

IN THE SUPREME COURT OF FLORIDA

KELLY TORMEY,

Petitioner,

v.

Case No. SC97143

MICHAEL W. MOORE, et al.,

Respondents.

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**RESPONDENT MOORE'S RESPONSE TO PETITIONER  
TORMEY'S AMENDED PETITION FOR EXTRAORDINARY RELIEF**

Respondent Moore, through undersigned counsel, submits his supplemental response to the amended petition for extraordinary relief as directed by the Court on August 21, 2000.

**Preliminary Statement**

Secretary Moore accepts the statement of facts of petitioner regarding Ms. Tormey's commitment history. As noted by counsel for petitioner, by dates of offense, Ms. Tormey falls within Offender Group 3 (emergency gain-time at 99% of lawful capacity) and Offender Group 5 (provisional credits at 97.5% of lawful capacity). Based upon Ms. Tormey's conviction for second-degree murder, the Secretary has excluded her from eligibility for provisional credits under section 944.277(1)(i), Florida Statutes

(1989). (Exhibit C to Respondent Moore's Response to Tormey Petition). Because Ms. Tormey remains eligible for emergency gain-time at 99% of lawful capacity under section 944.598, Florida Statutes (1989), the Secretary has awarded her 30 days of emergency gain-time (Phase I) for Offender Group 2, as approved in Gomez v. Singletary, 733 So. 2d 499 (Fla. 1998). (Id.) Petitioner now challenges her removal from Offender Group 5 on the grounds that the chapter law enacting the murder exclusion of section 944.277(1)(i) violated Article III, Section 6, of the Florida Constitution and therefore the murder exclusion did not take effect until after her date of offense. Petitioner Tormey also challenges the amount of relief proposed (whether Offender Group 5 or Offender Group 3) that was previously approved in Gomez.

#### ARGUMENT

**A. CHAPTER 89-100 DID NOT VIOLATE ARTICLE III, SECTION 6, OF THE FLORIDA CONSTITUTION, AND THE MURDER EXCLUSION IN SECTION 944.277(1)(I) TOOK EFFECT ON JANUARY 1, 1990. (REPHRASED)**

Petitioner Tormey contends that she is eligible for provisional credits because the statute that originally made murderers, like herself, ineligible for such credits is void. Section 4 of Chapter 89-100, in relevant part, amended section 944.277, Florida Statutes to exclude murderers and attempted

murderers from eligibility for provisional credits. Tormey murdered her victim after the effective date of this amendment. She asserts that Chapter 89-100 was enacted in violation of the single subject rule and clear title corollary found in section 6 of article 3 of the Florida Constitution. Respondent Moore respectfully disagrees.

**Overview.** "Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." Art. III, § 6, Fla. Const. This provision was designed to prevent the enactment of legislation by logrolling and unfair surprise, as was recognized in State ex rel. X-cel Stores, Inc. v. Lee, 122 Fla. 7685, 166 So. 568, 571 (1936):

The object of section 16 [now section 6] of article 3 of the Constitution was not a design to embarrass legislation by making laws unnecessarily restrictive in their scope and operation and thus to multiply their number. On the contrary, its purpose was to remedy (1) the practice of bringing together into one bill subjects diverse in their nature, and having no necessary nor appropriate connections, with a view to combining in their favor the advocates of all, and thus secure the passage at one time of several unrelated measures, no one of which could succeed upon its own merits alone, and (2) to outlaw the practice of inserting, by dexterous manipulation, clauses of which the title to the bill gave no intimation, thereby sanctioning the passage of legislative provisions which the Legislature's membership could not be made by the title to the bill generally aware.

A liberal construction of the single subject rule is necessary to avoid lessening or destroying the power of the legislature. State ex rel. X-cel Stores, Inc. v. Lee, supra;

State ex rel. Attorney General v. Knowles, 16 Fla. 577 (1878)

("While the provision in the Constitution is mandatory, still 'there has been a general disposition in the courts of this and other States to construe it liberally rather than embarrass legislation by a construction where strictness is unnecessary to the accomplishment of the beneficial purposes for which it was adopted'"); State v. Lee, 356 so.2d 276 (Fla. 1978) (282 (Fla. 1978) ("This constitutional provision ... is not designed to deter or impede legislation by requiring laws to be unnecessarily restrictive in their scope and operation").

The title corollary to the single subject rule also must be construed liberally. State ex rel. Attorney General v. Knowles, supra, is instructive:

[T]he subjects of legislation are usually expressed with the utmost brevity and conciseness in their titles, and some consideration must be given to this circumstance in determining the question. The court is not to set aside or declare an act void because the subject was not as fully or as unequivocally expressed as it might otherwise have been. A liberal rule of interpretation must prevail in this respect, not only for the reason just stated, but because the proposition is to strike down and defeat the act of the Legislature, which can never be done upon any slight or untenable grounds. It is a truth which has been often asserted and often acted upon by the courts that to justify the annulling of a statute by judicial sentence, the violation of the Constitution must be clear and unmistakable. [internal quotation marks omitted]

Not only are constitutional provisions construed liberally to uphold legislation, but the statutes themselves are presumed constitutional; all doubt must be resolved in favor of the

constitutionality of a challenged statute; and no statute will "be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt." State v. Kinner, 398 So.2d 1360, 1363 (Fla. 1981).

