IN THE SUPREME COURT OF FLORIDA

XZAVIER TRAPP,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 96,074

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Xzavier Trapp, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of four volumes. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

Discretionary review is grounded on a decision of the district court below upholding the constitutionality of chapter 95-184 but certifying a question of great public importance:

WHETHER CHAPTER 95-184 VIOLATES ARTICLE III, SECTION 6 OF THE FLORIDA CONSTITUTION?

Petitioner presents approximately ten pages of facts concerning a routine ruling of the trial court that the State could use a visual aid to question witnesses on the events happening at the crime scene. The visual aid itself was not entered into evidence. As will be seen in the argument section, the State urges this Court not to address this issue. If it is addressed, the State accepts the Petitioner's statement of the case and facts as being essentially accurate for purposes of this appeal when considered in light of the following additions and/or corrections thereto.

Prior to trial, the Petitioner filed a notice of intent to rely upon an alibi defense. (V1, 153).

The Petitioner's pretrial objection to the demonstrative aid diagram was that it violated due process because the witnesses shown it would be able to answer questions crucial to the case based upon what some unknown person had written on it as it already contained someone else's version of what happened. (T1, 8). The other problem stated by defense counsel was that it had one vehicle whereas the victim stated there were cars parked up and down the road and was not to scale. (T1, 8,9).

The prosecutor responded that the fact that witnesses had already placed their initials on the diagram was of no consequence because it would not be introduced into evidence. (T1, 9). He also asserted that the diagram was intended only to give the jury an idea of the surroundings and relative positions of the persons. (T1, 10).

The court found that the Petitioner was not prejudiced by the diagram and that the fact it was not to scale could be fully covered in cross-examination of the witnesses. (T1, 10).

Marva Wade, the Petitioner's girlfriend, testified that he had his own set of keys to her white 1983 Toyota Camry and had her permission to drive it. (T1, 36-39). She did not know when he used the car on 1-10-97. (T1, 39). She was in possession of the car sometime after 2:00 p.m., but was not sure of the exact time. (T1, 41).

Willie Dunn testified that he knew the Petitioner for two or three years from the neighborhood. (T1, 42). The Petitioner was talking to everyone, asking if they had another puppy to fight his. (T1, 44). The Petitioner was arguing with a friend of his and Dunn stopped his friend from arguing, so Dunn thought the Petitioner got mad and left, stopping to say "Okay, its five against one." (T1, 44; compare IB, 2).

At the convenience store, someone told Dunn the Petitioner wanted to fight him one on one; Dunn walked away and three or four cars full of guys pulled up. (T1, 45). The Petitioner got out, went into the store, and came back out gesturing with his hands to say "What's up? What's up?" (T1, 45). Dunn told him he did not want to fight him and said that he was going to the park; a friend took him there to play basketball. (T1, 45).

As Dunn was playing ball, someone came up and told him the Petitioner wasn't going to come to the park, so Dunn left. (T1, 47). The Petitioner pulled up in a white car with the door open,

driving around 2 miles an hour alongside him saying “What’s up? What you want to do?” (T1, 47). Dunn told him to go ahead on and leave him alone. (T1, 47). At the time the Petitioner shot Dunn, he was beside him. (T1, 47). The Petitioner fired eight or nine more shots as Dunn ran away. (T1, 52). Dunn used the diagram to show where he had been playing basketball, the route he took when he left, both his and the Petitioner’s respective locations at the time of the shooting, and the path he took after being shot. (T1, 46-51).

On cross-examination, Dunn stated that the diagram did not include all of the houses and apartments on the opposite side of the street where the shooting happened, and did not include all of the people or other cars which were there. (T1, 62).

Gamelle Davis testified that she has known the Petitioner for about six years. (T1, 72). At 3:30 on the afternoon in question she observed Dunn walking down the street with a white four door car on the wrong side of the street going slowly down the road. (T1, 72-74). The Petitioner was driving the car which belonged to his girlfriend; Davis had seen him drive it before. (T1, 74-75). Dunn and the Petitioner were exchanging words as the defendant drove slowly alongside Dunn. (T1, 77). Through the open car door, she saw the Petitioner put his hand down by the seat, pull out a gun, and shoot six or seven time. (T1, 77-78). Dunn ran. (T1, 79). Davis used the diagram to show her position relative to the others. (T1, 76-77).

On cross-examination, Davis stated that the diagram did not include apartments, cars, or people present on the street at the time of the shooting. (T1, 83).

