IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **Case No. SC03-532**
L.T. No. 2D02-2430

CEDRIC T. GREEN,

Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

CERTIFIED CONFLICT and NOTICE OF RELATED CASES

This Court has postponed its decision on jurisdiction in this case. (See, Order dated June 5, 2003).

In Taylor v. State, 818 So. 2d 544 (Fla. 2d DCA 2002), the Second District Court held that Chapter 99-188 violated the single subject rule.[1] In response to Taylor, the Florida legislature enacted Chapters 02-208, 02-209, 02-210, 02-211, and 02-212, Laws of Florida, which reenacted the provisions of chapter 99-188. The 2002 chapter laws provided that they are to be applied retroactively.

In the instant case, Green v. State, 839 So. 2d 748 (Fla. 2d DCA 2003), the Second District Court held that Chapter 02-212, Laws of Florida, could not be applied retroactively under the Ex Post Facto Clauses of the United States and the Florida Constitutions. The Second District certified that its decision conflicts with Carlson v. State, 27 Fla. L. Weekly D2162 (Fla. 5th DCA Oct.4, 2002) and Hersey v. State,[2] 831 So. 2d 679 (Fla.

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[1]The Third District Court has certified conflict with Taylor in several pending cases. See e.g., Franklin v. State, SC03-413; State v. Watkiss, SC03-795; Moore v. State, 2003 WL 1824435 (Fla. 3d DCA, Apr 09, 2003); Washington v. State, 2003 WL 1722926 (Fla. 3d DCA, Apr 02, 2003).

[2]Hersey [certified question], currently is before this court in Hersey v. State, SC02-2630, pending the disposition of Lewis v. State, SC03-401, and Franklin v. State, SC03-413.

5th DCA 2002). Green, 839 So. 2d at 755, citing also, Lecorn v. State, 832 So. 2d 818, 819 (Fla. 5th DCA 2002); Jones v. State, 27 Fla. L. Weekly D2377 (Fla. 5th DCA, Nov.1, 2002). In addition, the Second District noted that its decision "may also be in 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)." Id. at n. 8.

Both Lewis v. State, SC03-401, and Franklin v. State, SC03-413, are currently pending before this Court on the merits of the Chapter 99-188 single subject challenge as well as the Chapter 02-208 - 02-212 retroactivity issue. Consequently, the instant brief reiterates the State's arguments previously presented in both Lewis and Franklin.

STATEMENT OF THE CASE AND FACTS

In Green v. State, 839 So. 2d 748 (Fla. 2d DCA 2003), the Second District Court set forth the following summary of facts and procedural background:

> Cedric Green was adjudicated guilty of violating section 893.135(1)(b)(1)(a), Florida Statutes (1999), by trafficking in more than 28 but less than 200 grams of cocaine. He committed this crime in April 2000. In September 2000, the circuit court sentenced him to 42.9 months' imprisonment, including the three-year minimum mandatory term required under the statute. After Green was sentenced, this court issued Taylor v. State, 818 So. 2d 544 (Fla. 2d DCA), review dismissed, 821 So. 2d 302 (Fla. 2002), declaring chapter 99-188 unconstitutional because it violated the single subject requirement. Section 9 of that chapter had amended section 893.135 to add the minimum mandatory prison term imposed on Green.
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> * * *
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> . . . on May 1, 2002, Green filed a motion pursuant to Florida Rule of Criminal Procedure 3.850, asserting that because Taylor had stricken the law that mandated a minimum sentence for his crime, and because he committed the crime during the window period for challenges on that basis, he should be resentenced under the 1997 statutes . . . Traditionally, when a defendant has been sentenced under a statute that is declared unconstitutional on single subject grounds, he is entitled to be resentenced under the valid law in effect on the date of his offense. See Heggs v. State, 759 So. 2d 620, 630-31 (Fla. 2000). In Green's case, however, the circuit court noted that the legislature had cured the single subject rule violation by reenacting the various provisions of chapter 99-188 retroactively to July 1, 1999. Accordingly, the circuit court held that Green was not entitled to relief.
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> Green, 839 So. 2d 748-749.

On review of Green's summary post-conviction appeal, the Second District held that the Ex Post Facto Clauses of the Florida and the United States Constitutions prohibit the retroactive application of chapter 02-212, Laws of Florida. The Second District Court concluded that Chapter 02-212 may be applied no earlier than its April 29, 2002 effective date, and remanded with directions to resentence Green pursuant to §893.135(1)(b)(1)(a), Florida Statutes (1997).

