

IN THE SUPREME COURT OF FLORIDA

KEVIN THOMAS,

Petitioner,

v.

Case No. 96,788

First DCA Case No. 1997-4068

STATE OF FLORIDA,

Respondent.

_____ /

ON APPEAL FROM THE
FIRST DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

| | <u>PAGE</u> |
|--|-------------|
| TABLE OF CONTENTS | i |
| TABLE OF CITATIONS | ii |
| PRELIMINARY STATEMENT | 1 |
| STATEMENT OF THE CASE AND THE FACTS | 3 |
| SUMMARY OF ARGUMENT | 4 |
| ARGUMENT | |
| ISSUE I | 6 |
| THE SESSION LAW WHICH CREATED THE VIOLENT CAREER CRIMINAL PENALTY, CH. 95-182, LAWS OF FLORIDA, IS UNCONSTITUTIONAL BECAUSE IT WAS ENACTED IN VIOLATION OF THE SINGLE SUBJECT RULE IN ARTICLE III, SECTION 6, CONSTITUTION OF FLORIDA, AND PETITIONER'S CRIME FALLS WITHIN THE WINDOW PERIOD. | |
| ISSUE II | 18 |
| THE SUBSTANTIVE OFFENSE OF POSSESSION OF A FIREARM BY A VIOLENT CAREER CRIMINAL, WITH WHICH PETITIONER STANDS CONVICTED, IS UNCONSTITUTIONAL BECAUSE IT WAS CREATED BY CHAPTER 95-182, LAWS OF FLORIDA, WHICH WAS ADOPTED IN VIOLATION OF THE SINGLE SUBJECT REQUIREMENT OF THE CONSTITUTION OF FLORIDA. | |
| CONCLUSION | 20 |
| CERTIFICATE OF SERVICE | 20 |
| APPENDIX | 21 |

TABLE OF CITATIONS

| <u>CASES</u> | <u>PAGE(S)</u> |
|---|-----------------------|
| <u>Albritton v. State</u> , 82 Fla. 20, 89 So. 360 (1921). | 10 |
| <u>Bortel v. State</u> , 24 Fla. L. Weekly D2259 (Fla. 4th DCA Sept. 29, 1999) | 8 |
| <u>Brewer v. Gray</u> , 86 So.2d 799 (Fla. 1956) | 9 |
| <u>Brown v. Firestone</u> , 382 So.2d 654 (Fla. 1980) | 9 |
| <u>Bunnell v. State</u> , 453 So.2d 808 (Fla. 1984) | 11,15 |
| <u>Claybourne v. State</u> , 600 So.2d 516 (Fla. 1st DCA 1992), <i>approved</i> , 616 So.2d 5 (Fla. 1993) | 8 |
| <u>Colonial Investment Co. V. Nolan</u> , 131 So.2d 178 (Fla. 1930) | 10 |
| <u>Fox v. State</u> , 24 Fla. L. Weekly D1998 (Fla. 1st DCA Aug. 25, 1999), <i>review granted</i> , ___ So.2d ___ (Fla. Sept. 24, 1999). | 1,2 |
| <u>Garrison v. State</u> , 607 So.2d 473 (Fla. 1st DCA 1992), <i>approved</i> , 616 So.2d 993 (Fla. 1993) | 8 |
| <u>Johnson v. State</u> , 589 So.2d 1370 (Fla. 1st DCA 1991), <i>approved</i> , 616 So.2d 1 (Fla. 1993) | 8 |
| <u>Robinson v. State</u> , 24 Fla. L. Weekly D1960 (Fla. 1st DCA Aug. 17, 1999), <i>review granted</i> , ___ So.2d ___ (Fla. Sept. 22, 1999) | 1 |
| <u>Rodriguez v. Jones</u> , 64 So.2d 278 (Fla. 1953) | 9 |
| <u>Salters v. State</u> , 731 So.2d 826 (Fla. 4th DCA 1999) | 8 |

| | |
|---|------|
| <u>Santos v. State</u> , 380 So.2d 1284, 1285 (Fla. 1980) | 9 |
| <u>State v. Lee</u> , 356 So.2d 276 (Fla. 1978) | 9,10 |