**1. The history and enactment of Chapter 89-100.**

Respondent Moore accepts Petitioner Tormey's summary of the history and enactment of Chapter 89-100 with the following addition, comments, and clarification:

1. Chapter 89-100 (CS/HB 25) passed by unanimous vote in both houses of the legislature. ("Appendix to Petitioner Tormey's Reply and Amended Petition," App. C and F)

2. Petitioner Tormey states that the challenged provision was added to the body of CS/HB 25 on the floor of the House. (Reply, 8) This is an acceptable practice, for the title and body of bills may be amended on the floor of each house, State ex rel. X-cel Stores, Inc. v. Lee, 122 Fla. 685, 166 So. 568 (1936); § 7, Art. III, Fla. Const., which is in keeping with the legislature's "prerogative to make, interpret and enforce its own procedural rules," Moffitt v. Willis, 459 So.2d 1018, 1022 (Fla. 1984).

3. Petitioner Tormey states that CS/HB 25 was read by title on the floor of the Senate, and after being substituted for the companion bill, CS/CS/CS/SB 45, was read by title a second and third time. (Reply, 8) It is perfectly acceptable to read a bill by caption title or short title, rather than by full title, or by

the full bill. State v. Kaufman, 430 So.2d 904, 906-907 (Fla. 1983).

4. Petitioner Tormey contends that there were House and Senate bills which addressed only provisional release credits, including a general murder exclusion, but that these bills never reached the floor. She identifies them as "HB 586, CS/HB 586, HB 1050, SB 210, and SB 307." (Reply, 8 n. 2 and 3)

The Senate Summary to SB 307 provided:

Prohibits the Secretary of Corrections from granting provisional credits for early release to any inmate who has been convicted of certain acts of violence against a law enforcement or correctional officer, murder, aggravated child abuse, or sexual child abuse. Provides that certain inmates may be released upon reaching their provisional release date or tentative release date, whichever date is earlier.

HB 586 and CS/HB 586 appear to be identical to SB 307.

The Senate Summary to SB 210 provided:

Limits the circumstances under which the Secretary of Corrections may grant provisional credits to inmates when the inmate population reaches 97.5 percent of lawful capacity. Prohibits the award of credits to any inmate sentenced on or after October 1, 1989, who has been adjudicated a delinquent juvenile for the commission of certain acts, has been convicted of murder, has escaped from a correctional institution, or has been convicted for the assault, battery, or kidnapping of a law enforcement or correctional officer.

The Legislative Summary to HB 1050, which was very similar to SB 210, provided:

Limits the circumstances under which the Secretary of Corrections may grant provisional credits to inmates when the inmate population reaches 97.5 percent of

lawful capacity. Prohibits the award of credits to any inmate sentenced for a crime committed on or after October 1, 1989, who has been adjudicated a delinquent juvenile for the commission of certain acts, has been convicted of murder, has escaped from a correctional institution, has been convicted for the assault, battery, or kidnapping of a law enforcement or correctional officer, or has been convicted in another jurisdiction of an offense comparable to those enumerated.

According to the "Florida Legislature--Regular Session--1989 History of ... Bills," SB 210 died in the Committee on Appropriations with a reference to CS/HB 25 (Ch. 89-100); SB 307 died in Committee on Appropriations with a reference to CS/HB 25 (Ch. 89-100) and SB 12-B (Ch. 89-531); HB 586 died in Committee on Appropriations with a reference to CS/HB 25 (Ch. 89-100) and SB 12-B (Ch. 89-531); and HB 1050 died on calendar with a reference to CS/HB 25 (Ch. 89-100).

**2. Chapter 89-100 did not contain a defective and misleading title in violation of Article III, Section 6, of the Florida Constitution.**

As previously stated, "Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." Art. III, § 6, Fla. Const. (emphasis supplied) "The subject of an act is the matter to which it relates and the object is its general purpose." State v. Canova, 94 So.2d 181, 184 (Fla. 1957). The legal principles for determining whether the title requirement is satisfied are summarized in State ex rel. Moodie v. Bryan, 50 Fla. 293, 39 So. 929 (1905):

It is sufficient that the title should express the subject and that it is not necessary for it to set out the matter properly connected therewith. *Id.*, at 962.

If the title fairly gives notice of the subject of the act, so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary. It need not be an index to the contents. *Id.*, at 962.

The title of an act may be general and so long as the generality of the subject therein expressed is not employed as a guise to conceal the real object of the law, or some provision therein, it will not be objectionable. It is also true that the title to an act may be so restrictive as to confine the body of the act to such phase of the subject as is indicated by the title. *Id.*, at 962.

The amplification of the title to an act, so as to make it expressly mention matters germane to and properly connected with its general subject, does not vitiate such title or subject it to the criticism of having dealt with two distinct or incongruous subjects. *Id.*, at 962.

Also instructive are three other cases, the first of which is Florida E. C. Ry. Co. v. Hazel, 43 Fla. 263, 31 So. 272 (1901). The challenged act there was entitled, "An act requiring railroad companies to fence their tracks, and providing remedies against them for failure to do so." The fourth section of the act authorized the recovery of double damages and attorney's fees in the event the railroad failed to erect the requisite fences. The railroad company contended that this provision created a penalty that was not identified in the title to the act. This Court upheld the statute. It concluded that the provision could have been added under the first clause of the title, and that the second clause containing the word remedies did not so restrict the title as to make it misleading.



The second case is State v. Vestel, 81 Fla. 625, 88 So. 477, 478-479 (1921) in which this Court again upheld a statute against a title challenge. The act there was entitled, "An act to provide for the assessment and collection of the taxes for the city of Orlando and for the collection of the back taxes and tax sale certificates of said city," and in the body of the act, the city was authorized to impose occupational license taxes. This Court reasoned that while there was a constitutional difference between property and license taxes, both types could "fairly be included in the term 'assessment and collection of taxes.'" *Id.*, at 630.