Shanika Banister, 16, testified that she knew both Dunn and the Petitioner from the neighborhood. (T1, 90). Banister observed the Petitioner driving a car, as Dunn walked along the sidewalk. (T1, 90-92). From a few feet away, she saw him pull out a gun and shoot several times. (T1, 92-93). A group of children were nearby who had just been unloaded, apparently from a bus. (T1, 92). She used the diagram to point out the positions of herself, the Petitioner and Dunn. (T1, 91-93).

On cross-examination, Banister stated that the diagram did not include all of the apartments on the road. (T1, 101). On re-direct, she stated that the area they were talking about was depicted in the diagram. (T1, 103).

Aaron Hamilton testified that he knew Dunn from the neighborhood, but had never seen the Petitioner prior to January 10, 1997. (T1, 104). He observed Dunn playing basketball and people coming up to him; Dunn left and he followed behind Dunn. (T1, 105). A crowd of people started following them and a car was riding alongside of Dunn. (T1, 105). He saw the driver arguing with Dunn, shoot Dunn, and fire four or five more times. (T1, 105-06, 108). The diagram was not to scale, but sort of depicted the area. (T1, 106). On cross-examination, Hamilton stated the diagram did not include all of the apartments on the street. (T1, 110).

Detective McDaniel testified that the Petitioner made the following statement upon his arrest:

> There were five guys waiting to whip my ass. Earlier that day one of them kicked my car and pushed me. They kicked people to sleep and hurt people. I was leaving and they came up to my car. And he pulled his jacket up. He'd already been aggravating my wife about towing her car. Of course I was in the car. It's my wife's car. I'm saying my prints are going to be in the car." (T1, 134).

During the course of McDaniel's investigation both Davis and the victim, who knew the Petitioner, unequivocally identified the defendant as the shooter. (T1, 140).

In the lower court, the Petitioner challenged the State's use of demonstrative evidence, in the form of a diagram, contending that the diagram did not accurately reflect the crime scene and also challenged the constitutionality of 95-184, asserting that it violated the single subject rule. The First District Court of Appeal affirmed on the first issue without comment and also affirmed on the second issue certifying a question of great public importance.

SUMMARY OF ARGUMENT

ISSUE I

The district court rejected this claim that the use of a visual aid by witnesses was prejudicial error with a terse statement that "we find no error." This Court should also exercise its discretion and decline to address this insignificant and non-meritorious claim.

The District Court of Appeal properly found that the trial court did not abuse its discretion in permitting the State to have witnesses use a diagram to help explain their testimony. The issue raised on appeal below and before this Court, is not identical to the objection below. Thus, it was not properly preserved for appellate review here.

Even if the argument is considered, it is clear the argument is without merit. Witnesses may use representations which are reasonably accurate depictions of the matter discussed; these representations need not rise to the level of exactitude urged by the Petitioner. Even if the diagram should not have been used, its use was, at most, merely harmless, in view of the fact that it was made clear to the jury, through the testimony of numerous witnesses, that the diagram was not, and was not intended to be, an exact replication of the crime scene. The diagram contained no evidence, and was not introduced into evidence. It had no significance in view of the multiple witnesses who identified the defendant as the person who shot the victim.

ISSUE II

The Petitioner's contention that the Crime Control Act violates the single subject provision of the Florida Constitution is without merit. The Act addresses criminal sentencing and includes types of criminal conduct which comprise domestic violence. It also provides remedies for victims of domestic violence. The various sections of the Act therefore have a natural and logical connection to each other.

ARGUMENT

ISSUE I

SHOULD THIS COURT CONDUCT ERROR REVIEW TO CONSIDER A CLAIM AFFIRMED WITHOUT COMMENT BY THE DISTRICT COURT OF APPEAL, AND IF IT DOES, HAS THE PETITIONER MET HIS BURDEN OF ESTABLISHING THE EXISTENCE OF REVERSIBLE ERROR BY SHOWING THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO USE A DIAGRAM OF THE AREA IN WHICH THE CRIME TOOK PLACE AS A TOOL TO FACILITATE WITNESS TESTIMONY? (Restated)

The Petitioner asserts that the trial court erred in permitting the state to use a diagram as a demonstrative aid when the diagram was not to scale. In essence, he contends that the fact that the diagram did not include potential obstructions to their view which might have effected their ability to identify him rendered use of the diagram improper. The Court should exercise its discretion not to address this issue but, if it does, the claim is without merit for a variety of reasons.

