re-sentencing. In *State v. Mackey*, 23 Fla.L.Weekly S485 (Fla. Sept. 24, 1998), the Court refused to find that it is *per se* error any time there is a scoresheet error. *See also State v. Rubin*, 23 Fla.L.Weekly S493 (Fla. Sept. 24, 1998).

In those cases, the Court approved the Second District's holding in *Hines v. State*, 587 So. 2d 620 (Fla. 2d DCA 1991). In *Hines*, the court found "beyond a reasonable doubt that the trial judge would have imposed the same departure sentence notwithstanding the scoresheet error." It is now clear that the appellate court can review a possible scoresheet error in order to determine whether there is evidence that the trial court would have imposed the sentence even if the scoresheet was corrected. If the reviewing court finds enough indication that the judge would have given the Defendant the same sentence, there is no reason to send it back for a new sentencing.

In the instant case, the record clearly shows that the trial court would have imposed the very same sentence even if the score was 18 points lower. The trial judge addressed the Defendant extensively before imposing the sentence, explaining his reasons for the sentence:

> THE COURT: . . .
> Mr. Carson, I've been doing

> criminal law for about close to 15 years now and next to some first degree murder cases that I've prosecuted and first degree murder cases I've handled as a defense attorney, this is one of the worse crimes I've seen.
>
> What makes this aggravated is it occurred in the presence of children, it's an execution style killing here. Whether a weapon was found or not is irrelevant. We know that weapon was a firearm.
>
> Mr. Carson, whether you were the person that pulled the trigger or one of the other people, it doesn't make a difference. If you are involved in something like this, you have to be responsible for your actions.

(R.29). As the sentencing hearing progressed, the trial judge further explained:

> THE COURT: . . .
>
> I have to look at the crime. You've been in the system obviously for a while and your grandmother said that you are a follower and I'm not disagreeing with that. You probably are a follower. Either you are making this decision -- nobody forced you to make this decision. Even if you are a follower, you are following the wrong group of people. Obviously, they are walking free and you are in here paying for the crime.
>
> It's just this -- I just don't understand it, but at the same time I have to do what I have to do. I'm not trying to back my way into sentencing you in prison because I am going to look you right in the eye and tell you what I am going to sentence you to. You will have a life after this.
>
> I can't put you in prison for

> life. It may be longer than what you may like, but it's punishment. You may have changed and that's fine too. I hope you will change, but I am still going to punish you for what you did. It may seem harsh, but at the same time, I have to look at **what crime you actually committed**, and maybe you will have some time while you are in jail to think about it.
>
> . . .
>
> . . .
>
> **I just can't find any reason to be lenient on you.** I just don't -- I don't know what reason I can have. I am going to -- I guess I've said it and I'm probably repeating myself, but I am going to sentence you at this time.
>
> I think **what you did** was wrong and I want you to understand that. You have to be punished **for what you do.**

(emphasis added) (R.32-34). The judge then asked about the guideline range. (R.34). The prosecutor stated, "I believe the court is probably bound by the 17 and a half year sentence as a maximum that was originally imposed." (R.34). The court responded, "Yeah, I know that. I wasn't going to sentence him to more than 17 years." (R.34).

The judge proceeded to sentence the Defendant to 17 years in prison. (R.36). When the judge asked about a corrected scoresheet, the prosecutor told him that the score would be different after removing the points for the vacated conviction. (R.36). The judge stated:

> THE COURT: The sentence I just gave

was in the guidelines.

PROSECUTOR: Yes, your honor.

THE COURT: That's all I'm worried about.

(R.36).

The record shows that the trial court imposed the 17 year sentence based on the **crimes committed**, not the raw score or the specific guideline range. He impressed upon the Defendant that he intended to impose a significant punishment for the specific crimes for which the Defendant was convicted. As long as that sentence was within the guideline range, it did not matter what the exact score or range was. The trial court's decision was based on the seriousness of the crimes and the Defendant's particular circumstance.