The third and last case is City of Pensacola v. Shevin, 396 So.2d 179 (Fla. 1981). There, the expressly stated subject was the Pensacola Civil Service System, and all but two of the sections of the act were listed in the title. The two omitted sections were important because they related to the loss of vested pension rights. In upholding the statute, this Court stated, "The fact that a somewhat detailed listing in a title is not complete, however, is of no consequence if the disputed sections relate to the general subject and the subject is expressed in the title." *Id.*, at 180.

In the present case, the title to Chapter 89-100 provides:

**An act relating to criminal penalties;** creating the "Law Enforcement Protection Act"; providing legislative findings and intent; creating s. 775.0823, F.S.; establishing mandatory minimum penalties for persons convicted of murder,

manslaughter, kidnapping, aggravated battery, and aggravated assault of law enforcement officers, correctional officers, state attorneys, and assistant state attorneys; prohibiting provisional credits; amending s. 944.277, F.S.; prohibiting the granting of provisional credits to inmates convicted of committing certain offenses against law enforcement officers, correctional officers, state attorneys, and assistant state attorneys; providing an effective date. (emphasis supplied)

Section four of Chapter 89-100 provides:

Paragraphs (h) and (i) are added to subsection (1) of section 944.277, Florida Statutes, 1988 Supplement, to read:

944.277 Provisional credits.--

(1) Whenever the inmate population of the correctional system reaches 97.5 percent of lawful capacity as defined in s. 944.096, the Secretary of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such condition in writing, the secretary may grant up to 60 days of provisional credits equally to each inmate who is earning incentive gain-time, except to an inmate who:

(h) Is convicted, or has been previously convicted, of committing or attempting to commit assault, aggravated assault, battery, aggravated battery, kidnapping, manslaughter, or murder against an officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9) or against a state attorney or assistant state attorney.

(i) Is convicted, or has been previously convicted, of committing or attempting to commit murder in the first, second, or third degree under s. 782.04(1), (2), (3) or (4).

The expressly stated subject of Chapter 89-100 is criminal penalties. In the body of the act, in relevant part, murderers and attempted murderers are excluded from eligibility for early release credits under § 944.277, Florida Statutes. ch. 89-100, § 4, at 256. Since section 944.277 may be viewed as affecting an offender's punishment, Gomez v. Singletary, 733 So.2d 499 (Fla.

1998), there can be no doubt that the subject of the legislation gives fair notice of the act's contents.

Petitioner Tormey contends that this subject is "broad" and "without constitutional significance." (Reply, 13-14) Respondent Moore respectfully disagrees. As a practical matter, a subject cannot be so general, such as public safety or justice system, that virtually everything is covered under it. To allow a subject this broad would in effect nullify the single subject rule. By contrast, "criminal penalties" is a fairly narrow subject.

Petitioner Tormey further contends that the real subject of Chapter 89-100 is the protection of law enforcement, and that this subject is so restrictive that the amendment to § 944.277 excluding murderers and attempted murderers from eligibility for provisional credits falls outside its scope. Respectfully, Respondent Moore disagrees. A reasonable interpretation is that the act includes, but is not limited to, penalties for criminals who physically harm law enforcement personnel.<sup>1</sup> The challenged provision itself simultaneously protects law enforcement personnel, as well as other members of society.

The shift in focus from the expressly stated subject of

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<sup>1</sup> Whenever Respondent Moore uses the shorthand phrase "law enforcement personnel," he is referring to law enforcement officers, correctional officers, state attorneys, and assistant state attorneys. § 3, at 255, ch. 89-100.

criminal penalties to the protection of law enforcement personnel at most may have created an ambiguity, but if so, that ambiguity must be resolved by upholding the statute. Florida E.C. Ry. Co. v. Hazel, 31 So. at 274 is instructive:

The court is not authorized to declare the title obnoxious to the constitutional requirement as to title, if the question be a doubtful one. It is not clear that the word 'remedies' was used in a technical sense in the second clause of the title, but, rather, that it was intended by this clause to assert in a most general way that means were provided for enforcing the act, without designating specifically whether these means consisted of the imposition of liabilities, penalties, or otherwise. It certainly does not exclude the idea that liabilities or penalties are imposed for violating the duty declared. The court should not resort to critical or technical construction of the language of the title in order to exclude parts of the body of the act from its purview. We do not feel authorized to declare that the matter objected to is not properly connected with the subject-matter embraced in the title, or that the title is so restricted as to render its insertion improper. [citations omitted]

Petitioner Tormey shifts this Court's attention away from the language of the title and onto extraneous matters; that is, the substantive sections of the act, other than the one under attack, and the history of the act. (Reply, 10-15) The goal here, however, is not to divine legislative intent; rather it is to determine whether a reasonable person reading the title would understand that the act relates, in part, to punishment of murderers and attempted murderers. Mayo v. Polk Co., 124 Fla. 534, 169 So. 41, 43 (1936) ("The test by which it may be determined whether the title of an act meets this requirement is met if its verbiage is sufficient to put one on notice and cause

him to inquire into and ascertain the contents of the body of the act." ). The expressly stated subject (an act relating to criminal penalties), of course, puts the reasonable reader on notice of this fact.