In response to the Second District Court's summary post-conviction opinion, the State filed a motion for rehearing[3] asserting, *inter alia*, that a majority of the Third District Court, sitting *en banc* in State v. Franklin, 836 So. 2d 1112 (Fla. 3d DCA 2003) held that Chapter 99-188 did not violate the single subject rule. Thus, if Chapter 99-188 does not violate the single subject rule, as the Third District Court in Franklin determined, the defendant, Cedric Green, cannot prevail on any "ex post facto" challenge to the 2002 reenactment legislation. Alternatively, any alleged constitutional defect in chapter 99-188 was cured by its legislative reenactment into multiple

[3]This was a summary post-conviction proceeding in the trial court and on appeal, and a response was never requested by the Court. See, Rule 9.141(c), Fla. R. App. P. Thus, this was the State's first opportunity to address the post-Taylor conflict and the legislative reenactments/retroactivity issue in this case.

separate acts in 2002, and those reenactments can be retroactively applied without violating the ex post facto clause. On March 7, 2003, the Second District Court denied the State's motion for rehearing. On April 25, 2003, this Court granted the State's motion to stay proceedings.

SUMMARY OF THE ARGUMENT

Chapter 99-188

Chapter 99-188 of the Laws of Florida does not violate the single subject requirement of the Florida Constitution. The two sections of this Act which the Second District Court in Taylor found violated the single subject rule have a reasonable and logical connection to the overall stated purpose of this act, which is "incapacitating the reoffender" and "accelerating the decline in crimes rates." Because there is no single subject violation, this Court should quash the decision of Taylor v. State, 818 So. 2d 544 (Fla. 2d DCA 2002) and adopt the decision of State v. Franklin, 836 So. 2d 1112 (Fla. 3d DCA 2003). Furthermore, even if this Court were to find the Act unconstitutional, the sections at issue can be severed from the act, leaving the remaining sections intact.

2002 Legislative Reenactments

Any alleged constitutional defect in Chapter 99-188 was cured by its legislative reenactment into multiple separate acts in 2002. Those reenactments can be retroactively applied without violating the ex post facto clause of the Florida Constitution.

ARGUMENT

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

An essential preliminary issue before this Court is whether chapter 99-188 of the Laws of Florida violates the single subject provision of the Florida Constitution. In Taylor v. State, 818 So. 2d 544 (Fla. 2d DCA 2002), the Second District Court held that Chapter 99-188 violated the single subject rule. However, both the First and Third Districts found that there is no single subject violation. See, Watson v. State, 842 So. 2d 274 (Fla. 1st DCA 2003) and State v. Franklin, 836 So. 2d 1112 (Fla. 3d DCA 2003). In immediate response to Taylor, the legislature enacted Chapters 02-208, 02-209, 02-210, 02-211, and 02-212, Laws of Florida, which reenacted the provisions of chapter 99-188. The 2002 chapter laws provide that they are to be applied retroactively to the extent the federal and state constitutions permit. The Fourth and Fifth Districts found that any single subject violation in chapter 99-188 is cured by the enactment of chapters 02-208, 02-209, 02-210 and 02-211, and can be retroactively applied. See, Lewis v. State, 836 So.2d 1095 (Fla. 5th DCA 2003); Hersey v. State, 831 So.2d 679 (Fla. 5th

DCA 2002) and Nieves v. State, 833 So.2d 190 (Fla. 4th DCA 2002). However, in the instant case, Green v. State, 839 So. 2d 748 (Fla. 2d DCA 2003), the Second District Court held that retroactive application of chapter 02-212 would violate the ex post facto clauses of the United States and Florida constitutions. For the following reasons, the State respectfully submits that Chapter 99-188 does not violate the single subject rule; and, even if there were a single subject violation, any violation is cured by the 2002 reenactments of the act which can be applied retroactively.

Governing Legal Principles

The State contends that chapter 99-188 is constitutional and does not violate the single subject rule of article III, section 6 of the Florida Constitution which provides that every law "shall embrace but one subject and matter properly connected therewith." In assessing a statute's constitutionality, this Court is bound "to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent." State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994)(quoting State v. Elder, 382 So. 2d 687, 690 (Fla. 1980)).

