IN THE SUPREME COURT OF FLORIDA

CURTIS LEON HEGGS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 93,851

RESPONDENT'S ANSWER BRIEF (AMENDED)

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PRELIMINARY STATEMENT

Respondent State of Florida was the appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court and will be referred to as respondent, appellee, or the state. Petitioner CURTIS LEON HEGGS was the appellant in the DCA and the defendant in the trial court and will be referred to as petitioner, appellant or defendant. References to petitioner's supplemental brief will be as PSB___.

All emphasis through bold lettering is supplied unless the contrary is indicated.

This amended answer brief is filed in order to correct the Table of Citations. No changes have been made to the substance of the brief.

CERTIFICATION OF TYPE AND FONT

Undersigned counsel certify that this brief was prepared using Courier New 12 font.

STATEMENT OF THE CASE AND FACTS

The state accepts petitioner's statement of the case and facts.

This answer brief is submitted pursuant to this Court's order of 24 March 1999 on the additional questions raised by the Court.

SUMMARY OF ARGUMENT

The state is in substantial agreement with much of what petitioner argues and, in the end, agrees that petitioner's claim of a violation of the single subject provision, under the facts and circumstances of this case, is reviewable as a claim of fundamental error and should be disposed of on the merits.

The state agrees with petitioner that the Criminal Appeal Reform Act of 1996 does not retroactively alter the definition of criminal conduct or increase the penalty for such conduct and, thus, presents no **ex post facto** problems. PSB1.

The state also agrees with petitioner that the Reform Act is substantive law and should not be retroactively applied. PSB1. However, because the Act has no impact on the crimes themselves and affects only appeals from future trials, the substantive law of the Reform Act may be prospectively applied, consistent with due process, to appeals from trials which take place **after** the effective date of the Reform Act, as here. This is so because there is no **ex post facto** problem **and** all parties were on notice of the terms of the Reform Act and its potential impact on any appeal from such trials. Both parties and the trial court knew or should have known that the Reform Act could be applied to any appeals which might arise from the trial.

The Criminal Appeal Reform Act, by its terms, does not prohibit raising claims of fundamental error for the first time on appeal. This non-prohibition is applicable to convictions and sentences.

The claim at issue here, violation of the single subject provision of the Florida Constitution, has been held by this Court to be one of fundamental error which can be raised for the first time on appeal. State v. Johnson, 616 So.2d 1 (Fla. 1993). The legislature is presumed to be familiar with case law and, thus, was familiar with the holding of Johnson when it enacted the Reform Act recognizing that claims of fundamental error might be raised for the first time on direct appeal. Therefore, the applicability of the Reform Act, retroactive or otherwise, does not matter here because the Act itself permits claims of fundamental error to be raised for the first time on appeal as petitioner did.

The critical question is whether the rules of criminal and appellate procedure which this Court promulgated to implement the Reform Act should be retroactively applied to appeals which commenced prior to their effective date of 1 January 1997? Appellate rules are not ordinarily retroactively applied to appeals which have commenced prior to the effective date of the new rules. These implementing rules should not be retroactively applied here because petitioner did not have the full benefit of rule 3.800(b) on his 1 November 1996 sentences and should not be penalized by the prohibition of appeals on unpreserved sentencing issues in rule 9.140(d), which prohibition is contingent on the availability of rule 3.800(b) as a trial court remedy. For reasons more fully developed in the argument section, the state suggests that they should not be retroactively applied,

particularly when, as here, we are dealing with a single subject claim of fundamental error.

In sum, the state's position is that the Reform Act and implementing rules do not, in the circumstances and facts of this case, bar review of this single subject claim grounded on fundamental error.

The state emphasizes that its position here is grounded on the particular facts and circumstances of this case. The state's position is consistent with its position on other companion and similar cases presently before the Court concerning the application of the Reform Act where the facts and circumstances are unlike those here, most notably, where the trial and **sentencing** take place **after** 1 January 1997, the effective date of the implementing criminal and appellate rules of procedure. In those instances, the defendant and putative appellant have the opportunity to raise claims of prejudicial sentencing error in the trial court and to then appeal any denial.

