IN THE SUPREME COURT OF FLORIDA

PAUL FOX,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 96,573

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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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, Paul Fox, 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 the record on appeal (R), the transcript on Appeal (T), Transcript of proceedings - one volume (I), and the Supplemental Record on Appeal (S), which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number. "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

This case is here for discretionary review on the authority of Robinson v. State, No. 98-3576 (Fla. 1st DCA 17 August 1999), which has been briefed and is now pending review here under case number 96,481. The district court, as in Robinson, certified conflict with Thompson v. State, 708 So.2d 315 (Fla. 2d DCA), review granted, 717 So.2d 538 (Fla. 1998). In actual fact, as will be developed in the argument section, this case and Robinson differ in significant detail from Thompson in determining whether Robinson and Fox are within a window period in which they may challenge chapter 95-182 as violative of the single subject provision of the Florida Constitution. Thus, Thompson is not necessarily dispositive.

The full text of the district court decision on which discretionary review has been sought is as follows.

PER CURIAM

We affirm on the authority of Robinson v. State, No. 98-3576 (Fla. 1st DCA Aug. 17, 1990), and certify conflict with Thompson v. State, 708 So.2d 315 (Fla. 2d DCA), review granted, 717 So.2d 538 (Fla. 1998).

As is readily apparent from the text of the decision quoted above, the only issue cognizable for discretionary review is the common, controlling issue of Robinson and Thompson: did the legislature violate the single subject provision in enacting chapter 95-182, Laws of Florida, which contains the original Gort Act, or, as the state presents the issue, did the legislature violate the single subject provision in enacting chapter 96-388, Laws of Florida? The state argues in the argument section that

this Court should not address petitioner's second claim that the trial court should have given a special jury instruction because it was not addressed by the district court below. If this claim is not addressed, much of petitioner's statement of the case and facts may be disregarded.

If the Court does decide to entertain the per curiam affirmed issue not addressed below, the state supplements with the following relevant facts.

On June 16, 1998 a jury found Petitioner guilty of aggravated battery and possession of a weapon by a State prisoner. [R 1-2, 49]. These offenses occurred on May 15, 1997, while Petitioner was serving a prison sentence on another conviction.

Petitioner's sentencing took place on October 13, 1998. During the sentencing hearing, the State produced the Petitioner's prior record showing that at the time of the current offense he was in prison serving sentences for four habitual Offender sentences for Aggravated Battery on a Law Enforcement Officer with a Deadly Weapon; and three counts of Written threats to Kill or do Bodily Injury. Petitioner was sentenced as a violent career criminal pursuant to 775.084(4) Fla. Stat. (Supp. 1996). [R 102].

In the court below, Petitioner argued that his sentence as a violent career criminal was invalid because Chapter 95-182, Laws of Florida (Gort Act) violated the single subject rule. Petitioner, in support of his argument, cited the holding in Thompson v. State, 708 So.2d 315 (Fla. 2d DCA 1998), which held

Chapter 95-182 violated the single subject rule. The State countered that Thompson did not violate the single subject rule and, even if it did, the defect had been cured by Chapter 96-388, which reenacted and amended section 775.084, Florida Statutes (Supp. 1996), effective on October 1, 1996, seven months prior to Petitioner's offense.

In the court below Petitioner also challenged the trial court's denial of his request for a jury instruction on the justifiable use of non deadly force.

The First District Court affirmed Petitioner's judgment and sentence and certified conflict with Thompson.

Concerning the aggravated assault by appellant, in the prison yard, on May 15, 1997. The victim, William Cortez, did not have a weapon. [I 34]. He testified that although he may have thrown a punch in trying to stop the Petitioner after he'd been attacked, he never actually hit the Petitioner. [I 41].

Officer Davis testified that he witnessed Petitioner strike out at the victim's facial area while the victim was holding his neck with one hand and attempting to deflect Petitioner's attack with the other hand. [I 48]. Officer Davis ordered the Petitioner to stop attacking Cortez but the Petitioner did not stop. Officer Davis called for assistance and Petitioner did not stop his attack on the victim until assistance arrived. [I 48-49]. Officer Davis stated that there had been another fight in the yard but confirmed that the victim had not been involved. [I 49, 53].

The Petitioner admitted that he brought two razor blades to the prison yard on the day of the attack -- one was in his waist band, and the other was attached to a piece of tooth brush -- with the intent to kill the victim. [I 91]. In response to why he went after Cortez, Petitioner responded that William Cortez was the first one to say something wrong to him a few weeks prior. [I 88].

Exhibit #4 was admitted showing the victim's injury. [I 46, 75]. During his testimony, the victim, William Cortez was permitted to show his neck scar to the jury. [I 29-30].