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

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

The purpose of this constitutional prohibition against a plurality of subjects in a single legislative act is to prevent a single enactment from becoming a "cloak" for dissimilar legislation having no necessary or appropriate connection with the subject matter. State v. Lee, 356 So. 2d 276, 282 (Fla. 1978). This constitutional provision is not designed to deter or impede legislation by requiring laws to be unnecessarily restrictive in their scope and operation. Id. The primary purpose of the single subject rule is to prevent hodge-podge or logrolling legislation, i.e., putting two unrelated matters in one act; to prevent surprise or fraud by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and to fairly apprise the people of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon. State v. Thompson, 750 So. 2d 643, 646 (Fla. 1999)(citation omitted).

Ultimately, whether a legislative enactment meets the single subject rule requirement rests on common sense. It is enough if the questioned provision tends to make effective or promote the objects and purposes of legislation included in the subject. Smith v. Dep't of Insurance, 507 So. 2d 1080, 1087 (quotations omitted). Even where there are disparate subjects contained

within a comprehensive act, the act will not violate the single subject rule if the subjects reasonably relate to the crisis the legislature intended to address. Burch, 558 So.2d at 2-3.

Chapter 99-188

Chapter 99-188 of the Laws of Florida begins with "An act relating to sentencing" and is comprised of fourteen sections. The legislative enactment contains a detailed preamble evincing its intent by its reference to Florida's high rate of violent crime and the need to impose longer periods of incarceration for repeat and violent offenders. In creating chapter 99-188, the Legislature noted that Florida ranks as one of the most violent states in the nation and that "a substantial and disproportionate number of serious crimes are committed in this state by a relatively small number of repeat and violent felony offenders." The Legislature added that since 1995, it had enacted stronger criminal punishment laws and that the intent of enacting chapter 99-188 was to "improve public safety by incapacitating repeat offenders" and to "accelerate recent declines in the violent crime rate." Id.

Chapter 99-188 contains the following fourteen provisions, distinguished as follows:

Sec. 1 Provides a name for citing the Act

Sec. 2 Redefines portions of the Prison Releasee Reoffender Act

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

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

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

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

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

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

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

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

Sec. 11 Amends section 943.0535 to requires the clerk of the criminal court to communicate

the judgement and sentence of any alien to federal immigration authorities

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

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

Sec. 14 Provides an effective date for the Act

Chapter 99-188, Laws of Fla.

In sum, section 2 expands the definition of prison releasee reoffender to include one who commits an enumerated offense while in prison or escape status. Sections 3 and 6 deal with the “Three Strikes” law. Section 3 creates the “three-time violent felony offender” law and accompanying mandatory minimum sentences. Section 6 modifies the subsection lettering in 790.235, Fla. Stat. (Possession of a Firearm by a violent career criminal). The modification simply changes the reference of 775.084(1)(c) and replaces it with 775.084(1)(d) to correspond to the lettering in the three-strikes law created in Section 3. Sections 4 and 5 create mandatory minimums for Assault and Battery on Law Enforcement and the Elderly, respectively. Section 7 creates the new offense of “repeat sexual batterer” and accompanying mandatory minimum sentence. Section 8 modifies 794.011 (which defines Sexual Battery) to include this new category of repeat sexual batterer. Sections 9 and 10 deal with

punishment for drug offenses. Section 9 amends 893.135(trafficking statute) as it toughens the threshold quantities for trafficking in cannabis by reducing the quantity from 50 to 20 pounds and adding cannabis plants, and providing for accompanying mandatory minimum sentences. The section also deals with "trafficking in cocaine" and "trafficking in illegal drugs" by amending quantity provisions and providing for minimum mandatory sentences. For purposes of incorporating the amendments to 893.135, Section 10 reenacts related statutes from the 1998 Supplement in order to conform to the amendments made in section 9. The state stresses that these are not amendments, but simply verbatim "reenactments" of previously existing statutes. These statutes include 397.451 (disqualification from receiving state funds, relating to service providers previously convicted in trafficking); 893.1351 (leasing for purposes of trafficking); 907.041(pretrial detention); 921.0022 (Criminal Punishment Code Offense Chart); 921.142 (separate penalty proceedings for capital drug offenses); 943.0585 (expunction of criminal records). Among other factors, creating a "three-strikes" enhanced sentencing law, creating a "repeat sexual batterer" offense, creating mandatory minimums (with special attention to cases where the victims are law enforcement and the elderly), toughening the criteria for drug offenses and the

accompanying penalties - all are reasonably related to the crisis the Legislature intended to address, as the Taylor court recognized.

