IN THE SUPREME COURT OF FLORIDA

HOWARD LEWIS,

Petitioner,

v. Case No. SC03-401

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

# MERITS BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE AND FACTS

The State generally accepts Lewis's statement of the case and facts but restates and adds the following:

In his appeal to the Fifth District, Lewis challenged his prison releasee reoffender sentence on the ground that it is the State Attorney rather than the court who determines whether the defendant will be sentenced as a prison releasee reoffender. Petitioner's Appendix, Initial Br. at 13.

## SUMMARY OF ARGUMENT

Chapter 99-188 of the Laws of Florida does not violate the single subject requirement of the Florida Constitution. The two sections of this Act which Lewis argues violate the single subject rule have a reasonable and logical connection to the overall stated purpose of this act, which is "incapacitating the reoffender" and "accelerating the decline in crimes rates." Because there is no single subject violation, this Court should quash the decision of Taylor v. State, 818 So.2d 544 (Fla. 2d DCA 2002) and adopt the decision of State v. Franklin, 836 So.2d 1112 (Fla. 3d DCA 2003). Also, Lewis has failed to demonstrate that he has standing to challenge these sections of the Act as those purportedly errant sections have no application to him.

Furthermore, even if this Court were to find the Act unconstitutional, the sections at issue can be severed from the act, leaving the remaining sections in tact. At the barest minimum, the three strikes violent felony offender provisions of section three should remain intact.

Finally, any such constitutional defect in chapter 99-188 was cured by its legislative reenactment into four separate acts in 2002. Those reenactments can be retroactively applied without violating the ex post facto clause of the Florida Constitution. Given this retroactive application, Lewis should

not be entitled to relief on his prison releasee reoffender sentence, the sentence he has challenged under chapter 99-188.

## ARGUMENT

### CHAPTER 99-188 DOES NOT VIOLATE THE SINGLE SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION, AND EVEN IF THERE WERE A CONSTITUTIONAL VIOLATION, THE VIOLATION IS CURED BY THE 2002 REENACTMENTS OF THE ACT WHICH CAN BE APPLIED RETROACTIVELY.

At issue before this Court is whether chapter 99-188 of the Laws of Florida violates the single subject provision of the Florida Constitution. The Second District has found that this law violates that constitutional provision. See Taylor v. State, 818 So.2d 544 (Fla. 2d DCA 2002). The First and Third Districts have found that there is no single subject violation. See Watson v. State, 842 So.2d 274 (Fla. 1st DCA 2003) and State v. Franklin, 836 So.2d 1112 (Fla. 3d DCA 2003). The Fourth and Fifth Districts have found that any single subject violation in chapter 99-188 is cured by the enactment of chapters 02-208, 02-209, 02-210 and 02-211, and can be retroactively applied. See Lewis v. State, 836 So.2d 1095 (Fla. 5th DCA 2003); Hersey v. State, 831 So.2d 679 (Fla. 5th DCA 2002) and Nieves v. State, 833 So.2d 190 (Fla. 4th DCA 2002). The Second District has further rejected the retroactive application of the 2002 enactments. See Green v. State, 839 So.2d 748 (Fla. 2d DCA 2003).

The State contends that chapter 99-188 is constitutional and does not violate the single subject rule of article III, section

6 of the Florida Constitution which provides that every law "shall embrace but one subject and matter properly connected therewith." In assessing a statute's constitutionality, this Court is bound "to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent." State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994)(quoting State v. Elder, 382 So. 2d 687, 690 (Fla. 1980)).

Legislative enactments are presumptively valid. State v. McDonald, 357 So.2d 405, 407 (Fla. 1978). Every doubt about a provision should be resolved in favor of the validity of the provision, since it must be presumed that the legislature intended to enact a valid law. Id. This Court has consistently held that wide latitude must be accorded the legislature in the enactment of laws. Burch v. State, 558 So.2d 1, 2 (Fla. 1990)(quoting State v. Lee, 356 So.2d 276, 282 (Fla. 1978)). This Court shall strike down a statute only when there is a plain violation of the constitutional requirement that each enactment be limited to a single subject that is briefly expressed in the title. Lee, 356 So.2d at 282.