Contrary to the statement made in Petitioner's initial brief that Cortez had made "sexually oriented" comments to Petitioner [IB 4], there is no such evidence in the record. [I 87]. The actual evidence shows that Officer Ellis asked the Petitioner if the comment had been sexually oriented and Petitioner evaded giving a direct response:

Officer: "Specifically what did [Cortez] say to you"?

Petitioner: "Just running his mouth."

Officer: "About what"?

Petitioner: "Anything they can say --"

Officer: "Sexually oriented"?

Petitioner: "How they talked to anybody back there."

{I 87].

During the jury instruction conference, Defense Counsel conceded that "[T]here was no assertion made by the defendant anywhere that Mr. Cortez expressed any threat of use of a weapon

or had a weapon or in any way was expressing a deadly violence intent toward the defendant." [I 118]. Defense Counsel requested the nondeadly force instruction "relying upon the statement of the defendant to Inspector Ellis, that [sic] contained within it the, somewhat inarticulate and not thoroughly explored, assertion by appellant that, over a period of a couple of weeks, he'd been having problems with a large group of people, and it came down to a confrontation between he and Mr. Cortez on this particular day." [I 117-118].

The trail court held:

> I do not believe that there is sufficient evidence before the court, nor even the intimations or anticipated arguments on behalf of the defense, to justify the giving of either instruction regarding self-defense or the justifiable use of force.

[I 119].

SUMMARY OF ARGUMENT

ISSUE I:

Petitioner was sentenced as a violent career criminal pursuant to 775.084(4) Fla. Stat. (Supp. 1996). [R 102].

In the court below, Petitioner argued that his sentence as a violent career criminal was invalid because Chapter 95-182, Law of Florida (Gort Act) violated the single subject rule, relying on Thompson v. State, 708 So.2d 315 (Fla. 2d DCA 1998). The State countered that the Gort Act did not violate the single subject rule and that, more importantly, even if it did, it would be irrelevant because Chapter 96-388, Laws of Florida, which reenacted and amended section 775.084, closed the window on any claim of unconstitutionality of Chapter 95-182 when it became effective on October 1, 1996, seven months prior to Petitioner's offense. In this connection, it should be noted that petitioner was not in fact eligible for sentencing as an habitual or violent felon until Chapter 96-388, § 44 amended §775.084 to include prisoners within its scope. Petitioner did not reply to the state's argument on the effect of Chapter 96-388 on his claim in the district court and raises here for the first time his claim that Chapter 96-388 also violates the single subject provision.

Petitioner's argument must fail. First, Petitioner lacks standing to challenge the constitutionality of the original Gort Act because his offense occurred more than seven months after the statute was reenacted and amended by Chapter 96-388. It was this amended (1996) version of the statute which was used to sentence

petitioner. Second, Petitioner's argument that Chapter 96-388 also violates the single subject rule was not raised in the district court even though the state relied on it in its answer brief. Finally, a section-by-section review of Chapter 96-388, shows that the act does not violate the single subject rule because all sections deal with the enhancement of public safety pertaining to criminal matters. All sections of the bill work in conjunction to achieve this purpose. Therefore, Chapter 96-388 is proper. Because Petitioner's offense was committed on May 15, 1997, long after the amendments came into effect, the validity or invalidity of the Chapter 95-182 has no bearing on this case or on Robinson.

Accordingly, Petitioner's single subject claim should be rejected and the decision of the district court approved.

Issue II:

Petitioner contends that the trial court committed reversible error by refusing his request for a jury instruction on the justifiable use of nondeadly force. Petitioner's argument is not only without merit, it should not be addressed in that the district court simply affirmed the convictions without comment and without addressing the jury instruction claim.

In the present case, the court certified conflict between the decision in this case at 24 Fla. L. Weekly D1998 (Fla. 1st DCA August 17, 1999), and the decision in Thompson v. State, 708 So.2d 315 (Fla. 2d DCA 1998), concerning whether the original Gort Act violates the single subject rule. The jury instruction

issue is not within the scope of the certified conflict nor is it even remotely related. Moreover, the lower tribunal's decision was a routine application of settled principles to the facts of the case and there is no legal issue warranting this Court's review. Indeed, given the uncontroverted facts of this case, the request for an instruction on justifiable use of force was absurd. For these reasons, the State urges this Court to decline to address the issue.

However, even if this Court addresses the justifiable use of nondeadly force, jury instruction issue, the record contains no evidence that Petitioner needed to defend himself. To the contrary, Petitioner admitted that he intended to kill the victim, brought two razors to the prison yard for that purpose, grabbed the unarmed victim from behind, and cut his throat with a razor blade. Defense counsel could only support his request for the justifiable use of nondeadly force with Petitioner's vague, "inarticulate" assertion that he had been verbally harassed by a group of people sometime before the day of the incident. Therefore, the trial court did not commit reversible error in refusing to give the justifiable use of nondeadly force jury instruction.

