IN THE SUPREME COURT OF FLORIDA

KELLY TORMEY,

Petitioner,

vs. Case No. SC97143[1]

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,
and
FLORIDA PAROLE COMMISSION,

Respondents.
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PETITIONER TORMEY'S REPLY TO RESPONDENT MOORE'S RESPONSE TO TORMEY'S AMENDED PETITION

Petitioner Tormey, by an through her undersigned appointed counsel, replies to respondent Moore's response as follows:[2]

A. CHAPTER 89-100 VIOLATES ARTICLE III, SECTION 6

The Secretary's response fails to overcome the serious constitutional problems presented by the title and subject of chapter 89-100. The central problem with the title of the law is that it restricts the subject and sets forth a complete index of every specific provision that relates to the restricted subject, but then omits the one provision

[1]This case was formerly consolidated with, then severed from, Nos. SC93294 and SC94507.

[2]Counsel certifies that this document is in 14-point Times New Roman.

that does not relate to the restricted subject. The central problem with the subject of the law is that every single provision relates to criminal penalties for offenses against law enforcement officers, except one. That stray provision, which is both unnoticed in the restrictive title and unrelated to the obvious subject of the entire law, is the general murder exclusion challenged by Ms. Tormey.

The constitutional problem that the Secretary fails to defend is that the general murder exclusion is the only substantive provision in chapter 89-100 that: (1) is not specifically noticed in the title; (2) is not related to criminal penalties for offenses against law enforcement officers; and (3) is not embraced by the name that the Legislature clearly gave to the entire act, "The Law Enforcement Protection Act." The Court must conclude that the law has a defective and misleading title, addresses more than one subject, or suffers from both constitutional infirmities. The general murder exclusion may not be constitutionally applied to Kelly Tormey.[3]

1. The title is misleading and unconstitutional

The title of chapter 89-100 is affirmatively misleading and cannot be sustained under article III, section 6. Unlike titles upheld by the Court, it does not simply say that the act relates to a broad subject like "criminal penalties." It affirmatively states

[3]The Secretary concedes that Ms. Tormey has standing to challenge the law under article III, section 6. *See* Response at 2-3, 15, 22-24.

that this is the "Law Enforcement Protection Act." It affirmatively sets forth or indexes in detail each of the substantive provisions of the act that relate to criminal penalties for offenses committed against law enforcement officers. Having affirmatively restricted the otherwise general subject from criminal penalties to criminal penalties against law enforcement, and having affirmatively indexed virtually every substantive provision of the act that is consistent with the subject thus restricted, the title then fails to index the one substantive provision that is not related to criminal penalties against law enforcement. For this precise reason the title is misleading and violative of article III, section 6.

The issue before the Court is not whether the Legislature may set forth a general subject in the title and then legislate on the details. The Court has consistently expressed a preference for that practice. The precise issue is whether the Florida Constitution permits the Legislature to mislead the reader by indexing the provisions that relate to a restricted subject while failing to give notice of the one provision that does not relate to that restricted subject. The Court should hold, as it has before, that when the Legislature chooses to restrict an otherwise broad subject by listing or indexing each substantive provision in the title of a law, it is misleading for the title to fail to include the one substantive provision that does not relate to the subject thus restricted.

Ms. Tormey does not contend that the title would be defective and misleading if the Legislature had stopped with the first clause, "An act relating to criminal penalties." And she certainly does not contend that the Constitution requires the Legislature to index the provisions of the act in the title. Her point, which is supported by precedent, is that once the title indexes a complete series of provisions that all relate to criminal penalties for offenses against law enforcement, it is misleading to fail to include in the title the one provision that does not relate to criminal penalties for offenses against law enforcement. Nothing in the Secretary's brief defeats this claim.

Apart from its long recitation of unobjectionable generalities, the Secretary's argument in defense of the title of chapter 89-100 depends on: (1) an erroneous application of this Court's decision in *City of Pensacola v. Shevin*, 396 So.2d 179 (Fla. 1981), and (2) an assertion that the Court of Appeal for the First District wrongly decided *State v. Physical Therapy Rehabilitation Center of Coral Springs, Inc.*, 665 So.2d 1227 (Fla. 1st DCA 1996). The Court should reject both arguments.

The Secretary's only significant authority in defense of the title is *City of Pensacola v. Shevin*, 396 So.2d 179 (Fla. 1981). *See* Response at 9-10. The *Pensacola* opinion bears close examination, for it has a superficial resemblance to this case but is distinguishable on several material grounds. The Secretary's

misapplication of *Pensacola* to this case is flatly inconsistent with any meaningful constitutional prohibition against misleading titles. Moreover, it is at odds with the courts' handling of the longstanding problem of restrictively indexed titles. Therefore, the Court should reject the Secretary's misuse of *Pensacola* in this case.