Petitioner Tormey also contends that "the title of chapter 89-100 violates the implicit prohibition against misleading titles." (Reply 9) For the reasons previously stated, Respondent Moore respectfully disagrees.<sup>2</sup>

Petitioner Tormey relies on the following cases: State v. Physical Therapy Rehabilitation Center of Coral Springs, Inc., 665 So.2d 1127, 1129-1130 (Fla. 1st DCA 1996) (title provided "An act relating to medical practice"; "title, although giving a virtual index to all of the other provisions of the enactment, does not list the provisions of section 16"; "title ... fails ... to contain broad language permitting one to conclude that a fee cap such as was imposed in section 16 on all providers of designated health services was encompassed by the legislation"; "title expressly refers to the imposition of a fee cap on

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<sup>2</sup> Implicit prohibitions are troublesome because they increase the odds of constitutional legislation being invalidated. No longer is the language in the constitutional provision the central focus, which in this case is that the "subject" must "be briefly expressed in the title." Art. III, § 6, Fla. Const. Shifting the focus onto what is not stated makes it easier to create procedural restrictions on law making. It also becomes easier to overlook the canon of construction that requires all doubts to be resolved in favor of upholding the legislation.

radiation therapy providers only, creating the appearance that no other fee caps are encompassed within the act"), *app. dismissed*, 676 So.2d 414 (Fla. 1996); Christensen v. Commercial Fishermen's Assoc., 187 So. 699, 700-01 (Fla. 1939) (title of act limited to specific types of nets and inside waters; words in title had specific meaning in fishing industry and did not include other types of nets and waters outside land barriers); State ex rel. Crump v. Sullivan, 128 So. 478, 481 (Fla. 1930) ("while it may be said that the 'subject' of the act of 1929 is 'primary elections,' the title indicates that the subject will be dealt with, not generally, but only within a limited and restricted sphere, to which the proviso of section 18 is foreign"); and Rouleau v. Avrach, 233 So.2d 1, 2-3 (Fla. 1970) ("the choice of the word 'in' counties wherever used in the title to both Acts was intended to mean that the law applied 'to' counties and their law library taxes, and not 'in' counties to every conceivable incidental or remotely-related person").

Tormey's reliance on the above cases is misplaced, for they are distinguishable. Unlike those cases, the challenged provision here relates to both subjects: criminal penalties and the protection of law enforcement personnel. Murderers and attempted murderers are not eligible for provisional credits, regardless of their victims' occupation.

The First District in Physical Therapy Rehabilitation Center

of Coral Springs ignored completely the expressly stated subject of the legislation (medical practice); it required all of the sections of the act to be listed in the title; and it read the reference to a fee cap on radiation therapy to preclude any other fee cap. This case violates the spirit, if not the letter, of City of Pensacola, supra, as well as Mayo v. Polk Co., 124 Fla. 534, 169 So. 41, 43 (1936), wherein this Court stated, "The expression of one thing is the exclusion of another is a sound rule of construction as applied to acts of the Legislature, but it has no application to the title of an act."

The remedy for violating the title requirement is severance of the part that was not properly identified in the title.

Presbyterian Homes v. Wood, 297 So.2d 556, 559 (Fla. 1974) sets forth the rules governing severance:

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

Wood was reaffirmed in Heggs v. State, 759 So.2d 620, 269 (Fla. July 10 2000) ("[A] court may sever a portion or portions of the body of a chapter law that are properly a single subject but have not been adequately noticed in the title, if severing such portion or portions would not run afoul of the principles set

forth in Wood.”)

Assuming, *arguendo*, that the title was too restrictive to permit a provision denying provisional credits to murderers and attempted murderers (regardless of the victim’s occupation), the remedy is to sever this provision from the remainder of the act. The legislative purpose expressed in the valid provisions is easily accomplished independently of the void provision. As to the valid provisions, criminals who commit violent crimes against law enforcement personnel must receive minimum mandatory sentences, and they are ineligible for provisional credits. The void provision does not interfere with implementation of these provisions.

Petitioner Tormey’s contention that logrolling was involved in the passage of this legislation simply is not true. (Reply, 15) Logrolling occurs when minority proposals are combined in a single bill to obtain a majority vote or when an unpopular proposal is added to a popular one to ensure its passage. Logrolling is improper because it leads to a result that would not otherwise be attainable. Colonial Inv. Co. v. Nolan, 100 Fla. 1349, 1351-52, 131 So. 178 (1930). An example of logrolling is found in State v. Thompson, 750 So.2d 643, 648 (Fla. 2000) (after three domestic violence bills failed to pass in the House of Representatives, career criminal bill was amended to include



domestic violence bills).<sup>3</sup>

In the present case, the original bill increased the punishment for persons who committed violent crimes against law enforcement personnel. Part of the increased punishment was ineligibility for early release from prison due to overcrowding. That part of the original bill was amended so that all murderers and attempted murderers would be ineligible for provisional credits, not just those who targeted law enforcement personnel. The suggestion that either the original or amended bill could not have passed standing alone is preposterous. Both are popular legislation because their goal is the protection of society against violent criminals. What this Court said in Burch, 558 So.2d at 3 is equally applicable here: "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."

**3. Chapter 89-100 does not violate the single-subject requirement of Article III, Section 6, of the Florida Constitution.**

To repeat, "Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be

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<sup>3</sup> There is nothing inherently offensive about multiple subjects being addressed in one bill. If fair notice is given, and the combined provisions would have passed separately, no harm is done by joining them in one bill.

briefly expressed in the title." Art. III, § 6, Fla. Const. (emphasis supplied) The applicable law on the single subject rule is set forth in State v. Canova, 94 So.2d 181, 184 (Fla. 1957):

It is perfectly clear, from reviewing prior decisions of this Court, that if a matter is germane to or reasonably connected with the expressed title of the act, it may be incorporated within the act without being in violation of ... our constitution. Provisions which are necessary incidents to, or tend to make effective or promote the object and purpose of the legislation included in the subject expressed in the title of the act may be regarded as matters properly connected with the subject thereof. \*\*\* In determining if matters are properly connected with the subject, the test is whether such provisions are fairly and naturally germane to the subject of the act, or are such as are necessary incidents to or tend to make effective or promote the objects and purposes of legislation included in the subject.

