IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner, Case No.: SC03-532

vs.

CEDRIC T. GREEN, L.T. Case No.: 2D02-2430

Respondent.

_____/

ANSWER BRIEF OF RESPONDENT CEDRIC T. GREEN

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STATEMENT OF THE CASE AND FACTS

Mr. Green disagrees with the commentary and argument contained in the State's Statement of Case and Facts. Accordingly, Mr. Green sets forth the relevant facts, timeline, and record citations.[1]

On July 1, 1999, chapter 99-188, Laws of Florida, purportedly became law. See Ch. 99-188, § 14, at 1081, Laws of Fla. Section 9 of that law required a sentencing court to impose a three-year mandatory minimum prison term for anyone possessing twenty-eight or more but less than 200 grams of cocaine. See Ch. 99-188, § 9, at 1057, Laws of Fla. Prior to that time, no minimum mandatory sentence applied to that offense. See § 893.135(1)(b)1.a., Fla. Stat. (1997). Section 9 of chapter 99-188 also prohibited individuals sentenced to mandatory minimums from obtaining discretionary early release. See Ch. 99-188, § 9 at 1061-62, Laws of Fla.

The State charged that, on April 6, 2000, Mr. Green possessed between twenty-eight and 200 grams of cocaine in violation of section 893.135(1)(b), a felony, and that he possessed less than twenty grams of marijuana, a misdemeanor. (A 1). Mr. Green pleaded no contest to both counts and was adjudicated guilty. (R 20). On September 27, 2000, the trial court sentenced Mr. Green to time served on the marijuana count and 42.9 months for the cocaine count, with a three-year mandatory minimum term of imprisonment. (R 21, 23-24). Mr. Green, who has

[1] References to the Record on Appeal shall be in the form, (R [page number]). References to Respondent Green's Appendix, which Mr. Green concurrently moves should be treated as part of the record, shall be in the form (A [page number]).

been in continuous custody since his arrest, received 175 days of credit towards his prison sentence. (A 9).

On January 23, 2002, the Second District Court of Appeal issued its decision in Taylor v. State, 818 So. 2d 544 (Fla. 2d DCA 2002). Taylor held that chapter 99-188 violated the single subject requirement of article III, section 6, of the Florida Constitution. The State petitioned this Court for review but subsequently dismissed its petition. See State v. Taylor, SC02-177 (Fla. order filed May 29, 2002).

In response to Taylor, the 2002 Legislature divided the substance of chapter 99-188 into five separate bills that became effective when the Governor signed them into law on April 29, 2002: chapters 2002-208, 2002-209, 2002-210, 2002-211, and 2002-212, Laws of Florida. Each of these laws contains a provision to the effect that it should be retroactively applied to July 1, 1999 -- the date chapter 99-188 was to take effect -- or as soon thereafter as the Florida and United States Constitutions permit. The portions of chapter 99-188 that directly affected Mr. Green are found in section 1 of chapter 2002-212.

On May 1, 2002, pursuant to Florida Rule of Criminal Procedure 3.850, Mr. Green, acting pro se, filed a motion in the trial court seeking relief from his sentence. (R 3). In his motion, Mr. Green contended that his sentence was illegal and that he is entitled to be resentenced under the valid laws in effect on the date of his offense. (R 9-10). The trial court denied Mr. Green's motion, ruling that the Legislature's enactment of chapters 2002-208 through 2002-212, which were to be retroactively applied, precluded Mr. Green from obtaining relief. (R 29).

On appeal, the Second District reversed the trial court and held that chapter 2002-212 could not retroactively authorize Mr. Green's three-year minimum mandatory sentence because to do so would violate the ex post facto clauses of the Florida Constitution and the United States Constitution. Green v. State, 839 So. 2d 748, 754 (Fla. 2d DCA 2003). The Second District certified conflict with the Fifth District's decisions in Hersey v. State, 831 So. 2d 679 (Fla. 5th DCA 2002), and Carlson v. State, 27 Fla. L. Weekly D2162 (Fla. 5th DCA Oct. 4, 2002), as well as probable conflict with the Fourth District's decisions in Nieves v. State, 833 So. 2d 190 (Fla. 4th DCA 2002), and Green v. State, 832 So. 2d 199 (Fla. 4th DCA 2002).

Thereafter, the State of Florida sought review in this Court of the Second District's decision. The Court has postponed its decision on jurisdiction, ordered a briefing schedule, and appointed counsel for Mr. Green. This brief is filed pursuant to the Court's order.

SUMMARY OF ARGUMENT

In Taylor v. State, 818 So. 2d 544 (Fla. 2d DCA 2002), the Second District correctly concluded that chapter 99-188, Laws of Florida, violates the Florida Constitution's single subject requirement. Twelve of the law's fourteen sections have a natural and logical connection to the subject of criminal sentencing. Consistent with this connection, the law's preamble discussed criminal sentencing in the context of violent and repeat offenders and the need to enhance the sentences for such persons. Likewise, when the 2002 Legislature responded to the decision in Taylor by enacting the provisions of chapter 99-188 as five separate bills, the Legislature itself asserted the subject of chapter 99-188 to be criminal sentencing.

Two of chapter 99-188's sections, however, have no natural or logical connection to criminal sentencing. Section 13 of chapter 99-188 expands the definition of "conveyance" in the burglary statute to include not only railroad cars but railroad vehicles or cars. This substantive expansion of a single, nonviolent criminal offense has nothing to do with sentencing, violent felonies, or repeat offenders. Also, the legislative history shows that the language found in section 13 was added to the bill in the last few days of the 1999 session, long after the law's other provisions were in place.

Section 11 also bears no natural or logical connection to criminal sentencing. That provision requires all court clerks to notify federal immigration authorities whenever an alien is found guilty or pleads nolo contendre to any offense. On its face, this administrative provision has no connection to criminal sentencing, or to violent or repeat offenders. Also, the law's legislative history confirms that this

provision was targeted, not at violent and repeat offenders (who under the law are more likely to serve longer prison sentences), but at a completely different class of persons: those under state supervision who are released from prison before federal authorities identify them as aliens or who never receive any prison sentence.

Contrary to the State's arguments, these disparate subjects may not be united by labeling chapter 99-188 a comprehensive crime bill. The law was plainly not a comprehensive bill; the Legislature itself identified the subject as criminal sentencing. In addition, the supposed connections between these sections offered by the State and accepted by the Third District in State v. Franklin, 836 So. 2d 1112 (Fla. 3d DCA 2003), are too attenuated to be natural or logical. They rely exclusively on the potential happenstance of events, not unity of a single subject.

Finally, the State's argument that sections 13 and 11 should be severed from the law is contrary to this Court's decision in Heggs v. State, 759 So. 2d 620 (Fla. 2000), which soundly rejected the notion that multi-subject laws in which all subjects are properly noticed in the title can be severed. The State offers no basis to overrule Heggs, which remains the law of Florida, and none exists.

The Second District in the decision under review, Green v. State, 839 So. 2d 748 (Fla. 2d DCA 2003), also correctly determined that the federal and state prohibitions on ex post facto laws prohibit chapter 2002-212 from being applied retroactively to impose a minimum mandatory sentence on Mr. Green for his April 2000 conduct. The sole authority relied upon to support retroactivity, Dobbert v. Florida, 432 U.S. 282 (1977), is inapposite here for three reasons.