ARGUMENT

ISSUE I

DID THE ENACTMENT OF THE ORIGINAL GORT ACT, CHAPTER 95-182, AS SUBSEQUENTLY AMENDED AND REENACTED BY CHAPTER 96-388 VIOLATE THE SINGLE SUBJECT PROVISION OF THE FLORIDA CONSTITUTION? (Restated)

Petitioner was sentenced as a violent career criminal pursuant to 775.084(4) Fla. Stat. (Supp. 1996).

Petitioner argued in the court below that his sentence as a violent career criminal was invalid because Chapter 95-182, Law of Florida (Gort Act) violated the single subject rule, relying on Thompson v. State, 708 So.2d 315 (Fla. 2d DCA 1998). The argument overlooked entirely the fact that under the Gort Act, as originally enacted by chapter 95-182, prisoners such as petitioner did not fall within the definition of section 775.084 and he would not have been eligible for such sentencing. He only became eligible effective 1 October 1996 when the Legislature reenacted the Gort Act and amended section 775.084(1)(a)2 and 775.084(b)2 to include:

> a. While the defendant was serving a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense;

The State countered that Chapter 95-182 did not violate the single subject rule under Chapter 95-182 in any event, but, more significantly, even if it did, the defect was irrelevant to Petitioner because Chapter 96-388, which reenacted and amended section 775.084 closed the window on any claim of unconstitutionality pursuant to Thompson when it became effective

on 1 October 1996, seven months prior to Petitioner's offense. Petitioner did not reply to this argument in the district court, although afforded an opportunity to do so by reply brief.

Petitioner's argument here must fail. First, Petitioner lacks standing to challenge the constitutionality of the original Gort Act in Chapter 95-182 because his offense occurred more than seven months after §775.084, Florida Statutes (Supp. 1996), as amended and reenacted by Chapter 96-388, became effective. Second, Petitioner's argument that Chapter 96-388 also violates the single subject rule was not raised in the district court even though the state had explicitly relied on the reenactment and amendment as the basis for an alternative argument. Finally, a section-by-section review of Chapter 96-388 shows that the act does not violate the single subject rule because all sections deal with the enhancement of public safety pertaining to criminal matters. See, also, the state's earlier argument in Robinson which is pending under case number 96,481.

STANDING:

Chapter 96-388, § 44, under which Petitioner was sentenced, became effective on October 1, 1996. This reenactment and amendment superseded §775.084, Florida Statutes (1995) and closed the window under which the Gort Act, enacted by Chapter 95-182, §§2-7, could be challenged as violating the single subject rule. Ordinarily, this window would not have closed until May 24, 1997 with the two-year reenactment of Florida Statutes. Because Petitioner's offense occurred on May 15, 1997, over seven months

after the reenactment and amendment by Chapter 96-388, Petitioner does not have standing to contest the constitutionality of Chapter 95-182. Only a defendant who committed his offense within the period of alleged unconstitutionality has standing to challenge the constitutionality of the Gort Act[1]. Because the single subject provision applies only to chapter laws; Florida Statutes are not required to conform to the provision. State v. Combs, 388 So. 2d 1029 (Fla. 1980). Once reenacted, a chapter law is no longer subject to challenge on the grounds that it violates the single subject provision of Article III, § 6, of the Florida Constitution. State v. Johnson, 616 So.2d 1, 2 (Fla. 1993). The reenactment of a statute cures any infirmity or defect. State v. Carswell, 557 So.2d 183, 184 (Fla. 3d DCA 1990); Honchell v. State, 257 So.2d 889 (Fla. 1972); Alterman Transport Lines, Inc. v. State, 405 So.2d 456 (Fla. 1st DCA 1981). Thus, with single subject issues an important question is whether the incident being prosecuted arose prior to the constitutional problem being cured by reenactment.

In Salters v. State, 731 So.2d 826 (Fla. 4th DCA 1999)[2], the State argued that Petitioner could not challenge the statute, as Petitioner committed the offense after October 1, 1996, the effective date of Chapter 96-388 Laws of Florida, which cured, or

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[1]Moreover, as the state has already pointed out, prisoners such as Petitioner who commit their new crimes while still serving previous sentences did not become eligible under the Gort Act until it was amended and reenacted by Chapter 96-388, §44.