The State acknowledges that this Court has discretionary authority to consider issues other than those upon which jurisdiction is based where such other issues are fully briefed and dispositive of the case, Savoie v. State, 422 So.2d 308, 312 (Fla. 1982), but notes that the District Court below affirmed on this claim without comment. Clearly the instant issue is not dispositive of the case and the State therefore asserts that this Court should decline to address this issue. See: Stephens v. State, 572 So.2d 1387 (Fla. 1991) and State v. Gibson, 585 So.2d 285 (Fla. 1991)(Court declined to address other issues raised by

the parties which lay beyond the scope of the certified question.); Burks v. State, 613 So.2d 441, 446 fn.6 (Fla. 1993) ("We decline to address the other issues raised in the appeal because they are unnecessary to the resolution of the certified question."); State v. Hodges, 616 So.2d 994 (Fla. 1993) (The Court declined to address the second certified question in which claimant made a new argument for the first time on the grounds that it would require resolution of extensive factual matters, citing, Trushin v. State, 425 So.2d 1126 (Fla. 1982).)

In the event that this Court determines to consider the issue despite the principle set forth in Savoie, the State asserts that the argument made here is not the same as that made in the trial court and is thus not preserved. In any event, the claim is without legal merit.

PRESERVATION

The State points out that the original objection at trial is not the same as the argument presented on appeal, and the issue is not preserved for appellate review. The District Court of Appeal therefore properly affirmed without comment.

The record below shows that at the pretrial hearing the Petitioner argued the use of the diagram violated due process because witnesses would be able to answer questions crucial to the case based upon what some unknown person had written on it. (T1, 8). The other problems complained of by defense counsel were that the diagram depicted one vehicle whereas the victim

stated there were cars parked up and down the road and the fact that the diagram was not drawn to scale. (V1, 8,9). At no time at the trial court level did the Petitioner make the same argument asserted on appeal, i.e., that the placement of the apartments across the road, the cars in the area, and the people present, effected the ability of the eyewitnesses to the crime to accurately identify him. Because the argument on appeal differs from the objection at trial, the issue is not preserved for appellate review. F.S. 924.051; Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

The petitioner has the burden of establishing that prejudicial error occurred and was properly preserved in the trial court, or, if not preserved, that prejudicial error constitutes fundamental error. F.S. 924.041(3). Thus, in this case, to prevail, he must prove that his claim relating to the diagram rises to the level of fundamental error in view of his failure to preserve it below.

Should this Court reject the preservation argument made above, the State includes the following merits argument.

Standard of Review

The issue is controlled by an abuse of discretion standard. Reaves v. State, 639 So. 2d 1, 6 (Fla. 1994); Pozo v. State, 682 So. 2d 1124, 1125 (Fla. 1st DCA 1996); 27th Ave. Gulf Service Center v. Smellie, 510 So. 2d 996, 998 (Fla. 3d DCA 1987) (Trial court did not abuse its discretion in allowing demonstrative

evidence to show how the accident occurred). Thus, only where the Petitioner can show that no reasonable person would have taken the position the lower court did, may he prevail. Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

A trial court should permit the introduction of relevant evidence which is otherwise not excluded under the evidence code. Section 90.403, Florida Statutes (1983); State v. Wright, 473 So.2d 268, 269-70 (Fla. 1st DCA 1985). While a demonstrative exhibit which is totally inaccurate should be excluded, it need be only a reasonably accurate representation. Brown v. State, 550 So. 2d 527 (Fla. 1st DCA 1989). In those cases where a replica of an item, Alston v. State, 105 So. 2d 785 (Fla. 1958), or in which computer animation is used to recreate an event or a duplicate of an item is used, the accuracy requirement appears to be more stringent. See: Pierce v. State, 718 So.2d 806 (Fla. 4th DCA 1997). However, even in those types of cases, the replication need only be "reasonably accurate." Brown v. State, 550 So. 2d 527, 529 (Fla. 1st DCA 1989).

The use of diagrams should be governed by the lesser standard because diagrammatic representations are received, not as independent evidence, but in connection with other evidence to enable the jury to better understand the case. West v. State, 53 Fla. 77, 43 So. 445 (Fla. 1907); Livingston v. State, 140 Fla. 749, 192 So. 327 (Fla. 1939). This is particularly true where, as in this case, the diagram was not admitted into evidence, but was instead merely used as a testimonial tool.