First, Dobbert permitted retroactive application of a capital sentencing law in part because, through the "operative fact" of a prior law in effect at the time he committed his offense, the defendant in that case had "fair warning" of the punishment the Legislature intended to seek for his crime. No such "fair warning" exists here, as this Court's case law makes plain that a law in contravention of the single subject requirement cannot be said to the product of the necessary majority of legislators. Thus, chapter 99-188 was never "operative," and it provided neither Mr. Green nor anyone else "fair warning" of the Legislature's will.

Second, Dobbert concerned a series of procedural changes in how the death penalty was assessed in Florida. The Supreme Court in that case emphasized that the Legislature made no change to the elements of the crime at issue (first degree murder) or the punishment for that crime. That is not the case here.

Finally, Dobbert is inapplicable here because it need not control this Court's interpretation of Florida's constitutional prohibition on ex post facto laws. In the case of a single subject violation -- a violation that has no federal counterpart -- this Court should read article I, section 10, of the Florida Constitution to prohibit the Legislature from "reenacting" a prior penal law, invalid under the single subject requirement, and making the new, substantive penal enactment retroactive to the effective date of the defective law. The Legislature should not find itself in a better position for having enacted a prior law in violation of the single subject

rule than had the Legislature enacted no such prior law at all, especially in the case of criminal laws.

STANDARD OF REVIEW

The matters addressed in this review are solely issues of law. Accordingly, the Court reviews these issues de novo. Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000).

ARGUMENT

I. CHAPTER 99-188, LAWS OF FLORIDA, VIOLATES THE FLORIDA CONSTITUTION'S SINGLE SUBJECT REQUIREMENT.

The Second District's decision in this matter concerned only the constitutionality of retroactively applying chapter 2002-212, Laws of Florida. Nonetheless, the State begins its argument in its Initial Brief by challenging the decision that prompted the Legislature's retroactive enactments, Taylor v. State, 818 So. 2d 544 (Fla. 2d DCA), rev. dismissed, 821 So. 2d 305 (Fla. 2002). Citing the Third District's subsequent decision in State v. Franklin, 836 So. 2d 1112 (Fla. 3d DCA 2003), the State contends that Taylor erred in holding that chapter 99-188 violates the Florida Constitution's single subject requirement. The State further contends that Mr. Green lacks standing to assert the law's unconstitutionality. Finally, the State contends that the law's sections reflecting alternative subjects should be severed, leaving the section affecting Mr. Green intact.

The Court need address none of these points, because they were not passed upon by the Second District in its decision. E.g., Metropolitan Dade County v. Chase Fed. Hous. Corp., 737 So. 2d 494, 499 n.7 (Fla. 1999) (holding an issue not raised before the trial or district court not to be preserved). Further, the State voluntarily dismissed its appeal of the decision in Taylor, making reconsideration of

that decision especially inequitable, particularly in a subsequent case arising from the Second District, which has been applying Taylor since early 2002. Nonetheless, because the single subject issues raised by the State are also the subject of other cases now pending in this Court, Mr. Green will address -- and dispose of -- the State's contentions on their merits.

A. CHAPTER 99-188 PERTAINS TO MORE THAN A SINGLE SUBJECT AND IS THUS UNCONSTITUTIONAL.

Article III, section 6, of the Florida Constitution provides that "[e]very law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." This provision prohibits "a plurality of subjects in a single legislative act . . . ." E.g., State v. Johnson, 616 So. 2d 1, 4 (Fla. 1993); Martinez v. Martinez, 582 So. 2d 1167, 1172 (Fla. 1991). Chapter 99-188 contravenes this prohibition and is accordingly unconstitutional.

In addressing single subject challenges to enacted legislation, this Court has repeatedly held that an act may be as broad as the Legislature chooses, so long as the matters included in the act have a natural or logical connection. Florida Dep't of Highway Safety and Motor Vehicles v. Critchfield, 842 So. 2d 782, 785 (Fla. 2003); Johnson, 616 So. 2d at 4; Martinez, 582 So. 2d at 1172. The primary purpose of the single subject requirement is to prevent "logrolling," where a single enactment cloaks dissimilar legislation having no necessary or appropriate connection. Critchfield, 842 So. 2d 782, 785 (Fla. 2003); Johnson, 616 So. 2d at 4; Scanlan, 582 So. 2d at 1172.

This Court has declared legislative acts in violation of the single subject rule

on numerous occasions. For instance, in Johnson, this Court held unconstitutional a law regarding habitual offenders and licensing private investigators because no natural or logical connection existed between the two subjects. In State v. Thompson, 750 So. 2d 643 (Fla. 1999), the Court held unconstitutional a law that concerned the disparate and unconnected subjects of domestic violence and career criminals. Most recently, in Critchfield, the Court held unconstitutional a law concerning motor vehicle licenses and registrations that also included a section on private debt collections for worthless checks.

Chapter 99-188 shares the same defect as the laws found unconstitutional in these cases: no single subject unites all of the law's disparate provisions. Although some of the provisions are related, others have nothing to do with them. The law's provisions are as follows, with two sections that are dissimilar from the remainder in bold:

Section 1: identifies the law as the "Three Strikes Violent Felony Offender Act"

Section 2: expands the definition of "prison release reoffender" in section 775.082, a sentencing statute

Section 3: amends section 775.084 to define a "three-time violent felony offender" and imposes a minimum mandatory sentence for such persons

Section 4: amends section 784.07 to provide a three-year minimum mandatory sentence for aggravated battery of a law enforcement officer

Section 5: amends section 784.08 to provide a three-year minimum mandatory sentence for aggravated assault on a person 65 years or older and for aggravated battery on a person 65 years or older

Section 6: amends references to section 775.084 found in section 790.235,

in conformity with section 3

Section 7: creates section 794.0115, which defines "repeat sexual batterer" and creates a mandatory minimum sentence for such persons

Section 8: amends section 794.011, wherein the crime "sexual battery" is defined, to reference punishment for that offense in conformity with the new statute created by section 7

Section 9: amends section 893.135, which criminalizes trafficking in certain drugs, to expand the definitions of certain trafficking offenses and provide a minimum mandatory sentence for certain trafficking offenses

Section 10: amends various statutes to incorporate references to section 893.135, as amended by section 9

Section 11: amends section 943.0535 to require clerks of court to transmit to the appropriate United States immigration officer records pertaining to aliens who are convicted or who enter a plea to any crime

Section 12: requires the Governor to publicize the penalties contained in the act

Section 13: amends section 810.011 to expand the definition of "conveyance," as used to define burglary, to include a "railroad vehicle or car," the statute previously referencing a "railroad car"

Section 14: provides an effective date for the act of July 1, 1999

See Ch. 99-188, Laws of Fla.