TABLE OF CITATIONS

(Continued)

| | |
|---------------------|-----------------------|
| <u>CASES</u> | <u>PAGE(S)</u> |
|---------------------|-----------------------|

| | |
|---|------------|
| <u>Thomas v. State</u> , | |
| 24 Fla. L. Weekly D2370(d) | |
| (Fla. 1st DCA Oct. 15, 1999) | 1,3 |
| <u>Thompson v. State</u> , | |
| 708 So.2d 315 (Fla. 2d DCA), <i>review granted</i> , | |
| 717 So.2d 538 (Fla. 1998) | 1,3,6,7,8 |
| <u>Williams v. State</u> , | |
| 459 So.2d 319 (Fla. 5th DCA), <i>appeal dismissed</i> , | |
| 458 So.2d 274 (Fla. 1984) | 9,11,15,16 |

CONSTITUTIONS AND STATUTES

Florida Constitution

| | |
|----------------------------------|---------|
| Article III, Section 6 | 6,16,18 |
|----------------------------------|---------|

OTHER SOURCES

Laws of Florida

| | |
|--------------------------|-----------------|
| Chapter 96-388 | 8,9,12,14,15,16 |
| Chapter 95-182 | 2,6,16,18 |
| Chapter 82-150 | 10 |

PRELIMINARY STATEMENT

Petitioner, Kevin Thomas, was the defendant in the trial court and appellant in the district court of appeal. He will be referred to in this brief as petitioner or by his proper name. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the district court. Respondent will be referred to herein as such, or as the state.

The record on appeal consists of five consecutively numbered volumes and one supplemental volume. They will be referred to by use of the symbols "V," and "SV," respectively, followed by the appropriate volume and page numbers.

All emphasis is supplied unless the contrary is indicated.

Pursuant to Administrative Orders of this Court, counsel certifies that this brief is printed in 12 point Courier New Font, and that a disk containing the brief in WordPerfect 6.1 is submitted herewith.

Attached hereto as appendix 1 is the decision of the lower tribunal, which has been reported as Thomas v. State, 24 Fla. L. Weekly D2370(d) (Fla. 1st DCA Oct. 15, 1999).

The same issue presented here is currently pending before this Court in Thompson v. State, 708 So.2d 315 (Fla. 2d DCA), *review granted* 717 So.2d 538 (Fla. 1998); Robinson v. State, 24 Fla. L.

Weekly D1960 (Fla. 1st DCA Aug.17, 1999), *review granted*, ___ So.2d ___ (Fla. Sept. 22, 1999); and Fox v. State, 24 Fla. L. Weekly D1998 (Fla. 1st DCA Aug. 25, 1999), *review granted*, ___ So.2d ___ (Fla. Sept. 24, 1999).

The Second Issue, whether the substantive offense of possession of a firearm by a violent career criminal, which was created by the adoption of Chapter 95-182, Laws of Florida, is constitutional, is inextricably intertwined with the first issue. This second issue was argued, and rejected, in both the circuit and district courts. Appellant contends that the ruling on the First Issue presented will apply with equal force to the Second Issue presented.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with possession of a firearm by a repeat felony offender (V1-10). The evidence presented at trial showed that he pawned a .22 caliber rifle that did not operate properly. The jury found petitioner guilty as charged (V1-148). The court then declared petitioner to be a violent career criminal and sentenced him to life without parole (V1-171). Notice of appeal was timely filed.

On appeal, petitioner argued that the session law which created the substantive offense with which he was charged and the accompanying sentence was unconstitutionally enacted. The First District Court of Appeal disagreed, but certified conflict with Thompson v. State, supra. See, Thomas v. State, supra.

Petitioner filed a timely Notice to Invoke discretionary Jurisdiction of this Court, and on October 21, 1999, this Court later entered an Order Postponing Decision on Jurisdiction and Briefing Schedule.

SUMMARY OF ARGUMENT

Petitioner will argue in this brief that the offense with which he was charged and his violent career criminal sentence are illegal because the 1995 session law which created this statute and penalty was unconstitutionally enacted in violation of the single subject rule. The Second District has so held. The session law combined the creation of the career criminal sentencing scheme with civil remedies for victims of domestic violence. This issue was argued in, and rejected by, both the trial court and the district court of appeal.