However, in Taylor, the Second District found that the single subject rule was violated by the inclusion of two allegedly "unrelated" sections, 11 and 13, in Chapter 99-188. See, Taylor, 818 So. 2d at 549-551. Thus, this Court initially must determine whether sections 11 and 13 are reasonably related to the purpose of providing harsher penalties and protecting the public from the class of felons identified in the Act or, in other words, whether these sections "relate to sentencing." Contrary to the Second District's conclusion in Taylor and following the Third District's conclusion in Franklin, the State contends that each of the sections in Chapter 99-188 relate to that overall goal and that each section of the Act is naturally and logically connected.

First, the Second District erred in concluding that section eleven addresses "a purely administrative subject that is far afield from the act's other provisions." Id. at 549. Instead, section 11 imposes a duty to transmit the judgments and sentences of convicted aliens to federal authorities for purposes of removing them from the State. Section 11 deals with a previously existing statute, § 943.0535, which directs the

clerk of court to furnish the INS with judgments and sentences (felony and misdemeanor) of any aliens. The former statute required such transmittal only upon request of the INS. Section 11 removes the "upon official request" provision - requiring for transmittal in every case.

This provision is reasonably related to the Legislature's purpose of protecting the public from the class of criminals identified in the Act. Transmittal of convictions facilitates removal of convicted aliens from the State. The fact that this provision is not limited to convicted aliens who are *repeat* offenders is of no consequence; if the provision serves the purposes of the legislation it is constitutionally authorized. Grant, at 657; Smith at 1087. Indeed, removal of first time felons will prevent repeat offending. Thus, contrary to Taylor, this is not a "noncriminal ...purely administration subject that is far afield" from the Legislature's goal." Moreover, as the Third District observed in Franklin, this provision clearly is reasonably related to the purpose of providing harsher penalties and protecting the public from the class of felons identified in the Act since it insures their removal from this country after they have served their state sentences. Franklin, 836 So. 2d at 1114. The fact that this provision is not limited to the transmission of judgments involving repeat offenders, violent

felons, or drug traffickers is of no consequence; if the provision serves the purposes of the legislation it is constitutionally authorized. Grant, 770 So. 2d at 657; Smith, 507 So. 2d at 1087. Instead, the removal of these convicted aliens will prevent repeat offending.

Additionally, section 11 is no different in its import than the provision authorizing probable cause arrests of probation violators as part of the legislative scheme to punish felony offenders who had recently been released from prison. That section was a part of the legislative act attacked in Grant which pertained to the sentencing of reoffenders. See Grant, 770 So. 2d at 657. Although the arrest provisions dealt with in Grant necessarily included probationers who had never been to prison, the section at issue aided the overall purpose of the Act which was to protect the public from recently released felons. Id. With that, this Court found there was a logical nexus between the various provisions of the statute and thus, no violation of the single subject requirement. Id. The same holds true here.

According to the legislative history, House Bill 121 was corrected to include section 11 on February 3, 1999, over three months prior to its approval by the Governor. The correction's committee analysis of the bill which incorporated this addition

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

Section 13 amends the definition of "conveyance" in the burglary statute to include a railroad "vehicle" in addition to a railroad car. The prior definition of conveyance included "railroad car," and the amendment refines the definition to read "railroad *vehicle or* car." Armed burglary is an enumerated offense for purposes of imposing enhanced sanctions under the prison releasee reoffender act, habitual offender act, and the new three-time violent felony offender act, and the inclusion of this section is inherent to burglary, which is a predicate offense in these sentencing provisions. See Franklin, 836 So.2d at 1114 (the inclusion of railway vehicle affects "the expansion of the definition of the crime of armed burglary, one of the

offenses included in the Habitual Felony Offender Act"). Thus, this amendment enumerated in section 13 is incorporated into and makes effective the three-strikes law created in section three, as well as the amendments to the prison releasee reoffender and habitual violent felony offender contained in sections two and three. Accordingly, inclusion of this section, given the statute as a whole, is "quite plainly not a 'cloak' for dissimilar legislation having no necessary or appropriate connection the subject matter." Id. (quoting Lee, 356 So.2d at 282). Contrary to the Second District's assertion that the relationship is so tenuous, so dependent on the happenstance of individual cases, Taylor, 818 So.2d at 549, this section has a natural and logical connection to the rest of the Act.