ARGUMENT

ISSUES OR QUESTIONS

DO SECTIONS 924.051(3) AND 924.051(4), FLORIDA STATUTES (SUPP. 1996) (CRIMINAL APPEAL REFORM ACT OF 1996) APPLY TO APPELLATE REVIEW OF SENTENCES IMPOSED AFTER THE EFFECTIVE DATE OF THE REFORM ACT FOR CRIMES COMMITTED BEFORE THE EFFECTIVE DATE OF THE ACT, 1 JULY 1996? (PARAPHRASE OF COURT BRIEFING ORDER TO FIT FACTS)

IF THE REFORM ACT DOES APPLY, WHAT EFFECT DO THESE STATUTORY SECTIONS, AND THE RULES OF CRIMINAL AND APPELLATE PROCEDURE IMPLEMENTING THESE SECTIONS, HAVE ON THE PRESENT CASE? (PARAPHRASE OF COURT BRIEFING ORDER)

It is the basic position of the state that both criminal defendants and the state, in its role as the prosecution, are entitled to raise claims of prejudicial error in the trial court and to obtain appellate review of such claims provided they comply with reasonable conditions placed by the legislature on the exercise of such rights **and** do so in accordance with the rules of practice and procedure promulgated by this Court under article V, section 2(a) of the Florida Constitution. With that perspective in mind, the state submits the following responses to the questions posed by the Court and to the arguments presented by the petitioner[1].

[1]Ordinarily, with the parties in agreement on the controlling question, there would be no need to expand on the reasons for such agreement. However, parties may not stipulate to jurisdiction and the state believes the Court wishes to have its questions answered and discussed. The state also believes that the answers here throw light in a contrapuntal manner to similar

DOES THE REFORM ACT APPLY HERE

The state agrees with petitioner that the Criminal Appeal Reform Act of 1996[2] does not alter the definition of any criminal conduct or increase the penalty for such conduct, retroactively or prospectively, and thus does not present any **ex post facto** problems. PSB1.

The state also agrees with petitioner that the Act is substantive law and should not be retroactively applied. PSB1. However, because the Act has no impact on criminal offenses themselves and affects only appeals from trials conducted after its effective date, the provisions of the Act may be applied prospectively as would those of any other substantive law[3]. This is so because the Act poses no **ex post facto** problems **and** all parties to subsequently conducted trials have due process notice of the terms of the Act and its potential impact on any appeals which might arise from such trials. Here, the chronology of

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cases now before the Court which are also being orally argued on 11 May 1999.

[2]Ch. 96-248, Laws of Florida, codified in chapter 924, Florida Statutes (Supp. 1996), and implemented in Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure effective 1 January 1997. Amendments to Florida Rules of Criminal Procedure, 685 So.2d 1253 (Fla. 1996) and Amendments to Florida Rules of Appellate Procedure, 685 So.2d 773 and 696 So.2d 1103 (Fla. 1996).

[3]It also needs to be recognized that much of the Reform Act is a codification and reaffirmation of well-settled case law. Thus, the principles and provisions of law in the Reform Act may well be applicable to trials and appeals occurring long before the Reform Act was enacted. In such cases, the Reform Act itself may be persuasive but not controlling.

events clearly shows that the parties and the trial court knew or should have known of the Reform Act and its effective date, 1 July 1996, prior to trial, and that the Act would be applicable to any appeals arising from these criminal proceedings.

EFFECT OF APPLICATION OF REFORM ACT

Nevertheless, although the terms of the Act are applicable to the present proceedings as shown above, the state acknowledges that the Act, by its terms, does not prohibit an appellant from raising a claim of fundamental error for the first time on appeal, as appellant did in the district court. See, §924.051(3):

> (3) An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, **if not properly preserved, would constitute fundamental error**. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved or, **if not properly preserved, would constitute fundamental error**.

This Court has upheld §§ 924.051(3) & (4) and the authority of the legislature to place reasonable substantive conditions on the exercise of the right to appeal in Amendments to Florida Rules of Appellate Procedure, 696 So.2d 1103, 1104-1105 (Fla. 1996):

> However, we believe that the legislature may implement this constitutional right [to appeal] and place reasonable conditions upon it so long as [it does] not thwart the litigants' legitimate appellate rights.[fn omitted]. **Of course, this Court continues to have jurisdiction over the practice and procedure relating to appeals.**
>
> Applying the rationale to the amendment of section 924.051(3), we believe the legislature could reasonable condition the right to appeal upon the preservation of a prejudicial error **or the assertion of fundamental error**.
>
> . . . . .

... Obviously, one cannot expressly reserve a sentencing error which has not yet occurred. By any standard, this is not a reasonable condition to the right to appeal. Therefore, we construe this provision of the Act [section 924.051(4)] to permit a defendant who pleads guilty or nolo contendere without reserving a legally dispositive issue to nevertheless appeal a sentencing error, providing it has been timely preserved by motion to correct the sentence.
Id.