[2] Salter is pending in this Court in case no. 95,663

mooted any single subject problem of Chapter 95-182. The Fourth District Court of Appeal agreed with the State's argument, found that Salters did not have standing to challenge the statute and certified conflict with the decision in Thompson concerning the window period to challenge the constitutionality of the Gort Act. Salters properly held that the Petitioner did not have standing to challenge the constitutionality of the act. Accordingly, the State urges this Court to hold that Petitioner's offenses of May 1997 occurred outside the window period of Chapter 95-182 and thus, he does not have standing to challenge the Gort Act as originally enacted.

CONSTITUTIONALITY OF CHAPTER 95-182:

However, if the court does deem that Petitioner has standing to challenge the constitutionality of the 1995 Gort Act, the State relies on, and incorporates by reference, its briefs in State v. Thompson, case no.92,831, which is pending decision in this Court.

REENACTMENT:

The window period announced in Thompson is clearly erroneous in that it overlooks the reenactment and amendments contained in Chapter 96-388, §44. The window period in Thompson is uncontroverted and thus Thompson simply assumed in dicta that the biennial adoption of Florida Statutes in Chapter 97-97, Laws of Florida, closed the window period. Id. at 317, FN1. In actual fact, 1996 Fla. Laws ch. 388 § 44, states in pertinent part:

> Effective October 1, 1996, paragraphs (a)(b)and (c) of subsections (1), and subsections (2), (3), and (4) of

> section 775.084, Florida Statutes are amended and subsection (6) of said section is reenacted . . . .

Chapter 96-388, §44, Laws of Florida , which was approved by the Governor on May 31, 1996, omitted sections 8-10 of Chapter 95-182 dealing with the domestic violence sanctions. Sections 8-10 were the so-called civil sections which the Thompson court claimed were a second subject to the Gort Act. Thus, the omission of sections 8-10 removes the ground on which the Thompson holding rests.

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

In Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991), this Court found a single subject violation occurred when the legislature combined workers compensation legislation with international trade legislation. In determining the effective dates, this Court held that the problem was cured by the legislature in a special session reenacting the legislation in a manner which separated these two distinct concepts. Id. at 1169. Thus, this Court has recognized that the biennial reenactment of the

statutes is not the only way to close a window of alleged unconstitutionality based on an alleged violation of the single subject rule. Indeed, the state points out that it is entirely possible for the Legislature, by promptly reenacting an earlier act, to cure the defect before it goes into effect and to eliminate the window of unconstitutionality entirely. What happened here is analogous to Scanlan. Applying Scanlan, the legislative action in Chapter 96-388 cured the alleged problem with Chapter 95-182 because Petitioner's offense was committed on May 15, 1997, long after Chapter 96-388 Laws of Florida went into effect.

JURISDICTION:

The new thrust of Petitioner's argument here is that Chapter 96-388, Laws of Florida itself violates the single subject rule, rendering the session law unconstitutional.

The State notes that this issue is being raised for the first time here in the Florida Supreme Court based upon this Court's discretionary jurisdiction. Petitioner did not present this argument in the district court even though the state explicitly relied on Chapter 96-388, §44 as closing the window of alleged unconstitutionality under Thompson. The State recognizes the decision in State v, Johnson, 616 So. 2d 1 (Fla. 1993), which holds that single subject violations are fundamental errors and may be raised for the first time on appeal but continues to maintain that Johnson erred in so holding. The fallacy of appellate decisions which encourage professional incompetency is

accented if, as here, the failure to preserve the issue is excused even when it happens in the appellate court itself. Nothing in article V of the Florida Constitution creates discretionary jurisdiction on the basis of fundamental error claims.

CONSTITUTIONALITY OF CHAPTER 96-388:

Petitioner's new argument before this court is that the issue regarding the window period of Chapter 96-388 is moot because Chapter 96-388 also violates the single subject provision of Article III, Section 6. The State disagrees.

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

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

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

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

The purpose of Article III, Section 6 is the prohibition of unrelated subjects in a single legislative act to prevent "logrolling", Martinez v. Scanlan, 582 So.2d 1167, 1172 (Fla. 1991); State v. Lee, 356 So.2d 276, 282 (Fla. 1978). Logrolling is the practice of combining separate, unrelated subjects into a single act 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).

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

This Court has given great deference to the legislature in the single subject area by holding that the legislature has wide latitude in the enactment of acts. State v. Lee, 356 So.2d 276 (Fla. 1978); State v. Leavins, 599 So.2d 1326, 1334 (Fla. 1st DCA 1992). Examples abound where this Court has held that Acts

covering a broad range of topics do not violate the single subject provision. The single subject provision is not violated when an Act provides for the decriminalization of traffic infractions and also creates a criminal penalty for willful refusal to sign a traffic citation, State v. McDonald, 357 So.2d 405 (Fla. 1978); the provision is not violated where an Act covers both automobile insurance and tort law, State v. Lee, 356 So.2d 276 (Fla.1978); nor is the provision violated where an Act covers a broad range of topics dealing with medical malpractice and insurance because tort litigation and insurance reform have a natural or logical connection, Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981), Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987); nor is the provision violated where an Act establishes a tax on services and includes an allocation scheme for the use of the tax revenues. In re Advisory Opinion to the Governor, 509 So.2d 292 (Fla. 1987).

