

IN THE SUPREME COURT OF FLORIDA

**KEVIN THOMAS**,

Appellant,

v.

Case No. **SC96788**

STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT  
OF THE **FOURTH** JUDICIAL CIRCUIT,  
IN AND FOR **DUVAL** COUNTY, FLORIDA

**SUPPLEMENTAL INITIAL BRIEF OF APPELLANT**

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### PRELIMINARY STATEMENT

The Court granted petitioner leave to file this supplemental initial brief after the opinion in State v. Thompson, 25 Fla. L. Weekly S1 (Fla. Dec. 22, 1999), was issued. Petitioner was charged with possession of a firearm by a violent career criminal (VCC) and sentenced to life without parole as a VCC. Both the substantive offense, and the enhanced sentencing provision, were contained in chapter 95-182, Laws of Florida. In Thompson, supra, this Court held the chapter 95-182, Laws of Florida, was unconstitutionally enacted in violation of the single subject requirement of the Florida Constitution. The purpose of this brief is to address whether appellant's offense was committed before the unconstitutional statute was subsequently reenacted and made constitutional.

Petitioner, Kevin Thomas, was the defendant in the trial court, and the 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 of appeal. 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.

**STATEMENT OF FONT SIZE**

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.

### STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with possession of a firearm by a violent career criminal (V1-10). The evidence showed that on October 15, 1996, he pawned a broken .22 caliber rifle (V1-10). He was sentenced to life in prison without possibility of parole as a VCC.

In both the trial and district courts petitioner argued that his prosecution and sentence under the violent career criminal (VCC) statute were improper because that statute had been enacted in violation of the single subject requirement of the Florida Constitution.

In State v. Thompson, supra, this Court held that chapter 95-182, Laws of Florida, upon which the VCC statute was predicated, was unconstitutionally enacted in violation of the single subject requirement of the Florida Constitution. In 1997, the Florida Legislature reenacted the VCC statute. Chapter 97-97, Laws of Florida. The Thompson decision did not rule on the date the VCC statute became constitutional due to its reenacted.

Consequently, the only issue remaining in this case is whether petitioner was prosecuted and sentenced during the window period when the VCC statute was unconstitutional.

### SUMMARY OF ARGUMENT

Petitioner was charged with, and found guilty of, possession of a firearm by a violent career criminal. Thereafter, he was sentenced to life without parole as a VCC. The date of the alleged offense was October 15, 1996, (V1-10).

In both the trial and appellate courts, petitioner challenged the constitutionality of the statute creating the substantive offense with which he was charged, and the accompanying sentencing provisions. He alleged the statutes were both enacted in violation of the single subject requirement of Article 3, section 6, of the Florida Constitution.

In State v. Thompson, supra, this Court held that chapter 95-182, Laws of Florida, which created both the substantive offense and the accompanying sentencing provisions, was unconstitutionally enacted in violation of the single subject requirement of the state constitution.

Chapter 97-97, Laws of Florida, reenacted the statutes at issue as part of the biennial adoption of the Florida Statutes. This had the effect of making the previously improperly enacted provisions of chapter 95-182 constitutional. State v. Johnson, infra. The effective date of chapter 97-97, Laws of Florida, was May 24, 1997. See, chapter 97-97, Laws of Florida. Therefore,

the provisions of chapter 95-182, Laws of Florida, and the statutes under which petitioner was charged and sentenced, did not become law until May 24, 1997. Id. See also, Thompson v. State, infra (window period began October 1, 1995, and closed May 24, 1997). But see, Salters v. State, infra (window closed October 1, 1996).

Possession of a firearm by a violent career criminal was a nonexistent offense on the date petitioner is alleged to have violated that statute. State v. Thompson, infra; Thompson v. State, infra. That is, the statutes under which petitioner was both prosecuted and sentenced had not been lawfully enacted at the time he is alleged to have violated them. Where a conviction for a nonexistent offense is vacated, the proper remedy is retrial on any lesser offense instructed on at trial. State v. Gibson, infra; State v. Wilson, infra.

The only lesser offense instructed on at trial was possession of a firearm by a convicted felon (V1-137). Therefore, this Court must vacate petitioner's conviction for the then nonexistent offense of possession of a firearm by a violent career criminal, vacate the life sentence imposed below, and remand to the trial court so petitioner can be tried for the offense of possession of a firearm by a convicted felon.