The situation is similar to that which occurred when the 1989 legislature amended the habitual violent offender statute in the same session law with statutes concerning the repossession of personal property.

Petitioner's October, 1996 crime falls within the window period which allows this attack. The defect in the 1995 session law was not cured by the enactment of a 1996 session law for two reasons. First, the 1996 session law did not reenact the faulty 1995 session law. Second, even if it did, the 1996 session law suffers from the same constitutional infirmity.

The proper remedy is to declare the 1995 session law to be unconstitutional and vacate the violent career criminal sentence

imposed by the trial court. On remand, the trial court should be ordered to enter a judgment of guilty for the offense of possession of a firearm by a convicted felon, the only lesser included offense on which the jury was instructed.

ARGUMENT

ISSUE I

THE SESSION LAW WHICH CREATED THE VIOLENT CAREER CRIMINAL PENALTY, CH. 95-182, LAWS OF FLORIDA, IS UNCONSTITUTIONAL BECAUSE IT WAS ENACTED IN VIOLATION OF THE SINGLE SUBJECT RULE IN ARTICLE III, SECTION 6, CONSTITUTION OF FLORIDA, AND PETITIONER'S CRIME FALLS WITHIN THE WINDOW PERIOD.

Respectfully, petitioner submits that the opinion of the lower tribunal, see appendix 1, is incorrect. The First District implicitly held that the session law which created the violent career criminal penalty, chapter 95-182, Laws of Florida, was not unconstitutionally enacted in violation of the single subject rule in Article III, section 6, Constitution of Florida.

In Thompson v. State, supra, the court held that the session law which created the violent career criminal sentencing scheme was unconstitutional as a violation of the single subject rule, because it combined the creation of the career criminal sentencing scheme with civil remedies for victims of domestic violence:

Sections 1 through 7 of chapter 95-182, known as the Gort Act, create and define the violent career criminal sentencing category and provide sentencing procedures and penalties. Sections 8 through 10 of chapter 95-182 deal with civil aspects of domestic violence. Section 8 creates a civil cause of action for damages for injuries inflicted in

violation of a domestic violence injunction. Section 9 creates substantive and procedural rules regulating private damages actions brought by victims of domestic abuse. Section 10 imposes procedural duties on the court clerk and the sheriff regarding the filing and enforcement of domestic violence injunctions.

* * *

Likewise, chapter 95-182 embraces criminal and civil provisions that have no "natural or logical connection." See, *Johnson*, 616 So.2d at 4 (quoting *Martinez v. Scanlan*, 582 So.2d 1167, 1172 (Fla. 1991)). Nothing in sections 2 through 7 addresses any facet of domestic violence and, more particularly, any civil aspect of that subject. Nothing in sections 8 through 10 addresses the subject of career criminals or the sentences to be imposed upon them. It is fair to say that these two subjects "are designed to accomplish separate and dissociated objects of legislative effort." *State v. Thompson* 120 Fla. 860, 892-93, 163 So. 270, 283 (1935). Neither did the legislature state an intent to implement comprehensive legislation to solve a crisis. Cf. *Burch v. State*, 558 So.2d 1 (Fla. 1990)(upholding comprehensive legislation to combat stated crisis of increased crime rate). Harsh sentencing for violent career criminals and providing civil remedies for victims of domestic violence, however laudable, are nonetheless two distinct subjects. The joinder of these two subjects in one act violates article III, section 6, of the Florida Constitution; thus, we hold that chapter 95-182, Laws of Florida, is unconstitutional. In so holding, we acknowledge conflict with the Third District's opinion in *Higgs v. State*, 695 So.2d 872 (Fla. 3d DCA 1997). We reverse

Thompson's sentences and remand for resentencing in accordance with the valid laws in effect at the time of her sentencing on May 21, 1996.