Finally, in a legislative act and case very similar to the case at bar, Burch v. State, 558 So.2d 1 (Fla. 1990), this Court held that, based on the strong presumption of constitutionality and deference to the legislative prerogatives, Chapter 87-243 did not violate the single subject rule:

> [C]hapter 87-243 deals with three basic areas: (1) comprehensive criminal regulations and procedures, (2) money laundering, and (3) safe neighborhoods. Each of these areas bear a logical relationship to the single subject of controlling crime, whether by providing for imprisonment or through taking away the profits of crime and promoting education and safe neighborhoods. The fact that several different statutes are amended does not mean that more than one subject is involved. There is nothing in this act to suggest the presence of

> log rolling, which is the evil that article III, section 6, is intended to prevent. In fact, it would have been awkward and unreasonable to attempt to enact many of the provisions of this act in separate legislation.
> * * *
> [C]hapter 87-243 is a comprehensive law in which all of its parts are directed toward meeting the crisis of increased crime.
>
> Despite its breadth, when chapter 87-243 is tested by this standard, we cannot say that it violates the single-subject provision of our constitution.

Burch v. State, 558 So.2d 1,3 (Fla. 1990). See also Martinez v. Scanlan, 582 So.2d 1167, 1172 (Fla. 1991); State v. Lee, 356 So.2d 276, 282 (Fla. 1978).

In the instant case, all the sections of Chapter 96-388 deal with criminal matters and means of enhancing public safety pertaining to those criminal matters.

There are seventy-four sections of Chapter 96-388, all of which are "fairly and naturally germane to the subject of the act." Smith v. Department of Insurance, 507 So.2d 1080, 1087 (Fla. 1987). The title itself encompasses all sections of the act: "An act relating to public safety." All portions of the statute deal with criminal matters and methods in which to increase public safety across the State. All portions of the statute share a common goal, a common purpose: The enhancement of "public safety" pertaining to criminal matters.

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

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

Sections 3-16 are all related to information systems for public safety agencies which promote the protection of the public through the sharing of information among various criminal and juvenile justice agencies. Similarly, sections 17-21 concern the maintenance and sharing of juvenile delinquency and criminal records. Section 22 revises the language relating to sentence guidelines score sheets. Later in the act, sections 50-53 also include revisions to the sentencing guidelines. Protection of the public and an attempt to reduce the recidivism rate are key here. Sections 23 and 24 concern regulation of the Juvenile Justice Advisory Board and the Justice Administrative Commission both of which relate to public safety. Section 25 addresses the criminal prosecution of criminal violations of the Worker’s Compensation Law.

Sections 26-31 repeal certain public safety statutes, including those relating to (1) the Council on Organized Crime; (2) crime prevention information; (3)bail bond advisory council; (4) unfunded drug program; (5) negligent treatment of children.

Section 32 concerns the Department of Law Enforcement, a critical agency for the protection of the public and the detection and prosecution of crime.

Sections 33-43 concern the prevention of street gangs and the protection of the public from organized, street gangs. As facilitated by sections 3-21, these provisions also include considerations of a street gang member's prior record and criminal history, and therefore the recidivism of those who have committed crimes in the past.

Sections 44-46 redefine the violent career criminal, habitual offender and habitual felony offender categories. These provisions help to protect the public from the recidivism of habitual and violent criminals.

Sections 47 through 49 concern the definition of criminal offenses by expanding the definitions of burglary, trespass and theft.

Sections 50-53 concern sentencing guidelines and are addressed above.

Section 54 amends the criminal trafficking statute, a public safety measure.

Sections 55 and 57 make certain convicted felons ineligible for early release from prison because of the threat they pose to public safety.

Section 56 relates to the unlawful taking of a police officer's weapon.

Section 58 makes grammatical corrections to the restitution statute which directly relates to protection of the public by awarding compensatory restitution for injuries and losses from criminal activities.

Section 59 amends the gain time statute, a measure directly related to the protection of the public.

Sections 60 through 67 concerns the Jimmy Ryce Act, which relates to sexual predators.

Section 68 relates to the security and arrest of persons suspected of criminal activities.

Sections 69-71 concern prosecution for computer pornography as criminal offenses.