**ARGUMENT**

**ISSUE I**

PETITIONER HAS STANDING TO CHALLENGE HIS PROSECUTION AND SENTENCE UNDER THE VIOLENT CAREER CRIMINAL STATUTE BECAUSE THE DATE HE IS ALLEGED TO HAVE COMMITTED THIS OFFENSE WAS OCTOBER 15, 1996, AND THE STATUTE AT ISSUE WAS NOT REENACTED, AND THUS MADE CONSTITUTIONAL, UNTIL MAY 24, 1997.

Petitioner was found guilty of possession of a firearm by a violent career criminal, and sentenced to life in prison as a VCC. The date of the offense was October 15, 1996 (V1-10).

In State v. Thompson, supra, this Court held that both the offense of possession of a firearm by a VCC, and sentencing under the VCC statute were unconstitutional because they were enacted in violation of the single subject requirement of the Florida Constitution.

Here, petitioner asserts that both his prosecution for possession of a firearm by a VCC, and his sentence under the VCC statute for an offense that occurred on October 15, 1996, were a nullity because neither the substantive offense nor the VCC sentencing provisions had been lawfully enacted at the time of the alleged offense.

**The Window Period**

In State v. Johnson, 616 So. 2d 1 (Fla. 1993), this Court noted that a chapter law enacted in violation of the single subject requirement would become constitutional once it was reenacted as part of the Florida Statutes. There, as here, the Court was faced with the question of when an unconstitutionally enacted statute became constitutional by virtue of the legislature reenacting it. The Court reasoned:

Chapter 89-280 was enacted effective October 1, 19889. Chapter 91-44, Laws of Florida, reenacted the 1989 amendments contained in chapter 89-280, effective May 2, 1991, as part of the biennial adoption of the Florida Statutes. The reenactment has the effect of adopting as the official statutory law of the state those portions of statutes that are carried forward from preceding adopted statutes. Once reenacted as a portion of the Florida Statutes, a chapter law is no longer subject to challenge on the grounds that it violates the single subject requirement of article III, section 6, of the Florida Constitution.

Id. at 2.

In the case at bar, the proscription against possession of a firearm by a violent career criminal and accompanying sentencing provisions were contained in chapter 95-182, Laws of Florida. That statute became effective October 1, 1995. This Court, however, ruled that the statutes at issue were enacted in

violation of the single subject requirement of our state constitution. State v. Thompson, supra.

Chapter 97-97, Laws of Florida, reenacted the 1995 amendments contained in chapter 95-182, as part of the biennial adoption of the Florida Statutes. The 1997 reenactment of the 1995 amendments became effective on May 24, 1997. See, chapter 97-97, Laws of Florida. Therefore, the VCC statute did not become constitutional until May 24, 1997. State v. Johnson, supra; Thompson v. State, 708 So.2d 315 (Fla. 2d DCA 1998)(window period began October 1, 1995. The window closed May 24, 1997). But see, Salters v. State, 731 So.2d 826 (Fla. 4th DCA 1999) (window closed October 1. 1996).

The date petitioner is alleged to have committed the instant offense is October 15, 1996, (V1-10). The statute under which he was both prosecuted and sentenced was unconstitutional at that time, and petitioner's conviction and sentence cannot stand.

#### **Remedy**

It should be noted that, in his Initial Brief, Petitioner urged this Court to vacate his conviction for possession of a firearm by a VCC, and to enter a judgment of conviction for possession of a firearm by a convicted felon, the only lesser

offense on which the jury was instructed at trial. After a closer reading of the applicable statutes, petitioner now urges the Court to order that he be retried on that lesser included offense.

Possession of a firearm by a VCC was a nonexistent offense until May 24, 1997, the date the otherwise unconstitutional statute was reenacted. Where a conviction for a nonexistent offense is vacated, the proper remedy is retrial, not resentencing, on any lesser offense instructed on at trial. State v. Gibson, 682 So.2d 545 (Fla. 1996); State v. Wilson, 680 So.2d 411 (Fla. 1996).

The only lesser offense instructed on at trial was possession of a firearm by a convicted felon (V1-137). Therefore, this Court must vacate appellant's conviction for the nonexistent offense of possession of a firearm by a VCC, vacate the sentence of life without parole that was imposed below, and remand to the trial court for a new trial on the offense of possession of a firearm by a convicted felon.

**CONCLUSION**

Based on the foregoing argument, reasoning, and citation to authority, this Court must reverse petitioner's conviction for possession of a firearm by a VCC, vacate the accompanying sentence, and remand to the circuit court for a new trial on the charge of possession of a firearm by a convicted felon.

**CERTIFICATE OF SERVICE**

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

Respectfully submitted,

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