IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-413

COREY FRANKLIN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 Northwest 14th Street
Miami, Florida 33125
(305) 545-1958

LISA WALSH
Assistant Public Defender
Florida Bar No. 0964610

BILLIE JAN GOLDSTEIN
Assistant Public Defender
Florida Bar No. 0075523

Counsel for Petitioner

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> THE SESSION LAW THAT CREATED THE "THREE-STRIKE VIOLENT FELONY OFFENDER ACT," VIOLATED THE SINGLE-SUBJECT CLAUSE OF ARTICLE III, SECTION 6 OF THE FLORIDA CONSTITUTION. APPELLANT CANNOT BE RE-SENTENCED UNDER THE RE-ENACTMENT OF THE "THREE-STRIKE VIOLENT FELONY OFFENDER ACT."

A. The subject of Chapter 99-188, Laws of Florida, is increased sentencing for repeat offenders. Sections 11 and 13 do not relate to this subject.

The Respondent argues that all the sections of Chapter 99-188 relate to a single subject. (Brief of Respondent at 7, 11-12). The Respondent's argument is based upon the faulty premise that the single subject addressed in Chapter 99-188, Laws of Florida, is not **sentencing**, but rather "to improve public safety by incapacitating repeat offenders." The language quoted by the Respondent is taken out of context from a paragraph of the preamble to Chapter 99-188. The full language of the paragraph is as follows:

> WHEREAS, the enactment and enforcement of legislation in Florida that requires courts **to impose mandatory prison terms on three-time violent felony offenders will improve public safety by incapacitating repeat offenders** who are most likely to murder, rape, rob, or assault innocent victims in our communities, and . . .

Ch. 99-188, at 735, Laws of Florida (1999) (emphasis added). Thus, it is **mandatory prison terms** which will increase public safety. The phrase "incapacitating repeat

offenders" relates specifically to increasing prison sentences, not to other methods of improving public safety, such as deportation or redefining criminal offenses.

The Respondent's claim that the Act's subject is increasing public safety by incapacitating re-offenders is analogous to the broad "protecting the public" or "controlling crime" arguments repeatedly made by the State and rejected by this Court in single-subject decisions. Like Chapter 99-188, the chapter laws in *State v. Johnson*, 616 So. 2d 1 (Fla. 1993), *State v. Thompson*, 750 So. 2d 643 (Fla. 1999), and *Heggs v. State*, 759 So. 2d 620 (Fla. 2000), related to sentencing. This Court rejected the State's arguments made in each case that the true subject of each act was the "protection of the public," and that the civil sections added to the acts served the function of protecting the public or controlling crime. This Court should similarly reject the State's attempts to argue that the subject of Chapter 99-188 is improving public safety by incapacitating the offender.

B. Sections 11 and 13 do not reasonably relate to the subject of Chapter 99-188, increased sentencing to reduce crime.

The Respondent posits that deportation of aliens and re-defining the term "conveyance" reasonably relate to a single subject. (Brief of Respondent at 9-12). The Respondent argues that deporting aliens ensures they will not re-offend and redefining the term "conveyance" may create new armed burglary offenders, and armed burglary is an enumerated offense for the purpose of several enhanced

sentencing provisions. As argued in the Initial Brief, these arguments should be rejected.

First, the subject of Chapter 99-188 is increased sentencing, not "stopping recidivism by any means." Facilitating deportation has nothing to do with sentencing. This Court has repeatedly struck down laws which combine civil and criminal provisions addressing multiple subjects. *See, e.g.*, *Bunnell v. State*, 453 So. 2d 808, 809 (Fla. 1984) (invalidating law which combined provisions on obstruction by false information with amendments to council on criminal justice); *State v. Johnson*, 616 So. 2d 1, 4 (Fla. 1993) (invalidating law which combined habitual offender sentencing with provisions on private investigators); *State v. Thompson*, 750 So. 2d 643 (Fla. 2000), *reh'g denied*, and *Heggs v. State*, 759 So. 2d 620 (Fla. 2000), *reh'g denied* (invalidating both laws which combined sentencing provisions with provisions on domestic violence).

Second, the Respondent argues that section 13 may now create a new class of armed burglars who may qualify for several forms of enhanced sentencing. (Brief of Respondent at p. 11). The following predicate conditions would have to be met before the State's "reasonable relationship" were to exist: (1) an offender burglarizes, not trespasses in a railroad car, (2) the offender carries a weapon, (3) the offender otherwise qualifies for sentencing as a habitual violent felony offender, (4) the state

attorney chooses to enhance the offender and (5) the offender is actually sentenced to a longer sentence as a result of this designation. As the *Taylor* court aptly noted, "[T]hat relationship is so tenuous, so dependent on the happenstance of individual cases, that it simply cannot be characterized as natural or logical." *Taylor v. State* 818 So. 2d 544, 549 (Fla. 2d DCA 2002)[1].