There is absolutely no reason to believe that the trial court would have imposed a different sentence if the scoresheet had *reflected a lower guideline score. Even if the challenged 18* points were removed from the scoresheet, the 17 year sentence was well within the guideline range. The range <u>with</u> the points is 14 to 23.9 years, while the range <u>without</u> the points is 13 to 22 years. The 17 year sentence falls near the middle of both ranges.

Absent some indication that the trial court would have imposed a lesser sentence, there is no reason for this court to send the case back for the trial court to reconsider the sentence. Clearly, the court could re-impose the very same sentence. Without a

showing that the judge would reduce the sentence if the scoresheet was reduced by the challenged 18 points, there is no reason to send the case back to the trial court.

## POINT II

BECAUSE THE DEFENDANT NEVER RAISED THE CONSTITUTIONALITY OF THE 1995 SENTENCING GUIDELINES, THE ISSUE IS NOT PRESERVED FOR APPELLATE REVIEW.

The Defendant waived any challenge to the constitutionality of the statute on appeal. He failed to raise or argue this issue before the trial court at any stage of his case, including the first sentencing, the direct appeal, and the re-sentencing hearing. Therefore, he failed to preserve this issue for appellate review.

The Defendant acknowledges that this court's holding in *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998) precludes appellate review of any sentencing issues which were not preserved in the lower court. In this case, the Defendant had three opportunities to raise the constitutionality issue, but failed to do so. There is no reason for this court to consider the issue now.

Furthermore, there has not yet been any finding in any appellate court that the statute is unconstitutional. Even the Second District Court, which decided *Heggs v. State*, 718 So. 2d 263 (Fla. 2d DCA 1998) refused to hold the statute unconstitutional. Instead of being the court to send back to the trial court every case that was sentenced between October 1, 1995 and May 24, 1997, the Second District deferred to the Florida Supreme Court to make that decision. That issue has already been briefed before the Florida Supreme Court, and the State's brief on the merits is

attached as an appendix. The well-reasoned brief clearly points to the legal precedent which supports a ruling that there was no violation of the single subject rule. That merits brief also points out that this court could sever any constitutionally offensive portion of that statute in order to preserve the constitutional aspects. Either argument provides this court with the legal support to affirm the sentence in the instant case.

There is no reason for this court to make the determination that the 1995 guidelines are unconstitutional, especially when the Defendant failed to preserve the issue. If, however, this court determines -- like the Second District -- that only the Florida Supreme Court should determine the issue, this court can hold this case in abeyance until the Florida Supreme Court decides *Heggs*.

## CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully asks this honorable court to affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Rebecca Roark Wall

REBECCA ROARK WALL
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618586
444 Seabreeze Blvd.
5th Floor
Daytona Beach, FL 32118

COUNSEL FOR APPELLEE

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by delivery to Nancy Ryan, Assistant Public Defender for Appellant, this 9th day of December, 1998.

Rebecca Roark Wall

Rebecca Roark Wall
Of Counsel

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

RONALD CARSON

Appellant,

v. CASE NO. 98-2281

STATE OF FLORIDA,

Appellee.

_____/

APPENDIX

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

REBECCA ROARK WALL
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618586
444 Seabreeze Blvd.
5th Floor
Daytona Beach, FL 32118

COUNSEL FOR APPELLEE

INSTRUMENT:

IN THE SUPREME COURT OF FLORIDA

CURTIS LEON HEGGS,

Petitioner,

v. CASE NO. 93,851

STATE OF FLORIDA,

Respondent.
_____/

# MERITS BRIEF OF RESPONDENT

---

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DALE E. TARPLEY
Assistant Attorney General
Florida Bar No. 0872921
Westwood Center
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR RESPONDENT

/mah

## TABLE OF CONTENTS

OTHER AUTHORITIES

## CERTIFICATE OF SIZE AND STYLE OF FONT

Your undersigned hereby certifies that the size and style of font used in this brief is 12 point Courier New, a font that is not proportionately spaced. And, if footnotes are published, the same size and style of font is used and the footnotes are single spaced.