Section 72 concerns the protection and compensation of victims of forcible felonies.

Section 73 concerns the effective date of a bill relating to security alarms which are critical in protecting households and businesses from burglaries, robberies, and other crimes.

Finally, Section 74 contains the effective date of the act and its provisions.

Based on a review of all the sections of this act and their purposes, it is clear that all are germane to one theme or subject: Public Safety in criminal matters. Contrary to petitioner's argument, the various sections of the act all have a natural and logical connection.

Petitioner's reliance upon State v. Johnson, 616 So.2d 1 (Fla. 1993) and Bunnell v. State, 453 So.2d 808 (Fla. 1984) is misplaced. In Johnson, 616 So.2d 1 (Fla. 1993), this Court held that a chapter law violated the single subject provision because it addressed two subjects: "the first being the habitual offender statute, and the second being the licensing of private

investigators and their authority to repossess personal property." 616 So. 2d at 4. The court stated that the two matters had no cogent connection. Nothing like that is present here.

Similarly, in Bunnell v. State, 453 So.2d 808 (Fla. 1984), this Court held that a session law violated the single subject provision when it created the criminal offense of obstruction of justice by false information and made amendments concerning membership of the Florida Council on Criminal Justice. The Thompson Court characterized these amendments as noncriminal and dealing with an executive branch function. The act here, as shown above, is not controlled by Bunnell, it is controlled by Burch.

By contrast to Johnson, the sections of Chapter 96-388 do have a common core. They concern repeated criminal offenders, street gang prevention, sharing of criminal history information for both adult and juvenile criminals, and other public safety measures. Moreover, in contrast to Bunnell, which dealt with amendments that involved both legislative and executive functions, these amendments concern traditionally legislative matters. Setting punishment for recidivist offenders and compensating victims are both legislative branch matters. Additionally, as shown, all sections of Chapter 96-388 address means of enhancing public safety where criminal matters are concerned. Thus, the legislative enactment at issue in this case is significantly different from the acts at issue in Johnson and Bunnell.

Petitioner also relies upon Williams v. State, 459 So. 2d 319 (Fla. 5th DCA 1984). There, the court held that Chapter 82-150 unconstitutionally violated the single subject provision because one section created a new criminal offense and the other section amended the operation and membership of the Florida Criminal Justice Council and the act was not a comprehensive law or code type of statute.

Contrary to Petitioner's position, the State, again, invites this Court's attention to its decision in Burch v. State, 558 So.2d 1 (Fla. 1990). In Burch, this Court held that the Crime Prevention and Control Act did not violate the single subject provision of the Florida Constitution. The Act dealt with (1) comprehensive criminal regulations, (2) money laundering, (3) drug abuse education, (4) forfeiture of conveyances, (5) crime prevention studies, and (6) safe neighborhoods. Id. The Court held that there was a logical and natural connection among these subjects because all of the parts were related to its overall objective of crime control. The Court noted that the sections were intended to control crime, whether by providing for imprisonment or through taking away the profits of crime. The taking away profits language is a reference to the forfeiture section of the Act. A forfeiture proceeding is civil and independent of any criminal action. Kern v. State, 706 So.2d 1366 (Fla. 5th DCA 1998). All civil forfeiture cases are heard before a circuit judge of the civil division and the rules of civil procedure govern. § 932.704(2), Fla. Stat. (1997). Thus,

the legislature may combine criminal sentencing and civil remedies for crimes without violating the single subject provision.

Here, as in Burch, the legislature has provided for protection of the public through sharing of criminal record information, recidivism control, notice to the public of sexual predators living in their neighborhoods, sentencing guidelines amendments, and other public safety measures. In Burch, the legislature sought to control crime in different ways. Here, the legislature also sought to protect the public by utilizing several methods, working together. The legislature set forth a comprehensive plan to protect the public and to provide for public safety. The legislature may properly set forth a goal of protecting the public. When the legislature does so, the sections have a natural and logical connection and do not violate the single subject provision.

In summary, Petitioner lacks standing to challenge Chapter 95-182, the original Gort Act, because his offense was committed after Chapter 96-388 § 4, effective October 1, 1996, reenacted the Gort Act minus the disputed sections. Further, for reasons set forth above and in other similar cases now pending here, the Gort Act, as original enacted and subsequently amended, does not violate the single subject rule because all sections deal with measures to protect the public against repeat offenders.

Accordingly, Petitioner’s judgment and sentence should be affirmed and the decision of the district court below approved.

