IN THE SUPREME COURT OF FLORIDA

HOWARD H. LEWIS,

Petitioner,

v. CASE NO. SC03-401

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The petitioner, Howard Lewis, was charged with committing one count of robbery with a deadly weapon in case no. CR01-12656 in the Ninth Judicial Circuit; the offense was alleged to have taken place on September 14, 2001. (Vol. I, R 27) He was convicted, after a jury trial, of the lesser included offense of robbery with a weapon, a first-degree felony, on January 30, 2002. (Vol. I, R 61-62, 59) See Section 812.13(2)(b), Florida Statutes. He was sentenced on March 22, 2002, on that first-degree felony, to life in prison as a habitual violent felony offender, see Section 775.084(1)(b) and (4)(b), Florida Statutes, with a thirty-year minimum mandatory term under the Prison Releasee Reoffender Act. See Section 775.082(9), Florida Statutes (1999); cf. Chapter 2002-211, Laws of Florida. (Vol. I, R 15-16, 90-91) At sentencing, the defense did not dispute that Mr. Lewis was convicted in 1998 of aggravated battery, which qualified him for enhanced sentencing under the habitual violent felony offender statute, and did not dispute that he was released from prison in August 22, 2001, which further qualified him for "Prison Releasee Reoffender" ("PRR") sentencing. (Vol. I, R 12-13, 73-74, 82)

After sentencing, Mr. Lewis, through counsel, moved to vacate his sentence as illegal on the ground that the 1999

amendments to various sentencing statutes had been passed in violation of the constitutional single-subject rule. (Vol. I, R 99) Thereafter, counsel for Mr. Lewis filed a timely notice of appeal from the orders of judgment and sentence. (Vol. I, R 101)

On appeal to the Fifth District Court of Appeal, in case no. 5D02-1161, Mr. Lewis argued through counsel that the 30-year minimum mandatory sentence he had received pursuant to the PRR provision, Section 775.082(9) Florida Statutes (1999), should be struck from his sentence. His position was that the PRR provision was significantly affected by the amendment made to it in Chapter 99-188, Laws of Florida, and that enactment of 99-188 had violated the constitutional single-subject rule. (See appendix to this brief.) The State argued in response that the Fifth District Court had just held that "a 2002 statutory amendment to chapter 99-188 could be applied retroactively." (See State's appellate answer brief at 11, in the appendix to this brief.) The District Court affirmed Mr. Lewis's judgment and sentence, issuing an opinion which states in its entirety

> We affirm the appellant's conviction and sentence. We certify, however, as we did in Hersey v. State, 831 So. 2d 679 (Fla. 5th DCA 2002), the question of whether the enactment of Chapter 02-210 [sic], Laws of Florida, cured the single-subject violation

of Chapter 99-188, Laws of Florida.

Lewis v. State, 836 So. 2d 1095 (Fla. 5th DCA February 7, 2003).

On March 3, 2003, Mr. Lewis filed a timely notice in the Fifth District Court to invoke this court's discretionary jurisdiction, and he now files this brief pursuant to this court's orders issued March 18, 2003 and April 17, 2003.

SUMMARY OF ARGUMENT

This court should hold that enactment of Chapter 99-188, Laws of Florida, violated the single-subject rule, and should further hold that the Legislature's effort to retroactively cure that problem in 2002 had no legal effect in light of Article X, Section 9 of the Florida Constitution.

ARGUMENT

THE DISTRICT COURT WRONGLY HELD THAT THE ENACTMENT OF CHAPTER 02-211, LAWS OF FLORIDA, CURED THE SINGLE-SUBJECT VIOLATION IN CHAPTER 99-188, LAWS OF FLORIDA.

The District Courts' decisions.

This case is before this court as a companion case to State v. Franklin, 836 So. 2d 1112 (Fla. 3rd DCA 2003) (en banc), no. SC03-413 (Fla. 2003). In Franklin, the Third District Court of Appeal certified conflict with the Second District Court's decision in Taylor v. State, 818 So. 2d 544 (Fla. 2d DCA 2002), *rev. dism*. 821 So. 2d 302 (Fla. 2002). In Taylor, the Second DCA held that Chapter 99-188, Laws of Florida, violated the Florida Constitution's requirement that each legislative act must deal with only a single subject. Franklin, on the other hand, which was issued *en banc* over two dissenting opinions signed by four judges, holds that no single-subject violation affects Chapter 99-188. The First District Court appears to have allied itself with the Third, see Watson v. State, 2003 Fla. L. Weekly 1877193 (Fla. 1st DCA April 16, 2003), and the Fifth and apparently the Fourth District Courts agree with Taylor, but hold that the Legislature, by fiat, retroactively cured the single-subject problem in 2002. Hersey v. State, 831 So. 2d 679 (Fla. 5th DCA