The single subject provision requires that there must be "a

logical or natural connection" between the various portions of a legislative enactment. Grant v. State, 770 So.2d 655, 657 (Fla. 2000)(quoting State v. Johnson, 616 So.2d 1, 4 (Fla. 1993)). The single subject requirement is satisfied if a "reasonable explanation exists as to why the legislature chose to join the two subjects within the same legislative act." Id. Thus, the subject of any act may be as broad as the legislature chooses as long as the matters included in the act have a natural or logical connection. Chenoweth v. Kemp, 396 So.2d 1122, 1124 (Fla. 1981).

The purpose of this constitutional prohibition against a plurality of subjects in a single legislative act is to prevent a single enactment from becoming a "cloak" for dissimilar legislation having no necessary or appropriate connection with the subject matter. State v. Lee, 356 So.2d 276, 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. Id.

The primary purpose of the single subject rule is to prevent hodge-podge or logrolling legislation, i.e., putting two unrelated matters in one act; to prevent surprise or fraud by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and

carelessly and unintentionally adopted; and to fairly apprise the people of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon. State v. Thompson, 750 So.2d 643, 646 (Fla. 1999)(citation omitted).

Ultimately, whether a legislative enactment meets the single subject rule requirement rests on common sense. It is enough if the questioned provision tends to make effective or promote the objects and purposes of legislation included in the subject. Smith v. Dep't of Insurance, 507 So.2d 1080, 1087 (quotations omitted). Even where there are disparate subjects contained within a comprehensive act, the act will not violate the single subject rule if the subjects reasonably relate to the crisis the legislature intended to address. Burch, 558 So.2d at 2-3.

Chapter 99-188

Chapter 99-188 of the Laws of Florida begins with "An act relating to sentencing" and is comprised of fourteen sections. The legislative enactment contains a detailed preamble evincing its intent by its reference to Florida's high rate of violent crime and the need to impose longer periods of incarceration for repeat and violent offenders. In creating chapter 99-188, the Legislature noted that Florida ranks as one of the most violent states in the nation and that "a substantial and

disproportionate number of serious crimes are committed in this state by a relatively small number of repeat and violent felony offenders." The Legislature added that since 1995, it had enacted stronger criminal punishment laws and that the intent of enacting chapter 99-188 was to "improve public safety by incapacitating repeat offenders" and to "accelerate recent declines in the violent crime rate." Id.

With that, chapter 99-188 contains the following fourteen provisions:

Sec. 1 Provides a name for citing the Act

Sec. 2 Redefines portions of the Prison Releasee Reoffender Act

Sec. 3 Creates the "Three Strikes" law and redefines certain aspects of the Habitual Felony Offender Act

Sec. 4 Creates a mandatory minimum sentence for the crime of assault and battery of a law enforcement officer

Sec. 5 Creates a mandatory minimum sentence for the crime of assault and battery of a person 65 years of age or older

Sec. 6 Modifies the subsection lettering in section 790.235 to accommodate or correspond to the changes in adopting the "Three-Strikes" law

Sec. 7 Creates the category of a "Repeat Sexual Batterer" under section 794.0115 and imposes a corresponding mandatory minimum sentence

Sec. 8 Modifies section 794.011 to accommodate the new "Repeat Sexual Batterer" category

Sec. 9 Amends section 893.135 to redefine certain drug offenses to provide for harsher penalties including mandatory minimum sentences

Sec. 10 Reenacts certain other statutes from the 1998 Supplement, for purposes of incorporating the amendments to section 893.135 accomplished in section nine of the Act

Sec. 11 Amends section 943.0535 to requires the clerk of the criminal court to communicate the judgement and sentence of any alien to federal immigration authorities

Sec. 12 Requires the Governor to advise the public of the penalties set out in the Act

Sec. 13 Redefines "conveyance" for the purposes of defining the crimes of burglary and trespass

Sec. 14 Provides an effective date for the Act

Chapter 99-188, Laws of Fla.