The Petitioner's argument ignores the fact that representations of scenes are often used by witnesses during their testimony as a means of assisting them in presenting their testimony and as a means of illustrating events to the jury. For example, crime scene sketches of the homicide and subject room are frequently used, Brown v. State, 532 So.2d 1326, 1327 (Fla. 3d DCA 1988), as are rough accident sketches to show direction and point of impact. 27th Ave. Gulf Service Center v. Smellie, supra. The fact that these renditions do not contain every item in the original setting or are not to scale do not prevent their use. Here, the general area was depicted in the drawing and the fact that the apartments across the street were omitted is irrelevant since it is not shown that their absence effected the witnesses' observation of the person who committed the crime. Furthermore, no drawing made after the fact could account for each and every car or person in the vicinity. Only a photo taken at the exact moment of the crime could do so and the case in which such a photo is taken is unusual indeed. In any event, all witnesses were subject to cross examination on the reliability of their identification of the defendant.

The use of diagrams by courts in explaining the basis upon which they reach a decision illustrates the effectiveness of such drawings in explaining evidence and establishes that the courts are themselves not slaves to the fastidious exactitude urged by the Petitioner. In Osborn v. King, 194 So.2d 912 (Fla. 2d DCA 1967), for example, the court relied upon a diagram attached to

the opinion, noting that although it was not drawn to scale, it would help illustrate the location of the matters of expert testimony.

Regardless, even if this Court finds that the trial court erred in permitting the witnesses to use the diagram during their testimony, any error is, at most, merely harmless. State v. DiGuillio, 429 So. 2d 1129 (Fla. 1986); Rhames v. State, 473 So. 2d 724, 726 (Fla. 1st DCA 1985); §§924.051(7) & 924.33. Here, the record shows that the Petitioner repeatedly elicited from the witnesses the fact that the diagram did not include all of the buildings on the street, cars on the street, or people in the area. However, more significantly, the Petitioner presented no evidence to show that the witnesses' observations were in any fashion effected by the presence of these things or people. Thus, their omission from the diagram was not important. Finally, the Petitioner ignores the fact that while his defense was one of misidentification, both the victim and other witnesses who testified identified him as the perpetrator and these persons knew the Petitioner for a period of several years. The use of the diagram had no impact on the jury verdict and did not cause the jury to return a verdict it otherwise would not have. This Court should affirm on this issue if it addresses it at all.

ISSUE II

DOES CHAPTER 95-184 VIOLATE THE SINGLE SUBJECT PROVISION, ARTICLE III, §6 OF THE FLORIDA CONSTITUTION? (Restated)

The Petitioner contends that the enactment of Chapter 95-184, Laws of Florida, violates the single subject rule and is therefore unconstitutional. The argument is without merit because a reasonable and rational relationship exists between all of the sections of the Act.

PRESERVATION

This issue is preserved.

MERITS

PRESUMPTION OF CONSTITUTIONALITY

Legislative acts are strongly presumed to be constitutional. See: State v. Kinner, 398 So. 2d 1360, 1363 (Fla. 1981). Courts should resolve every reasonable doubt in favor of the constitutionality of a statute. Florida League of Cities, Inc. V. Administration Commission, 586 So. 2d 397, 412 (Fla. 1st DCA 1991). An act should not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. Todd v. State, 643 So. 2d 625, 627 (Fla. 1st DCA 1994). Single subject challenges, like all constitutional challenges, are governed by these principles. State v. Physical Therapy Rehabilitation Center of Coral Springs, Inc., 665 So. 2d 1127, 1130 (Fla. 1st DCA 1996) (noting, in the context of a constitutional challenge

to a statute alleging a defective title, that a presumption exists in favor of the validity of the statute.

STANDARD OF REVIEW

The constitutionality of a statute is a question of law to be reviewed on appeal *de novo*. See: United States v. Cardoza, 129 F.3d 6, 10 (1st Cir. 1997); United States v. Bailey, 115 F.3d 1222, 1225 (5th Cir. 1997); United States v. Wilson, 73 F.3d 675, 678 (7th Cir. 1995); United States v. Crawford, 115 F.3d 1397, 1400 (8th Cir. 1997); United States v. Michael R., 90 F.3d 340, 343 (9th Cir. 1996). An appellate court reviews the constitutionality of all statutes, including sentencing statutes, *de novo*. United States v. Quinn, 123 F.3d 1415, 1425 (11th Cir. 1997). Thus, the standard of review is *de novo*. Phillip J. Padovano, Florida Appellate Practice § 9.4 (2d Ed. 1997).