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

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

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

of a Risk Assessment Information System Coordinating Council (section 51). See ch. 87-243, Laws of Fla. Despite the vastness of the act, this Court concluded that each of these three areas bore a logical relationship to the single subject of controlling crime, whether by providing for imprisonment or through taking away the profits of crime and promoting education and safe neighborhoods. Id. The relationship between those areas all focused on one purpose, meeting the crisis of increased crime, and this Court noted while it was a comprehensive law, all of its parts were directed toward that same purpose. Id.

The same holds true here. Chapter 99-188 is even more focused and condensed than chapter 87-243, and each of its sections focus on the same goal, the punishment of offenders. While it is a comprehensive law, as was the law in Burch, there is nothing in this act to suggest the presence of logrolling, which is the evil that article III, section 6 is intended to prevent. Id. The Second District's conclusion that the legislature created this evil in this case stretches this constitutional provision beyond its means and leaves every legislative act which addresses a broad but naturally connected law subject to this constitutional attack. This will force the legislature to enact restrictive laws and generate piece after

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

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

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

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

Standing

A party may not challenge the constitutionality of a portion of a statute which does not affect them. State v. Hagan, 387 So.2d 943, 945 (Fla. 1980). In this case, the respondent, Cedric Green, was sentenced pursuant to section nine of this Act, and sections eleven and thirteen have no application to him. Accordingly, he lacks the standing to make a constitutional attack on sections of the Act which are completely unrelated to him and have no impact on him. See Franklin, 836 So. 2d at 1114 n. 4 (citing 10 Fla. Jur. 2d

Constitutional Law §73 at 431 (1997)); Isaac v. State, 626 So. 2d 1082, 1083 (Fla. 1st DCA 1993), rev. denied, 634 So. 2d 624 (Fla. 1994)(defendant lacks standing to challenge constitutionality of statute because "it is apparent from the face of the record that he has not been adversely affected by the asserted infirmity in the statute").

Severability

Even is this Court were to follow Taylor and find that the inclusion of sections eleven and thirteen in the Act violate the single subject rule, the Taylor court erred in declaring the entire act unconstitutional. Taylor, 818 So.2d at 550. The Taylor court failed to consider the alternative and more appropriate remedy of severability. This Court has held that the proper remedy for a single subject violation is to sever the parts of the act which are not properly connected to the single subject thereof, leaving intact the valid provisions of the act. See, Tormey v. Moore, 824 So.2d 137, 142 (Fla. 2002); Moreau v. Lewis, 648 So.2d 124, 127 (Fla. 1995). As this Court opined:

> An unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining valid provisions, that is, if the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void; and the good and bad features are not inseparable and the Legislature would have passed one without the other; and an act complete in itself

remains after the invalid provisions are stricken.

Id. (quoting Presbyterian Homes v. Wood, 297 So.2d 556, 559 (Fla. 1974)). Severing sections 11 and 13 is the proper remedy in this case as the valid sections of this Act can be logically severed from the two "invalid" sections and stand on their own to accomplish the expressed legislative purpose. In other words, removal of the offending portions, sections 11 (alien documents to the INS) and 13 (redefining 'conveyance' to include railroad *vehicle*), would not, in any way, hinder the accomplishment of the valid provisions concerning sentencing.

Should this Court find a violation of the single subject rule, rather than declare the entire act unconstitutional, this Court should simply sever sections 11 and 13 so that the valid provisions addressing the sentencing of offenders, the goal of this Act, can be accomplished. See Lee, 356 So.2d at 283 (because legislative purposes behind enactment of remaining portions of act can be accomplished independently of offending section, the offending section is properly severable). Finally, as a last resort, this Court should note that section three of the Act creates the sentencing scheme for the three time violent felony offender and that enactment corresponds to the name given for citing this Act, "Three-Strike Violent Felony Offender Act." At the barest minimum, that portion of the act comports with the

single subject rule and should be left in tact with the remaining sections of the act being severed. Tormey, 824 So.2d at 142.

Retroactivity of Legislative Reenactment of Chapter 99-188

A determination that Chapter 99-188 is valid makes it unnecessary to decide the retroactivity issue. However, if this Court were to declare chapter 99-188 unconstitutional for an alleged single subject rule violation, that unconstitutionality has been cured by later legislative enactments which can be retroactively applied to Green and others similarly situated.