Lewis concedes each section, except sections eleven and thirteen, address the overall purpose of the act which affects sentencing by "creat[ing], amend[ing], incorporat[ing] by reference, or mandat[ing] publication of enhanced penalties." Petitioner's Br. at 8. Nevertheless, Lewis relies upon the Second District's analysis in Taylor to argue that neither section eleven nor section thirteen serve the stated purpose of the Act and render the entire Act unconstitutional for violating the single subject rule. See Taylor, 818 So.2d at 549-551.

The issue this Court must decide is whether sections eleven

and thirteen are reasonably related to the purpose of providing harsher penalties and protecting the public from the class of felons identified in the Act or in other words, whether these sections "relate to sentencing." Contrary to the Second District's conclusion in Taylor and following the Third District's conclusion in Franklin, the State contends that each of these sections relate to that overall goal and that each section of the Act is naturally and logically connected.

First, the Second District erred in concluding that section eleven addresses "a purely administrative subject that is far afield from the act's other provisions." Id. at 549. Instead, section eleven imposes a duty to transmit the judgments and sentences of convicted aliens to federal authorities for purposes of removing them from the State. As the Third District observed in Franklin, this provision clearly is reasonably related to the purpose of providing harsher penalties and protecting the public from the class of felons identified in the Act since it insures their removal from this country after they have served their state sentences. Franklin, 836 So.2d at 1114. The fact that this provision is not limited to the transmission of judgments involving repeat offenders, violent felons, or drug traffickers is of no consequence; if the provision serves the purposes of the legislation it is constitutionally authorized.

Grant, 770 So. 2d at 657; Smith, 507 So.2d at 1087. Instead, the removal of these convicted aliens will prevent repeat offending.

Additionally, section eleven is no different in its import than the provision authorizing probable cause arrests of probation violators as part of the legislative scheme to punish felony offenders who had recently been released from prison. That section was a part of the legislative act attacked in Grant which pertained to the sentencing of reoffenders. See Grant, 770 So.2d at 657. Although the arrest provisions dealt with in Grant necessarily included probationers who had never been to prison, the section at issue aided the overall purpose of the Act which was to protect the public from recently released felons. Id. With that, this Court found there was a logical nexus between the various provisions of the statute and thus, no violation of the single subject requirement. Id. The same holds true here.

While Lewis suggests that section eleven was added at the last minute, the legislative history of the house bill, H.B. 121, demonstrates otherwise. House Bill 121 was corrected to include section eleven on February 3, 1999, over three months prior to its approval by the Governor. The correction's committee analysis of the bill which incorporated this addition

stressed the importance of federal immigration authorities being able to identify criminal aliens in our state prison system. Inclusion of this provision now provides federal immigration authorities a tool for determining which aliens are housed in our prisons, allowing them to document the alien prisoner's location and release dates. Given the events to follow on September 11, 2001, the importance of this inclusion of this section cannot be emphasized enough. In all, any notion that this section was pushed through or unintentionally adopted is belied by the analysis given when it was added during the creation of the bill.

Section thirteen amends the definition of "conveyance" in the burglary statute to include a "railroad vehicle" in addition to a railroad car. Armed burglary is an enumerated offense for purposes of imposing enhanced sanctions under the prison releasee reoffender act, habitual offender act, and the new three-time violent felony offender act, and the inclusion of this section is inherent to burglary, which is a predicate offense in these sentencing provisions. See Franklin, 836 So.2d at 1114 (the inclusion of railway vehicle affects "the expansion of the definition of the crime of armed burglary, one of the offenses included in the Habitual Felony Offender Act"). Thus, this amendment enumerated in section thirteen is incorporated

into and makes effective the three-strikes law created in section three, as well as the amendments to the prison releasee reoffender and habitual violent felony offender contained in sections two and three. Accordingly, inclusion of this section, given the statute as a whole, is "quite plainly not a 'cloak' for dissimilar legislation having no necessary or appropriate connection the subject matter." Id. (quoting Lee, 356 So.2d at 282). Contrary to the Second District's assertion that the relationship is so tenuous, so dependent on the happenstance of individual cases, Taylor, 818 So.2d at 549, this section has a natural and logical connection to the rest of the Act.