MERITS

The single subject provision, Article III, Section 6, of the Florida Constitution, provides that "[e]very law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title."

The purpose of this constitutional prohibition against a plurality of subjects in a single legislative act is to prevent "logrolling," Martinez v. Scanlan, 582 So. 2d 1167, 1172 (Fla. 1991); State v. Lee, 356 So. 2d 276, 282 (Fla. 1978), a practice whereby several separate issues are rolled into a single

legislative 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).

An act may be as broad as the legislature chooses to make it provided the matters included in it have a natural or logical connection. Chenoweth v. Kemp, 396 So. 2d 1122 (Fla. 1981); Board of Public Instruction v. Doran, 224 So. 2d 693, 699 (Fla. 1969). Broad and comprehensive legislative enactments are not in violation of the single subject provision. See: Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987). The test to determine whether legislation meets the single subject provision is based upon a common sense application. Id. at 1087.

Historically, this Court has accorded great deference to the legislature in the single subject area, recognizing that the rule affords the legislature wide latitude in its enactment of laws. 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 issues 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). This provision was also not held to have been violated where an act covered both automobile insurance and tort law, State v. Lee,

supra, nor was it violated where an Act dealt with a broad range of topics dealing with medical malpractice and insurance since tort litigation and insurance reform have a natural or logical connection. Chenoweth v. Kemp, supra; Smith v. Department of Insurance, supra. Similarly, an act establishing a tax on services which included an allocation scheme for use of tax revenues was deemed not to have violated the single subject provision. In re Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987). Finally, this Court has found that an act dealing with comprehensive criminal regulations, money laundering, and safe neighborhoods was valid since each of the areas addressed bore a logical relationship to the single subject of controlling crime. Burch v. State, 558 So. 2d 1 (Fla. 1990).

The provisions of Chapter 95-184, the Crime Control Act of 1995, contain provisions, in sections two through twenty-seven, dealing with discussion of those crimes to which the act applies, definitions, offense severity levels, the guidelines worksheet and attendant computations, recommended and departure sentences, and amendments to certain criminal statutes. Sections twenty-eight through thirty-three amend statutes dealing with assistance to victims of crime, Chapter 960: F.S. 960.293 (determination of damages and losses), F.S. 960.29 (legislative findings and intent dealing with restitution to victims including civil liens), F.S. 960.291 (definitions), F.S. 960.292 (enforcement of civil restitution liens), F.S. 960.294 (effect of civil restitution liens), and F.S. 960.295 (civil restitution lien supplemental to

other forms of restitution). Sections thirty-four through thirty-eight amend F.S. 960.296 construction and severability, F.S. 960.297 authorization for governmental right of restitution for costs of incarceration, add a new subsection to F.S. 741.31 awarding damages to persons sustaining injuries as a result of violation of a domestic violence injunction, creating F.S. 768.35 recognizing a new crime for continuing domestic violence, and adding additional subsections to F.S. 784.046 relating to cases for injunctions involving repeated violence. It is readily apparent that all of these provisions have a logical relationship to the control, prevention, and punishment of crime or to amelioration.

It is the last three sections, thirty-six through thirty-eight, relating to domestic violence, which the defendant asserts are violative of the single subject rule because, he asserts, they combine civil and criminal penalties. The State submits that combining civil and criminal penalties is a common sense remedy for dealing with criminal and anti-social behavior and does not violate the single subject provision of the constitution.

Nevertheless, the State addresses each of these sections in detail. Section thirty-six, an amendment of F.S. 741.31, adds section (2) to the preexisting statute. The preexisting version of F.S. 741.31 recognizes as a criminal misdemeanor, conduct whereby a person wilfully violates an injunction for protection against domestic violence providing for punishment in accordance with F.S. 775.082 or 775.083. Subsection (2), which is at issue,

grants an individual who is the victim of a violation of an injunction against domestic violence recovery for injuries or loss resulting from the violator's conduct, in addition to costs and attorney's fees occasioned thereby. Subsection (2) is clearly a standard provision of restitution to be recovered by a victim as the result of another's criminal conduct. There is an obvious nexus between the punishment of crime and the award of monetary compensation to victims of crimes.