2002), no. SC02-2630 (Fla. 2003); see Nieves v. State, 833 So. 2d 190 (Fla. 4th DCA 2002); see Chapters 2002-208 through -212, Laws of Florida. The Second District Court has ruled that the Legislature cannot retroactively cure a single-subject problem, in Green v. State, 839 So. 2d 748 (Fla. 2d DCA 2003) (certifying conflict with Hersey and Nieves), no. SC03-532 (Fla. 2003), and the Third District Court, in dictum, has announced en banc, without dissent, that "even before Green" it had "serious doubts" whether the Fifth District Court's retroactivity analysis has any merit. Franklin, supra, 836 So. 2d 1112 at 1114 n.5.

This court should hold that Chapter 99-188 did violate the single-subject rule, and should further hold that the Legislature's effort to retroactively cure that problem in 2002 had no legal effect.

The single-subject violation.

This court recently, in Department of Highway Safety and Motor Vehicles v. Critchfield, 2003 WL 1089288 (Fla. March 13, 2003), announced and applied the fundamental principles that govern the single-subject rule for legislation:

> Article III, section 6 of the Florida Constitution provides, in pertinent part, that "[e]very law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly

> expressed in the title." ...
>
> The purpose of this constitutional prohibition against a plurality of subjects in a single legislative act is to prevent "logrolling" where a single enactment becomes a cloak for dissimilar legislation having no necessary or appropriate connection with the subject matter. The act may be as broad as the legislature chooses provided the matters included in the act have a natural or logical connection.

2003 WL 1089288 at *2 (cites omitted.) In Critchfield this court held that passage of a 1998 chapter of the Laws of Florida violated the single-subject rule in that there was no natural or logical connection between the greater part of that law, which governed drivers' licenses and vehicle registrations, and a particular section of that law, which provided that the payees of worthless checks may assign the debt to private debt collectors and recover collection fees. In Critchfield this court also analyzed the legislative history of the 1998 law, noting that the focus of the bill shifted substantially as it moved from the House to the Senate, then back to the House one day before the close of the regular legislative session. 2003 WL 1089288 at 2-3.

The law now at issue before this court, Chapter 99-188, was similarly scrutinized by the Second District Court in Taylor v. State, supra, 818 So. 2d 544 (Fla. 2d DCA 2002). The Taylor court reasonably found no natural or logical connection

between **sections 11 and 13** of 99-188 and the remainder of the law. Chapter 99-188 recites that it may be cited as the "Three-Strikes Violent Felony Offender Act," see §1, and sections 3 and 6 create an enhanced sentencing provision for third-time violent felons (codified at Section 775.084(1)(c) and (4)(c), Florida Statutes), and incorporate that change by reference into an existing statute. Further, the statute's 21-paragraph preamble (headed "WHEREAS") deplores crime rates and the extent to which they are attributable to "a relatively small number of repeat and violent felony offenders." See Taylor, 818 So. 2d at 546 and n.2. The remaining sections of 99-188, excluding **11 and 13**, either create, amend, incorporate by reference, or mandate publication of enhanced penalties for drug traffickers, repeat sexual batterers, those who commit offenses shortly after being released from prison, and those who assault or batter people over 65 or law enforcement officers. In contrast, **Section 11** of 99-188 generally requires the clerks of the Circuit and County Courts to provide criminal records in all felony and misdemeanor cases to United States immigration officers - even those cases where only probation is imposed; and **Section 13** expands the definition of "conveyance" in the substantive burglary statute to include "railroad vehicles" -- in addition to "railroad cars," which

were already the possible subject of burglaries. The Taylor court concluded that **Section 13's** "slight expansion of a substantive criminal offense has only an attenuated relationship to sentencing," and that **Section 11**, the provision that alters the duties of the clerks of court vis-à-vis immigration officials, "bears even less relationship to the act's other provisions...[it] addresses a purely administrative subject that is far afield of the act's other provisions." 818 So. 2d at 549.

Again reflecting the analysis in Critchfield, the court in Taylor reviewed the history of the bills that became Chapter 99-188, noting that **Section 13**, concerning "railroad vehicles," was added by the Senate on April 28, 1999, at the very end of that year's regular legislative session. The Taylor court concluded that that last-minute addition "occurred under circumstances that often lead to problems with the single subject rule...the addition of **Section 13** was an afterthought. This is exactly the type of 'log rolling' legislation that the single subject rule was intended to prevent." 818 So. 2d at 549. **Section 11** was also an add-on, first appearing in a House Committee substitute for the original bill, which had involved only enhanced-sentencing matters. Cf. HB 121 (Feb. 10, 1999) with CS/HB 121 (Feb. 24,

1999). See http://www.leg.state.fl.us/house/Session.