ISSUE II

SHOULD THIS COURT ADDRESS A CLAIM OF TRIAL COURT ERROR WHICH WAS NOT ADDRESSED BY THE DISTRICT COURT AND WHICH IS UNRELATED TO THE CERTIFIED CONFLICT ON WHICH DISCRETIONARY JURISDICTION IS BASED? IF THE CLAIM OF TRIAL COURT ERROR IS ADDRESSED, DID THE TRIAL COURT ERR IN REFUSING A SPECIAL JURY INSTRUCTION ON THE JUSTIFIABLE USE OF FORCE WHICH WAS NOT SUPPORTED BY ANY EVIDENCE? (Restated)

Despite the narrow issue on which review is sought and tentatively granted, petitioner has raised an unrelated claim that the trial court erred in not granting him a special jury instruction on the justifiable use of nondeadly force. This claim was so devoid of even arguable merit that the district court found it unworthy of comment, i.e., the claim was per curiam affirmed without comment. Accordingly, although this Court may entertain ancillary issues in certified conflict cases pursuant to Trushin v. State, 425 So.2d 1126 (Fla. 1983), it should decline to do so and ignore entirely petitioner's lengthy statement of the case and facts concerning that claim. See, Grate v. State, case no. 95,701 (Fla. 28 October 1999)("Regardless of how a petition seeking review of a district court decision is styled, this Court does not have jurisdiction to review per curiam decisions rendered without opinion..."), which the state suggests is a more faithful interpretation of this Court's jurisdiction to conduct discretionary review of ancillary issues which themselves could not, as a matter of constitutional law, create discretionary jurisdiction.

Exercise of Jurisdiction:

First, it is well established practice for the court to decline to address issues which are not within the scope of the certified conflict or certified question for which the court has granted jurisdiction. McMullen v. State, 714 So.2d 368 (Fla. 1998); Allstate Ins. Co. v. Reliance Ins. Co., 692 So.2d 891 (Fla. 1997); Ratliff v. State, 682 So.2d 556 (Fla. 1996). In the present case, the court certified conflict between the decision in this case at 24 Fla. L. Weekly D1998 (Fla. 1st DCA August 17, 1999), and the decision in Thompson v. State, 708 So.2d 315 (Fla. 2d DCA 1998), concerning whether the original Gort Act violates the single subject rule. The jury instruction issue is not within the scope of the certified conflict nor is it even remotely related. Moreover, the lower tribunal's decision was a routine application of settled principles to the facts of the case and there is no legal issue warranting this Court's review. For these reasons, the State requests this Court to decline addressing the issue.

Even if the court deems it proper to address this issue, the defendant's claim is erroneous.

ARGUMENT:

Petitioner contends that the trial court committed reversible error by refusing Petitioner's request for a jury instruction on the justifiable use of nondeadly force. Petitioner's argument is without merit.

STANDARD OF REVIEW:

In Florida, "The grant or denial of a jury instruction is addressed to the sound discretion of the trial court." Williams v. State, 591 So.2d 319, 320 (Fla. 3d DCA 1991). It is well settled that a defendant is entitled to an instruction if there is sufficient evidence to support a claim of self defense. Motley v. State, 155 Fla. 545, 20 So.2d 798 (1945); Laythe v. State, 330 So.2d 113 (Fla. 3d DCA 1976), cert. denied, 339 So.2d 1172 (Fla.1976); Stiglitz v. State, 270 So.2d 410 (Fla. 4th DCA 1972); Canada v. State, 139 So.2d 753 (Fla. 2d DCA 1962).

In Smiley v. State, 395 So.2d 235 (Fla. 1st DCA 1981), the First DCA held that "...in order to be entitled to an instruction on self-defense, there must be some evidence that the defendant acted out of self-defense." Id at 236. The Smiley court further clarified:

> A person is justified in the use of deadly force to defend himself only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself. Section 776.012, Fla.Stat.; State v. Coles, 91 So.2d 200 (Fla.1956). When considering the matter of threats in relation to proof of self-defense, there must be some evidence of an overt act expressing an intention to immediately execute the threats so that the person threatened has a reasonable belief that he will lose his life or suffer serious bodily harm if he does not immediately take the life of his adversary. Delagado v. State, 361 So.2d 726 (Fla. 4th DCA 1978); Coles, supra. However, in order to be entitled to an instruction on self-defense, there must be some evidence that the defendant acted out of self-defense.

Smiley v. State, 395 So.2d 235,236 (Fla. 1st DCA 1981).

