

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

FEB 15 1988

CLERK, SUPREME COURT

By Deputy Clerk

MELISSA HENRIQUEZ,

Petitioner,

vs.

Case No. 71,414

STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

LAUREN HAFNER SEWELL  
Assistant Attorney General  
1313 Tampa Street, Suite 804  
Park Trammell Building  
Tampa, Florida 33602

OF COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE NO.

TABLE OF CONTENTS.....	i
TABLE OF CITATIONS.....	ii
PRELIMINARY STATEMENT.....	1
SUMMARY OF THE ARGUMENT.....	2
ISSUE I.....	3
THE ABSENCE OF CONTEMPORANEOUS OBJECTION TO THE IMPOSITION OF COSTS CONSTITUTED A WAIVER OF THE PRIOR NOTICE REQUIRED BY JENKINS V. STATE, 444 So.2d 947 (Fla. 1984)	
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	9

TABLE OF CITATIONS

PAGE NO.

Barker v. State,  
\_\_\_ So.2d \_\_\_ (Fla 2d DCA January 13, 1988)  
[13 F.L.W. 217].....1, 4, 5, 6, 7

Castor v. State,  
365 So.2d 701 (Fla. 1978).....4

Clark v. State,  
363 So.2d 331 (Fla. 1978).....4

Henriquez v. State,  
513 So.2d 1285 (Fla. 2d DCA 1987).....3

Jenkins v. State,  
444 So.2d 947 (Fla. 1984).....1, 2, 3, 4, 6, 7

Outar v. State,  
508 So.2d 1311 (Fla. 5th DCA 1987).....3, 6, 7

Ray v. State,  
403 So.2d 956 (Fla 1981).....5

Reynolds v. State,  
\_\_\_ So.2d \_\_\_ (Fla 5th DCA Dec. 17, 1987) [13 F.L.W. 2887].....7

PRELIMINARY STATEMENT

The question that is ultimately presented by this case is as follows:

Whether a contemporaneous objection is necessary to preserve for appellate review the propriety of imposing costs on an indigent defendant at a sentencing hearing without the prior notice required by Jenkins v. State, 444 So.2d 947 (Fla. 1984)

This question has been certified to this Court as one of great public importance in Barker v. State, \_\_\_ So.2d \_\_\_ (Fla. 2d DCA January 13, 1988) [13 F.L.W. 217]. The time for filing a notice to Invoke Discretionary Jurisdiction runs on February 13, 1988.

Respondent simply wishes to make this Court aware of the possibility that Barker might also be before the Court. Since the Second District Court of Appeal explained its rationale for Henriquez in Barker, this Court may choose to review the cases together.

MELISSA HENRIQUEZ will be referred to as the "Petitioner" in this brief. The STATE OF FLORIDA will be referred to as the "Respondent". The record on appeal, consisting of one (1) volume, will be referred to by the symbol "R" followed by the appropriate page number.

### SUMMARY OF THE ARGUMENT

This Court has said an indigent defendant has a due process right to notice and opportunity to be heard prior to the imposition of costs. Jenkins. In this case, the Second District Court of Appeal found that the failure to object at the sentencing hearing when the judge announced his intention to impose fines, costs and liens constituted a waiver of the issue for appeal. Other courts have found the failure to provide notice constituted fundamental error negating the contemporaneous objection requirement.

However, the error is not fundamental because it does not go to the foundation of the case or to the merits of the cause of action. The failure to give notice prior to the imposition of costs which are mandated by statute and which are anticipated by defense counsel must not be deemed fundamental, especially in the absence of any allegation of prejudice stemming from the lack of notice.

Though the error could be easily corrected, defense counsel should not be allowed to sandbag the courts by keeping silent about the Jenkins requirements until the case is on appeal and then crying foul without establishing prejudice.

Since Henriquez did not object to the imposition of fines, costs and liens, she has waived the issue; and since the absence of prior notice does not constitute fundamental error, Henriquez is not entitled to relief. Accordingly, the imposition of costs must be affirmed.

ARGUMENT

ISSUE I

THE ABSENCE OF CONTEMPORANEOUS OBJECTION TO  
THE IMPOSITION OF COSTS CONSTITUTED A WAIVER  
OF THE PRIOR NOTICE REQUIRED BY JENKINS V.  
STATE, 444 So.2d 947 (Fla. 1984).

At Henriquez' sentencing hearing, the judge clearly stated his intention to impose fines, costs, and a lien for the services of the public defender. The amount of the lien was suggested by the assistant public defender himself. The fines, costs and lien were imposed absent any objection by either the defendant or her public defender.

Notwithstanding the absence of objection, the public defender appealed the imposition of the assessment on direct. In spite of the fact that the statutes allowing the imposition of such assessments have been in force for several years, and in spite of the fact that the attorney was prepared to testify as to the hours he'd worked on the case, the public defender alleged Henriquez' right to notice and opportunity to be heard on the levy had been violated.