Neither Critchfield nor Taylor represents any departure from the established law that governs the single-subject rule for legislation. This court's decisions and opinions in Heggs v. State, 759 So. 2d 620 (Fla. 2000), State v. Thompson, 750 So. 2d 643 (Fla. 1999), State v. Johnson, 616 So. 2d 1 (Fla. 1993), and Bunnell v. State, 453 So. 2d 808 (Fla. 1984), are strikingly similar to those issued in both Critchfield and Taylor. The laws invalidated in Heggs, Thompson, Johnson, and Bunnell each involved two disparate subjects of legislation: see Heggs, 759 So. 2d at 626-28 and Thompson, 750 So. 2d at 647-48 (criminal penalties for recidivists, civil penalties for domestic batterers; two related 1995 laws invalidated); Johnson, 616 So. 2d at 2, 4 (criminal penalties for recidivists, licensing of private investigators); Bunnell, and 453 So. 2d at 809 (membership of Florida Criminal Justice Council and obstruction of justice.) Further, in Heggs and in Thompson, this court reviewed the relevant legislative history and noted that "[i]mportantly," House amendments added May 4, 1995 - again at the end of the regular session - had altered the substance and title of the original Senate bill. See Thompson, 750 So. 2d at 648; see also Heggs, 759 So. 2d at 624-25.

The majority opinion in State v. Franklin, supra, 836 So. 2d 1112 (Fla. 3rd DCA 2003) (en banc), no. SC03-413 (Fla. 2003), in contrast to Taylor, represents a substantial departure from this court's analysis in single-subject cases. That majority opinion substitutes for analysis the cavalier statement

> since the Supreme Court will necessarily itself resolve the conflict with Taylor anyway, it is necessary only rather summarily to announce that we believe that each provision of the statute [sic] is sufficiently related to the others and to the general purpose of the act as a whole, and that the constitution is therefore satisfied.

836 So. 2d at 1113. The majority's judges further relieved themselves of these novel observations:

> we see no principled reason why the general rule of harmlessness should not be applied to the present situation; that is, that a legislative "error" in attaching even an *un*related provision to an otherwise valid statute should not have any impact upon those, like this appellant, who are affected only by the valid ones.... [P]ersons like Franklin should be regarded as lacking constitutional "standing" to challenge of sections like 9, 11, and 13, which have nothing to do with them.... Franklin has no right to the passage of legislation in any particular way, and...to the contrary, the single subject provision affects only the legislators themselves.

Id. at n.4. These dicta are patently at odds with Heggs v.

State, 759 So. 2d 620 (Fla. 2000), which expressly sets out when a single-subject violation can be cured by severance rather than by voiding the act in its entirety. Where, as here, the act is not an appropriations act, and its title and its body both pertain to more than one subject, severance is not possible and the act must be voided in its entirety. Heggs, 759 So. 2d at 628-31.

This court should adopt the correct decision and careful opinion issued by the Second District Court in Taylor v. State, and hold that the Legislature's enactment of Chapter 99-188 violated the constitutional single-subject rule for legislation.

Retroactive effect of Chapter 2002-208 et seq.

In an express response to Taylor, the Legislature passed Chapters 2002-208 through -212, which separately reenacted various sentencing provisions that appeared in 99-188. Each of those chapters stated that its provisions "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." Green v. State, supra, 839 So. 2d 748, 749-50 (Fla. 2d DCA 2003), citing Chs. 02-208, §2; 02-209, §3; 02-210, §3; 02-211, §3; and 02-212, §4. The Second District Court in Green, declining to give Chapter 2002-212

retroactive effect, noted “this was the first time the legislature has undertaken a retroactive reenactment of criminal laws after they were found unconstitutional because of a single subject rule violation.” 839 So. 2d 748 at 750.