The superficial resemblance between *Pensacola* and this case is limited to the fact that each title lists most sections of the law but fails to list the challenged provisions. The similarity ends there. In *Pensacola* the provisions specifically enumerated in the title were mere expressions of the general, unrestricted subject clearly expressed in the title. Here, in contrast, the indexed provisions clearly express a restriction of the general subject. Unlike the enumerations in *Pensacola*, they render the restrictive title inaccurate, misleading, and unconstitutional. *See City of Winter Haven v. A.M. Klemm & Son*, 132 Fla. 334, 181 So. 153 (1938).

Pensacola is not a case in which the general subject of the law was effectively restricted by the rest of the title. In *Pensacola* the Legislature stated a fairly narrow subject in the title (the Pensacola Civil Service System) and also listed some provisions that adhered to, and did not restrict, that subject. That the title in *Pensacola* did not list each provision related to that subject was of no constitutional significance. The title was not restrictive in a misleading manner. After holding that

everything in the law related to the Civil Service System and repeating the Court's often-expressed preference for general titles, the Court held:

> The title of [the act] might be said to go into unnecessary detail, as measured by the constitutional requirement, regarding most of the act's provisions. 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***.

City of Pensacola, 376 So.2d at 180 (emphasis added). The title in *Pensacola* was constitutional because it stated a general subject, adhered to it, and did not misleadingly restrict it. The holding in *Pensacola* is limited to those titles that do not effectively restrict their stated subjects in a misleading way.[4] The opinion does not even discuss restrictive and misleading titles. *Pensacola* stands for the proposition that detail alone does not make a title unconstitutional, provided that the title expresses a clear subject and all the provisions adhere to that clearly-expressed subject.

This case is readily distinguishable from *Pensacola*. The title in *Pensacola* stated only one general subject, the city's civil service system. The title expressed no narrower or restricted subject. While it may have been overly detailed and also

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[4]Even though it is materially distinguishable from this case, *Pensacola*'s issue was still a close one and might not be decided the same way today. *Pensacola*'s title holding was rendered over a persuasive dissent by Justice Sundberg. The holding has not been cited by this Court in a reported opinion. The First District validly distinguished the *Pensacola* holding in *Physical Therapy*, as discussed below.

incomplete, it was not a restrictive or misleading title. Unlike the title in this case, it expressed the real subject[5] clearly and without restriction. Most important, the act in *Pensacola* did not depart from the one subject identified unqualifiedly in the title; each provision in the act addressed only the single, unrestricted subject clearly expressed in the title. None of these characteristics is present in this case.[6]

In contrast to *Pensacola*, the indexed provisions in the title to chapter 89-100 do not merely exemplify one clearly-expressed subject in the title. They effectively restrict it. Every substantive provision indexed in the title to chapter 89-100 relates directly to penalties for offenses against law enforcement. Unlike the title in *Pensacola*, the title to chapter 89-100 is a restrictive title. *See*, *e.g.*, *State v. Physical Therapy Rehabilitation Center of Coral Springs, Inc.*, 665 So.2d 1227, 1130 (Fla. 1st DCA 1996)(quoting *Town of Monticello v. Finlayson*, 156 Fla. 568, 23 So.2d 843 (1945)). It becomes a misleading title when it fails to list the sole provision that does not relate to the restricted subject, penalties for offenses against law enforcement. The

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[5]*See Colonial Investment Co. v. Nolan*, 100 Fla. 1349, 131 So. 178, 179 (1930) ("[i]t is a sufficient compliance with . . . the Constitution ***if the real subject*** of the act is briefly expressed in its title. . . .")(emphasis added).

[6]The Secretary's other authorities are equally inapposite. *See* Response at 8-9 (citing *Fla. E. C. Ry. Co. v. Hazel*, 43 Fla. 263, 31 So. 272 (1901), and *State v. Vestal*, 81 Fla. 625, 88 So. 477 (1921)). The titles in *Hazel* and *Vestal* were short, clear, unindexed titles that were neither restrictive nor misleading.

provisions omitted from the title in *Pensacola* related to the one clear, unrestricted subject of the title. The provision omitted from the title of chapter 89-100 did not relate to the unified, restricted subject clearly expressed in the title.