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

Each chapter (02-208 - 02-212) contains a preamble in which the

Legislature stated its intent.[4] Green's minimum mandatory

[4]Each preamble states:

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

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

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

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

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

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

sentence was imposed pursuant to section 9 of chapter 99-188. That aspect of chapter 99-188 was reenacted in chapter 02-212. Chapter 02-212 specifically provides for its retroactive application to July 1, 1999:

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

This law became effective April 29, 2002, when it was signed by the Governor. In determining whether a statute should be applied retroactively, the first inquiry is whether there is clear evidence of legislative intent to apply the statute retroactively, and if so, the second inquiry is whether the

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

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

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

retroactive application is constitutionally permissible. Metropolitan Dade County v. Chase Federal Housing Corp., 737 So.2d 494, 499 (Fla. 1999).

Here, chapter 02-212 contains an express command that the statute apply retroactively. Further, it does not violate the ex post facto provision because at the time Green committed his offense chapter 99-188 had not yet been held unconstitutional and was in full force and effect. Thus, at the time he committed his crimes, Green knew what conduct was prohibited and the penalty for that criminal conduct.

This conclusion is supported by Dobbert v. Florida, 432 U.S. 282 (1977). In Dobbert, the United States Supreme Court held that Dobbert's death sentence did not constitute an ex post facto violation despite the death penalty having been determined to be invalid in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972). The Dobbert court held that the existence of the earlier death penalty statute served as an "operative fact" to warn Dobbert of the penalty which Florida would seek to impose on him if he were convicted of murder. In response to Dobbert's claim that there was no death penalty 'in effect' at the time of his offense, the court explained:

> But this sophisticated argument mocks the substance of the Ex Post Facto Clause. Whether or not the old statute would in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder.
>
> Petitioner's highly technical argument is at odds with the statement of this Court in Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374, 60 S.Ct. 317, 318, 84 L.Ed. 329 (1940):
>
> The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law: that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. (citations omitted). It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored.
>
> Here the existence of the statute served as an 'operative fact' to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder. This was sufficient compliance with the ex post facto provision of the United States Constitution.

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

In the instant case, the existence of chapter 99-188 at the time Green committed his offenses served as an operative fact to

warn him of mandatory term under which he was sentenced. "The fact that the State ultimately corrected the defect in the later legislation to require exactly that which it had invalidly required earlier and then mandated a retroactive application of the amendment does not, according to Dobbert, violate the ex post facto provision of the United States Constitution." Carlson v. State, 27 Fla. L. Weekly D2162 (Fla. 5th DCA October 4, 2002). Thus, here, as in Dobbert, there would be no ex post facto violation in applying chapter 02-212 to Green. In this case below, Green v. State, 839 So. 2d 748, 752 (Fla. 2d DCA 2003), the Second District rejected this "operative fact" analysis, stating "we cannot fathom how an unconstitutionally enacted law, which therefore never had any actual effect could serve as an operative fact under the Dobbert analysis." (quotations and emphasis omitted). The Second District's analysis of Dobbert and its rejection in this specific single subject context ignores common sense and the uniqueness of a single subject violation. The substance of chapter 99-188 is not unconstitutional, the purported unconstitutionality rests solely in its form. Its effect on the sentencing statutes involved is only a coincidental by-product of the single subjection violation.

Retroactive application will have no added "new" harm to

defendants such as Green, who was sentenced under section nine of chapter 99-188. That law has not changed with the new enactment of chapter 02-212. The two sections (11 and 13) which ostensibly rendered chapter 99-188 constitutionally infirm ultimately have no bearing on Green's sentence. Green was aware of the penalty he faced under chapter 99-188; and absent the technical defect in the form of chapter 99-188, his penalty under 02-212 would remain the same. For the same reasons why Green has no standing to challenge chapter 99-188 on constitutional grounds, he further cannot allege that the retroactive application changes his sentence or detrimentally affects him. See Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798)(an ex post facto law is one that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed"). In all, the "operative fact" as delineated in Dobbert is that Green was on notice that he would face a minimum mandatory term, and that has not changed. Accordingly, there is no ex post facto violation. See Hersey, 831 So.2d at 679. Because the 2002 reenactments cured any alleged constitutional defect and can be retroactively applied, this Court should affirm Green's sentence in all respects.