Throughout his argument, Lewis relies upon this Court's recent decision of Florida Dep't of Highway Safety and Motor Vehicles v. Critchfield, 28 Fla. L. Weekly S225 (Fla. March 13, 2003), as support for his single subject violation claim. There, this Court found that chapter 98-223 violated the single subject rule because the act, which addressed driver's licenses, vehicle registrations, and operation of motor vehicles, contained one section that created a new statute which involved assigning bad checks to a private debt collector. Id. at S226. This Court held that this section had no natural or logical connection to driver's licenses, operation of motor vehicles, or vehicle registrations. Id.

While Justice Cantero in his dissent did, in fact, demonstrate this section's relevance to two other provisions of the act, the relationship between the questioned sections here is not nearly as tenuous as the section at issue in Critchfield. See id. at S227 (Cantero, J., disssenting)(a natural and logical connection exists between bad check debt collection section and rest of the act which includes sections that address the suspension of driver's licenses when a warrant is issued for passing a worthless check and the notice required for such a suspension). Thus, Lewis's reliance upon Critchfield is misplaced as the relationship between the sections at issue here is reasonable and logically connected unlike the errant section in Critchfield.

In contrast to Critchfield, in Burch v. State, 558 So.2d 1, 3 (Fla. 1990), this Court rejected a single subject challenge to chapter 87-243. That chapter, which is to be cited as the Crime Prevention and Control Act, contained 76 sections which this Court categorized as addressing three basic areas: comprehensive criminal regulations and procedures, money laundering, and safe neighborhoods. Id. Included in that act are sections which address the abatement of nuisances (section 8), aircraft registration (section 21), an amendment to section 924.07 regarding cross appeals by the state (section 46), and creation

of a Risk Assessment Information System Coordinating Council (section 51). See ch. 87-243, Laws of Fla. Despite the vastness of the act, this Court concluded that each of these three areas bore 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. Id. The relationship between those areas all focused on one purpose, meeting the crisis of increased crime, and this Court noted while it was a comprehensive law, all of its parts were directed toward that same purpose. Id.

The same holds true here. Chapter 99-188 is even more focused and condensed than chapter 87-243, and each of its sections focus on the same goal, the punishment of offenders. While it is a comprehensive law, as was the law in Burch, there is nothing in this act to suggest the presence of logrolling, which is the evil that article III, section six is intended to prevent. Id. The Second District's conclusion that the legislature created this evil in this case stretches this constitutional provision beyond its means and leaves every legislative act which addresses a broad but naturally connected law subject to this constitutional attack. This will force the legislature to enact restrictive laws and generate piece after

piece of legislation. This is the complete antitheses to what this constitutional protection was enacted for. See e.g., State ex rel. X-Cel Stores, Inc. v. Lee, 122 Fla. 685, 166 So. 568 (1936)(Article III, section six is not designed to deter or impede legislation by requiring laws to be unnecessarily restrictive in their scope and operation).

As in Burch, this Court should consider the overall purpose of this Act when analyzing the inclusion of sections eleven and thirteen. That analysis will reveal that both these sections have a direct correlation to the overall purpose of this Act and the remaining sections, which is the reduction of crime and the imprisonment of repeat offenders. Compare Grant, 770 So. 2d at 657 (upholding the Prison Releasee Reoffender Act which included a section granting police authority to make probable cause arrests of probation violators) and State v. Johnson, 616 So. 2d 1 (Fla. 1993)(striking down amendments to the Habitual Felony Offender Act which included a section for licensing private investigators). See also Thompson, 750 So. 2d at 647 (striking down the Violent Career Criminal Act for its last minute inclusion of a section dealing with civil aspects of domestic violence).

In all, this Court has held that the test for determining duplicity of a subject "is whether or not the provisions of the

bill are designed to accomplish separate and disassociated objects of legislative effort." Burch, 558 So.2d at 2. Here, each section, while covering a broad range of provisions, is reasonably related and serves the broad purpose of accelerating the reduction in crime and incapacitating repeat offenders, the goals of this Act "relating to sentencing." The provisions of this Act do not accomplish separate and disassociated objects by the legislature and there is no legitimate fear that these two sections were enacted through logrolling. Where, as here, there is a logical nexus between the Act's various provisions, and adhering to the presumption of constitutionality, the single subject requirement of the Florida Constitution has not been violated by the enactment of chapter 99-188.