MERITS:

In the case at bar, the Petitioner never presented such a defense. None of the evidence suggested that the Petitioner needed to defend himself, let alone, to use any type of force in self defense. Petitioner was the initial aggressor. Petitioner admitted that he brought two razor blades to the prison yard on the day of the attack -- one was in his waist band and the other attached to a piece of tooth brush. [I 91]. Petitioner said that he intended to kill the victim. [I 91]. In response to why he went after Cortez, Petitioner responded that William Cortez was the first one to say something wrong to him a few weeks prior. [I 88]. The victim, William Cortez, did not have a weapon. [I 34]. He testified that although he may have thrown a punch in trying to stop the Petitioner after he'd been attacked, he never actually hit the Petitioner. [I 41]. Officer Davis testified that he witnessed Petitioner strike out at the victim's facial area while the victim was holding his neck with one hand and attempting to deflect Petitioner's attack with the other hand. [I 48]. Officer Davis ordered the Petitioner to stop but the Petitioner did not stop. Officer Davis called for assistance and Petitioner did not stop his attack on the victim until assistance arrived. [I 48-49]. Officer Davis stated that there had been another fight in the yard but confirmed that the victim had not been involved. [I 49, 53].

Officer Ellis, to whom, Petitioner gave his taped statement, testified that Petitioner never gave him a direct answer as to

whether or not he had problems in the past, specifically with Cortez. [I 103].

It should be noted that, contrary to the statement made in Petitioner's initial brief that Cortez had made "sexually oriented" comments to Petitioner [IB 4], there is no such evidence in the record nor is there any reason why this claim, if true, justifies an instruction on the justifiable use of non-deadly force, particularly when the evidence shows the use of deadly force. [I 87]. The actual evidence shows that Officer Ellis asked the Petitioner if the comment had been sexually oriented and Petitioner evaded giving a direct response:

Officer: "Specifically what did [Cortez] say to you"?

Petitioner: "Just running his mouth."

Officer: "About what"?

Petitioner: "Anything they can say --"

Officer: "Sexually oriented"?

Petitioner: "How they talked to anybody back there."

{I 87].

During the jury instruction conference, Defense Counsel conceded that "[T]here was no assertion made by the defendant anywhere that Mr. Cortez expressed any threat of use of a weapon or had a weapon or in any way was expressing a deadly violence intent toward the defendant." [I 118]. Defense Counsel requested the nondeadly force instruction "relying upon the statement of the defendant to Inspector Ellis, that [sic] contained within it the, perhaps somewhat inarticulate and not thoroughly explored,

assertion by the defendant that over a period of a couple of weeks he'd been having problems with a large group of people, and it came down to a confrontation between he and Mr. Cortez on this particular day." [I 117-118].

The court held:

> I do not believe that there is sufficient evidence before the court, nor even the intimations or anticipated arguments on behalf of the defense, to justify the giving of either instruction regarding self-defense or the justifiable use of force.

[I 119].

Additionally, the judge and jury saw exhibit #4, a photo depicting the victim's neck injury after having his throat cut by Petitioner's razor. [I 46,75]. Moreover, the judge and jury had an opportunity to view the victims scar during the trial. [I 29-30].

Based on the evidence, there is no hint that Petitioner needed to defend himself. To the contrary, Petitioner admitted that he intended to kill the victim and brought two razors to the prison yard for that purpose. Therefore, the trial court did not commit reversible error in refusing to give the justifiable use of nondeadly force jury instruction.

HARMLESS ERROR:

Assuming, arguendo, that the trial court did err by not giving the requested instruction, Fla. Std. Jury Instr. (Crim.)§ 3.04(d) at 43, the error was harmless. In Yates v. Evatt, 500 U.S. 391, 111 S.Ct 1884, 144 L.Ed.2d 432 (1991), rev'd on other grounds, Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991),

The United States Supreme Court established the test for determining whether or not error is harmless:

> Whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

Id. 111 S.Ct at 1862 (citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The Yates Court clarified

> [t]o say that an error did not "contribute" to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous.
> * * *
> To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.

Id. at 111; S.Ct. at 1893. See also State v. DiGuilio, 491 So.2d 1129 (Fla. 1991).

In the case at bar, the lack of an instruction on the justifiable use of nondeadly was unimportant in relation to the overwhelming evidence that Petitioner actually used deadly force, including Petitioner's admissions that he brought two razors to the yard with the intent to kill the victim as well as the visual evidence of the victim's injury.

Accordingly, if the merits of this claim are reached, Petitioner's judgment and sentence should be affirmed.

CONCLUSION

Based on the foregoing, the decision of the district court upholding the constitutionality of the statute should be approved and the decision entered in Thompson v. State, 708 So.2d 315 (Fla. 2d DCA 1998) quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Robert Friedman, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this ____ day of November, 1999.

_____
Sherri Tolar Rollison
Attorney for State of Florida

IN THE SUPREME COURT OF FLORIDA

PAUL FOX,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 96,573

APPENDIX

Fox v. State of Florida, 1st DCA opinion dated August 25, 1999.

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