Section thirty-seven creates F.S. 768.35, which permits recovery for victims of continuing domestic violence, references F.S. 741.28 which defines domestic violence as any assault, aggravated assault, battery, aggravated battery, sexual assault, stalking, aggravated stalking, or criminal offense resulting in physical injury or death of one family or household member by another who is or was residing in the same single dwelling unit. Thus, the conduct defined as domestic violence contemplates the commission of a crime. The statute can therefore only properly be viewed as encompassing both criminal penalties and civil remedies. A cognizable nexus, a natural and logical connection, therefore exists between this provision and the Act. This is particularly apparent in view of the fact that civil liens are available to protect awards of restitution in criminal cases.[1]

[1] Of particular note, is the fact that the defendant does not challenge the authority of the legislature or the constitutionality of the sections authorizing imposition of civil liens in the prior sections of the act.

The availability of civil remedies for victims of crimes is indistinguishable.

Section thirty-eight amends existing subsections to F.S. 784.046. Chapter 784, of course, sets forth the crimes of assault, battery, and culpable negligence. F.S. 784.046 authorizes a victim of repeat violence in the form of assault, battery, sexual battery, or stalking to obtain an injunction against repeat violence and sets forth the procedural means by which it is obtained. The subsections added by this section of the Act clarify procedures to be followed, including service of injunction by law enforcement personnel. This section therefore addresses civil law procedures to be used in obtaining relief via an injunction for conduct prohibited by criminal law. The section, which encompasses both civil and criminal elements, therefore cannot be said to be violative of the single subject rule.

Because Petitioner inaccurately characterizes Chapter 95-184 as improperly combining provisions dealing with unrelated criminal and civil penalties, the Petitioner contends that this case is comparable to that of Thompson v. State, 708 So. 2d 315 (Fla. 2d DCA 1998), in which Thompson challenged a violent career criminal sentence on the grounds that Chapter 95-182 violated the single subject rule. There, the Second District Court of Appeal reversed the sentence finding that Chapter 95-182 improperly encompassed multiple subjects in that sections one through seven dealt with violent career criminal sentencing and penalties,

while sections eight through ten[2] dealt with civil aspects of domestic violence.

The Thompson Court recited a brief legislative history of the Gort Act noting that sections eight through ten had begun as three bills which died in committee. When the three house bills were engrafted on to the original Senate bill creating violent career criminal sentencing, the three house bills became law. The Court stated "[i]t is in circumstances such as these that problems with the single subject rule are most likely to occur." The Court further reasoned that the two parts had no natural or logical connection because the Act encompassed both criminal and civil provisions, analogizing it to State v. Johnson, 616 So. 2d 1 (Fla. 1993) and Bunnell v. State, 453 So. 2d 808 (Fla. 1984). Finally, the Court also expressed concern over the fact that nothing in sections two through seven addressed domestic violence and nothing in sections eight through ten addressed career criminals.

The Petitioner's reliance upon Thompson fails to make mention of the fact that in Higgs v. State, 695 So. 2d 872 (Fla. 3d DCA 1997), the Third District Court of Appeal rejected the contention that the Gort Act violated the single subject rule and affirmed Higgs' sentence. The Higgs Court held that there is a reasonable and rational relationship among each of the sections of the Gort

[2] As discussed in greater depth hereafter, sections eight through ten of the Gort Act, 95-182, mirror the same provisions challenged by the Petitioner in 95-184. The argument is therefore the same.

Act. Similarly, and perhaps more significant, is the fact that in Holloway v. State, 23 Fla. L. Weekly D1413 (Fla. 3d DCA 1997), the Third District reaffirmed its position in Higgs and certified conflict with Thompson. Briefing in that case was completed in August of 1998 with oral argument before this Court in November 1998.

CIVIL AND CRIMINAL MATTERS

The Thompson Court held that the two parts of 95-182 have no natural or logical connection because the Gort Act embraces both criminal and civil provisions finding that sections one through seven of the chapter create and define violent career criminal sentencing whereas sections eight through ten deal with civil remedies for domestic violence. The Court concluded that the first part of the Act is criminal in nature and the second is civil and there was therefore no natural or logical connection between criminal and civil matters. This erroneous conclusion is the same one urged upon this Court by the Petitioner. The characterization of these sections by the Petitioner herein and by the Thompson Court's is inaccurate, however, since the second part of both Acts is both civil and criminal in that it deals with civil remedies for repeated criminal behavior.

Domestic violence, defined in § 741.28(1), Florida Statutes (1997), is:

> ...any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnaping, false imprisonment, or any criminal offense resulting in physical injury or

> death of one family or household member by another who is or was residing in the same single family dwelling unit.