Standing

Lewis fails to set forth which portion of the Act detrimentally affects him. While Lewis argues that sections eleven and thirteen render the Act unconstitutional for violation of the single subject rule as found in Taylor, his sentence is completely unaffected by the inclusion of these sections. For this reason, the State also submits that Lewis lacks standing to make this constitutional challenge.

A party may not challenge the constitutionality of a portion of a statute which does not affect them. State v. Hagan, 387

So.2d 943, 945 (Fla. 1980). Lewis concedes that he did not dispute that he qualified for sentencing as a habitual violent felony offender and a prison releasee reoffender as his counsel agreed at the sentencing hearing. Petitioner's Br. at 1; Vol. II, T. 13. Thus, Lewis was sentenced pursuant to sections two and three of this Act, and sections eleven and thirteen have no application to him. Accordingly, he lacks the standing to make a constitutional attack on sections of the Act which are completely unrelated to him and have no impact on him. See Franklin, 836 So.2d at 1114 n. 4 (citing 10 Fla. Jur. 2d Constitutional Law § 73 at 431 (1997)); Isaac v. State, 626 So.2d 1082, 1083 (Fla. 1st DCA 1993), rev. denied, 634 So.2d 624 (Fla. 1994)(defendant lacks standing to challenge constitutionality of statute because "it is apparent from the face of the record that he has not been adversely affected by the asserted infirmity in the statute"). His prison releasee reoffender sentence would have been the same before the amendments in chapter 99-188 under section 775.082 of the Florida Statutes (1998 Supp.) and thus, he has no basis for relief. Cf. Diaz v. State, 28 Fla. L. Weekly D1053 (Fla. 5th DCA April 25, 2003); Lindsey v. State, 839 So.2d 737 (Fla. 2d DCA 2003). Accordingly, Lewis lacks the standing to make this constitutional challenge.

Severability

Even is this Court were to follow Taylor and find that the inclusion of sections eleven and thirteen in the Act violate the single subject rule, the Taylor court erred in declaring the entire act unconstitutional. Taylor, 818 So.2d at 550. The Taylor court failed to consider the alternative and more appropriate remedy of severability.

This Court has held that the proper remedy for a single subject violation is to sever the parts of the act which are not properly connected to the single subject thereof, leaving intact the valid provisions of the act. See Tormey v. Moore, 824 So.2d 137, 142 (Fla. 2002); Moreau v. Lewis, 648 So.2d 124, 127 (Fla. 1995). This Court opined:

> 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.

Id. (quoting Presbyterian Homes v. Wood, 297 So.2d 556, 559 (Fla. 1974)).

Severing sections eleven and thirteen is the proper remedy in this case as the valid sections of this Act can be logically severed from the two “invalid” sections and stand on their own

to accomplish the expressed legislative purpose. In other words, removal of the offending portions, sections eleven (alien documents to the INS) and thirteen (redefining 'conveyance'), would not, in any way, hinder the accomplishment of the valid provisions concerning sentencing.

Should this Court find a violation of the single subject rule, rather than declare the entire act unconstitutional, this Court should simply sever sections eleven and thirteen so that the valid provisions addressing the sentencing of offenders, the goal of this Act, can be accomplished. See Lee, 356 So.2d at 283 (because legislative purposes behind enactment of remaining portions of act can be accomplished independently of offending section, the offending section is properly severable).

Finally, as a last resort, this Court should note that section three of the Act creates the sentencing scheme for the three time violent felony offender and that enactment corresponds to the name given for citing this Act, "Three-Strike Violent Felony Offender Act." At the barest minimum, that portion of the act comports with the single subject rule and should be left in tact with the remaining sections of the act being severed. Tormey, 824 So.2d at 142.

Retroactivity of Legislative Reenactment of Chapter 99-188

If this Court were to declare chapter 99-188

unconstitutional for the single subject rule violation, that unconstitutionality has been cured by later legislative enactments which can be retroactively applied to Lewis and others similarly situated. Lewis relies primarily upon the Second District's opinion in Green v. State, 839 So.2d 748 (Fla. 2003) to argue that the retroactive application of these enactments violates the ex post facto clause of the Florida Constitution. See Art. X, Sec. 9, Fla. Const. The State disagrees.