The preamble to chapter 99-188 contains a lengthy recitation regarding the Legislature's basis for enacting the law. See id. at 1038-40. The preamble declares that, in 1996, Florida had the highest violent crime rate of any state and that eleven other states had higher incarceration rates. See id. at 1038. The preamble further details the number of violent crimes since 1988, the increase in per capita violent crime over the preceding twenty-five years, and the number of violent felons during

1996-1997 who were not sentenced to the maximum authorized sentence. See id. at 1038-39. It states that in 1997 more violent felons were on probation or similar prison alternatives than were in prison, and that the general prison population had grown twice as fast as the violent offender prison population. See id. at 1039.

The preamble concludes by noting, among other things, that violent career criminals should be incarcerated for extended terms with substantial minimum terms, that persons who commit three violent felonies should receive mandatory maximum sentences, that the adoption of "three strikes" legislation in California has been followed by significant reductions in crime in that state, and that imposing mandatory prison terms on three-time violent offenders will improve public safety, prevent such persons from committing more crimes, and accelerate declines in the violent crime rate. See id. at 1039-40.

As the Second District observed in Taylor, the law's preamble focuses on the need for enhanced criminal sentencing, as does the name given the law in the first section. 818 So. 2d at 548-49. Further, and as the Second District there concluded, every section of the law is naturally and logically related to criminal sentencing, with two exceptions: section 11 and section 13. Id. Those sections bear no natural or logical connection to the remainder of the law. As a result, chapter 99-188 violates the single subject requirement of Article III, section 6.

Section 13 -- Expanding Conveyance to Include "Railroad Vehicles"

Section 13 expands the crime of burglary as it applies to railroad cars to include railroad vehicles. See Ch. 99-188, § 13, at 1081, Laws of Fla. This substantive expansion of a single, nonviolent criminal offense has no natural or logical relationship to criminal sentencing. Nor does this expansion have any such relationship to violent felonies or repeat offenders, the concerns discussed at length in the law's preamble and addressed by every section in the law other than sections 11 and 13.

Notably, the language found in section 13 was not added to the bill that became chapter 99-188 until late in the 1999 legislative session, long after the original bill had been proposed. The House had already passed a committee substitute bill to become the "Three Strikes Violent Felony Offender Act," which contained every provision now found in the law except section 13, see Fla. H.R. Jour. 1128-29 (Reg. Sess. 1999), when, with three days remaining in the 1999 session, the Senate added the railroad burglary section via a strike everything amendment. See Fla. S. Jour. 1276, 1290, 1292 (Reg. Sess. 1999). The House and Senate passed the bill, with the amended language, on the last day of the 1999 session. See Fla. S. Jour. 1964-65 (Reg. Sess. 1999); Fla. H.R. Jour. 1911-12 (Reg. Sess. 1999).

This procedural background confirms what the text of section 13 suggests: that expanding the definition of conveyance in the burglary statute to include "railroad vehicles" had no natural or logical connection to the law's other sections. The language was not included in any of the prior versions of the bill, which from

the start was aimed at violent felons and repeat offenders. Nor does section 13 offer any textual connection to violent felony or repeat offenders, or, more significantly to sentencing, which is the subject of the bill. Indeed, by all appearances, the only connection between section 13 and the remainder of the bill is that both deal with crime.

Crime, however, in the absence of reasonable indicators to suggest an omnibus effort to address that subject, is a constitutionally insufficient connection for these provisions. See, e.g., State v. Thompson, 750 So. 2d 643 (Fla. 1999) (holding that a law addressing career criminals and domestic violence was constitutionally invalid because those were separate subjects, though both dealt with crime). Here, not only did the Legislature not provide any reasonable indicators of an omnibus effort, but the Legislature affirmatively and expressly declared that its intent was to address sentencing for violent felons and repeat offenders, a far more narrow scope than "crime."

More recently, and perhaps most similarly, the Court concluded that the "Law Enforcement Protection Act" violated the single subject requirement because the act not only enhanced the penalties associated with crimes against law enforcement officers but it also enhanced the penalties associated with the general crime of first degree murder. Tormey v. Moore, 824 So. 2d 137 (Fla. 2002). This Court in Tormey held that the Legislature, having selected the "true subject" of the act to be enhanced penalties for persons who commit crimes against law enforcement personnel, could not include in the same act a provision prohibiting an award of provision credits to any person who committed or attempted any murder.

The same result should follow here. Having expressly identified a problem with the sentencing of violent felony and repeat offenders, and having expressly set forth to address that problem, the Legislature could not then include in the Three Strikes Violent Felony Offender Act a provision expanding the nonviolent, single offense of burglary to include not only "railroad cars" but "railroad vehicles and cars." The two subjects simply have no natural or logical connection.

The State defends the law's constitutionality with respect to section 13 by relying upon the Third District's reasoning in Franklin. According to the State, section 13 has a natural and logical connection to the remainder of the law because a person committing a burglary may be armed, and thus may commit a crime -- armed burglary -- that might be counted as one offense towards a finding that the person is a habitual offender under the Habitual Felony Offender Act. Pet. Br., at 16. The Second District considered this argument in Taylor and concluded that the purported relationship between the expanded definition of conveyance and the repeat offender portion of the Three Strikes Violent Felony Offender Act was "so tenuous, so dependent on the happenstance of individual cases, that it simply cannot be characterized as natural or logical." 818 So. 2d at 549.

The Second District was correct. As in Tormey, where it was insufficient that a person might murder a law enforcement officer and thus a connection might exist between eliminating gain time for first degree murder and enhancing penalties associated with crimes against law enforcement officers, the abstract and uncertain connection offered by the State in this case is neither natural nor logical.

This Court's recent decision in Critchfield is also instructive in this regard.

There, the Court held unconstitutional a law that addressed motor vehicle licenses and registrations together with private debt collections for worthless checks. The State argued that some convergence existed between the two subjects: one of the law's sections relating to licenses provided that failure to appear before a court in connection with a prosecution for passing a worthless check would result in a license suspension, while another section of the law authorizing private debt collections provided a means for persons to collect worthless checks prior to public prosecution proceedings; if the recipient of a worthless check chose to invoke the private collection procedure, this could avoid a prosecution and the chance that the check passer's license would be revoked for not appearing in court. The Court held that no logical or natural connection existed between these disparate subjects.

In this case, the attenuated nature of the two subjects at issue is even greater than in Critchfield. Under the law at issue there, all private collection efforts would forestall or eliminate prosecutions for passing worthless checks, and thus would forestall or eliminate the possibility a person will have his or her license suspended for failing to appear in such a prosecution. Here, however, not all burglaries of railroad vehicles can result in enhanced sentencing for violent, repeat offenses -- only armed burglaries of railroad vehicles can do so, and then only in situations where other qualifying offenses exist as well.

The State also argues that chapter 99-188 is a "comprehensive law," relying on this Court's decision in Burch v. State, 558 So. 2d 1 (Fla. 1990), to suggest that disparate provisions contained in comprehensive laws can be constitutionally

aggregated. In Burch, the Court concluded that seemingly disparate subjects contained in chapter 87-243 related to the single subject, expressly recognized in the law's preamble, of addressing a general crisis resulting from a rapidly increasing crime rate. As shown above, however, the preamble to chapter 99-188 does not identify a general crisis related to crime. Nor can such be inferred, because the preamble here expressly identifies the particular problem of high violent felony rates and low incarceration rates for violent felony and repeat offenders, and the law then attempts to address that specific problem through a tougher sentencing scheme. In short, chapter 99-188 was not an omnibus crime bill. See also Heggs v. State, 759 So. 2d 620, 626-27 (Fla. 2000) (distinguishing laws the Legislature intended to be comprehensive laws from a law with a specific, more narrow focus).