## SUMMARY OF THE ARGUMENT

The fact that the scope of legislation is broad and comprehensive is not fatal under the single subject rule so long as the matters included in the enactment have a natural or logical connection. The enactment under attack in the instant case, Chapter 95-184, Laws of Florida, can and should be held constitutional since it is a comprehensive piece of legislation updating interrelated components of the criminal justice system. The fact that several statutes are amended does not mean more than one subject is involved. The subject of the act in question is the definition, punishment, and prevention of crime and the protection of the rights of crime victims. The act does not violate the single subject rule and it should be upheld. Alterna-tively, the Court should sever the offending portion of the enactment.

## ARGUMENT

**THE LEGISLATIVE VEHICLE WHICH AMENDED THE 1994 SENTENCING GUIDELINES DID NOT VIOLATE THE SINGLE SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION SINCE THE PROVISIONS OF THE ACT WERE COGENT AND INTERRELATED AND DIRECTED TOWARD THE DEFINITION, PUNISHMENT AND PREVENTION OF CRIME AND THE ANCILLARY RIGHTS OF CRIME VICTIMS.**

The petitioner challenges the constitutionality of the 1995 sentencing guidelines as enacted by chapter 95-184, Laws of Florida arguing that the bill which ultimately became law violated the single subject requirement of article III, section 6 of the Florida Constitution.[1] He argues that the bill violated the single subject requirement because it embraced, not one, but several different subjects, e.g., criminal sentencing and private civil damages. The state responds that the matters addressed by chapter 95-184 are naturally and logically connected such that the single subject requirement is not violated.

The rule that every legislative act is presumed to be constitutional, and that every intendment must be indulged by the courts in favor of its validity is applicable to statutes claimed to be unconstitutional for violating the single subject rule. A

---

[1]The amendment provides: "Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title."

legislative enactment should be stricken only when there is a plain violation of the requirement that an enactment be limited to a single subject expressed in the title. However, every doubt should be resolved in favor of the validity of the provision, since it must be presumed the legislature intended to enact a valid law. 49 *Fla. Jur.* 2d, *Statutes*, §70 (1984 ed.).

In reference to the statute challenged here, the fact that the scope of a legislative enactment is broad and comprehensive is not fatal under the single subject rule so long as the matters included in the enactment have a natural or logical connection. *In re Advisory Opinion to the Governor*, 509 So. 2d 292, 313 (Fla. 1987). *See also Smith v. Dept. of Insurance*, 507 So. 2d 1080, 1085 (Fla. 1987); *Chenoweth v. State*, 396 So. 2d 1122, 1124 (Fla. 1981). The test for determining duplicity of subject "is whether or not the provisions of the bill are designed to accomplish separate and disassociated objects of legislative effort." *Burch v. State*, 558 So. 2d 1, 2 (Fla. 1990) (quoting *State v. Thompson*, 120 Fla. 860, 163 So. 270 (1935).

However, a statute will not be unconstitutional for embracing more than one subject if the title is sufficiently broad to connect it with the general subject matter of the enactment. *State v. McDonald*, 357 So. 2d 405, 407 (Fla. 1978). In *Smith v. City of St. Petersburg*, 302 So. 2d 756 (Fla. 1974) the supreme court reasoned:

For a legislative enactment to fail, the

> conflict between it and the Constitution must be palpable, however, where by reasonable intent the title can be determined to be sufficiently broad as to include a provision that can be deemed to reasonably connect it with the subject matter of an enactment, then it should not be declared inoperative and unconstitutional. In other words, the title should reasonably and fairly give notice of what one may expect to find in the body of the enactment.