Under *Pensacola*, as well as *Physical Therapy* and the authorities on which it relies, the title to chapter 89-100 is unconstitutionally misleading precisely because it has two attributes that, *in combination*, are repugnant to article III, section 6. First, it purports to restrict its subject to penalties for offenses against law enforcement by specifically identifying that restricted subject and indexing each substantive provision that relates to that restricted subject. Second, it fails to list the one substantive provision that does not relate to that restricted subject. The Legislature may choose a single broad subject and legislate accordingly, or it may choose a narrow subject and legislate accordingly. It may not, however, express a clear restriction of a broad subject, proceed to index only those provisions that relate to the restricted subject, and fail to index the one provision that relates only to the broad, unrestricted subject. While the Constitution allows the Legislature to identify a general or restricted subject, and while the Constitution allows – indeed, encourages – the Legislature to dispense with indexes, the Constitution prohibits the Legislature from choosing a restrictive title, indexing only the provisions that adhere thereto, and then omitting

from the title the sole provision that departs from the restrictive title. Such titles are inherently misleading and unconstitutional as a matter of law.

The *Physical Therapy* case is fully consistent with the above principles and supports Ms. Tormey's position. *See* Reply and Amended Petition at 9, 13-14. The Secretary's response is merely that *Physical Therapy* is wrongly decided because it refuses to misapply *Pensacola*. *See* Response at 14. The First District distinguished the *Pensacola* holding on two grounds, both of which are entirely correct and in accord with the basic principle on which Ms. Tormey relies. *Physical Therapy* first recognized that the title in *Pensacola* identified a single, unrestricted subject to which all of the act's provisions related. *See Physical Therapy*, 665 So.2d at 1130. The same cannot be said of the title in this case. Second, the court recognized that nothing in the title at issue in *Pensacola* affirmatively misled the reader into thinking that the subject of the act was restricted to the matters indexed. *Id*. at 1130-31. Here, as in *Physical Therapy*, the title affirmatively misleads the reader into thinking the title is restricted to the subject of the indexed provisions. *Physical Therapy* draws the correct line in this difficult area of the law, and it is the same line that the Court must draw in this case.

In the last analysis, the Secretary is uncertain as to the real subject identified in the title to chapter 89-100. On the one hand, he states that the subject is simply

"criminal penalties." *See* Response at 10. On the other hand, the Secretary appears to acknowledge that the real, restricted subject expressed in the title has to do with law enforcement protection. *See* Response at 14. The Secretary's equivocation is telling but irrelevant to the specific title defect in this case.

The title of chapter 89-100 is not unconstitutional because it expresses one subject or the other. The title is unconstitutional because it is misleading. It is misleading because it at least states a restricted subject *and also* indexes all those provisions, and only those provisions, that relate to that restricted subject. *Physical Therapy* and the cases on which it relies condemn the title to chapter 89-100 for combining a restricted subject *and* an exhaustive index that omits only the one provision that lies outside the subject identified in the restrictive title. This Court should condemn it for the same reasons.

The title of chapter 89-100 is misleading and violates article III, section 6. The general murder exclusion of section 944.277(1)(i) did not take effect on January 1, 1990, and was not in effect on Ms. Tormey's date of offense.[7] She is entitled to provisional credits in accordance with the version of section 944.277 in effect before January 1, 1990.

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[7]The parties agree on the proper remedy for the title defect. *See* Response at 15; Reply and Amended Petition at 9-10.

2. The general murder exclusion is unrelated to the subject of the act, which is penalties for offenses against law enforcement personnel

The Secretary recites the correct test for determining generally whether a provision is related to the subject of an act. *See* Response at 17-18. However, he fails to apply the test, for he never succeeds in identifying the correct subject of chapter 89-100.

The Secretary unconvincingly equivocates on the subject of chapter 89-100. To advance his title argument, he identifies both "criminal penalties" in general and the more restrictive "protection of law enforcement personnel." *See* Response at 10-14. In his single-subject argument, he initially ignores a specific, text-based identification of the subject. *See* Response at 17-20. However, the validity of his single-subject argument necessarily depends on his identifying the broadest possible subject – "criminal penalties" – because he knows that the general murder exclusion does not relate in a constitutionally permissible way to "law enforcement protection." In the end, therefore, he states that "criminal penalties" must be the subject of chapter 89-100. *See* Response at 20-21.

The real subject of the act for article III purposes is the restricted one clearly expressed by the Legislature in the title: criminal penalties for offenses against law enforcement personnel. *See Colonial Investment Co. v. Nolan*, 100 Fla. 1349, 131 So.