Likewise, the State is incorrect when it refers to the supposed single subject of chapter 99-188 as the two-pronged "reduction of crime and the imprisonment of repeat offenders." Pet. Br., at 20. This characterization ignores the Legislature's express statements regarding high violent felony rates and low incarceration rates for violent felony and repeat offenders, as well as the Legislature's stated aim to address that problem through a tougher sentencing scheme. See Ch. 99-188, at 1038-40, Laws of Fla. As shown above, chapter 99-188 was not an omnibus crime bill designed to reduce crime. It was a sentencing law largely aimed at enhancing the punishments given violent felony and repeat offenders. Indeed, when the Legislature enacted chapter 99-188's provisions in five separate laws following the Second District's decision in Taylor, the Legislature stated in each law that it had "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 . . . ." Chs. 2002-208, at 1426; 2002-209, at 1428; 2002-210, at 1432; 2002-211, at 1444; and 2002-212, at 1454, Laws of Fla.

As the Second District correctly recognized, there is no natural or logical connection between (1) the sentencing-related provisions of the Three Strikes Violent Felony Offender Act and (2) the amendment to the burglary statute regarding railroad vehicles. Including section 13 in chapter 99-188 accordingly rendered that law unconstitutional under the single subject requirement.

Section 11 - Requiring Clerks to Report Aliens to the United States

Chapter 99-188 contains a second provision that is disconnected from the remainder of the law. The inclusion of section 11 in the Three Strikes Violent Felony Offender Act also resulted in an unconstitutional multiplicity of subjects and rendered that act invalid under the single subject requirement.

Section 11 requires Florida's clerks of court to notify United States immigration officials whenever an alien is convicted of a crime or pleads no contest to a criminal charge in Florida. See Ch. 99-188, § 11, at 1081, Laws of Fla. The prior law had authorized clerks to make such notifications only in the case of convictions, and then only at the request of federal immigration officials. As the Second District explained in Taylor, this provision is purely administrative. It has no connection to violent felonies, repeat offenses, or the sentencing enhancements created by the other portions of the Three Strikes Violent Felony Offender Act.

The State argues, again relying on the Third District's decision in Franklin, that section 11 is "reasonably related to the Legislature's purpose of protecting the

public for the class of criminals identified in the Act." Pet. Br., at 14. The State reads the act's legislative history to suggest "the importance of federal immigration authorities being able to identify criminal aliens in our state prison system," and the State also claims that the original House bill that ultimately became chapter 99-188 was "corrected" to include section 11. Pet. Br., at 15. The State is wrong on all counts.

First, this is an administrative provision, not a sentencing provision. It applies to all persons who are found guilty of or who plead no contest to any crime, whether felony or misdemeanor, violent or nonviolent, first offense or fiftieth, and whether sentenced or not. The only possible connection to violent felons or habitual offenders would be one of happenstance, not purpose.

Moreover, the legislative history of chapter 99-188 discusses the section and demonstrates how this provision has nothing whatsoever to do with the supposed "class of criminals" identified in the law. The February 24, 1999 report of the House's Committee on Corrections included a detailed analysis of the bill as it then existed, including the amendment proposed by the committee to add the language that ultimately became section 11. The committee's analysis stated that the federal Immigration and Naturalization Services (INS) had been working with Florida's Department of Corrections (DOC), pursuant to a memorandum of understanding, to identify undocumented aliens in DOC or county correctional facility custody. See Fla. H.R. Comm. on Corrections, CS/HB 121 (1999) Staff Analysis 7-8 (rev. Feb. 24, 1999). The analysis further stated that no data existed with regard to "the number of aliens on DOC community supervision (probation, community control,

or post-prison release)," though, the analysis pointed out, in November 1998 there were 145,979 offenders on community supervision alone. Id.

Thus, the purpose of the amendment was not -- as the State and the Third District have stated -- merely to eliminate the need for federal authorities to request information on aliens. Rather, the purpose of the amendment was to require state officials to begin collecting information that had never before been collected -- information that would allow INS to identify undocumented aliens regardless of whether those persons were still in DOC or county custody; indeed, regardless of whether those persons had ever been in jail or prison at all.

Considering that the express purpose of the Three Strike Violent Felony Offender Act was to minimize, if not eliminate, the ability of violent felony and repeat offenders to avoid prison time for their offenses, it is manifest that section 11 was aimed not at the "class of criminals" targeted by that act but at an entirely different class of persons: criminals who never received prison or jail time or who have been released but remain under DOC supervision.

Even at first blush, common sense suggests that the policy considerations that underlie a "three strikes" sentencing law such as chapter 99-188 are vastly different from the policy considerations that underlie a law aimed at encouraging deportation of undocumented aliens convicted of, or who plead no contest to, any criminal offense. The Corrections Committee analysis confirms that the Legislature included section 11 in chapter 99-188 to serve a purpose fully distinct from that served by the remainder of the Three Strikes Violent Felony Offender Act. Thus, the inclusion of section 11 in the law rendered the act unconstitutional. See, e.g.,

Bunnell v. State, 453 So. 2d 808 (Fla. 1984) (finding a single subject violation where "the object of section 1 is separate and disassociated from the object of sections 2 and 3").

B. MR. GREEN IS AFFECTED BY CHAPTER 99-188 AND HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE LAW.

The State next contends that Mr. Green lacks standing to challenge chapter 99-188 on single subject grounds, asserting he is not specifically affected by sections 11 and 13. The State's standing analysis is fundamentally incorrect.

As an initial matter, Mr. Green is affected by sections 11 and 13. No less than the remaining provisions, sections 11 and 13 contribute to a multiplicity of subjects within chapter 99-188. This multiplicity of subjects renders the law -- the entire law -- in violation of the single subject requirement of Article III, section 6. So long as Mr. Green is affected by any provision of the law, he has standing to challenge the constitutionality of chapter 99-188.

Furthermore, this Court held in Heggs v. State, 759 So. 2d 620, 628 (Fla. 2000), that where an act embraces more than a single subject, the entire act is void. Mr. Green has thus been sentenced, and his release time has been computed, pursuant to a void law. Under these circumstances, Mr. Green necessarily has standing to challenge the constitutionality of the law upon which his sentence is predicated.

C. THE COURT SHOULD DECLINE TO OVERRULE ITS PRIOR DECISION NOT TO ATTEMPT TO SEVER LAWS WITH MULTIPLE SUBJECTS.

The State's final argument regarding the constitutional invalidity of chapter

99-188 is that the Court should sever sections 11 and 13 of the law if doing so would eliminate an unconstitutional multiplicity of subjects. The Court has previously rejected such a severability argument, which is incompatible with this Court's longstanding precedent regarding the significance of a violation of the single subject requirement. The Court should adhere to that precedent.