302 So. 2d at 758. This comports with the purpose of article III, section 6 in requiring that legislative acts embrace one subject, which is to give adequate notice to the legislature and to the public of what the law encompasses. *McDonald*, 357 So. 2d at 407.

It must be recognized that this provision is not designed to deter or impede legislation by requiring laws to be unnecessarily restrictive in their scope and operation. *State ex rel. X-Cel Stores, Inc. v. Lee*, 122 Fla. 685, 166 So. 568 (1936). The key appears to be palpable conflict between the bill in question and the single-subject requirement. The state submits that the enactment under attack, chapter 95-184, can and should be held constitutional since it is a comprehensive piece of legislation updating interrelated components of the criminal justice system. The provisions of the bill are not designed to accomplish separate and disassociated objects of legislative effort.

The state is aware of the Second District's recent opinion in *Thompson v. State*, 708 So. 2d 315 (Fla. 2d DCA 1997) in which chapter 95-182, Laws of Florida, was held unconstitutional as

violating the single subject rule. According to this opinion, harsh sentencing for violent career criminals and the providing of civil remedies for victims of domestic violence comprise two distinct subjects. *Id.* at 317. *Compare Higgs v. State*, 695 So. 2d 872 (Fla. 3d DCA 1997) (finding reasonable and rational relationship between each section of Act); *Holloway v. State*, 712 So. 2d 439 (Fla. 3d DCA 1998) (following *Higgs* and certifying conflict); *Linder v. State*, 711 So. 2d 1340 (Fla. 3d DCA 1998) (same).

As a consequence, the question is whether the court, in evaluating the single subject challenge to chapter 95-184, will follow the line of cases outlined in *Burch v. State*, 558 So. 2d 1 (Fla. 1990) or the view which prevailed in *State v. Johnson*, 616 So. 2d 1 (Fla. 1993) and *Bunnell v. State*, 453 So. 2d 808 (Fla. 1984) cited by the Second District in *Thompson*.

In entertaining a challenge to chapter 87-243 as violative of the single subject rule the *Burch* court reviewed the case law:

> In State v. Lee, 356 So. 2d 276 (Fla. 1978), we considered whether chapter 77-468, Laws of Florida, violated article III, section 6, because it dealt with both insurance and tort reform. In upholding the act, we pointed out:
>
> > The purpose of the constitutional prohibition against a plurality of subjects in a single legislative act is to prevent a single enactment from becoming a "cloak" for dissimilar legislation having no necessary or appropriate connection

> with the subject matter. E.g., Colonial Inv. Co. v. Nolan, 100 Fla. 1349, 131 So. 178 (1930). This constitutional provision, however, is not designed to deter or impede legislation by requiring laws to be unnecessarily restrictive in their scope and operation. See State ex rel. X-Cel Stores, Inc. v. Lee, 122 Fla. 685, 166 So. 568 (1936). This Court has consistently held that wide latitude must be accorded the legislature in the enactment of laws ...
>
> Id. at 282.

In Chenoweth v. Kemp, 396 So. 2d 1122 (Fla. 1981), we debated whether chapter 76-260, Laws of Florida, was unconstitutional because it contained provisions covering medical malpractice, tort litigation, and insurance reform. Holding that the act did not violate article III, section 6, we said:

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

Id. at 1124 (quoting Board of Public Instruction v. Doran, 224 So. 2d 693, 699 (Fla. 1969)).

Once again, in Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987), this Court addressed the constitutionality of the 1986 Tort Reform and Insurance Act, chapter 86-160, Laws of Florida. In analyzing this comprehensive act we found that it covered five basic areas: (1) long-term insurance reform, (2) tort reform, (3) temporary insurance reform, (4) creation of a task force to study tort reform and insurance law, (5) modification of financial responsibility requirements applicable to physicians. The Court referred to the preamble of the act which explained how the tort reform provisions

> were "properly connected" for purposes of article III, section 6. Despite the many disparate subtopics contained in the act, we determined that all of them were reasonably related to the liability insurance crisis which the act was intended to address.