The Canova test, which was reaffirmed in Smith v. Department of Insurance, 507 So.2d 1080, 1086 (Fla. 1987), focuses on the relationship of the parts of the act to the subject of the act, not on the relationship of the parts of the act to each other. In other words, the various provisions of an act must be logically connected to the general subject of the act but not necessarily to each other.<sup>4</sup> See also, Burch v. State, 558 So.2d

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<sup>4</sup> It, of course, is quite possible for each provision of an act to be germane to the subject expressed in the title and also to be logically connected to each other. See e.g., State v. Petruzzelli, 374 So.2d 13, 15 (Fla. 1979) ("Each provision of the law is fairly and naturally germane to the subject expressed in the title...; the several provisions are all necessary to achieve the purpose of the legislation, and all provisions are naturally and legally connected to one another.").

1, 4 (Fla. 1990) ("Each of these areas [comprehensive criminal regulations and procedures, money laundering, and safe neighborhoods] 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.").

More recently, this Court has focused on the latter relationship; that is, the relationship of the various provisions of the act to each other, as opposed to the subject matter of the legislation. Thompson v. State, 750 So.2d 643, 647-648 (Fla. 2000) is illustrative:

After reviewing the various sections of chapter 95-182, we find it clear that those sections address two different subjects: career criminals and domestic violence. The State argues that the subject of chapter 95-182 is the penalties to be imposed upon recidivist criminal offenders, and the object is to reduce crime by imposing more severe sanctions on those criminal offenders. However, as the Second District observed: "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." Thompson, 708 So.2d at 317. We agree with the Second District's observation.

See also Heggs v. State, 759 So.2d at 626 ("After reviewing the various sections contained in chapter 95-184, we conclude that our analysis in Thompson concerning chapter 95-182 must be applied here--the domestic violence provisions contained in chapters 95-182 and 95-184 are not naturally or logically connected to the remaining criminal subject matters contained in

those chapter laws"); State v. Johnson, 616 So.2d 1 (Fla. 1993) ("As the district court noted, it is 'difficult to discern a logical or natural connection between career criminal sentencing and repossession of motor vehicles by private investigators.' ... We agree. \*\*\* No reasonable explanation exists as to why the legislature chose to join these two subjects within the same legislative act, and we find that we must reject the State's contention that these two subjects relate to the single subject of controlling crime").

One can see in an instant that a lot more laws could be struck down using the new method of analyzing single subject challenges than under the original method. Far less deference and flexibility is accorded the legislature under the new method, for it is more difficult to connect the sections to each other than it is to connect each section to the subject of the legislation.

One explanation for the shift in focus may be the Court's implicit concern that the subject in the title may be so general and broad that it fails to give notice of the act's true subject. See e.g., Thompson, 750 So.2d at 648 (title of bill changed from "[a]n act relating to career criminals" to "[a]n act relating to justice system"); Heggs 759 So.2d at 625 ("Chapter 95-184 is characterized as '[a]n act relating to the justice system.'"); Martinez v. Scanlan, 582 So.2d 1167, 1172 (Fla. 1991)

(legislature's stated purpose was "comprehensive economic development").

Regardless of how the issue is analyzed in the present case, the outcome is the same--the challenged law satisfies the single subject rule. Chapter 89-100 is entitled, in relevant part, "An act relating to criminal penalties." The title also discloses that provisional credits are prohibited, and that the provisional credits statute, § 944.277, is to be amended. Section 4 of Chapter 89-100 does in fact amend § 944.277 by excluding from eligibility for prison overcrowding credits persons who commit certain enumerated violent crimes, either against any citizen of the state or against law enforcement personnel. The challenged provision is clearly germane to the subject of criminal penalties expressed in the title, and it also is logically connected to that portion of the act amending section 944.277 to exclude other offenders from eligibility for provisional credits.

What Petitioner Tormey in essence is asking this Court to hold is that the Legislature must pass two separate laws to amend the identical statute, § 944.277; that is, one chapter law which denies provisional credits to all murderers and attempted murderers and a second chapter law which denies provisional credits to persons who assault, batter, kidnap, and kill law enforcement personnel.

Tormey's approach draws no distinction between the two types

of constitutional violations at issue in the present case. The first type relates to the title. If the title is underinclusive, the error can be corrected by the enactment of a new law with a broader title, not necessarily by the enactment of two new laws. On the other hand, if the problem is the combination of two different subjects in one act, the error must be corrected by the enactment of two new laws. Tormey's approach would emasculate the liberal construction of the single subject rule and require this Court to micromanage the legislature.

Petitioner Tormey's reliance on Thompson and Heggs is clearly misplaced. The expressly stated subject there was virtually unlimited, and logrolling was involved, whereas the expressly stated subject here is narrow, and no logrolling is involved.

- 4. The murder exclusion of section 944.277(1)(i) took effect on January 1, 1990, which was approximately five months prior to the date Ms. Tormey robbed and murdered her victim, and thus it applies to her.**

Petitioner Tormey robbed and murdered her victim on May 18, 1990. Section 944.277, Florida Statutes relating to provisional credits was amended three times in 1989. §§ 4 and 6, at 256, ch. 89-100, effective January 1, 1990 and applies to "offenses committed on or after the effective date" (ineligibility for credits); §§ 5 and 52, at 2662-2663, 2690, ch. 89-526, effective September 1, 1990 (triggering percentage and supervised release); and §§ 5 and 19, at 2717, 2721, ch. 89-531, effective October 1,

1989 (supervised release).