In Heggs v. State, 759 So. 2d 620 (Fla. 2000), this Court determined that a law violated the single subject requirement where it contained numerous criminal provisions as well as civil provisions dealing with remedies for victims of domestic violence. The State asserted that the civil provisions should be severed, leaving the balance of the law intact, but the Court rejected that assertion. The Court held that the doctrine of severability is potentially applicable to single subject violations only in limited circumstances, such as appropriations bills and where a bill contains two subjects but the title reflects only one of them. Heggs expressly held that where a general law contains more than one subject, all of which are reflected in the title, the law is void in its entirety and cannot be severed. 759 So. 2d at 629.

Heggs relied in this regard upon a series of cases from the 1930s, beginning with Colonial Investment Co. v. Nolan, 131 So. 178 (1930). In Nolan, the Court held a law violating the single subject requirement is entirely invalid. Since that decision, numerous cases decided by this Court likewise confirm that statutes unlawfully enacted, as where a single subject violation exists, are entirely void. See B.H. v. State, 645 So. 2d 987, 995 (Fla. 1994); McCormick v. Bounetheau, 190 So. 882, 883-84 (Fla. 1939); City of Winter Haven v. A.M. Klemm & Son, 181 So. 153, 165-66 (1938); Messer v. Jackson, 171 So. 660, 662 (Fla. 1936); Sawyer v.

State, 132 So. 188, 192 (Fla. 1931); Ex parte Winn, 130 So. 621, 621 (Fla. 1930).

This Court in Heggs also rejected a "beyond a reasonable doubt" standard for severing a multi-subject law, instead finding persuasive the notion that a court cannot determine which portion of a multi-subject act, properly titled, is the defective portion. See 759 So. 2d at 630 n.8. In this regard, Heggs also observed that severing a multi-subject act is inconsistent with a basic theoretical underpinning of the single subject requirement: the requirement presumes that a multi-subject law has been produced by aggregating minorities in favor of each subject to create an artificial majority. Severance, on the other hand, presupposes that a legislative majority would nonetheless have enacted the surviving portion and that the Governor would have signed that stand-alone law or otherwise allowed it to become law. Heggs acknowledged that to permit severance of multi-subject laws, where all subjects are properly notices in the title, would compromise the single subject requirement's very foundation.

The State offers the Court no basis to depart from the conclusions reached just three years ago in Heggs, derived from this Court's earlier precedent. Indeed, the State completely ignores Heggs and the numerous other authorities listed above, citing instead this Court's decision in Tormey v. Moore, 824 So. 2d 137 (Fla. 2002). Tormey, however, in no way receded from Heggs and does not support the State's position in this case.

In Tormey, the Court severed a law that contained multiple subjects, only one of which was referenced in the law's title. The State overlooks that Tormey is wholly consistent with Heggs, which expressly held that severance may occur

under such circumstances. 759 So. 2d at 629. Indeed, Tormey cited Heggs as authority. See 824 So. 2d at 140. Thus, Tormey did not overrule the general rule against severance and is simply inapposite here.

This Court adheres to the doctrine of stare decisis and will only overrule its prior precedent if there was an error in legal analysis or change in circumstances. See Puryear v. State, 810 So. 2d 901, 904-905 (Fla. 2002). Here, the State has made no argument, let alone demonstrated, that Heggs or its predecessors contained an error in legal analysis or that circumstances have in some material way changed. There is nothing "new" about single subject jurisprudence or the manner in which the Legislature passes laws. As such, this Court should adhere to stare decisis and follow Heggs.

A panoply of problems would follow if this Court were to accept the State's invitation and allow courts to perform a severability analysis whenever a single subject challenge is present. Most notable are separation of powers problems. At its essence, severance requires that a court determine whether a bona fide majority of legislators would have approved a law containing only one of a law's multiple subjects. Such divination into the minds of legislators is not the role of the judicial branch. Indeed, voting to determine whether a given piece of legislation will pass in the Legislature is a power that the Constitution textually commits to the Legislature, not this Court. See art. III, § 1, Fla. Const. ("The legislative power of the state shall be vested in a legislature of the State of Florida[.]). Rejecting a severability analysis where a law simply combines two or more subjects avoids replacing a legislative vote with a judicial one.

Rejecting a severability analysis also avoids the evidentiary problems that would arise in any effort to determine how legislators would have voted on a law other than the law they passed. Typical legislative history, such as staff analyses and committee reports, generally speaks to the purpose or intent behind all or part of a proposed law, not whether individual legislators support one provision or another or some combination of provisions. Some other source, then, would have to supply the evidence necessary for the courts to reach a conclusion regarding severability.[2]

Would the Court consider the testimony of the legislators themselves, assuming a legislator would speak voluntarily -- or that a court could so compel -- to explain his or her likely vote on a bill that did not pass and, standing alone, may never have even existed? Would the Court view legislators' contemporaneous public statements of support as binding? Private statements of intent? The contemporaneous views of media, such as editorial boards? Moreover, how would a court evaluate the credibility of these statements? What if the statements were inconsistent?

Ultimately, determining whether a Legislature that passed a law containing numerous subjects would have passed a law containing only one of them is no more than an exercise in political speculation. Inevitably, such speculation would

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[2] Unlike the record of the United States Congress, which courts often cite to demonstrate the intentions of individual members of Congress, the journals of the houses of the Florida Legislature in most instances do not contain transcripts of floor debates or supporting statements and materials. The journals here do not contain transcripts or supporting statements and materials.

be undertaken in every instance where a person raises a single subject challenge to a law. As in Heggs, this Court should continue to decline to embroil the judiciary in such matters. The Court should affirm its longstanding case law on this point and reject the State's severability argument.

II. RETROACTIVE APPLICATION OF CHAPTER 2002-212 TO OFFENSES OCCURRING PRIOR TO APRIL 29, 2002, VIOLATES THE EX POST FACTO CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

Having demonstrated that chapter 99-188 is constitutionally invalid, the question remains whether chapter 2002-212 may be retroactively applied to enhance the penalties imposed upon Mr. Green and others who committed offenses prior to April 29, 2002. As shown below, the Second District in Green correctly concluded that retroactive application of chapter 2002-212 to Mr. Green and those similarly situated violates the ex post facto prohibitions found in both the United States Constitution and the Florida Constitution. See art. I, § 10, U.S. Const; art. I, § 10, Fla. Const.

For more than two hundred years, the United States Supreme Court has consistently defined the scope of the federal constitution's prohibition on ex post facto laws. See, e.g., Stogner v. California, 2003 WL 21467073, *3-4 (U.S. June 26, 2003), Calder v. Bull, 3 U.S. (3 Dall.) 386, 390-91 (1798). As explained by that court, the Ex Post Facto Clause proscribes four types of legislative action:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and

> receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

Stogner, at *4 (quoting Calder, 3 U.S. at 390-91) (emphasis altered from original and quoted material). The test for whether a law violates the Ex Post Facto Clause contains two simple elements: (1) "the law 'must be retrospective, that is, it must apply to events occurring before its enactment;'" and (2) "the law 'must disadvantage the offender affected by it.'" Miller v. Florida, 482 U.S. 423, 430 (1987) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)).

