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 REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

As to severability, the State fails to acknowledge this court's express holding in Heggs v. State, 759 So. 2d 620 (Fla. 2000), that a non-appropriations act cannot be severed to cure a single-subject problem where the act's title and substance both pertain to more than one subject. 759 So. 2d at 628-31.

As to retroactivity of the 2002 legislation, the State also fails to acknowledge dispositive authority. Article X, Section 9 of the Florida Constitution governs this case independently of any ex post facto protections.

Dobbert v. Florida, 432 U.S. 282 (1977), is inapplicable here because Article X, Section 9 governs. Dobbert controls only where ex post facto protections are relied on.

In any event, as the Second District Court has held, even in the ex post facto context Dobbert's "operative act" analysis does not control cases that involve a single-subject violation. Where the single-subject rule is violated, the Legislature's act is void ab initio because it was improperly enacted in a way *that deprived the public of notice*.

ARGUMENT

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

The State argues that House Bill 121, which became Chapter 99-188, was "corrected" on February 3, 1999, to include the language that became the chapter's Section Eleven. (State's merit brief at 11) Nothing in the legislative history supports the notion that the newly added provision "corrected" an inadvertent or logical omission in the existing bill; the new provision, which directs the clerks of the Circuit Courts to communicate with the immigration authorities, was plainly unrelated to the existing House bill when it was added February *24*, 1999, by the House Corrections Subcommittee.[1] See the bill analysis for H 0121 S1 (Corrections), in the documentation of House Bill 121 that appears in the history of the 1999 session on the Florida Legislature's website.

The State firmly asserts that "each of [99-188's]

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[1] House subcommittees that amended House Bill 121 included Criminal Justice Appropriations, Crime and Punishment, and Corrections. The Corrections Subcommittee of the House Committee on Public Safety and Crime Prevention does not correct bills, but instead deals with substantive matters related to the Department of Corrections and the county jails. See www.myfloridahouse.com/ Committees.aspx.

sections focus on the same goal, the punishment of offenders." (Merit brief at 14) Petitioner will rely on the argument made in his initial brief on the merits, and on the Second District Court's careful analysis in Taylor v. State, 818 So. 2d 544 (Fla. 2d DCA 2002), for his position that sections 11 and 13 of Chapter 99-188 do not in fact focus on punishment, as do the remaining portions of 99-188. Petitioner notes in addition that the federal deportation process - the long-term goal of Section Eleven - is not part of sentencing.

Bafflingly, the State, in its arguments headed "Standing" and "Severability" (State's merits brief at pp. 16-19), does not acknowledge this court's dispositive decision in Heggs v. State, 759 So. 2d 620, 628-31 (Fla. 2000), which is cited and discussed in Petitioner's initial brief on the merits at 11. Isaac v. State, 626 So. 2d 1082 (Fla. 1st DCA 1993), rev. denied, 634 So. 2d 624 (Fla. 1994), cited by the State on this point (in its brief at 17), does not support its position. In Isaac, the defendant argued that the statute under which he was charged, which proscribed murder of a law enforcement officer, was unconstitutionally vague because it did not expressly include a scienter element which would have required the State to show that the defendant knew his victim was an officer; the First District held that Isaac had not asserted

facts sufficient to show he had standing to make the argument. That holding has no application to the specific question before this court, which is whether a non-appropriations act can be severed to cure a single-subject problem where the act's title and substance both pertain to more than one subject. As this court expressly held in Heggs, the answer is "no." Heggs, 759 So. 2d at 628-31.

Under the rubric "Standing," the State further argues that Petitioner's sentence "would have been the same" under the 1988 version of Section 775.082, citing Diaz v. State, 2003 WL 1936119 (Fla. 5th DCA April 25, 2003) and Lindsay v. State, 839 So. 2d 737 (Fla. 2d DCA 2003). In that first case Mr. Diaz argued, pro se, that his 25-year minimum mandatory sentence for trafficking in over 28 grams of heroin was affected by the single-subject problem afflicting 99-188; the Fifth District Court corrected that factual misapprehension, and correctly held that Mr. Diaz had no standing to object to passage of a 1999 law that had not changed the statutory subsection he was sentenced under. See Chapter 99-188, §9, Laws of Florida, amending in part Section 893.135(1)(3)(1)(c), Florida Statutes. In the other case relied on by the State on this point, Lindsay, the Second District Court held that the briefs before it were facially insufficient to warrant relief

because they *did not allege* that the 1999 changes to the prison releasee reoffender act affected the appellant; that allegation has been made in the briefs now before this court, and Lindsay is accordingly inapplicable here. (See Petitioner's merit brief at 13-14.)

As to the retroactivity of the 2002 legislation, again bafflingly, the State fails to acknowledge the dispositive authority cited by the Petitioner. Article X, Section 9 of the Florida Constitution governs this case independently of any ex post facto protections, in that it expressly provides that "repeal or amendment of any criminal statute does not affect the prosecution or punishment for any crime previously committed." (See Petitioner's merits brief at 14-15; State's brief at 21-25.)

Dobbert v. Florida, 432 U.S. 282 (1977), relied on by the State, is inapplicable here because Article X, Section 9 governs. Dobbert controls only where ex post facto protections are relied on; the Supreme Court expressly noted in Dobbert that the ex post facto clauses were *not* intended "to limit the legislative control of remedies," while clearly Article X, Section 9 *does* impose such a limit. In any event, as the Second District Court has held, even in the ex post facto context Dobbert does not control cases that involve a single-

subject violation. Green v. State, 839 So. 2d 748, 753 (Fla. 2d DCA 2002). Where the single-subject rule is violated, the Legislature's act is void ab initio because it was improperly enacted *in a way that deprived the public of notice*. Green, citing In re F.G., 743 N.E. 2d 181 (Ill. App. 2000). The State finally argues that this court need not reach the retroactivity question, since the prison releasee reoffender act (the "PRR") was "reenacted, verbatim" in Chapter 2000-246, Laws of Florida, effective October 1, 2000.[2] (State's merit brief at 28) While portions of the PRR were reenacted in 2000-246, those portions do not include Section 775.082(3)(d), the subsection which was changed in 1999 and which applies to this case. Cf. Ch. 2000-246, §3 with Ch. 99-188, §2, Laws of Florida.

[2] The offense charged in this case was alleged to have taken place on September 14, 2001. Vol. I, R 27.

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 9th day of June, 2003.

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Nancy Ryan
Florida Bar No. 765910

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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