708 So.2d at 316-17.

The situation is similar to that which occurred when the 1989 legislature amended the habitual violent offender statute in the same session law with statutes concerning the repossession of personal property. The courts held that the 1989 session law violated the single subject rule. Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991), *approved*, 616 So.2d 1 (Fla. 1993); Claybourne v. State, 600 So.2d 516 (Fla. 1st DCA 1992), *approved*, 616 So.2d 5 (Fla. 1993); and Garrison v. State, 607 So.2d 473 (Fla. 1st DCA 1992), *approved*, 616 So.2d 993 (Fla. 1993).

The "window" period for attacks on the session law exists from October 1, 1995, to May 24, 1997. Thompson v. State, *supra*, at 317, note 1. Petitioner's October 15, 1996 crime falls within the window period. This Court must approve the Thompson v. State, *supra*, window period and declare the session law unconstitutional.

In Salters v. State, 731 So.2d 826 (Fla. 4th DCA 1999), and Bortel v. State, 24 Fla. L. Weekly D2259 (Fla. 4th DCA Sept. 29, 1999), the Fourth District Court of Appeal disagreed with the Thompson Court as to the parameters of the window period. The

Fourth District incorrectly concluded that the window closed on October 1, 1996, the effective date of chapter 96-388, Laws of Florida.

While it is true that Section 44 of Chapter 96-388 contains a slightly amended version of the violent career criminal statute, it is not a biennial adoption of the Florida Statutes in an odd-numbered year, which would cure the one subject violation. See Brewer v. Gray, 86 So.2d 799 (Fla. 1956); and Rodriguez v. Jones, 64 So.2d 278 (Fla. 1953). Nor is it a comprehensive enactment of a new criminal code, which would also cure the one subject violation.

Moreover, even if Chapter 96-388 is viewed as a biennial adoption, it is equally unconstitutional as a violation of the single subject rule.

This Court stated the purpose of the single subject rule in Santos v. State, 380 So.2d 1284, 1285 (Fla. 1980):

The purpose of the requirement that each law embrace only one subject and matter properly connected with it is to prevent subterfuge, surprise, "hodge-podge" and log rolling in legislation.

See also, Brown v. Firestone, 382 So.2d 654, 663 (Fla. 1980); State v. Lee, 356 So.2d 276, 282 (Fla. 1978); and Williams v. State, 459 So.2d 319 (Fla. 5th DCA), *appeal dismissed*, 458 So.2d 274

(Fla. 1984). Where legislation violates the single subject rule the courts must strike it down.

This Court has stated, regarding the single subject rule:

[W]ide latitude must be afforded the Legislature in the enactment of laws, and this Court will strike down a statute only when there is a plain violation of the constitutional requirement that each enactment be limited to a single subject which is briefly expressed in the title.

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

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

manufacture and trafficking of liquor and a provision criminalizing voluntary intoxication failed the one subject rule in Albritton v. State, 82 Fla. 20, 89 So. 360 (1921).

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

1. Created the new crime of "prohibiting the obstruction of justice by false information."
2. Challenged membership rules for the Florida Council on Criminal Justice.
3. Repealed certain sections of the Florida Council on Criminal Justice.
4. Provided an effective date for the bill.

This legislation was found violative of the one subject rule. The Fifth District in Williams v. State, supra at 321, explained:

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

In Bunnell v. State, 453 So.2d 808, 809 (Fla. 1984), this Court agreed:

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

These cases establish the following principles:

1) Provisions in the statute will be considered as covering a single subject if they have a cogent, logical, or natural connection or relation to each other.

2) The legislature will be given some latitude to enact a broad statute, provided that statute is intended to be a comprehensive approach to a complex and difficult problem that is currently troubling a large portion of the citizenry.

3) However, separate subjects cannot be artificially connected by the use of broad labels like "the criminal justice system" or "crime control."

Based on these principles, Chapter 96-388, Laws of Florida is unconstitutional. It is loosely titled "Public Safety." Its 74 sections run the gamut from implementing a continuous revision cycle for the criminal code, to coordinating information systems

resources, to enacting the "Street Gang Prevention Act of 1996," to enacting the "Jimmy Ryce Act" relating to sexual predators, as well as redefining various crimes and attendant punishments. The 74 sections of chapter 96-388 may be briefly summarized as follows:

Section 1 -- creates a new Section 775.0121, which requires the legislature to revise and update the Florida criminal statutes on a regular basis.