The amendments enacted in chapter 89-100 were not included in chapters 89-526 and 89-531, but they were included in two of the 1990 amendments to § 944.277. §§ 2 and 4, at 201-202, chapter 90-77, effective October 1, 1990 (persons who commit violent crimes against justices or judges are not eligible for provisional credits); §§ 1 and 4, at 846-847, ch. 90-186, effective "October 1, 1990, and shall apply to offenses committed on or after the effective date" (persons who commit certain sex crimes and who are serving concurrent sentences from other jurisdictions are not eligible for provisional credits). The 1989 amendments were reenacted in Chapter 91-44 as part of the biennial adoption of the Florida Statutes, effective May 2, 1991.

It is Respondent Moore's position that chapter 89-100 is constitutional, and that, therefore, the effective date of the murder exclusion is January 1, 1990, which means that Petitioner Tormey is ineligible for provisional credits.

Assuming, however, that a constitutional violation occurred, the time frame for challenging the law would run from the effective date of the law to the date of its reenactment. The longest time period would be two years, but it could be shorter.

In the present case, there are potentially two time frames:

(1) From **January 1, 1990**, effective date of chapter 89-100, to **May 2, 1991**, the date on which chapter 89-100 was reenacted as

part of the biennial adoption of the Florida Statutes. State v. Johnson, 616 So.2d 1 (Fla. 1993) ("Chapter 91-44, Laws of Florida, reenacted the 1989 amendments ..., effective May 2, 1991, as part of the biennial adoption of the Florida Statutes").

(2) From January 1, 1990, effective date of chapter 89-100, to October 1, 1990, the effective date of the amendment to section 944.277(1) set out in chapters 90-77 and 90-186.

Should chapter 89-100 be found unconstitutional, it appears that the first time frame applies in the present case based on this Court's decisions in Salters v. State, 758 So.2d 667 (Fla. May 11, 2000) and Trapp v. State, 760 So.2d 924 (Fla. June 1, 2000). In Trapp, the same statutes were amended in 1995 and 1996. The statutes were set out in both chapter laws, and the 1996 amendments included changes in the language that had been added in 1995. See e.g., ch. 96-388, § 53 at 2352-56; ch. 95-184, § 6, at 1693-98, cited and discussed in Trapp. Thus, the effect of Salters and Trapp is that criminals who murdered or attempted to murder victims other than law enforcement personnel before May 2, 1991 are eligible for provisional credits.

**B. BECAUSE NONE OF THE OVERCROWDING RELEASE STATUTES ASSURED AN ELIGIBLE PRISONER THAT THE STATE WOULD NOT TAKE STEPS TO PREVENT THE PRISON POPULATION FROM REACHING THE STATUTORY TRIGGERING THRESHOLDS, SUBSEQUENT OVERCROWDING RELEASE STATUTES THAT PROVIDED FOR THE EARLY RELEASE OF SOME BUT NOT ALL OF THE PREVIOUSLY ELIGIBLE PRISONERS AT LOWER TRIGGERING THRESHOLDS THAN PREVIOUS OVERCROWDING RELEASE STATUTES DO NOT VIOLATE THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION BASED SOLELY ON THE OPERATION OF THE LOWER**



## **THRESHOLDS.**

Ms. Tormey contends that even if the Court rejects her constitutional challenge to the murder exclusion of section 944.277(1)(i), she is entitled to more substantial relief than the 30 days of emergency gain-time proposed by the Secretary. Ms. Tormey asserts that this Court's decision in Gomez does not remedy the ex post facto violation created by section 947.146. She articulates her position as follows:

*Gomez* does not remedy the ex post facto violation created by section 947.146. That case requires only that the Secretary continue to apply the law in effect on the date of offense, using population figures that are themselves the result of the retroactive exclusions enacted in the control release statute. While *Gomez* correctly held that the control release statute was ex post facto, in that it in substance and effect repealed or amended the earlier statutes, the remedy provided by *Gomez* preserves and extends the ex post facto violation. It fully allows the retroactive selectivity (exclusions and inclusions) of control release to reduce the population in a way that would not have occurred under provisional release or the earlier mechanisms. The remedy in *Gomez* proceeds as if *Gomez* held that the State in fact could constitutionally supplant provisional release credits with control release, but that the State simply could not cease to operate the earlier mechanisms after control release had its retroactive, disadvantageous effects on Ms. Tormey. *Gomez* did not so hold, but the effect of the inadequate remedy that *Gomez* approved is to belie and substantially diminish the express, correct ex post facto holding in that case.

Tormey's Reply and Amended Petition for Extraordinary Relief at 21.

The substance of Ms. Tormey's argument is embodied in the 35-plus pages contained in Petitioner Hall's Supplemental Reply

to Respondent Moore's Supplemental Response. However, distilled to a single sentence, Petitioners Hall and Tormey both apparently contend that once the Florida Legislature enacted the emergency gain-time statute in 1983--which essentially applied to all prisoners except those serving life sentences, death sentences, and firearm mandatory terms<sup>5</sup> the legislature was thereafter precluded from enacting any statute that allowed a more restricted group of prisoners from achieving early release at a lower triggering threshold. Such was not the holding of the United States Supreme Court in Lynce v. Mathis; neither was it the holding of this Court in Gomez.<sup>6</sup> Petitioner Hall and Tormey's entire analysis of the offender groups and the remedies

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<sup>5</sup> In Petitioner Hall's supplemental reply, upon which Petitioner Tormey relies, petitioner takes the position that the emergency gain-time statute applies to all prisoners. However, the emergency gain-time statute only allowed the application of the 30-days of gain-time to be applied to the sentences of those prisoners "eligible to earn gain-time". Those prisoners serving death sentences, life sentences, and firearm mandatories are by the very nature of their sentences ineligible to earn gain-time and therefore were ineligible emergency gain-time.