Chapter 99-188 was reenacted in 2002 in chapters 02-208, 02-209, 02-210, 02-211, and 02-212. The Act, as reenacted, has corrected the alleged single subject problems of its predecessor and may be applied without constituting an ex post facto violation.

Each chapter enacted in 2002 contains a preamble in which the Legislature stated its intent.[1] Lewis was sentenced pursuant to

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[1] Each preamble states:

WHEREAS, in 1999 the Legislature adopted chapter 99-188, Laws of Florida, with the primary motivation of reducing crime in this state and to protect the public from violent criminals through the adoption of enhanced and mandatory sentences for violent and repeat offenders, for persons involved in drug-related crimes, committing aggravated battery or aggravated assault on law enforcement personnel or the elderly, and for persons committing criminal acts while in prison or while having escaped from prison, and

WHEREAS, a three-judge panel of the District Court of Appeal

of Florida, Second District, has issued a nonfinal opinion declaring chapter 99-188, Laws of Florida, unconstitutional as a violation of the requirement in Section 6, Article III of the Florida Constitution that “every law shall embrace but one subject and matter properly connected therewith...”, finding that the addition of two minor provisions relating to burglary of railroad vehicles and the provision of sentencing documents relative to aliens to the Immigration and Naturalization service were not matters properly connected with the subject of the 1999 act, which was “sentencing,” and

WHEREAS, the nonfinal ruling on this matter was issued while the Legislature was in session, and

WHEREAS, the Attorney General, on behalf of the people of the State of Florida, has indicated a determination to seek rehearing, en banc, of this matter, and

WHEREAS, a final opinion by the District Court of Appeal of Florida, Second District, declaring chapter 99-188, Laws of Florida, to have been in violation of Section 6, Article III of the Florida Constitution would be subject to appeal by the state to the Florida Supreme Court, and

WHEREAS, in its nonfinal ruling, the panel of the District Court of Appeal of Florida, Second District, has certified its decision as passing on two questions of great public importance with respect to chapter 99-188, Laws of Florida, further invoking the jurisdiction of the Florida Supreme Court, and

WHEREAS, the final resolution as to the constitutionality of chapter 99-188, Laws of Florida, remains uncertain, and is unlikely to be finally determined by the judicial system, while the 2002 legislative session is in progress, and

WHEREAS, the Legislature, only out of an abundance of caution due to tentative posture of the law while it awaits final resolution by the District Court of Appeal and the Florida Supreme Court, has prepared five separate bills to reenact selected provisions of chapter 99-188, Laws of Florida, all of which relate to the single general issue of sentencing in criminal cases, and

WHEREAS, the Legislature does not intend the division of

chapter 99-188 as a prison releasee reoffender and it is that portion of chapter 99-188 that he has challenged. That aspect of chapter 99-188 was reenacted in chapter 02-211. Section three of chapter 2002-211 specifically provides for its retroactive application to July 1, 1999:

> Section 3. Except as otherwise specifically provided in this act, the provisions reenacted by this act shall be applied retroactively to July 1, 1999, or as soon thereafter as the Constitution of the State of Florida and the Constitution of the United States may permit.

This law became effective April 29, 2002, when it was signed by the governor.

In determining whether a statute should be applied retroactively, the first inquiry is whether there is clear evidence of legislative intent to apply the statute retroactively, and if so, the second inquiry is whether the retroactive application is constitutionally permissible. Metropolitan Dade County v. Chase Federal Housing Corp., 737 So.2d 494, 499 (Fla. 1999).

Here, chapter 02-211 contains an express command that the statute apply retroactively. Further, it does not violate the

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these bills relating to sentencing as any kind of legislative acknowledgment that said bills could not or should not be joined together in a single bill in full compliance with Section 6, Article III of the Florida Constitution, NOW THEREFORE,

ex post facto provision because at the time Lewis committed his offense chapter 99-188 had not yet been held unconstitutional and was in full force and effect. Thus, at the time he committed his crimes, Lewis knew what conduct was prohibited and what the penalty for that criminal conduct was.