This Court's numerous decisions detailed in the Initial Brief compel the conclusion that Chapter 99-188 violates Article III, section 6. Sections 11 and 13 address a different subject not related to the subject of the Act and thus, this Court should declare the Act void *ab initio.*

C. The Respondent's suggestions regarding "standing" or "harmlessness" must be rejected.

In the Initial Brief, the Petitioner explained that the Petitioner is harmed not by the application of sections 11 and 13 to him, but by being sentenced pursuant to an invalid law, a law which, in effect, did not exist. *See Martinez v. Scanlan*, 582 So. 2d 1167, 1174 (Fla. 1991) ("Clearly, a penal statute declared unconstitutional is **inoperative from the time of its enactment** . . . ."), *emphasis added*; *Heggs*, 759 So. 2d at 623 (a person has standing to raise a single-subject claim if that person committed an offense after the time of the enactment and before the statutes were

[1] The tenuousness of the relationship may not have been noticed or appreciated by the legislators, as section 13 was added to the bill at the last moment. (See Initial Brief of Petitioner at 16; Brief of Respondent at 14).

validly re-enacted); *Johnson*, 616 So. 2d at 2-3 (same); *Thompson*, 750 So. 2d at 645 (same).

The Respondent ignores this argument. (Brief of Respondent at p. 18). Instead, the Respondent repeats the suggestion made in *Franklin*, that the defendant must be directly affected by sections 11 and 13 in order to be "harmed." 836 So. 2d 1114 at n. 4. The Petitioner has standing or was harmed because he was sentenced under a law which is entirely a nullity. The Respondent's standing argument should be rejected by this Court.

D. The Respondent's severability argument must also be rejected.

In the Initial Brief, the Petitioner analyzed the severance doctrine and its inapplicability to Chapter 99-188. The Petitioner explained that where the **title and body** of a law address multiple subjects, the offending sections which violate single-subject cannot be severed and the entire law must fail. (Brief of Petitioner at p. 29-32). The **title and body** of Chapter 99-188 contain multiple subjects, and thus, severance is not appropriate. The Petitioner's analysis was based upon more than 70 years of this Court's jurisprudence. *See Colonial Investment Co. v. Nolan*, 100 Fla. 1349, 131 So. 178, 179-80 (Fla. 1930) (if **act and title** embrace more than one subject, the entire act is void); *Tormey v. Moore*, 824 So. 2d 137 (Fla.2002) (same); *Heggs v. State*, 759 So. 2d 620 (Fla. 2000) (same); *Sawyer v. State*, 100 Fla. 1603, 1611, 132

So. 188, 192 (1931) (relying on *Nolan* to invalidate entire chapter law because the law's **title and body** contained more than one subject); *Ex parte Winn*, 100 Fla. 1050, 1053, 130 So. 621, 621 (1930) (stating that "both the act and the title dealt with more than one subject, and that the several subjects dealt with were not so properly connected as to conform with [the single-subject rule], and for this reason the entire act must fall").

The Respondent states that this Court may simply sever the offending sections 11 and 13 from the Act and save Chapter 99-188. (Brief of Respondent at 18-20). In order to make this argument, the Respondent completely ignores the above analysis and its long-standing underpinnings in this Court.

E. The re-enacted laws, Chapter 2002-208 through Chapter 2002-212, Laws of Florida, may not be retroactively applied without running afoul of the *ex post facto* clauses in Article 1, section 10 of the Florida Constitution and Article I, section 9, clause 3 of the United States Constitution.

The State now argues that under *Dobbert v. Florida*, 432 U.S. 282 (1977), there is no *ex post facto* problem in retroactively applying the re-enacted 2002 "Three-Strikes Law." (Brief of Respondent at p. 24-25). *Dobbert* is inapplicable to the instant case. As the Supreme Court explained in *Dobbert*, the death penalty always existed in Florida. However, Dobbert committed capital murder at a time when Florida's penalty phase procedures were constitutionally defective. The Florida legislature subsequently enacted a revised statute, improving the procedures. The

defendant was tried and sentenced to death pursuant to the new scheme. The Supreme Court rejected an *ex post facto* claim. The Court regarded the new statute as "ameliorative" in that it actually made the imposition of the death sentence more difficult. *Id.* at 294. The Court explained that the change in the statute was purely procedural and thus not subject to *ex post facto* limitations. "In the case at hand, the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; ***there was no change in the quantum of punishment attached to the crime.***"*Dobbert,* 432 U.S. at 293-294 (emphasis added).

Unlike the death penalty at issue in *Dobbert,* the enhanced sentencing laws at issue here did not exist until enacted as Chapter 99-188. Chapter 99-188 violates the single-subject clause and is therefore *void ab initio. See Martinez v. Scanlan*, 582 So. 2d 1167, 1174 (Fla. 1991) ("Clearly, a penal statute declared unconstitutional is inopererative from the time of its enactment, not only and simply from the time of the court's decision."); *Heggs v. State,*759 So. 2d 620, 623 (Fla. 2000) (window period for asserting single-subject claim opens at time of enactment); *State v. Johnson,* 616 So. 2d 1 (Fla. 1993) (the operative window for attacking the statute ran from the date of its original enactment on October 1, 1989, until its valid re-enactment on May 2, 1991).

