

FILED

SID J. WHITE

DEC 14 1992

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO.: 80,817

TERRANCE GARRISON,

Respondent.

PETITIONER'S REPLY BRIEF

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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

Claiming the State "muddles the distinction between trial and sentencing error," Garrison ~~makes~~ the outlandish claim that the "test for fundamental error differs from one context to the other." (answer brief, p.4). Garrison cites no authority for this novel concept, because there is **none**. **As** explained in detail in the State's initial brief, ~~fundamental~~ error calls into question the essential fairness of a proceeding. While the facts establishing such error may differ, the test is the same. Taken to its conclusion, Garrison's definition of fundamental error **would** be any non-preserved error that could provide relief to a dilatory defendant.

The remainder of Garrison's **argument** rests on **this** premise: that a **one-subject** violation results in an **illegal** sentence, which **is** fundamental error that can be raised **for the** first time on appeal. The subtlety of the premise is its undoing. Whenever a court has held that illegality of a sentence can be raised for the first time on **appeal**, it **has** done so because it **would** be unfair to convict or sentence under a statute in violation of a substantive right under the state or federal constitution.

Garrison has never claimed his substantive rights are affected by the number of subjects in ch. **89-280**, Laws of Florida. He cannot. Thus, it is not fundamentally unfair that he was sentenced under the statutory changes enacted in ch. 89-280. **Like** the First District in Claybourne,¹ Garrison never attempts to explain **how** the number **of** subjects in a legislative act affects his right to due process. Neither the Claybourne court nor Garrison establish the relevance, to a criminal sentencing statute, of **two** old decisions² involving **powers** of municipalities. The number of subjects in a legislative act can never be error that is fundamental.

Finally, Garrison betrays himself. At page 4 he argues **for** relief, should the court find that the "statute [ch. **89-280**] is unconstitutional **as** applied to him" {e.s.} Constitutional challenges to statutes as **applied** must be raised before the trial court. Trushin v. State, **425 So.2d 1126 (Fla. 1983)**.

Otherwise, Garrison's sentence is clearly authorized by the substance of ch. **89-280**. Garrison's failure to raise **his** one-subject challenge before the trial court precludes relief on direct **appeal**.

¹ Claybourne v. State, 600 So.2d 516 (Fla. 1st DCA 1992), rev. pending, case no. 80,157.

² Parker v. Town of Callahan, 115 Fla. 266, 156 So. 334 (Fla. 1934); Town of Monticello v. Finlayson, 156 Fla. 568, 23 So.2d 843 (Fla. 1945).

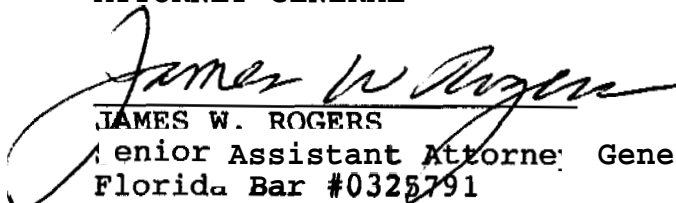
Garrison concludes his argument with the toothless threat that defense counsel will hold **up** sentencing hearings if they are required to go through the paces of raising "constitutional sentencing issues" before the trial court. That is exactly why preservation is necessary - to hold **up** the trial court, **and** give it opportunity to consider allegations of error. The "incantations" (answer brief, **p. 5**) alluded to by Garrison are actually the mumbo-jumbo of appellate defense counsel who would burden the appellate courts by sandbagging the trial court. This court must not condone such practice.

CONCLUSION

The First District exceeded its authority by granting relief upon error that was neither preserved nor fundamental. The opinion below must be vacated and Garrison's sentence upheld. Alternatively, ch. 89-280 must be found not to contain more than one subject; the certified question answered in the negative; and Garrison's sentence affirmed.

Respectfully submitted,

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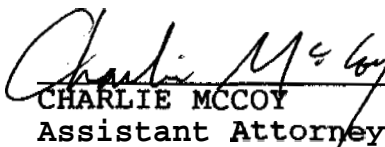
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32301 this 14th day of December, 1992.


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