558 So. 2d at 2. The *Burch* court then turned its attention to chapter 87-243 and found the subject matter to be not as diverse as that contained in the legislation approved in *Lee*, *Chenoweth*, and *Smith*.[2] The court concluded "[t]he fact that several statutes are amended does not mean more than one subject is involved." Unlike the bill construed in *Bunnell*, chapter 87-243 was found to be a comprehensive law in which all its parts were directed toward meeting the crisis of increased crime.

---

[2]*See also In re Advisory Opinion to the Governor*, 509 So. 2d 292 (Fla. 1987) (legislation proper that established a tax on services and included an allocation scheme for the use of the tax revenues); *State v. McDonald*, 357 So. 2d 405 (Fla. 1978) (statute proper that provides for the decriminalization of traffic infractions and also creates a criminal penalty for refusing to sign traffic citation); *Board of Public Instruction v. Doran*, 224 So. 2d 693 (Fla. 1969) (statute mandating open meetings for boards and commissions with provisions for criminal penalties and civil injunctive relief not unconstitutional); *State ex rel. Flink v. Canova*, 94 So. 2d 181 (Fla. 1957) (Florida Pharmacy Act covering practice of pharmacy and regulation of drug stores not unconstitutional since these matters properly connected).

Applying the principles of *Burch*, *Lee*, *Chenoweth*, and *Smith* to chapter 95-184, it is clear that its provisions are cogent and interrelated and directed toward one primary object: the definition, punishment, and prevention of crime and the concomitant protection of the rights of crime victims. The chapter is not as diverse and comprehensive as that upheld by the supreme court in *Burch*. It defines and clarifies substantive offenses, e.g., burglary and theft, prescribes punishment through the amendment of various statutes, including enhancement and reclassification statutes as well as statutes relating to gain time and control release; and attempts to protect victims' rights by amending statutes relating to supplemental civil restitution liens and domestic violence. The rights of crime victims are inextricably intertwined with the chapter's goal of the punishment and prevention of crime and there is a natural, logical connection between the two.

The instant enactment is not palpably in conflict with the Constitution as were the statutes at issue in *Johnson* and *Bunnell*. Likewise, the instant case is distinguishable from *Martinez v. Scanlon*, 582 So. 2d 1167 (Fla. 1991), *Alachua County v. Florida Petroleum Marketers Ass'n.*, 553 So. 2d 327 (1st DCA), *approved*, 589 So. 2d 240 (Fla. 1991), and *State v. Leavins*, 599 So. 2d 1326 (Fla. 1st DCA 1992). Each provision of chapter 95-184 is directed toward the definition, punishment, and prevention of crime and the related

purpose of protecting and compensating crime victims. The Court should follow *Burch*, *Lee*, *Chenoweth*, and *Smith*.

The state urges the Court to uphold chapter 95-184 as not in violation of the single subject requirement as it is presumed to be valid. If, however, for some reason the Court should find the statute in violation of the single subject requirement, the state suggests the objectionable portion of the enactment should be severed.[3] This Court has summarized the general rule regarding severability as follows:

> An unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining valid provisions, that is, if the legisla-tive purpose expressed in the valid portions can be accomplished independently of those which are void; and the good and bad features are not inseparable and the Legislature would have passed one without the other; and an act complete in itself remains after the invalid provisions are stricken.

*Moreau v. Lewis*, 648 So. 2d 124, 128 (Fla. 1995) (quoting *Pres-*

---

[3]The state did not argue severability before the Second District. However, upon closer reflection the state believes the Court can and should entertain the possibility of severing the offending portion of the enactment. This is not an appeal from an adverse ruling but a continuing of the litigation in a higher court. As such, the state feels entitled to present the argument as a possible solution to the constitutional problem.