Here, both critical elements are present. By its text, section 4 of chapter 2002-212 may apply to conduct occurring prior to April 29, 2002, the date the law became effective, by providing that "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." Ch. 2002-212, § 4, at 1499, Laws of Fla. In Mr. Green's case, the law can only be applied retroactively: Mr. Green committed his offense in April 2000 and was sentenced in September 2000, long before chapter 2002-212 was enacted.

Further, chapter 2002-212 enhances the punishment applicable to Mr. Green's actions. Section 1 of chapter 2002-212 requires that those who violate section 893.135(1)(b)1.a. be given a mandatory three-year minimum sentence. See Ch. 2002-212, § 1, at 1455, Laws of Fla. At the time of Mr. Green's offense, section 893.135(1)(b)1.a., Florida Statutes (1997) (effective October 1, 1998, see ch. 97-194, § 13, Laws of Fla.) -- the governing statute for Mr. Green's offense in the light of chapter 99-188's unconstitutionality -- did not authorize any mandatory

minimum sentence.

Chapter 2002-212 also eliminates Mr. Green's ability to receive a discretionary early release. See Ch. 2002-212, § 1, at 1460, Laws of Fla. (codified at § 893.135(3), Fla. Stat. (2002)) (providing that anyone sentenced to mandatory minimum for violating section 893.135 is ineligible for any form of discretionary early release during such term). At the time of Mr. Green's offense, section 893.135(3), Florida Statutes (1997) -- also the operative statute because of chapter 99-188's unconstitutionality -- did not prohibit the award of discretionary early release credit.[3]

The State contends that giving retroactive effect to chapter 2002-212 does not violate the constitutional restrictions against ex post facto laws. Echoing the decision of the Fifth District in Carlson v. State, 27 Fla. L. Weekly D2162 (Fla. 5th DCA Oct. 4, 2002), the State asserts that retroactive application of chapter 2002-

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[3] To the extent the State argues that Mr. Green has no standing because his sentence under the Criminal Punishment Code is greater than the mandatory minimum term, that argument is without merit because the retroactive imposition of the mandatory minimum also retroactively eliminates Mr. Green's ability for discretionary early release. A petitioner may sustain an ex post facto challenge even where there is no showing that the punishment has been increased, if there has been a loss of a chance for earlier release. See Miller v. Florida, 482 U.S. 423, 432 (1987); Lindsey v. Washington, 301 U.S. 397, 401-402 (1937). Moreover, Florida's standing requirements are more relaxed than those of the federal court. See, e.g., Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 895 (Fla. 2003).

The State cites to a Department of Corrections Internet page and asserts that Mr. Green is concurrently serving sentences in other cases. Pet. Br., at 31. No other sentence is established in the record on appeal, and the State's citation should thus not be considered by this Court. Moreover, any existence of such other sentences changes neither the constitutional violations in need of vindication here nor the fact that chapter 2002-212 prevents Mr. Green from receiving consideration for discretionary early release.

212 will present Mr. Green with no "new" harm because chapter 99-188 prescribed the same minimum mandatory sentence chapter 2002-212 now requires. The State rests its argument entirely on the United States Supreme Court's decision in Dobbert v. Florida, 432 U.S. 282 (1977).

In that case, the State of Florida charged and convicted a defendant, Dobbert, of first-degree murder. At the time Dobbert committed the murder, that crime carried a mandatory sentence of death unless the jury recommended mercy, a recommendation Dobbert did not receive. After he committed his offense, but before his sentencing, the United States Supreme Court held Georgia's death penalty scheme to be unconstitutional, see Furman v. Georgia, 408 U.S. 238 (1972), this Court relied on Furman to hold Florida's similar death penalty scheme to be unconstitutional, see Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972), and the Florida Legislature passed a new law instituting new procedures for determining whether a person convicted of a capital crime should receive capital punishment. See Ch. 72-724, at 15-22, Laws of Fla.

Specifically, the Legislature created a procedure whereby the jury would hear evidence of aggravating and mitigating factors at a separate sentencing phase proceeding and make a recommendation on the appropriate sentence. If the trial court decided to impose a death sentence, then the court was required to make written findings regarding the applicable aggravating or mitigating factors. The Supreme Court ultimately upheld the constitutionality of these procedures. See Proffitt v. Florida, 428 U.S. 242 (1976).

Dobbert argued that, under the Ex Post Facto Clause, the revived death

penalty laws should not be applicable to him because the law in effect at the time he committed his offense had been declared unconstitutional by this Court in Donaldson. The Supreme Court rejected Dobbert's arguments, holding the changes made by the Legislature were procedural changes that, in fact, benefited defendants such as Dobbert. The court also held that regardless of whether the prior law had been held unconstitutional after Dobbert committed his offense, that law's existence was an "operative fact" that gave Dobbert "fair warning" of the punishment the Legislature intended to impose on him.

For numerous reasons, and as the Second District correctly held below, Dobbert has no application to Mr. Green's case or to the cases of others affected by the retroactive application of chapter 2002-212. Each of these reasons will be discussed in turn.

A. DOBBERT IS NOT APPLICABLE BECAUSE A SENTENCING LAW THAT VIOLATES THE SINGLE SUBJECT REQUIREMENT NEVER EXISTS AS A MATTER OF "OPERATIVE FACT" AND CANNOT PROVIDE "FAIR WARNING" OF THE PUNISHMENT THE LEGISLATURE SEEKS TO IMPOSE FOR AN OFFENSE.

The State contends that chapter 99-188 was in place at the time Mr. Green committed his offense and was, therefore, an "operative fact" sufficient to trigger the application of Dobbert. The State is incorrect. As demonstrated above, chapter 99-188 was enacted in violation of Florida's single subject requirement. Consequently, the law was void ab initio. As the Second District held, the law therefore cannot be characterized as an operative fact that gave Mr. Green "fair warning" of the punishment the Legislature would impose on him for his trafficking

offense.

In Heggs v. State, 759 So. 2d 620, 628-31 (Fla. 2000), this Court relied on longstanding Florida precedent to hold that a law enacted with more than one subject, where all subjects are noticed in the title, is void in its entirety. In reaching this conclusion, the Court relied not only on a series of its earlier cases dating back seventy years but on the "cogent analysis" of a law review article summarizing the principles that underlie this result:

> Unconstitutionality, generally flows from lack of legislative power. The one subject rule is not concerned with substantive legislative power. It is aimed at log-rolling. It is assumed, without inquiring into the particular facts, that the unrelated subjects were combined in one bill in order to convert several minorities into a majority. The one- subject rule declares that this perversion of majority rule will not be tolerated. The entire act is suspect and so it must all fall. If this is the rationale for the constitutional rule and it certainly is the principal one stated by the courts, then it is manifestly unsound to employ severability to save the provisions dealing with one of the subjects. The necessary assumption that this will carry out the legislative purpose, assented to by a majority of the legislators, cannot be made.

Id. at 630 (quoting Millard H. Ruud, "No Law Shall Embrace More Than One Subject," 42 Minn. L. Rev. 389, 399 (1958)) (emphasis added).