Chapter 2002-211, section 2, re-enacted 99-188’s amendments to the prison releasee reoffender act, and was applied retroactively by the District Court in this case; Chapter 2002-212, which was at issue in Green, re-enacted a drug-trafficking minimum mandatory sentence initially set out in 99-188. Mr. Green sought resentencing post-conviction under Taylor v. State, the Circuit Court in Pinellas County denied that relief based on retroactive application of 2002-212, and the Second District Court reversed the Circuit Court’s ruling on ex post facto grounds. Green, 839 So. 2d at 751–53. On the ex post facto question the Second District Court has, again, carefully and correctly applied this court’s precedent. This court should approve Green v. State and disapprove the Fifth District’s decision in this case, both because the Second District Court’s ex post facto analysis is correct as regards minimum mandatory sentences newly imposed under the 2002 chapters, and because Article X, Section 9 of the Florida Constitution demands the same result.

Two conditions must be present for an ex post facto

violation to occur: the new law must apply to events that occurred before its enactment, and it must disadvantage the offender who seeks relief. Green at 750-52, citing Miller v. Florida, 482 U.S. 423, 430 (1987). All of the 2002 chapters at issue in the cases now before this court, by their terms, "beyond argument" seek to apply to events occurring before their enactment. Green at 750-51. Chapter 2002-212, by creating a new three-year mandatory minimum drug-trafficking sentence that was applied to Mr. Green, equally plainly was disadvantageous to him. Id; Lindsay v. Washington, 301 U.S. 397 (1937). The new minimum mandatory "three strikes" sentences which were reenacted in Chapter 2002-210, and which were applied in State v. Franklin, 836 So. 2d 1112 (Fla. 3rd DCA 2003) (en banc), no. SC03-413 (Fla. 2003), and in Hersey v. State, 831 So. 2d 679 (Fla. 5th DCA 2002), no. SC02-2630 (Fla. 2003), also plainly disadvantage the defendants in those cases. Lindsay. Chapter 2002-211, s. 2, at issue in this case, amended the prison releasee reoffender act by allocating to the State, not the Circuit Court, the authority to finally determine whether ameliorating conditions exist which preclude the need to apply the minimum prison terms created by that act. While the change to 2002-211, s.2, does *not* clearly

implicate the ex post facto clauses,[1] Article X, Section 9 of the Florida Constitution precludes its retrospective application.

In Norman v. State, 826 So. 2d 440 (Fla. 1st DCA 2002), the defendant was convicted of sale of cocaine without the benefit of a jury instruction mandated by McMillon v. State, 813 So. 2d 56 (Fla. 2002), in which this court added an element to that offense. The State argued that Chapter 2002-258, Laws of Florida, which purports to supersede McMillon, justified affirmance although Norman's offense took place in 2000. The First DCA disagreed based on Article X, Section 9, of the Florida Constitution, which provides that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." Norman, 826 So. 2d at 441.

Article X, Section 9 operates independently of the ex post facto clauses; it denies the legislature power to either increase or ameliorate punishment, by either repealing or amending a statute, after a crime is committed. Norman at 442;

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[1] Procedural changes to the law do not run afoul of ex post facto protections. Lynce v. Mathis, 519 U.S. 433, 447 n. 17 (1997); Weaver v. Graham, 450 U.S. 24, 32, n.17 (1981); Dobbert v. Florida, 432 U.S. 282 (1977). A change to the law that alters the roles of the judge and jury in sentencing is procedural. Weaver v. Graham, 450 U.S. at 32, n.17, citing Dobbert.

see generally Allen v. State, 383 So. 2d 674 (Fla. 5th DCA 1980). In contrast, as the U.S. Supreme Court noted in Dobbert, "the inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit the legislative control of remedies and modes of procedure." 432 U.S. at 293 (cites and punctuation omitted.) Article X, Section 9 places precisely such a limit on the Florida Legislature in the criminal-law context, and disposes of the retrospective-application issue in this case.

CONCLUSION

The petitioner requests this court

- to quash the decision of the District Court of Appeal in this case;
- to approve Taylor v. State, 818 So. 2d 544 (Fla. 2d DCA), *rev. dism.* 821 So. 2d 302 (Fla. 2002) and Hersey v. State, 831 So. 2d 679 (Fla. 5th DCA 2002), to the extent they hold that Chapter 99-188, Laws of Florida, violated the single-subject requirement in the Florida Constitution and is void;
- to disapprove the decisions in this case, and in Hersey, to the extent they hold that the Legislature in 2002 effectively cured the single-subject problem with retroactive effect when it enacted Chapters 2002-208 through 2002-212; and
- to hold that Article X, Section 9 of the Florida Constitution precludes retrospective application of Chapters 2002-208 through -212.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing has been served on Assistant Attorney General Mary Griffo Jolley, of 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32117, by way of the Attorney General's in-box at the Fifth District Court of Appeal, this 30th day of April, 2003.

_____

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a) in that it is set in Courier New 12-point font.

_____

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