It is clear from this definition of domestic violence that the conduct described therein is a crime. The legislature has expressly declared its intention that "domestic violence be treated as a **criminal** act." § 741.2901(2), Florida Statutes (1997). Thus, it is incorrect to suggest that the measures dealing with domestic violence are purely civil in nature. Both section eight and nine are more properly viewed as restitutional in nature and restitution is deemed to be criminal. Strickland v. State, 681 So. 2d 929 (Fla. 3d DCA 1996) (holding that a trial court's imposition of additional restitution after sentencing was an increased sentence and therefore, violated double jeopardy); Lee v. State, 23 Fla. L. Weekly D1419 (Fla. 1st DCA June 9, 1998) (holding that imposition of restitution for the first time on remand constituted prohibited enhancement). As expressly noted by the Florida Supreme Court in Glaubius v. State, 688 So. 2d 913, 915 (Fla. 1997), the purpose of restitution is to compensate the victim and **to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system.**

The Crime Control Act of 1995 utilizes the identical language that is set forth in the Gort Act as part of the means by which restitution may be obtained. The legislature thus clearly viewed these sections as restitution methods which are part and parcel of the criminal sentencing scheme.

LEGISLATIVE HISTORY

The Petitioner's characterization of the legislative history behind the mirror sections of the Crime Control Act and Gort Act is overly simplified. While the three original House Bills that comprised these sections died in committee, the substance of one of them was not engrafted onto Senate Bill 168. Only minor portions of the original House bill actually became part of the final Acts. HB 1251, which became section thirty-eight of the Crime Control Act and section ten of the Gort Act, originally provided that a trial court must consider requiring a perpetrator to participate in a certified program for individuals who battered significant others, provided for a statement of legislative intent that every victim of domestic violence shall have access to shelter and counseling and expanded the conduct that constituted a violation of an injunction. None of these measures were engrafted onto the final versions of the Crime Control and Gort Acts. Only those measures relating to the duties of the clerk of the court and law enforcement officers, the most minor portions of the original House bill, were engrafted onto the final versions of the Acts. While significant portions of the other two house bills were engrafted onto the final versions of the Crime Control and Gort Acts, this engrafting, as discussed below, was both natural and logical.

The process described above does not constitute evidence of logrolling; rather, it merely illustrates the normal legislative process. Bills that die in one form are frequently resurrected

in part or whole in another act under which they then become law. The legislative process is not the assembling of products in a sterile laboratory, it is messy, at best, and the average act is a product of compromise. L.H. LaRue, Statutory Interpretation: Lord Coke Revisited, Special Issue on Legislation: Statutory and Constitutional Interpretation, 48 U. Pitt. L. Rev. 733 (1987).

The Petitioner contends that sections two through thirty-five of the Crime Control Act solely address sentencing concerns, whereas sections thirty-six through thirty-eight address only domestic violence. His argument is identical to the Thompson Court's expressed concern that nothing in sections two through seven of the Gort Act addressed domestic violence and nothing in sections eight through ten addressed career criminals.

The Petitioner is incorrect in his assessment of the Act. Section five of 95-184 deals with all of the forms of conduct which constitute domestic violence ranking them in an appropriate offense severity level. Section eight, which amends the burglary statute, addresses two forms of domestic violence, assault and battery, which may occur during the commission of the crime. Section twelve, which addresses the collection and dissemination of criminal justice information, was amended to include minors who commit assault and battery, two forms of domestic violence. Finally, section nineteen, amending F.S. 775.087, added aggravated stalking, with other forms of domestic violence, to enumerated acts qualifying for enhancement or imposition of a minimum mandatory sentence for possession of a firearm.

Similarly, section two of the Gort Act added a form of domestic violence, aggravated stalking, to the list of qualified offenses for habitual violent felony offenders and to the newly created list of qualifying offenses for violent career criminals.

The logical connection between the Crime Control Act sections is the fact that all forms of domestic violence are criminal offenses in the sentencing scheme. Aggravated stalking is a major connection between the sections of both Acts. It was added to the level six offense severity level via Senate Bill 172, having previously been an unranked criminal offense.

With regard to the Gort Act, both houses of the legislature contemplated the addition of the crime of aggravated stalking to the enumerated qualifying offenses for habitual violent offender sentencing. HB1789 and SB 118 added aggravated stalking to the definition of offenses constituting domestic violence. The linking of the two portions of the Gort Act is apparent since, contrary to the Thompson Court's conclusion, sections two through seven do, in fact, address domestic violence in its most virulent form. Thompson also ignored the fact that several of the crimes constituting domestic violence are forcible felonies included in the enumerated offenses for the career criminal classification, including aggravated assault, aggravated battery, sexual battery, and kidnaping.