Section 2 -- amends Section 187.201, which deals with the "State Comprehensive Plan" for the criminal justice system.

Section 3 -- amends Section 943.06, regarding the membership of the "Criminal and Juvenile Justice Information Systems Council."

Sections 4-16 -- amends and creates several statutes dealing with the membership and the duties of the "Criminal and Juvenile Justice Information Systems Council" and its relation to other government organizations.

Section 17-21 -- amends several statutes regarding juvenile criminal history records.

Section 22 -- amends the statutory provisions regarding the preparation of sentencing guidelines scoresheets.

Section 23 -- repeals Section 6 of Chapter 94-209, Laws of Florida, which had imposed duties on the Juvenile Justice Advisory Board.

Section 24 -- requires the "Justice Administrative Commission [to] report to the Legislature no later than January 1, 1997, itemizing and explaining each of its duties and functions.

Section 25 -- amends Section 27.34(4) by eliminating the provision that allowed the Insurance Commissioner to contract with the "Justice Administrative Commission for the prosecution of criminal violations of the Workers' Compensation Law...."

Section 26 -- repeals Section 27.37, which had created the "Council on Organized Crime" and detailed its membership and duties.

Section 27 -- repeals Sections 282.501 and .502, which had directed the Department of Education to establish the "Risk Assessment Coordinating Council," which was to "develop a population-at-risk profile for purposes of identifying at an early age, and tracking for statistical purposes, persons who are probable candidates for entering into the criminal justice system so as to develop education and human resources to direct such persons away from criminal activities," and providing for membership and duties of this council.

Section 28 -- repeals Sections 648.25(2), .265, and .266, which had established the "Bail Bond Advisory Council," which was to monitor and make recommendations regarding pre-trial release procedures.

Section 29 -- amends Sections 648.26(1) and (4) to eliminate the Bail Bond Advisory Council from the regulatory process over bail bond agents.

Section 30 -- repeals the "Florida Drug Punishment Act of 1990," which had attempted to identify offenders whose criminal activity was the result of drug problems and direct those offenders into treatment programs.

Section 31 -- repeals section 827.05, which had created the offense of "negligent treatment of children."

Section 32 -- repeals Section 943.031(6), which had provided for automatic repeal of Section 943.031, which in turn created, provided for membership, and imposed duties upon, the "Florida Violent crime Council."

Sections 33-43 -- amends Sections 39.053, 893.138, 895.02, and Chapter 874 regarding the prosecution of offenders who are members of a "Criminal Street Gang," including new definitions, the creation of new offenses, and provisions for punishment and forfeiture.

Sections 44-46 -- amends the habitualization sentencing statutes in minor ways.

Sections 47-48 -- amends the definitions of burglary and trespass.

Section 49 -- amends the definition of theft.

Sections 50-53 -- amends the sentencing guidelines in minor ways.

Section 54 -- significantly amends Section 893.135(1), regarding the offense of trafficking in controlled substances.

Sections 55-59 -- amends various statutes regarding enhanced offenses and a defendant's eligibility for gain-time or early release.

Sections 60-67 -- creates the "Jimmy Ryce Act," which significantly amends the Florida Sexual Predators Act and establishes provisions regarding the release of public records regarding missing children.

Section 68 -- creates Section 943.15(3), which requires "the Florida Sheriffs Association and the Florida Police Chiefs Association [to] develop protocols establishing when injured apprehendees will be placed under arrest and how security will be provided during any hospitalization [and] address[ing] the cost to hospitals of providing unreimbursed medical services...."

Section 69 -- amends Section 16.56 to give the statewide prosecutor jurisdiction over violation of "s. 847.0135, relating to computer pornography and child exploitation prevention...."

Sections 70-71 -- amends definitions and creates new offenses regarding computer pornography.

Section 72 -- amends Section 776.085 regarding the provision of a civil damages action against perpetrators of forcible felonies.

Sections 73-74 -- provides for an effective date.