The same principle that prevents courts from severing a properly titled, multi-subject law -- that courts cannot determine that a majority of legislators would have enacted any single subject of that law -- likewise prevents courts from determining that the invalid statute also gave citizens like Mr. Green "fair warning" of the punishment the State intended to impose for Mr. Green's trafficking offense. A law not supported by a majority of legislators is notice of nothing.

Nor is such a law's prior, valid existence an "operative fact," as that term

was used in Dobbert. Unlike here, the law at issue in Dobbert had been validly enacted by the Florida Legislature; it was only later found to violate substantive portions of the federal constitution. Here, section 99-188 was never "operative" at all. Heggs, 759 So. 2d at 629 ("[A] chapter law that violates the single subject rule contained in article III, section 6 of the Florida Constitution must be voided in its entirety should the body of such law contain more than one subject.").

Addressing this exact point, the Second District, held that it could not "fathom" how an unconstitutionally enacted law, which never had any actual effect, could serve as an operative fact under the Dobbert analysis. See Green, 839 So. 2d at 752. The Second District specifically, and correctly, identified Heggs, B.H., McCormick, City of Winter Haven, and Messer as supporting this result.

The Second District also relied on an Illinois court's decision in In re F.G., 743 N.E.2d 181 (Ill. Ct. App. 2000). There, like here, the state legislature enacted a law prescribing a certain mandatory minimum term of imprisonment, and that law was subsequently invalidated as violating the state constitution's single subject requirement. See id. at 183. There, like here, the defendant was sentenced to a mandatory minimum term prior to the law being declaring invalid. There, like here, the state legislature subsequently enacted an identical law, with no single subject deficiency, and when the defendant challenged his sentence on ex post facto principles, the state attempted to apply the new law retroactively to the defendant's sentence. See id. at 184. Finally, like here, the state relied on Dobbert and argued that the former law's existence prior to being declared unconstitutional constituted an "operative fact" that permitted retroactive application of the subsequent law.

The Illinois court rejected that argument. The court held that a law invalid under the state's single subject constitutional requirement failed to constitute an "operative fact" under Dobbert because the original law, enacted in violation of the state constitution's single subject requirement, was void ab initio. Thus, the court held, the defendant received no valid notice of the sentence the state intended to impose for the defendant's criminal acts, and Dobbert was not applicable. See 743 N.E.2d at 187. The same result should occur here.

As the Second District pointed out, this Court's decision in Martinez v. Scanlan, 582 So. 2d 1167 (Fla. 1991), is not to the contrary. There, this Court concluded that a law violated the single subject requirement by relating to both workers' compensation and international trade. At the time of the Court's decision, the Legislature had reenacted both subjects as separate laws and declared that each should be retroactively applied to the date the original law was to take effect. In determining the effective date of the Court's decision declaring the original law unconstitutional, the Court took into account numerous policy considerations and determined that the decision should be prospective only.

Martinez did not hold that laws in contravention of the single subject requirement are not void ab initio. The Court simply held that it would make its decision effective prospectively and not from the date of the law's enactment, a decision that can be attributed to the rather unique situation of addressing a multi-subject civil law that had been subsequently separated and retroactively enacted. Though the Court stated it was not "explicitly" ruling on the retroactivity provisions, those provisions plainly prompted the Court's policy decision. In all

events, Martinez has no bearing here because not only did the Court state that it was not addressing the subject of criminal laws bearing multiple subjects, the Court expressly stated that, "[c]learly, a penal statute declared unconstitutional is inoperative from the time of its enactment, not only and simply from the time of the court's decision." Id. at 1174 (emphasis added).

In sum, as the Second District concluded, a law enacted in violation of Florida's single subject requirement could not constitute an "operative fact" that gave the public, and specifically Mr. Green, "fair warning" of the Legislature's desire to impose a three-year minimum mandatory sentence for the offense Mr. Green committed. Accordingly, Dobbert has no application in this case, and retroactive application of chapter 2002-212 to Mr. Green's sentence violates the federal and state constitutions' ex post facto prohibitions.

B. DOBBERT IS ALSO INAPPLICABLE BECAUSE IT ADDRESSED PROCEDURAL, NOT SUBSTANTIVE, CHANGES IN THE LAW.

In addition to the foregoing, Dobbert is inapplicable to this case for a second and independent basis. As discussed above, this Court in Donaldson declared Florida's death penalty unconstitutional based not on a problem with the Legislature's ability to select death as a punishment for a crime but on concerns that the procedure for imposing that penalty fell short of the Supreme Court's teachings in Furman. The corrective action taken by the Legislature resolved those concerns by implementing new procedures to ensure fairness to capital defendants, and the Supreme Court ultimately approved those procedures in Proffitt. Dobbert cannot properly be read without considering that the case involved no changes

whatsoever to the elements of the offense at issue or to the gravaman of the applicable punishment. That is not the case here.

The Supreme Court in Dobbert took great effort to explain that Florida's new sentencing statute did not create a new punishment; rather, it merely amended the methods for the application of the death sentence, which methods gave greater protections to defendants. See 432 U.S. at 292 ("We conclude that the changes in the law are procedural, and on the whole ameliorative"), at 293-94 ("In the case at hand, the change in the statute was clearly procedural."), at 294 ("In this case, not only was the change in the law procedural, it was ameliorative."), and at 296 ("Hence, viewing the totality of the procedural changes wrought by the new statute . . . ."). The word "procedural" or some derivation thereof was used at least twenty-two times in the majority opinion.

The Supreme Court's unanimous decision in Miller confirmed that Dobbert applied to a unique situation -- where there was a procedural change to a procedurally deficient law. In Miller, the Supreme Court repeatedly explained that Dobbert was decided in the context of a procedural change. See Miller, 482 U.S. at 431-35. In the decision's concluding paragraphs, the court remarked:

> Thus, this is not a case where we can conclude, as we did in Dobbert, that the crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.

Miller, 482 U.S. at 435 (internal quotations and citations omitted) (emphasis added).

Thus, as the Supreme Court made clear in Dobbert and confirmed in Miller,

the substantive and long-standing punishment of death for first degree murder survived Furman and Donaldson, but not the procedures used to impose such a sentence. Dobbert permitted the Florida Legislature to correct those procedures without running afoul of the federal Ex Post Facto Clause. To be sure, though, had the Legislature attempted to increase the punishment for first degree murder retroactively, such action would have constituted an ex post facto violation. See Dobbert, 432 U.S. at 299, quoting Lindsey v. Washington, 301 U.S. 397, 400-401 (1937) ("The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer.").

The situation in this case is not comparable to that in Dobbert. Whereas the punishment of death was never declared unconstitutional in Furman or Donaldson, here the very punishment required by chapter 99-188 for crimes such as Green's offense has been declared unconstitutional because the law creating that punishment was never validly enacted by the Legislature. It follows, then, that the "correction" subsequently made by the Legislature in actuality constituted the first time the Legislature substantively imposed the increased punishments under which Mr. Green suffers. It cannot be said, like in Dobbert, that chapter 2002-212 is procedural -- it is not.