The claim at issue here, violation of the single subject provision of the Florida Constitution[4], has been held by this Court to be one of fundamental error which can be raised for the first time on appeal. State v. Johnson, 616 So.2d 1, 3 (Fla. 1993)("[W]e find the issue in this case [single subject challenge] to be a question of fundamental error.")[5] It should be noted that Johnson also involved a sentencing issue.

The legislature is presumed to be familiar with case law, particularly that interpreting or applying statutes. Akins v. Bethea, 33 So.2d 638, 640 (Fla. 1948). Thus, the legislature was, or should have been, familiar with the 1993 decision in Johnson that a claim of violation of the single subject rule is a claim of fundamental error which may be raised for the first time on appeal when it enacted the Criminal Appeal Reform Act of 1996 and provided in §924.051(3) that claims of fundamental error may be

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[4]Art. III, §6, Fla. Const.

[5]The state continues to maintain, passively for now and contrary to Johnson, that a single subject violation does not violate due process and thus is not a claim of fundamental error. However, that particular argument, if ever made, is for another day.

raised for the first time on appeal[6]. Although the state continues to maintain that Johnson was wrongly decided and that the Reform Act is applicable here, it nevertheless acknowledges that applying the Act does not matter to the outcome here because a claim of a violation of the single subject rule is cognizable for the first time on appeal pursuant to both the Act and Johnson. In sum, nothing in the Reform Act prohibits addressing petitioner's claim of a single subject violation for the first time on appeal.

ARE THE CRIMINAL AND APPELLATE RULES IMPLEMENTING THE REFORM ACT APPLICABLE?

There was a six-month delay between the effective date of the Reform Act, 1 July 1996, and that of the implementing rules, 1 January 1997. The sentencing at issue here occurred on 1 November 1996 which is before the effective date of the implementing rules and also before the issuance date of this Court's decisions prospectively promulgating the new implementing rules[7]. Thus, as the Court's queries suggest, even if the Reform Act is applicable, there is still a question of whether the implementing

[6]The state recognizes that one of these convictions involved a guilty plea, thus implicating section 924.051(4). However, it does not appear that the single subject claim can be isolated to section 924.051(3) only.

[7]Amendments to the Rules of Appellate Procedure first issued on 22 November 1996; Amendments to the Rules of Criminal Procedure issued 27 November 1996.

rules should be **retroactively** applicable. The short answer of the state is that they should **not** be applied to the instant cases.

This Court's rules of criminal and appellate procedure implementing the Reform Act are absolutely critical to the Reform Act. When the proposed appellate rules were orally argued to the Court in June 1996, undersigned counsel on behalf of the state urged the Court to speedily promulgate rules implementing the Reform Act and to make numerous changes in the rules as proposed to the Court by the Appellate Court Rules Committee in order to effectively implement the Reform Act. The central thrust of the state's argument was that new rules of practice and procedure offering appellants additional opportunities to properly preserve issues in the trial court were critically needed, particularly in the area of sentencing and in guilty or nolo contendere pleas, if the Reform Act was to be effectively implemented. The rules which this Court subsequently adopted were extraordinarily responsive to those concerns. They are a rational and coherent procedural framework for implementing the Reform Act while simultaneously providing appellants with opportunities to preserve issues in the trial court far beyond any which they had prior to the Reform Act and the implementing rules. These rule changes benefit all concerned: criminal appellants, the state as the prosecutor, and the judicial system, all of whom share a

common interest in having claims of error first raised and ruled on in the trial court[8].

As explained in Amendments to Florida Rules of Appellate Procedure, 696 So.2d 1103 (Fla.1996), this Court has been concerned for sometime with the unnecessary expenditure of scarce resources on appeals from guilty pleas and on appeals relating to sentences. Accordingly, the Court had initiated rulemaking to limit the issues raised in appeals from guilty pleas and to require that sentencing issues first be raised in the trial court[9]. The enactment of the Reform Act by the legislature lent greater weight and urgency to those concerns. The following new remedies for preserving claims of prejudicial error in the trial court and accompanying restrictions on raising such claims for the first time in the appellate courts are relevant.

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[8]The state continues to be mystified as to why trial and appellate defense counsel, more than two years after these salutary rules became effective, and concerned as counsel should be with the protection of their client's interests and not those of counsel, have not recognized the major benefit which their clients receive from being able for the first time to routinely challenge trial court orders in the thirty-day period after rendition while still protecting their rights to appeal and to then present issues to the appellate court which have been fully and properly preserved and do not have to be argued as "fundamental error."