This conclusion is supported by Dobbert v. Florida, 432 U.S. 282 (1977). The United States Supreme Court held that Dobbert's death sentence did not constitute an ex post facto violation despite the death penalty having been determined to be invalid in Donaldson v. Sack, 265 So.2d 499 (Fla. 1972).

The Dobbert court held that the existence of the earlier death penalty statute served as an "operative fact" to warn Dobbert of the penalty which Florida would seek to impose on him if he were convicted of murder. In response to Dobbert's claim that there was no death penalty 'in effect' at the time of his offense, the court explained:

> But this sophisticated argument mocks the substance of the Ex Post Facto Clause. Whether or not the old statute would in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder.
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> Petitioner's highly technical argument is at odds with the statement of this Court in Chicot County

> Drainage District v. Baxter State Bank, 308 U.S. 371, 374, 60 S.Ct. 317, 318, 84 L.Ed. 329 (1940):
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> > The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law: that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. (citations omitted). It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored.
> >
> > Here the existence of the statute served as an 'operative fact' to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder. This was sufficient compliance with the ex post facto provision of the United States Constitution.

Dobbert, 432 U.S. at 294-296.

In the instant case, the existence of chapter 99-188 at the time Lewis committed his offenses served as an operative fact to warn him of the provisions of the Prison Releasee Reoffender Act under which he was sentenced and which he now contests. "The fact that the State ultimately corrected the defect in the later legislation to require exactly that which it had invalidly required earlier and then mandated a retroactive application of the amendment does not, according to Dobbert, violate the ex post facto provision of the United States Constitution." Carlson v. State, 27 Fla. L. Weekly D2162 (Fla. 5th DCA October 4, 2002). Thus, here, as in Dobbert, there would be no ex post

facto violation in applying chapter 02-211 to Lewis.

In Green v. State, 839 So.2d 748, 752 (Fla. 2d DCA 2003), the Second District rejected this "operative fact" analysis, stating "we cannot fathom how an unconstitutionally enacted law, which therefore never had any actual effect could serve as an operative fact under the Dobbert analysis." (quotations and emphasis omitted). The Second District's analysis of Dobbert and its rejection in this specific single subject context ignores common sense and the uniqueness of a single subject violation. The substance of chapter 99-188 is not unconstitutional, the purported unconstitutionality rests solely in its form. Its effect on the sentencing statutes involved is only a coincidental by-product of the single subjection violation.

Retroactive application will have no harm to defendants such as Lewis as he was sentenced as a prison releasee reoffender under section two of chapter 99-188. That law has not changed with the new enactment of chapter 02-211. The sections which render chapter 99-188 constitutionally infirm ultimately have no bearing on Lewis's sentence. He was aware of the penalty and absent the technical defect in the form of chapter 99-188, his penalty would remain the same. For the same reasons why Lewis has no standing to challenge chapter 99-188 on constitutional

grounds, he further cannot allege that the retroactive application changes his sentence or detrimentally affects him. See Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798)(an ex post facto law is one that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed"). In all, the "operative fact" as delineated in Dobbert is that Lewis was on notice that he would be sentenced as a prison releasee reoffender, and that has not changed. Accordingly, there is no ex post facto violation. See Hersey, 831 So.2d at 679.

Because the Fifth District properly found that the 2002 reenactments cured the constitutional defect and can be retroactively applied, this Court should affirm Lewis's sentence in all respects.

Window Period

Finally, the window period for challenging a law opens on the effective date of the challenged law and closes when the defect is "cured." See e.g., Salters v. State, 758 So.2d 667, 671 (Fla. 2000)(holding that window period for challenging chapter 95-182, Laws of Florida, opened when the chapter became effective and closed on May 24, 1997, the effective date of chapter 97-97, Laws of Florida, which reenacted the amendments contained in chapter 95-182). Further, the State recognizes

that in Taylor, the court held that the window period for asserting a single subject rule challenge to chapter 99-188 opened on July 1, 1999. Taylor, 818 So.2d at 550. This is consistent with other single subject violation cases. See Heggs v. State, 759 So.2d 620 (Fla. 2000)(sentencing guidelines) and State v. Thompson, 750 So.2d 643 (Fla. 1999)(violent career criminal).