There can be no dispute that the three-year mandatory minimum term of imprisonment and corresponding prohibition on discretionary early release make the punishment for Green's crime more burdensome than it would otherwise be. Accordingly, and pursuant to Miller's clear language, Dobbert is inapplicable to this

case, and retroactive application of chapter 2002-212 to Mr. Green violates the constitutional proscriptions against ex post facto laws. This is precisely the point Judge Casanueva made in his concurrence below. Green, 839 So. 2d at 756 ("[T]he rationale of Miller, Weaver, and Calder compel the conclusion that chapter 02-212 renders Mr. Green's punishment more onerous in violation of the Ex Post Facto Clause of United States Constitution[.]") (Casanueva, J., concurring).

The Illinois decision in In re F.G. also supports this point. The F.G. court analyzed Dobbert and distinguished the case on the ground that Dobbert involved changes to a procedure for imposing a penalty, not the penalty. See id. at 186-87. The court explained that, in Dobbert, "the new law changing the role of the judge and jury in death penalty hearings did not change the quantum of punishment; rather, it changed only the procedure of who would impose the punishment." Id. at 187. Finding Dobbert inapplicable, the court held that the retroactive application of the minimum mandatory sentence violated the Ex Post Facto Clause.

This Court should reach the same conclusion. Retroactive application of chapter 2002-212 to Mr. Green substantively affects the punishment imposed for a crime that predates the law's enactment. Such retroactive legislation violates the ex post facto provisions of the United States and Florida Constitutions.

C. FLORIDA'S EX POST FACTO CLAUSE SEPARATELY PRECLUDES RETROACTIVE APPLICATION OF CHAPTER 2002-212.

Separate from any consideration of Dobbert and the federal Constitution's Ex Post Facto Clause, this Court should hold that the Florida Constitution's prohibition against ex post facto laws precludes retroactive application of chapter

2002-212. Without this holding, the single subject provision would be meaningless in the face of retroactive penal legislation.

As this Court has discussed numerous times, the fundamental rights contained in the Declaration of Rights are designed to protect Florida citizens' from proscribed government action. See, e.g., Traylor v. State, 596 So. 2d 957, 963-64 (Fla. 1992) (discussing, in the criminal law context, several of the rights secured by the Declaration of Rights). This Court has also explained that the individual rights reserved in the Declaration of Rights can be more expansive than those provided by United States Constitution:

> State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law--for without it, the full realization of our liberties cannot be guaranteed.

In re T.W., 551 So. 2d 1186, 1191 (Fla. 1989).

This case is well-suited to disposition under the Florida Constitution because the interaction of the single subject and ex post facto provisions is uniquely a Florida issue, not a federal issue. The federal constitution contains no counterpart to the single subject requirement found in Article III, section 6, of the Florida Constitution.

Plainly, Florida's single subject requirement prohibits laws with unrelated provisions. The efficacy of this requirement is greatly undermined if, at any time in the future, the Legislature, perhaps differently constituted, can "correct" a single subject violation in a penal law, and avoid Florida's ex post facto prohibition, by

enacting portions of a deficient penal law as a new law, retroactive to the deficient law's effective date. Indeed, permitting such actions would have the exact opposite effect of the single subject requirement: it would encourage logrolling. Legislators would simply hope that unpopular pieces of legislation cloaked with popular ones, if discovered, will at some later point be retroactively "reenacted," making them fully effective from the time of the original, though constitutionally flawed, enactment.

Simply put, where the Legislature wishes to enact retroactive legislation, the Legislature should not find itself in a better position for having previously approved the same provisions in a law that contravenes the single subject requirement than had the Legislature never enacted any law on the matter. This is particularly true in criminal matters, where Florida's ex post facto prohibition places specific constraints on the Legislature. Yet the State argues that the Legislature is in a better position for having enacted a prior, defective "law" that unconstitutionally contained multiple subjects. The State contends that, at least until the time a court declares a law invalid under the single subject requirement, the public has "notice" of the constitutionally defective law, and this is sufficient to permit a new law to be retroactive to the effective date of the earlier, constitutionally deficient law.

Mr. Green acknowledges that in Westerheide v. State, 831 So. 2d 93, 104 (Fla. 2002), this Court commented that it "has not construed [Florida's ex post facto] provision in a manner different from its federal counterpart." For several reasons, however, that language does not preclude this Court from finding an ex post facto violation here, under the Florida Constitution, regardless of whether such

a violation is found under the federal constitution.

First, that language from Westerheide came only in a three-justice plurality opinion, not an opinion of a majority of this Court.[4] Second, unlike the language directly tying Florida's search and seizure provision to the federal interpretation of the Fourth Amendment, see art. I, § 12, Fla. Const., nothing in the Florida Constitution expressly requires that its prohibition on ex post facto laws be read in conformity with the federal constitution. Finally, the plurality opinion in Weisterheide left open the possibility that Florida's provision might be read to provide greater protection to Florida's citizens, a possibility that should be recognized in a case, as this one, that also involves an important provision of Florida's constitutional law that has no federal counterpart: the single subject requirement. The lack of an equivalent restriction in the federal constitution means that the federal courts will never need to contemplate the juxtaposition of these constitutional limitations on the Legislature's ability.

In sum, this Court recently pointed out that "[t]he Constitution is the charter of our liberties." Cook v. City of Jacksonville, 823 So. 2d 86, 94 (Fla. 2002). This Court should hold that retroactive application of chapter 2002-212 to Mr. Green, and to others similarly situated, violates the liberties secured to Florida's citizens by the single subject requirement and the ex post facto prohibition contained in the

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[4] Opinion by Justice Harding, joined by Justices Wells and Lewis. Justice Quince concurred in result only by opinion, but her separate opinion is silent on this point. See Westerheide, 831 So. 2d at 113 (Quince, J., concurring in result only with opinion). Nor is the point addressed in Justice Pariente's separate opinion, which was joined by Chief Justice Anstead and Justice Shaw. See id., 831 So. 2d at 114 (Pariente, J., concurring in part and dissenting in part).

Florida Constitution.

CONCLUSION

This Court should hold that chapter 99-188, Laws of Florida, violated the single subject requirement of article III, section 6, Florida Constitution, in that the Legislature included more than one subject in that purported "enactment." Accordingly, this Court should approve the Second District's decision in Taylor v. State, 818 So. 2d 544 (Fla. 2d DCA 2002), and disapprove State v. Franklin, 836 So. 2d 1112 (Fla. 3d DCA 2003).

Furthermore, this Court should hold that the retroactive application of chapter 2002-212 to those individuals such as Mr. Green who committed their offenses prior to April 29, 2002, violates the ex post facto provisions of both the United States and Florida Constitutions. Accordingly, this Court should approve the Second District's decision under review and disapprove Hersey v. State, 831 So. 2d 679 (Fla. 5th DCA 2002), Carlson v. State, 27 Fla. L. Weekly D2162 (Fla. 5th DCA Oct. 4, 2002), and Nieves v. State, 833 So. 2d 190 (Fla. 4th DCA 2002).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 2003, a copy of the foregoing Answer Brief of Respondent Cedric Green and the Appendix To Answer Brief of Respondent Cedric Green have been furnished by U.S. Mail, postage prepaid, to

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CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

I HEREBY FURTHER CERTIFY, this 15th day of July, 2003, that the type size and style used throughout Respondent's Answer Brief is Courier New 12-Point Font.

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