[9]The Court's concern and efforts continues: see, EMERGENCY PETITION TO AMEND RULES 3.670 AND 3.700(b), FLORIDA RULES OF CRIMINAL PROCEDURE which is pending before the Court as this is written and is designed to ensure that final judgments and sentences are timely served on the defendant and the state so that rule 3.800(b) or 3.170(l) motions may be timely filed.

NEW REMEDIES FOR THE CRIMINAL DEFENDANT/APPELLANT

1. Criminal rule 3.800(b) now authorizes a motion to correct the sentence or order of probation if filed within thirty days of the rendition of the sentence. This remedy for prejudicial error did not exist prior to 1 July 1996 when this Court promulgated an emergency rule permitting such motion with ten days of rendition. Amendments to Florida Rules of Appellate Procedure 9.020(g) & Florida Rule of Criminal Procedure 3.800, 675 So.2d 1374 (Fla. 1996). Moreover, the state concedes that the emergency rules of 1 July 1996 could not become truly effective until the other implementing rules and the expanded thirty-day period became effective on 1 January 1997.

2. Criminal rule 3.170(l) now authorizes a motion to withdraw a plea **after sentencing** if filed within thirty days of the rendition of the sentence but only upon grounds specified in appellate rule 9.140(b)(2)(B)(I)-(v). This remedy did not exist prior to 1 January 1997 and at the time of sentencing here.

3. Appellate rule 9.020(h) has been amended to provide that trial court orders are not considered rendered until rulings have been entered on any timely filed motions pursuant to rules 3.170(l) and 3.800(b). This simultaneously protects the right to raise these claims in the trial court and to then appeal, if necessary, from the denial of such claims in the appellate court. This critical protection did not previously exist, including the time of sentencing here.

CONCOMITANT RESTRICTIONS ON RIGHTS TO APPEAL

1. Appellate rule 9.140(b)(2) now prohibits any appeals from guilty or no contest pleas unless (a) a dispositive guilt phase issue has been expressly reserved or (b) a specified issue has been properly preserved in the trial court. This highly significant restriction on appeals from guilty or no contest pleas was not entirely new but it does comprehensively and precisely codify and expand the restrictions formerly contained in Robinson v. State, 373 So.2d 898 (Fla. 1979). It also helps to implement sections 924.051(4) and 924.051(8) of the Reform Act and is part of the **quid pro quo** for the new remedies furnished in rules 3.170(l) and 3.800(b).

2. Appellate rule 9.140(d) prohibits raising **any** sentencing issue which has not been properly preserved in the trial court by contemporaneous objection at the time of sentencing or by motion pursuant to rule 3.800(b). This helps to implements sections 924.051(3) and 924.051(8) of the Reform Act and is also part of the **quid pro quo** for the new remedy provided in rule 3.800(b)[10].

[10]It also represents a rejection, as does the Reform Act itself, of the rationale expressed in State v. Rhoden, 448 So.2d 1013 (Fla. 1984) that failure to preserve a sentencing issue in the trial court is of no great moment. The rule and the Reform Act are a reaffirmation of the philosophy of Steinhorst v. State, 412 So.2d 332 (Fla. 1982) and Castor v. State, 365 So.2d 701 (Fla. 1978) which emphasized the critical importance to both the trial and appellate process of properly preserving all issues in the trial court. See, Justice Shaw's concurring in result opinion in Walker v. State, 462 So.2d 452, 454 (Fla. 1985) criticizing the Rhoden rationale and accurately predicting that it would lead to unnecessary and undesirable appellate review of unpreserved sentencing errors.

At this point, the state invites the attention of the Court to the penetrating analysis of the above implementing rules and their relationship to the Reform Act by Chief Judge Griffin for an **en banc** court in Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), review pending under case no. 93,966 with oral argument on 11 May 1999. The state suggests that the Maddox analysis shows why the implementing rules cannot be retroactively applied to sentences which occurred prior to 1 January 1997. Chief Judge Griffin's analysis in Maddox shows that this Court has implemented the Reform Act by providing trial court remedies in the thirty-day period following rendition of sentence and that these rules go beyond the mere implementation of the Reform Act, as this Court is constitutionally authorized to do in adopting rules of practice and procedure. The substantive right is the right to a judicial remedy for fundamental sentencing error. The actual method of raising such claims is a matter of practice and procedure for this Court. The implementing rules provide a foolproof, fail-safe method of raising **all** claims of sentencing error in the trial court and of obtaining appellate review should the claim be denied by the trial court. The defense counsel and client have thirty days to review the final sentencing order for prejudicial error and to seek correction in the trial court. If the trial court claim is denied, the appellant has a right to seek appellate review. Alternatively, if trial counsel fails to identify and move to correct a prejudicial sentencing error within thirty days, it can be said as a matter of law that this

