IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Petitioner,

vs. Case No. 80,357

RONALD EUGENE DEHART,

Appellee/Respondent.
_____/

APPELLANT/PETITIONER'S REPLY BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
BUREAU CHIEF, CRIMINAL LAW
FLORIDA BAR NUMBER 0325791

CHARLIE MCCOY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NUMBER 0333646

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0600

COUNSEL FOR APPELLANT/PETITIONER

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ARGUMENT

ISSUE I

WHETHER A CRIMINAL DEFENDANT'S RIGHT TO DUE PROCESS CAN BE DENIED MERELY BY THE NUMBER OF SUBJECTS IN A LEGISLATIVE ACT

Dehart's punishment is of the type and duration authorized by statute. The claimed illegality[1] of his sentence has nothing to do with his punishment, but with the state constitutional provision designed to prevent "logrolling" of bills by the Legislature. As he did below, Dehart never attempts to explain how inclusion of more than one subject in a legislative act could be error that is fundamental to a criminal defendant.

Belittling the obligation of a defense attorney to apprise the trial court of error, Dehart claims that the substantive issue will actually have its day; "better now than later." (answer brief, p. 5). This is not true -- the curative effect of the 1991 Legislature's adoption of the 1989 statutes as official law precludes this issue in the future. Defendants barred from raising

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[1] Since his sentence imposes imprisonment of an amount authorized by statute, Randall's sentence is not illegal. *See* Infante v. State, 197 So.2d 542, 544 (Fla. 3d DCA 1967)(statute allowing appeal of "illegal" sentence means a sentence that exceeds the statutory maximum or imposes a type of punishment not prescribed by law). The State does not concede that Dehart should not have been sentenced as an habitual felon.

the one-subject issue on direct appeal will have their postconviction remedies.

Appellate courts are not sentence review boards; they do not exist to correct the failings of defense counsel. They exiet to correct preserved harmful error, or fundamental error, committed by the trial court. Neither is present here.

In Rhoden v. State, 448 So.2d 1013 (Fla. 1984), this Court held that the total absence of statutorily mandated findings essential to the legal imposition of the sentence was fundamental error which rendered the sentence illegal and cognizable for the first time on appeal. This error was equivalent to the imposition of a death penalty or a sentencing guidelines departure with no written order because it was not merely erroneous, it was illegal. Grossman v. State, 525 So.2d 833 (Fla. 1988) *cert.* denied, 489 U.S. 1071 (1989). Unfortunately, in dicta which has been widely misapplied outside the Rhoden context of a missing mandatory sentencing order, the Court commented:

> The purpose of the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge. If the state's argument is followed to its logical end, a defendant could be sentenced to a term of years greater than the legislature mandated and, if no objection was made at the time of sentencing, the defendant could not appeal the illegal sentence.

Rhoden, 448 So.2d at 1016.

This Court receded from the expansive Rhoden dicta in State v. Whitfield, 487 So.2d 1045, 1046 (Fla. **1986):**

> *Rhoden, Walker,* and *Snow* all concern instances where the trial court sentenced in reliance on statute but failed to **make** the specific findings which the statutes in question mandatorily required **as** a prerequisite to the sentence. An alternative way of stating the ground on which *Rhoden, Walker,* and *Snow* rest is that the **absence** of the statutorily mandated findings rendered the sentences illegal because, in their absence, there was no statutory authority for the sentences. Thus, as the district court surmised, *Snow* makes clear that *Rhoden* is grounded on the failure to **make** mandatory findings and not on the proposition that contemporaneous objection? serve no purpose in the sentencing process. Sentencing errors which do not produce an illegal sentence or an unauthorized departure from the sentencing guidelines still require a contemporaneous objection if they are to be preserved for appeal. (e.s.)
>
> [2] Our *Rhoden* dicta that the purpose of the contemporaneous objection rule is not present in the sentencing process does not apply in every case. It is true that sentencing errors can be more easily corrected on appeal than errors in the guilt phase, but it is still true that all errors in all phases of the trial should be brought to the attention of the trial judge particularly where there is a factual issue for resolution.

Id.

Despite having been affirmed in Whitfield, the First District Court of Appeal thereafter adopted the inconsistent rule that there is an absolute right to appeal everything which occurs during the sentencing phase regardless of whether a sentencing issue is

preserved, or even identifiable. Ford v. State, 575 So.2d 1335 (Fla. 1st DCA), *review denied*, 581 So.2d 1318 (Fla. 1991).[2] The court regressed into the Rhoden dicta by circularly reasoning that (1) there is a right to appeal an illegal sentence and (2) illegal sentences are sentences, therefore, (3) there is a right to appeal all sentences because all sentences are presumptively illegal until the completion of the appellate process demonstrates that they are legal. Thus, as here, opposing counsel whose practice has been entirely or primarily in the First District continue to rely on the disavowed Rhoden dicta because in the First District it is still the law.