<sup>6</sup> Interestingly, nowhere in the 35 pages devoted to Petitioner Hall's argument nor in the 3 pages devoted to Petitioner Tormey's argument, which incorporates Hall's argument by reference, does either petitioner quote the holding in Gomez upon which each so steadfastly relies. They do not do so because they cannot. Gomez did not hold that the control release statute was *ex post facto* as applied to earlier offenders in all aspects, but only that the "substitution of the Control Release Program by the State for the statutory overcrowding programs in effect at the time of the petitioners' offenses improperly curtailed the availability of future credits" when the same triggering thresholds for the earlier statutes were met. Gomez, 733 So.2d at 500. (Emphasis supplied.)

for those groups is based upon their incorrect perception that this Court and the United States Supreme Court held the lower triggering thresholds of overcrowding release statutes enacted after the original emergency gain-time statute were themselves ex post facto violations. However, this argument was addressed explicitly by this Court in Gomez and implicitly by the United States Supreme Court in Lynce. In Gomez, this Court discussed this issue in some detail:

The petitioners contest the Department's proposed relief because they argue that the use of the Control Release statute to reduce prison overcrowding by releasing the less risky inmates reduced the *actual* level of prison overcrowding, thereby reducing the amount of credit now due to the petitioners. We conclude that if the legislature had maintained the percentage threshold for Control Release at below 97.5%, by releasing the less dangerous inmates on Control Release at that lower level, that action would probably have prevented the overcrowding levels from reaching the higher threshold levels. If those thresholds had not been reached, the required percentage contingency would not have come into fruition and there would probably have been no ex post facto violation. *Id.* at 505-506. [FN8]

FN8. The Supreme Court seems to have indicated in Lynce that had the State been able to release other less dangerous inmates and therefore avoid the occurrence of the requisite levels of prison overcrowding, it might have avoided the necessity of releasing the more dangerous inmates pursuant to the prior statutes. It stated:

The State, after all, could have alleviated the overcrowding problem in various ways: It could have built more prisons; *it could have paroled a large category of nonviolent offenders*; or it might have discontinued prosecution of some classes of victimless crimes.

Lynce, 519 U.S. at 446, 117 S. Ct. 891 (emphasis added). *Id.* at 506, n. 8.

Due to the later increases in the Control Release thresholds, however, prison overcrowding periodically *did exceed the relevant threshold levels* in 1993 and onward for a number of years. Nevertheless, to the extent that the State *did* succeed in reducing the prison population by releasing the less dangerous inmates on Control Release, we find no impropriety. Therefore, for any time-frames in which the prison population did *not* exceed the relevant percentage thresholds, the Department need provide no relief.

Id. at 506.

Thus, the problem revealed in Gomez was not that the Legislature had created a new program to address prison overcrowding, but rather that it had repealed the earlier programs or replaced them with a program that was more onerous to certain inmates. In other words, there was no impediment to the creation of new programs which would prevent the prison population from ever reaching the requisite thresholds, but there was a prohibition to the denial of credits if and when the thresholds were met. The explanation for the difference is simple: The Legislature authorized the credits when the prison population rose to certain levels, but it did not promise to take no action to prevent the population from reaching the requisite levels.

Gomez, in fact, is in accord with Lynce, where the Supreme Court implicitly reached the same conclusion:<sup>7</sup>

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<sup>7</sup> Clearly the Supreme Court must have considered the *ex post facto* implications of the later, more exclusive overcrowding release statutes operating at lower thresholds. After all, based

The changes in the series of statutes authorizing the award of overcrowding gain-time, do not affect petitioner's core *ex post facto* claim. Petitioner could have accumulated gain-time under the emergency gain-time provision in much the same manner as he did under the provisional credits statute. We recognize, however, that although the differences in the statutes did not affect petitioner's central entitlement to gain-time, they may have affected the precise amount of gain-time he received. Between 1988 and 1992, the provisional credits were authorized when the prison reached 97.5% capacity rather than 98% capacity as under the emergency gain-time statute. If the prison population did not exceed 98% of capacity between 1988 and 1992, and if petitioner received provisional credits during those years, there is force to the argument that the cancellation of that portion of the 1,860-day total did not violate the *Ex Post Facto* Clause.

Id., 519 U.S. at 448. (Emphasis supplied.)

Tormey (and Hall) complain, as did the inmates in Gomez, that the prison population did not rise on as frequent a basis to the triggering thresholds of their respective statutes (emergency gain-time at 99% of lawful capacity and emergency gain-time at 98% of lawful capacity) because of the enactment of subsequent statutes which authorized credits for other prisoners at lower

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upon his offense date of October 27, 1985, Lynce's overcrowding release entitlement was secured under the emergency gain-time statute at 98% of lawful capacity. The Supreme Court was well aware that the provisional credits statute and the initial control release statute operated at lower triggering thresholds and that these later statutes contained exclusions that the emergency gain-time statute did not. Indeed, the Court specifically recognized that if the 98% threshold of Lynce's statute was never reached during the time that the provisional credits statute was operating at the 97.5% threshold, then that portion of the overcrowding credits awarded prior to reaching the 98% threshold could still be canceled under section 944.278 without offending the *ex post facto* clause.

thresholds. As was previously pointed out, their complaint is unjustified. The emergency gain-time statute in effect on the date of both Tormey's and Hall's crimes, at most, promised them early release credits when the prison population rose to a certain percentage. It did not, in any manner, promise them that the government would do nothing to prevent the prison population from reaching this percentage (e.g., by releasing other less dangerous inmates earlier or by building more prison beds). Only if such a promise had been made in the emergency gain-time statute might their argument have any validity.