However, the State submits that the issue of a window period is rendered moot in light of chapter 99-188's reenactment in chapter 02-211. The statutes declared unconstitutional in Heggs and Thompson were reenacted by biennial adoption of the Florida Statutes, not by a specific reenactment statute making the reenactment retroactive to the initial enactment of the session law in question.

The instant case is similar to that in Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991). See also Garcia v. Carmar Structural, Inc., 629 So.2d 117 (Fla. 1994)(following Scanlan). There, the petitioner successfully raised a single subject challenge to chapter 90-201, Laws of Florida. In response, the Legislature called a special session and separately reenacted the provisions that this Court found to be in violation of the single subjection law. The Legislature also expressly provided that these two acts would apply retroactively to the original

effective date of chapter 90-201. Id. at 1172. The issue of the constitutionality of chapter 90-201 was nevertheless appealed to this Court.

This Court held that chapter 90-201 violated single subject law and then determined whether the act was void ab initio. The court stated that, in determining whether a statute is void ab initio, it must distinguish "between the constitutional authority, or power, for enactment as opposed to the form of enactment." Id. at 1774. As a result, this Court concluded that since it declared chapter 90-201 unconstitutional not because the legislature lacked the power to enact it, but because of the form of its enactment, the effective date of voiding chapter 90-201 was the date of the filing of the opinion. Id. 1174-1176.

Similarly, here chapter 02-211 was a specific reenactment of chapter 99-188 which expressly called for retroactive application. In addition, chapter 99-188 was declared unconstitutional because of the enactment's form, not the legislature's authority to enact such provisions. Thus, there is no longer a window period for violations of the single subject rule and Lewis's prison releasee reoffender sentence should not be disturbed.

Nevertheless, the State alternatively argues that even if

this Court were to find that there does exist a window for challenging chapter 99-188, the Second District erred in holding that the window closes on April 29, 2002. See Green, 839 So.2d at 748, 755 (reenactments of chapter 99-188 may be applied no earlier than April 29, 2002).

A law that violates the single subject rule is most often "cured" when the Legislature reenacts the provision through the biennial adoption of the Florida Statutes. Salters, 758 So.2d at 670; Trapp v. State, 760 So.2d 924 (2000). However, a law that violates the single subject rule may be cured by means other than the biennial adoption process. For example, a defect is cured if the Legislature convenes a special session prior to its biennial adoption, during which it separates and reenacts the dissimilar provisions as two distinct bills. Salters, 785 So.2d at 670 (citing Scanlan, 582 So.2d at 1172). Additionally, the defect may be cured prior to the biennial adoption when the Legislature "reenacts" the same statute. Taylor, 818 So.2d at 551-552 (distinguishing "reenactments" from "amendments" and holding that reenactments to a statute close the window while amendments do not).

In the instant case, in addition to separating and reenacting the provisions of chapter 99-188 in 2002 as discussed above, the Legislature also cured the defect prior to this when

it reenacted, verbatim, the Prison Releasee Reoffender Act in 2000. Lewis challenges his prison releasee reoffender sentence pursuant to section 775.082 for offenses he committed on September 14, 2001. This statute was reenacted in chapter 2000-246 /HB 683, Laws of Florida. The title of chapter 2000-246 expressly states: “An act ... reenacting ss.775.082(9).” Thus, even if a window exists, the window closed on October 1, 2000 - the effective date of chapter 2000-246. Accordingly, Lewis does not fall within this window and his prison releasee reoffeder sentence is unaffected by a ruling declaring chapter 99-188 unconstitutional.

## CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Court find chapter 99-188 constitutional and thereby quash the decision of Taylor v. State, 818 So.2d 544 (Fla. 2d DCA 2002). Alternatively, the State respectfully requests that this Court find that the 2002 reenactments of chapter 99-188 can be retroactively applied and thereby quash the decision of Green v. State, 839 So.2d 748 (Fla. 2d DCA 2003).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing merits brief has been furnished by delivery to Assistant Public Defender Nancy Ryan, counsel for Lewis, this _____ day of May, 2003.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

_____
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