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FEB 15 1993

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

WALTER LEE PEARCE,  
Petitioner,

vs.

Case No. 80,379

STATE OF FLORIDA,  
Respondent.

\_\_\_\_\_ /

ON DISCRETIONARY REVIEW FROM THE DISTRICT  
COURT OF APPEALS FOR THE SECOND DISTRICT  
STATE OF FLORIDA

PETITIONER'S REPLY BRIEF ON MERITS

Petitioner:

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Table of Contents

Summary of Argument	1
Argument	2
Conclusion	4
Certificate of Service	4

Table of Citations

<u>Reed v. Harris</u> , ___ U.S. ___, 109 S.Ct. 1038 (1989)	2
<u>Johnson v. State</u> , ___ So. 2d ___, 18 Fla. Law Weekly S55 (Fla. 1993)	1, 2, 3
<u>Johnson v. State</u> , 460 So. 2d 954 (Fla. 5th DCA 1984) <u>approved in</u> 483 So. 2d 420 (Fla. 1986)	2
<u>McCall v. State</u> , 583 So. 2d 411 (Fla. 4th DCA 1991)	2

Other Authorities

Chapter 89-280, Laws of Florida	1
Florida Rules of Criminal Procedure Rule 3.850	2

### Summary of Argument

Respondent's argument that Pearce's "challenge needs to be preserved to allow review" must fail on several accounts. Specifically, this Court's wording of Johnson v. State, \_\_\_ So. 2d \_\_\_, 18 Fla. Law Weekly S55 (Fla. Jan. 14, 1993), shows that this Court defined the violations of the "single subject rule" in Chapter 89-280, Laws of Florida, as being "fundamental error as a matter of law." Fundamental sentencing errors may be raised at any time.

Alternatively, the Respondent suggests that Pearce can be properly sentenced under the non-violent section of the habitual offender sentencing schemes. Although a sentence under the nonviolent section of 775.087 Fla. Stat. is a viable alternative, the sentence as it now stands is in violation of this state's constitution and must **be** reversed; thus creating the necessity of a re-sentencing hearing where a circuit court judge will pronounce sentence.

### Argument

The Repondent's first argument concerns whether Pearce properly raised his claim in the lower courts. The Petitioner would answer in the affirmative. This Court, in Johnson, supra, ruled that the single subject violations of Chapter 89-280, Law of Florida, constitute fundamental error. Id. at S56. Fundamental errors may be raised for the first time at any point, including postconviction proceedings. Johnson v. State, 460 So. 2d 954 (Fla. 5th DCA 1984) approved in 483 So. 2d 420 (Fla. 1986)(different case than the Johnson cited earlier).

The record clearly reflects that the issue now before this Court has been effectively raised via a Fla. R. Crim. P. Rule 3.850, Motion for Postconviction Relief, and that the trial court has had an opportunity to correct Petitioner's fundamentally flawed sentence. Additionally, the Second District Court of Appeals has also ruled upon the issue brought up within Pearce's Rule 3.850 motion. In both instances, the courts chose to rule upon the merits of the Petitioner's claims, citing McCall v. State, 583 So. 2d 411 (Fla. 4th DCA 1991) as controlling. Neither court applied a procedural bar on the Petitioner's issue.

The Respondent now attempts to argue that the Petitioner's issue is procedurally barred from review because of Pearce's failure to object to the errors in the lower court. The "plain statement" rule of Reed v. Harris, \_\_\_ U.S. \_\_\_, 109 S.Ct. 1038

(where the U.S. Supreme Court defined the "plain statement" rule as it applies to procedural default), states that the last reviewing court must "clearly and expressly" state that their judgment rests upon a procedural bar. There can be no such finding in the case now before this Court.

Respondent's final argument concerns what type of sentence Pearce will receive if this Court decides to reverse his sentence.

The Respondent respectfully submits that if Petitioner is granted a resentencing based on Johnson, this [a sentence under the non-violent habitual sentencing scheme] is the result that will be achieved.

Respondent's Brief on Merits, p. 3.

The Respondent, assuming arguendo that the Petitioner's sentence is reversed, has assumed the role of circuit court judge and resentenced the Petitioner to life under the nonviolent portion of the habitual offender statutes. It is the Petitioner's belief that sentencing, if needed, should be conducted by a judge---not the Attorney General's Office.

Conclusion

Based upon the foregoing facts, as well as the entire record now before this Court, Petitioner respectfully requests that this Honorable Court find the issue properly **raised** in the lower courts and properly preserved for review by this Court. Furthermore, Petitioner would ask that his sentence be vacated in its entirety and remanded for a new sentencing hearing.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 10 day of February, 1993, to the offices of: Donna ProvonshaLentz, Asst. Atty. General, 2002 North Lois Avenue, Suite 700, Tampa, FL 33607-2366.