Finally, another connection between all of the sections of both Acts is their concern for the control and punishment of first time and recidivist offenders. The first portions of both

Acts deal with sentencing for prohibited conduct and the challenged portions of the Acts provide additional remedies for violations. Thus, all of the sections have a cogent relationship.

LOGROLLING

The Petitioner in this case asserts what was implied in Thompson, i.e., that logrolling of sections has occurred. Logrolling is the joining of separate issues into a single proposal to achieve the passage of an unpopular measure by pairing it with another which is widely supported. Advisory Opinion to the Attorney General re Fish and Wildlife Conservation Commission, 705 So. 2d 1351, 1353 (Fla. 1988). The problem with this argument is that those portions of the Act complained of in the instant case were passed twice, once in the Crime Control Act and again in the Gort Act. Both Acts use the same language. Measures which passed the legislature twice can hardly be viewed as unpopular riders. Moreover, the Crime Control Act of 1995 is a prototypical crime control measure, an ordinary routine enactment which did little more than amend existing laws. Nothing in this Act makes it either widely popular or designed to arouse passions. The portions at issue could not have been passed strictly upon the popularity of the remaining portions of the Act. This is true even if one views the Gort Act as widely popular due to the incident which provoked it and the lengthy

mandatory sentencing attendant to it since it does not explain passage of the same language in the Crime Control Act.

Because the legislature voted twice for the same exact statutory amendments, logrolling is not a viable concern. The harm sought to be prevented by the single subject provision did not occur in light of the fact that the portions of the Act complained of also passed the legislature in another separate Act.

JOHNSON AND BUNNELL DISTINGUISHED

Reliance upon State v. Johnson, 616 So. 2d 1 (Fla. 1993) and Bunnell v. State, 453 So. 2d 808 (Fla. 1984) either here or in Thompson is misplaced. In Johnson, 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." State v. Johnson, 616 So. 2d at 4. The Court found that the two matters had absolutely no cogent connection because sentencing for repeat offenders and the licensing of private investigators had no common core.

Similarly, in Bunnell v. State, supra, the Florida Supreme Court held that a session law violated the single subject provision because the law created the criminal offense of obstruction of justice by false information and amended provisions concerning membership of the Florida Council on

Criminal Justice, an item entirely unrelated to obstruction of justice by false information. 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 sentencing and remedies to victims of crime. In contrast to Bunnell, which dealt with amendments involving both legislative and executive branch functions, these amendments concern matters which are traditionally legislative, since both criminal sentencing and the compensation of victims of crime are within the legislature's purview. Additionally, all of the sections of the Act have significant criminal aspects.

BURCH

In Burch v. State, 558 So. 2d 1 (Fla. 1990), the Florida Supreme Court held that the Crime Prevention and Control Act did not violate the single subject provision of the Florida Constitution. That Act addressed comprehensive criminal regulations, money laundering, drug abuse education, forfeiture of conveyances, crime prevention studies, and safe neighborhoods. The Burch 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 controlling crime. The Court noted the sections were intended to control crime, whether by providing for imprisonment or through taking away the profits of crime in the forfeiture section of the Act. Forfeiture is a

civil proceeding independent of any criminal action; these actions are heard by a circuit court judge of the civil division and are governed by the rules of civil procedure. Kern v. State, 706 So. 2d 1366 (Fla. 5th DCA 1998); F.S. 932.704(2), (1997). Thus, the legislature may combine criminal sentencing and civil remedies without violating the single subject rule, as it did in this case.

SEVERABILITY

The State does not address the Petitioner's argument regarding severability because it takes the position that severability is not applicable to legislative acts which violate the single subject rule.

SUMMARY

Because the Act addresses sentencing for crimes, including those involving domestic violence, and also provides alternative or additional remedies for victims of these crimes, there is a natural and logical connection among its sections. The Crime Control Act therefore does not violate the single subject provision of the Florida Constitution. For all of these reasons, this Court should uphold the constitutionality of the Act as the district court did below.

CONCLUSION

This Court should answer the certified question in the negative and approve the decision of the district court below upholding the constitutionality of section 95-184.

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 has been furnished by U.S. Mail to Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 15th day of September, 1999.

_____
Giselle Lylen Rivera
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