178, 179 (1930); *Physical Therapy*, 665 So.2d at 1130. Everything points in this direction. Every substantive provision listed in the title relates directly to that subject. The Legislature named the entire act the Law Enforcement Protection Act. Every finding relates to that subject. The entire bill that went to the floor related directly to that subject. The Court should have no hesitation in concluding that the clear, expressed subject of the bill did not change on the House floor; the title and predominant thrust of the bill were unchanged. On the floor the House simply added a provision unrelated to this restricted subject. It is inconsistent with the title and substance of the act, as well as with the purposes of article III, for the Secretary to assert that the subject of the act is broader than the restricted subject clearly expressed and addressed by the Legislature.

If the Court concludes, as it should, that the subject of chapter 89-100 is criminal offenses against law enforcement and related state personnel, then it is clear that the act violates the single-subject rule. While the exclusion from provisional credits of those who commit offenses against law enforcement personnel (section 944.277(1)(h)) is arguably connected to the expressed subject, the general murder exclusion is not. It bears no necessary or incidental relationship to offenses against law enforcement. That is why it was not part of the Law Enforcement Protection Act that went to the floor. That is why the Legislature excluded it from the otherwise

exhaustive index in the title. The Court should reject the conclusory assertion, set forth in the Secretary's title argument (Response at 14), that the general murder exclusion is properly connected to the expressed, restricted subject of criminal penalties against law enforcement personnel.

The Secretary wrongly charges that Ms. Tormey's position would require the Legislature to amend section 944.277(1) in two separate bills. *See* Response at 21. This is both irrelevant and untrue. It is irrelevant because the Legislature often amends the same statute in distinct laws in the same session, as it did with section 944.277 in 1989, 1990, and other years. It is untrue because Ms. Tormey's position requires only that the Legislature identify an accurate subject for its law, be it narrow or broad, and that the Legislature adhere to the chosen subject. The Legislature is free to legislate on law enforcement protection, provisional credits, or criminal penalties in general. It is not free, however, to legislate expressly on law enforcement protection and include extraneous matters in the same act.

It cannot fairly be said that the subject of chapter 89-100, the Law Enforcement Protection Act, is "criminal penalties" in general. Everything in the text of the act and its history bespeaks a restricted subject. Any honest, accurate reading of the act indicates it is about criminal penalties for offenses against law enforcement personnel.

Even if the subject of the act were criminal penalties in general, however, the Secretary's argument would fail. The only basis for his argument that exclusions from eligibility for provisional release credits relate to "criminal penalties" is *Gomez v. Singletary*, 733 So.2d 499 (Fla. 1998). *See* Response at 10. *Gomez* was a 180-degree turn in the law that did not become final until June 1999. Prior to *Gomez* and *Lynce v. Mathis*, 519 U.S. 433 (1997), and at all times relevant to chapter 89-100, exclusions from early release were *not* deemed to be criminal penalties as a matter of law. *See*, *e.g.*, *Calamia v. Singletary*, 686 So.2d 1337 (Fla. 1996)(citing long line of cases); *State v. Florida Parole Commission*, 624 So.2d 324 (Fla. 1st DCA 1993). Therefore, even if "criminal penalties" were the subject of the 1989 act for article III purposes, the act violates the single-subject rule in that it addresses matters that were clearly and publicly held at the time to have no relation to criminal penalties.

The subject of chapter 89-100 is criminal penalties against law enforcement and related personnel. The Court should hold that the last-minute insertion of the general murder exclusion into the "Law Enforcement Protection Act" was unrelated to that subject and, therefore, that the act violates the single-subject demands of article III, section 6, of the Florida Constitution.[8] For this reason Ms. Tormey is entitled to

[8]The parties agree on the remedy for the single-subject violation. *See* Response at 22-24; Reply and Amended Petition at 9-10, 18-20.

provisional credits under the version of section 944.277(1) in effect before January 1, 1990.

CONCLUSION

For the foregoing reasons and those previously set forth in Ms. Tormey's Amended Petition, the Court should hold that chapter 89-100, Laws of Florida, violates the title and single-subject requirements of article III, section 6, of the Florida Constitution. Ms. Tormey is entitled to provisional credits for each month in which she earned incentive gain-time in accordance with the version of section 944.277 in effect before January 1, 1990.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petitioner Tormey's Reply has been furnished by U.S. Mail to **Susan Maher**, Deputy General Counsel, Florida Department of Corrections, 2601 Blair Stone Road, Tallahassee, FL 32399, and **Robert A. Butterworth, Attorney General**, Department of Legal Affairs, Suite PL-01, The Capitol, Tallahassee FL 32399-1050, on this 16th day of October, 2000.

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John C. Schaible