is not acceptable trial strategy and that trial counsel has been ineffective pursuant to Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) and Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998). In these circumstances, a timely rule 3.850 motion alleging ineffective assistance of counsel requires nothing more than a showing of prejudicial sentencing error which is, of course, the same burden placed on a rule 3.800(b) movant. If relief is not given, the defendant/petitioner is entitled to appellate review of the order denying the rule 3.850 motion and the controlling question, as it would have been on direct appeal had trial counsel performed effectively, is whether there is prejudicial sentencing error.

There is no question that retroactive application of the plain terms of rules 9.140(b)(2) and 9.140(d) to the present case would prohibit petitioner from challenging his sentences in the district court when the claim had not been preserved in the trial court. None of the exceptions to these rules were met. However, the state agrees with petitioner that the implementing rules cannot be retroactively applied because the restrictions in rule 9.140(d) on direct appeal of sentencing errors cannot be separated from the additional remedies given for raising such issues within thirty days of the sentencing order by rule 3.800(b). Here, petitioner did not have the rule 3.800(b) opportunity to raise the single subject sentencing issue within thirty days of his 1 November 1996 sentencing. Obviously, he

should not now be thrown out of court by the selective application of one of these inseparable rules.

Petitioner's brief devotes twenty or more pages to the meaning and effect of the Reform Act and implementing rules on the plethora of case law which has examined and struggled with the meaning of such amorphous terms as "fundamental and non-fundamental sentencing error," "legal or illegal sentences," "lawful and unlawful sentences," and "constitutional or non-constitutional sentencing error." See, as only one of many examples, Judge Alterbernd's examination of "erroneous sentences," "unlawful sentences," and "illegal sentences" in Judge v. State, 596 So.2d 73 (Fla. 2d DCA 1991). Petitioner's brief, in the view of the undersigned counsel, is an impressive piece of professional work and his examination of this case law and its ramifications and uncertainties is commendable. It illustrates, however, the fundamental wisdom of Judge Griffin's analysis and of the state's position. We no longer need to concern ourselves with these esoteric excursions into the unknown and unknowable. None of these imprecise definitions matter if we simply provide remedies for all **prejudicial** sentencing errors, regardless of any other speculative characteristic they may have, e.g. fundamental. Whether by careful design or partial fortuity, this Court's implementing rules for the Reform Act have cut the Gordian knot of examining sentencing error by, instead of trying to unravel the knot, simply reaching the heart of the problem and providing a **remedy for all prejudicial sentencing error** thus

mooting the question of what type of error it may be. The state suggests that this is a major accomplishment which benefits all and should not be surrendered. A criminal prisoner who is doing a longer sentence because of prejudicial error than he might have otherwise done is not remotely interested, even if his appellate lawyer is interested, in some lawyerly formulation of why the error is fundamental or non-fundamental, or illegal, or unlawful, or whatever. The only adjective which has any reasonably certain meaning, and consistent relevancy, in this context is "prejudicial." It is theoretically possible to have a **nonprejudicial** fundamental error, just as it is possible to have an illegal sentence which is not prejudicial. Prejudicial sentencing error, outside the death penalty arena, is comparatively simple to identify: Is the sentence longer than it would have been had the error not occurred? That question almost invariably must be answered in the trial court which is why it is so critical that it be first raised there. As Maddox shows, our rules of criminal and appellate procedure now require that the question of prejudical error in a sentence be first raised in the trial court and that it not be addressed in an appellate court until that court is informed of the views and factual findings of the trial court on the issue. The state submits that is how it should be and the rules of criminal and appellate procedure should not be amended to permit raising sentencing errors for the first time in the appellate court. Those rules should not be retroactively applied to the instant facts and circumstances.

CONCLUSION

The Reform Act may be prospectively applied here but does not bar review of a claim of fundamental error. The implementing rules should not be retroactively applied but, if applied, they would bar review of this unpreserved claim of sentencing error. This Court should address the single subject issue on its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF (Amended) has been furnished by U.S. Mail to Richard J. Sanders, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida 33831, this 26th day of April, 1999.

James W. Rogers
Attorney for the State of Florida

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