Accordingly, the remedial offender groups and relief described by the Secretary in the Supplemental Response are complete and consistent with the holdings in Gomez and Lynce.<sup>8 9</sup>

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<sup>8</sup> Respondent notes that Petitioner Hall has taken great issue with the relief the department afforded Lynce and those prisoners in Group 2 who were similarly situated to Lynce and the relief that the department has afforded Hall and prisoners like him. After remand by the United States Supreme Court, the department restored all of the overcrowding credits to Lynce that had previously been made in the form of administrative gain-time and provisional credits. The department did so not because it believed that the Supreme Court had ruled that the emergency gain-time statute operated identically to the administrative gain-time and provisional credits statutes, but simply because the population was in excess of the 98% threshold on each of the dates the awards had been made and Lynce had been eligible under the statutes by which the awards were given. When developing the proposed relief under each of the overcrowding release statutes for the various offender groups identified under Gomez, it became clear that the department may have extended more credit to Lynce than the original emergency gain-time statute possibly would have authorized based upon the operation of subsections (3) and (4) of section 944.598 in conjunction with reaching the statutory threshold triggering the end of each overcrowding episode. The

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department finds the relief afforded under Lynce to be distinguishable from the relief proposed under Gomez. Under Lynce, the question was whether the department could constitutionally cancel overcrowding credits already given under the authority of section 944.278. After Lynce and during the pendency of Gomez, the department ultimately determined that it could constitutionally cancel all but 300 days actually awarded in the form of administrative gain-time and provisional credits during the period of February 5, 1987 through January 18, 1991, to Lynce and those like him. The fact that the department did not cancel the days in excess of the 300 days for Mr. Lynce and those similarly situated does not entitle Petitioner Hall to more days. Petitioner Hall is not eligible for nor entitled to more than 300 days for that time period because he is not similarly situated to Mr. Lynce in that he did not receive benefits under either the administrative gain-time statute or the provisional credits statute. The distinction between Mr. Hall's treatment and Mr. Lynce's treatment is not premised on a continuing *ex post facto* violation because the *ex post facto* clause is not violated by the later overcrowding release statutes simply because those statutes triggered at lower thresholds.

<sup>9</sup> Obviously, however, if the Court were to recede from its holding in Gomez and accept the position of the Petitioners as to the extent of the *ex post facto* violation created by the enactment of the lower threshold overcrowding release statutes, the remedial offender groups and the proposed relief necessarily would have to be redefined. Petitioners Tormey and Hall have chastised the Secretary for "not attempt[ing] a computer model of what the population would have been under 1983 law alone and without the retroactive effects of later law." See Petitioner Hall's Corrected Supplemental Reply to Respondent Moore's Supplemental Response at 31. Respondent reminds the Court that affidavits were presented to the Court in Gomez advising of the limitations in developing a computer model to recreate the history of Florida's prison population based upon new variables. Of course, the Secretary has not attempted to formulate relief based upon the Petitioners' perception of the *ex post facto* violation but rather on what his understanding is of the holdings of both Gomez and Lynce. Should the Court recede from its earlier holding in Gomez on this particular point, it will take some time for the department to suggest alternative relief. Petitioners have not been of much assistance in this regard except to complain that the relief is not enough. And, quite frankly, Petitioners Hall and Tormey's suggestion that the only

**Conclusion**

For the foregoing reasons, Respondent respectfully requests the Court to deny Petitioner Tormey's amended petition challenging the exclusionary provisions of section 944.277(1)(i) as violative of Article III, Section 6, of the Florida Constitution and to further dismiss the case as moot inasmuch as Petitioner Tormey has received full relief in accordance with this Court's decision in Gomez v. Singletary, 733 So.2d 499 (Fla. 1999).

Respectfully submitted,

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fair relief in these cases is to award to them all administrative gain-time, provisional credits and control release allotments previously awarded an amount of credit totaling in excess of 38 years--is simply preposterous. While the exact historical effect may not be recreated, suffice it to say that if the 1983 law were operating alone, overcrowding may well have been eliminated far sooner than actually occurred due to the extraordinarily large eligibility pool. The award of over 38 years of credit to the larger eligibility pool established by the emergency gain-time statute to control prison overcrowding would very likely be unnecessary.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT MOORE'S RESPONSE TO PETITIONER TORMEY'S AMENDED PETITION FOR EXTRAORDINARY RELIEF** has been furnished by U.S. Mail to **JOHN C. SCHAIBLE, ESQUIRE**, Florida Institutional Legal Services, Inc., 1110-C N.W. 8<sup>th</sup> Avenue, Gainesville, Florida 32601, and to **BRADLEY BISCHOFF, ASSISTANT GENERAL COUNSEL**, Florida Parole Commission, 2601 Blair Stone Road, Building C, Tallahassee, Florida 32399-2450, and to **BAYA HARRISON, ESQUIRE**, Post Office Box 656, Monticello, Florida 32345, on this \_\_\_\_\_ day of September, 2000.

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SUSAN A. MAHER