Window Period

The window period for challenging a law opens on the

effective date of the challenged law and closes when the defect is "cured." See e.g., Salters v. State, 758 So. 2d 667, 671 (Fla. 2000)(holding that window period for challenging chapter 95-182, Laws of Florida, opened when the chapter became effective and closed on May 24, 1997, the effective date of chapter 97-97, Laws of Florida, which reenacted the amendments contained in chapter 95-182). Further, the State recognizes that in Taylor, the court held that the window period for asserting a single subject rule challenge to chapter 99-188 opened on July 1, 1999. Taylor, 818 So. 2d at 550. This is consistent with other single subject violation cases. See Heggs v. State, 759 So.2d 620 (Fla. 2000)(sentencing guidelines) and State v. Thompson, 750 So.2d 643 (Fla. 1999)(violent career criminal).

The State submits that the issue of a window period is rendered moot in light of the fact that chapter 02-212 was a specific reenactment of chapter 99-188 which expressly called for retroactive application. The statutes declared unconstitutional in Heggs and Thompson were reenacted by biennial adoption of the Florida Statutes, not by a specific reenactment statute making the reenactment retroactive to the initial enactment of the session law in question. This case is

similar to that in Martinez v. Scanlan, 582 So. 2d 1167 (Fla. 1991). See also Garcia v. Carmar Structural, Inc., 629 So. 2d 117 (Fla. 1994)(following Scanlan). There, the petitioner successfully raised a single subject challenge to chapter 90-201, Laws of Florida. In response, the Legislature called a special session and separately reenacted the provisions that this Court found to be in violation of the single subjection law. The Legislature also expressly provided that these two acts would apply retroactively to the original effective date of chapter 90-201. Id. at 1172. This Court held that chapter 90-201 violated single subject law and then determined whether the act was void ab initio. The court stated that, in determining whether a statute is void ab initio, it must distinguish "between the constitutional authority, or power, for enactment as opposed to the form of enactment." Id. at 1774. As a result, this Court concluded that since it declared chapter 90-201 unconstitutional not because the legislature lacked the power to enact it, but because of the form of its enactment, the effective date of voiding chapter 90-201 was the date of the filing of the opinion. Id. 1174-1176. Similarly, here, chapter 02-212 was a specific reenactment of chapter 99-188 which expressly called for retroactive application. In addition, chapter 99-188 was declared unconstitutional because

of the enactment's form, not the legislature's authority to enact such provisions. Thus, there is no longer a window period for violations of the single subject rule and the defendant's sentence should not be disturbed.

Finally, even if this Court were to find Chapter 99-188 unconstitutional on the basis of an alleged single subject rule violation, not subject to severability, and that the statutory reenactments do not cure the alleged constitutional defect, Green still is not entitled to relief on his ultimate sentence. Even if the three-year minimum mandatory provision is deemed impermissible, Green still faces not only the identical three year, 6 month sentence for trafficking in cocaine, but also two unchallenged, concurrent four year prison terms for the crimes of possession of cocaine and aggravated battery of a pregnant victim. See, www.dc.state.fl.us/activeinmates.

In the final analysis, while Chapter 99-188 covers a broad range of statutory provisions dealing with sentencing, these provisions have a natural and logical connection to the Legislature's stated purpose of "incapacitating the reoffender" and "accelerating the decline in crime rates." Even assuming a single subject violation, this Court held, in Tormey, that the proper remedy for a single subject rule violation is to sever the parts of the act which are not properly connected to the

single subject thereof, leaving intact he valid provisions of the act. Moreover, the Legislature promptly responded to Taylor by specifically reenacting Ch.99-188 in Chapter 2002-212, et. seq., Laws of Florida. The Legislature also provided that the reenactment shall apply retroactive to the initial enactment of Ch. 99-188. This reenacting statute has corrected the alleged single subject problems of its predecessor and may be applied to the defendant without constituting an *ex post facto* violation. Here, the existence of Ch.99-188 at the time the defendant committed his offense served as an 'operative fact' to warn the defendant of the penalty he faced. Lastly, because the defect in this case was cured by a specific reenactment statute with retroactive application (as opposed to the biennial adoption process), there is no longer a window period for raising a single subject challenge.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Merits Brief of Petitioner has been furnished by regular U.S. mail to Sylvia Walbolt and Matthew John Conigliaro, Carlton Fields, P.A., Post Office Box 2861, St. Petersburg, Florida, this 20th day of June, 2003.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

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