If the law did not exist as of the time of its enactment, Mr. Franklin did not have notice of the law. If Chapter 99-188 did not exist at the time Mr. Franklin committed his offense, Chapters 2002-208 to 2002-212, Laws of Florida, may not be retroactively applied to him without falling afoul of the *ex post facto* clause. "[T]he Ex Post Facto Clause is triggered when a law 'increases punishment beyond what was prescribed when the crime was consummated.'" *Thomas v. Moore*, 748 So. 2d 1010, 1011 (Fla.1999) (quoting *Lynce v. Mathis*, 519 U.S. 433, 441 (1997)).

Among the federal courts of appeals that have construed the *ex post facto* clause in light of *Dobbert*, there is a strong consensus that in order for a retroactive change to be substantive for ex post facto purposes, it must create an increase in punishment. *See United States v. Miller*, 753 F.2d 19, 21 (3d Cir. 1985) ("ex post facto clauses 'apply only to laws which impose' punishment" (*quoting Weaver v. Graham*, 450 U.S. 24, 28 (1981)); *Dufresne v. Baer*, 744 F.2d 1543, 1546 (11th Cir. 1984) (one of the characteristics of an ex post facto law is that it is "disadvantageous to the offender because it may impose greater punishment"); *Paschal v. Wainwright*, 738 F.2d 1173, 1176 (11th Cir. 1984) (in order to be ex post facto, a law must be "disadvantageous to the [defendant] because it may impose greater punishment. . . . A law which is merely procedural and does not add to the quantum of punishment, however, cannot violate the ex post facto clause even if it is applied retrospectively.").

An excellent discussion of why *Dobbert* does not apply to the instant scenario is found in *Illinois v. F.G.*, 743 N.E.2d 181, 186-87 (Ill. App. 4th Cir. 2000). The law at issue in *F.G.* increased the mandatory period of commitment for juveniles who commit murder. After the juvenile in *F.G.* committed his offense, the statute was declared unconstitutional because it violated Illinois' single-subject constitutional provision. The State argued that a subsequent re-enactment of the same statute, enacted during the pendency of the defendant's appeal, should be retroactively applied to the juvenile, citing *Dobbert*. In rejecting the State's argument, the court first explained that *Dobbert* was inapposite, where it concerned a procedural change in the law that benefitted the defendant, rather than a substantive change in the law that increased punishment. *Id.* at 187. The court then explained as follows:

> *Dobbert* did not address the question of whether to apply a void *ab initio* statute in an *ex post facto* analysis. The State argues that the existence of the statute [Public Act 88-680] serves as an "operative fact" to warn defendant of the penalty that would be imposed on him if he were found guilty of first degree murder. See *Dobbert*, 432 U.S. at 298 . . . . **Here, however, the statute intended to serve as a warning to defendant was declared as never having existed by the Illinois Supreme Court. Therefore, a comparison of Public Act 90-590 to Public Act 88-680 in the present case's *ex post facto* determination is inappropriate.**

(emphasis added). Because the mandatory commitment provisions in the re-enacted law increased the quantum of punishment for the juvenile, *Dobbert* did not apply, and

the court held that the version of the statute in effect before the unconstitutional provision was enacted must be applied. *F.G.* is strikingly similar to the instant case. Chapter 99-188 is *void ab initio.* The re-enacted statute may not be retroactively applied here where it increases the quantum of punishment for the defendant. The analysis used by the appellate court in *F.G.* should be adopted here.

G. Window Period

Although acknowledging that the window period in single-subject cases opens on the date of enactment, the Respondent argues that the window is "rendered moot," because this Court may retroactively apply Chapters 2002-208 to 2002-212, Laws of Florida. (Brief of Respondent at p. 27). For the above-stated reasons, retroactive application is disallowed under the *ex post facto* clause, and thus, the window period should open when Chapter 99-188 was enacted and close when it was validly re-enacted in Chapters 2002-208 to 2002-212.[2]

[2] The Respondent argues that this Court may apply its decision prospectively, as it did in *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991). *Scanlan* concerned **worker's compensation** provisions the abolition of which would have wreaked havoc on the system. This Court specifically stated in *Scanlan* that **penal** statutes found unconstitutional are void *ab initio*: "Clearly, a penal statute declared unconstitutional is **inoperative from the time of its enactment** . . . ." 582 So. 2d at 1174 (emphasis added). *Scanlan* may not be applied here.

CONCLUSION

Based upon the foregoing, the defendant requests that this Court hold chapter 99-188, Laws of Florida, unconstitutional, and quash the decision of Third District which remanded this case to the trial court for re-sentencing under that law.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 NW 14 Street
Miami, Florida 33125
(305) 545-1958

By:_____
LISA WALSH
Assistant Public Defender

_____
BILLIE JAN GOLDSTEIN
Assistant Public Defender

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to Mary G. Jolley, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, this 9th day of July, 2003.

_____
LISA WALSH
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

_____
LISA WALSH
Assistant Public Defender