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

The proof of constitutional violation in Chapter 96-388 is clear. The only arguable connection among all sections of the bill is "public safety." But Florida courts have ruled such a broad, general area may not be considered a single subject or the constitutional mandate would become meaningless. For example, both Bunnell and Williams rejected the contention that many separate matters may be included together in one bill if all relate somehow to a broad general subject area, such as criminal justice or crime prevention and control, as contended by the state in those cases. The Fifth District in Williams highlighted the fallacy of such a position:

The Bunnell court [referring to the Second District decision] reasoned that although not expressed in the title, it could

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

459 So.2d at 321. (Footnote omitted.)

Since the Act clearly includes a great many more than one subject, Chapter 96-388 violates article III, section 6, Constitution of Florida, and should be invalidated. As the violent career criminal statute was unconstitutionally enacted by both Chapter 95-182 and chapter 96-388, the window period to challenge the constitutionality of the statute remained open until May 24, 1997, the date of the biennial adoption of the amendments to the Florida Statutes. Because the instant offense arose on October 15, 1996, petitioner is entitled to relief.

Petitioner raised this very argument in the trial court (V1 113-117), and on direct appeal to the First District Court. See, Appendix B, Initial Brief of Appellant. Both courts rejected it.

Petitioner's violent career criminal sentence affect the length of time he must serve and affect his fundamental liberty interests. The sentence must be vacated.

ISSUE II

THE SUBSTANTIVE OFFENSE OF POSSESSION OF A FIREARM BY A VIOLENT CAREER CRIMINAL, WITH WHICH PETITIONER STANDS CONVICTED, IS UNCONSTITUTIONAL BECAUSE IT WAS CREATED BY CHAPTER 95-182, LAWS OF FLORIDA, WHICH WAS ADOPTED IN VIOLATION OF THE SINGLE SUBJECT REQUIREMENT OF THE CONSTITUTION OF FLORIDA.

This issue was raised and rejected in both the trial court (V1 119-127), and the district court. See Appendix B. Although the district court did not certify that its ruling on this issue was in conflict with the decision of another district court on the same question of law, petitioner asserts that this issue is inextricably intertwined with the First Issue and should be addressed by this Court.

Petitioner was charged with possession of a firearm by a violent career criminal (V1-72). Before trial he moved to dismiss that charged and argued, inter alia, that the statute under which he was charged was created by Chapter 95-182, Laws of Florida, which was unconstitutionally adopted in violation of the single subject requirement of Article III, section 6, Constitution of Florida (V1 119-127).

Regarding the adoption of Chapter 95-182, petitioner relies on, adopts, and incorporates herein by reference, the reasoning, law, and argument, presented in the Issue I, above. Petitioner

contends that if this Court finds Chapter 95-182 was unconstitutionally adopted, then the offense of possession of a firearm by a violent career criminal, which was adopted pursuant to that session law, must also be declared unconstitutional.

REMEDY

If the statute under which petitioner stands convicted is found to have been adopted in violation of the single subject requirement of the Constitution of Florida, then his conviction for that offense must be vacated. A conviction may be entered, however, for any lesser included offense on which the jury was instructed.

In the trial court, the jury was instructed on one lesser included offense -- possession of a firearm by a convicted felon (V1 137-138; 148). Therefore, on remand, the trial court must be instructed to vacate petitioner's conviction for possession of a firearm by a violent career criminal, and to enter an order finding him guilty of possession of a firearm by a convicted felon. Petitioner must then be resentenced for that conviction.

CONCLUSION

Petitioner, based on the foregoing, respectfully urges this Court to disapprove the decision of the First District Court, vacate the conviction for possession of a firearm by a violent career criminal, and strike the sentence imposed below. On remand, the trial court should be instructed to enter a judgment of guilt for possession of a firearm by a convicted felon, and resentence petitioner accordingly.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Laura Fullerton Lopez, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL 32399-1050; and a copy has been mailed to Petitioner on this date, January 18, 2001.

Respectfully submitted,

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STATE OF FLORIDA,

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APPENDIX TO MERITS BRIEF OF PETITIONER

APPENDIX

DOCUMENT

- | | |
|---|---|
| A | <u>Thomas v. State</u> , 24 Fla. L. Weekly D2370 (Fla. 1st DCA October 15, 1999) |
| B | Supplemental Initial Brief of Appellant |