*byterian Homes v. Wood*, 297 So. 2d 556, 559 (Fla. 1974). *See generally* 49 *Fla. Jur. 2d, Statutes*, §§ 98, 99 (1984 ed. & 1998 Supp.). A legislative preference for severability of voided provisions is persuasive. *Moreau*, 648 So. 2d at 127.

The act in question, chapter 95-184, contains a severability clause. 95 Laws of Florida 184, §39. The provisions of the act that offended the court in *Thompson* and in the instant case, i.e., the civil provisions addressing domestic violence injunc-tions, could easily be excised leaving the interrelated criminal justice legislation intact. The legislature specifically provided for severability, the remaining sections of the act are viable and complete, and from an objective viewpoint, in all likelihood the legislature would have passed the act without the inclusion of the unconstitutional provision, a conclusion supported by the inclusion of a severance clause in the act. *See Smith v. Dept. of Insurance*, 507 So. 2d 1080 (Fla. 1987).

This approach would avoid the expenditure of judicial labor feared by the Second District of having to resentence every defendant in the window period prior to the biennial reenactment. If chapter 95-184 were held unconstitutional or the court refused to sever the provisions offensive to the single subject require-ment, every defendant sentenced in the window period between October 1, 1995 and May 24, 1997[4] would have to be resentenced

[4]This was the date of the biennial reenactment of the 1995

under the 1994 guidelines. This would require an enormous expense of judicial time and labor in the courts of the state and would be contrary to the legislative intent in enacting chapter 95-184.

The state respectfully requests that the Court uphold chapter 95-184 as constitutional and not in violation of article III, section 6 of the Florida Constitution. Alternatively, the state requests the Court to sever the offensive portion and leave the remainder of the enactment intact.

---

amendments of chapter 95-184 by chapter 97-97, Laws of Florida. Once reenacted as a portion of the Florida Statutes, a chapter law is no longer subject to challenge on the grounds it violates the single subject requirement of article III, section 6. *State v. Johnson*, 616 So. 2d 1, 2-3 (Fla. 1993). Thus, the reenactment cured the alleged single subject violation for all defendants whose offenses were committed after that date.

## CONCLUSION

In light of the foregoing facts, arguments, and authorities the statutory revisions embodied in Chapter 95-184, Laws of Florida, should be upheld as constitutional. Alternatively, the Court should sever the offending portions of the legislation.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

/S/

DALE E. TARPLEY
Assistant Attorney General
Florida Bar No. 0872921
Westwood Center, Suite 700
2002 N. Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739

/S/

ROBERT J. KRAUSS
Senior Ass't Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 0238538
Westwood Center, Suite 700
2002 North Lois Avenue
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR RESPONDENT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Richard J. Sanders, Esq., Public Defender's Office, Polk County Courthouse, P.O. Box 9000--Drawer P.D., Bartow, Florida 33831 on this 21st day of October, 1998.

/s/

OF COUNSEL FOR RESPONDENT

98-823 DR

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1999

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

RONALD CARSON,

Appellant,

v.

CASE NO. 98-2281

STATE OF FLORIDA,

Appellee.



---

Opinion filed April 30, 1999

Appeal from the Circuit Court
for Orange County,
Reginald K. Whitehead, Judge.

James B. Gibson, Public Defender,
and Nancy Ryan, Assistant Public
Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Rebecca Roark Wall,
Assistant Attorney General, Daytona Beach,
for Appellee.

PER CURIAM.

AFFIRMED. *See* § 921.0012, 775.0845, 777.04; *Lamont v. State,* 610 So.2d 435 (Fla. 1992); *Maddox v. State,* 708 So.2d 617 (Fla. 5th DCA), *rev. granted,* 718 So.2d 169 (Fla. 1998); *Sanders v. State,* 621 So.2d 723 (Fla. 5th DCA 1993).

DAUKSCH, SHARP, W., and THOMPSON,JJ., concur.

'B'