In Castor v. State, 365 So.2d 701, 703 (Fla. 1978), this court declared:

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system.

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[2] In application, Ford routinely produces opinions such as Evans v. State, No. 91-2437 (Fla. 1st DCA August 18, 1992), and Cooper v. State, No. 91-2040 (Fla. 1st DCA August 18, 1992); where the appellants received a negotiated sentence of probation on felony convictions but nevertheless appealed. The "issue" on which the district court based its jurisdiction after full review was a standard assessment of $1 to a so-called First Step of Bay Co. Inc., which appears on all probation orders in Bay County and is not orally pronounced at sentencing. (First Step is patterned after a Pinellas County program initiated by then Circuit Judge Overton to develop a fund for assisting probationers attempting to find work). The appeals were taken without identifying any issue. The $1 assessment arose during the *de novo* review of the sentencing process.

> It placed the trial judge on notice that error may have been committed, and provides him an opportunity to correct it ,at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

Id.

The State urges the Court to make it very clear that routine sentencing issues must be preserved in the trial court in order to obtain the right to appeal, or to raise the issue on appeal if appeal is otherwise permitted. The Court should declare that Rhoden applies only to sentences for which there is no statutory authority.

In short, Appellant's argument is based on convenience, when he should be arguing error that is fundamental. He cannot do so. If violation of the one-subject directive were fundamental, adoption of the 1989 statutes as the official law could not cure that error. Nevertheless, it is well established that reenactment of session laws in their codified form ends any two-subject problem. State v. Combs, 388 So.2d 1029 (Fla. 1980).

ISSUE II

WHETHER ALL PROVISIONS OF CHAPTER 89-280, LAWS OF FLORIDA, RELATE TO CONTROLLING CRIME

Three of four district courts ruling on this issue have held that ch. 89-280 does not violate the one-subject rule in Art. 111, §6 of the Florida Constitution. In addition to the cases from the Third and Fourth districts cited in the State's initial brief (p. 16), the Second District has recently upheld the act. Crews v. State, 17 F.L.W. D1925 (Fla. 2d DCA Aug. 19, 1992).

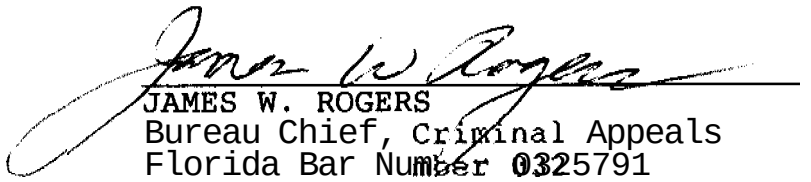
The reenactment of ch. 89-280 as part of the official statutes cures the one-subject violation found only by the First District. If it reaches the merits and is inclined to agree with Dehart, this court should note the curative effect of reenactment.

CONCLUSION

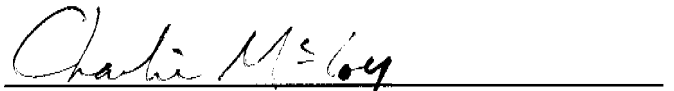
Based on the argument in Issue I, the opinion below must be vacated and Dehart's sentenced affirmed. Alternatively, based on the argument is Issue 11, this court must declare ch. 89-280 not violative of the one-subject rule; answer the certified question in the negative; and affirm Dehart's sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



JAMES W. ROGERS
Bureau Chief, Criminal Appeals
Florida Bar Number 0325791

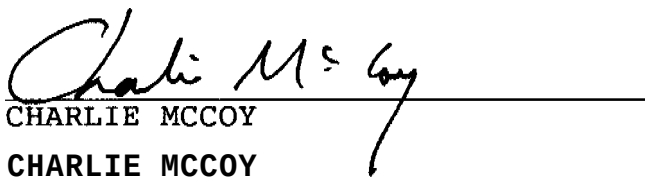


CHARLIE MCCOY
Assistant Attorney General
Florida Bar Number 0333646

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, Florida 32399-1050
(904) 488-0600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply Brief on the Merits has been furnished by U.S. Mail to MR. JOHN R. DIXON, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 14th day of ~~September~~ October, 1992.



CHARLIE MCCOY

CHARLIE MCCOY