The Second District Court of Appeal found the failure to object when the judge orally stated his intention to impose these assessments constituted a waiver of the right to assert objections to the assessments on appeal. They further found that this waiver included any objections that the procedural requirements of Jenkins v. State, 444 So.2d 947 (Fla. 1984) had not been met. The court noted conflict with the holding in Outar v. State, 508 So.2d 1311 (Fla. 5th DCA 1987). Henriquez v. State, 513 So.2d 1285 (Fla. 2d DCA 1987).

The question before this Court then becomes whether a contemporaneous objection is necessary to preserve for appellate review the propriety of imposing costs on an indigent defendant at a sentencing hearing without the prior notice required by Jenkins v. State, supra. See Barker v. State, \_\_\_ So.2d \_\_\_ (Fla. 2d DCA January 13, 1988) [13 F.L.W. 217]. Respondent and the Second District Court of Appeal urge that the absence of the objection constitutes waiver of the issue and so the imposition of the assessments in this case must be affirmed.

It has long been the law in Florida that a reviewing court will not consider points raised for the first time on appeal. Castor v. State, 365 So.2d 701 (Fla. 1978). Even constitutional errors, other than those constituting fundamental error, are waived unless timely raised in the trial court. Clark v. State, 363 So.2d 331 (Fla 1978).

Jenkins v. State, supra holds an indigent defendant has a due process right to be given notice and an opportunity to be heard prior to the imposition of court costs. However, the failure to follow the Jenkins requirements does not rise to the level of fundamental error which excuses the failure to the defendant to object to the imposition of assessments at a sentencing hearing for several reasons.

Fundamental error is error which goes to the foundation of the case or goes to the merits of the cause of action, Clark, supra, and should be applied only in the cases where a jurisdictional error appears or where the interests of justice

present a compelling demand for its application. Ray v. State, 403 So.2d 956 (Fla 1981) The failure to give a defendant written notice prior to the imposition of costs, which imposition is mandated by statute and of which at least the attorney has notice, can hardly be deemed fundamental error. This collateral issue does not go to the foundation of the case either for or against the defendant and it certainly does not go to the merits of the cause of action. Neither is the well-anticipated imposition of costs without notice a jurisdictional error.

Likewise, the failure to provide defendants with prior notice in these cases does not rise to a level that the interest of justice compels invocation of the fundamental error doctrine. The defendants are on notice that costs will be imposed by the existence of the statutes. The attorneys are on notice that costs will be imposed, and in the instance where attorneys liens are at issue, counsel is involved in the assessment of the amount.

The failure of either the defendant or the attorney to object does not seem to occur from surprise or lack of preparation, but from the absence of any true objection or prejudice. See Barker, supra. At this stage, neither indigence nor the ability to pay is an issue; the absence of notice is not vital. Also, the costs will not be collected without a finding that the indigent has the ability to pay, so the necessity for preparation for the imposition of costs is illusory.



The cases in which fines, costs and liens are imposed at the sentencing hearing, to the utter silence of the defendant and attorney, are numerous. See Barker, at 217. As is usually the case, Henriquez does not suggest a defense to the imposition of costs which she was forced to abandon due to the lack of notice. Indeed, Henriquez fails, as do most defendants, (see Barker at 218) to allege any prejudice at all stemming from the absence of prior notice. Without prejudice, the error cannot be considered fundamental.

Further evidence that the error is not fundamental is the remedy chosen by appellate courts. In cases where the courts have found the failure to meet the Jenkins requirement error, they have simply remanded for the reimposition of costs with proper notice. See Barker, at 217. If the error was fundamental it would seem that the remedy would be far more severe, at least striking the imposition of costs with prejudice.

For the reasons stated above, the Outar court erred in deeming the failure to give the defendant adequate notice and opportunity to object fundamental. Contrary to what they said in Outar, due process does not require a judicial determination that the defendant has an ability to pay; it merely requires adequate notice and an opportunity to object to the imposition of costs. Without a showing of prejudice due to the absence of notice, the error is not fundamental. Barker.

The Fifth District Court of Appeal may be implicitly receding from its holding in Outar in Reynolds v. State,

So.2d \_\_\_\_\_ (Fla. 5th DCA December 17, 1987) [13 F.L.W. 2887]. There they found the failure to raise the imposition of costs waived where the issue had not been raised in a previous appeal of the case. "However this case can serve as a vehicle to give notice that this type of error will not be considered until it has been first submitted to the trial court for correction." Id. at 2887.

The problem of providing notice that upon conviction costs will be imposed can easily be corrected by a piece of paper issued at some preliminary stage of criminal proceedings. Hopefully courts will undertake this simply remedy. However, deeming the failure to give such notice a fundamental error in cases like Henriquez where there is no prejudice alleged or shown, allows the defendant and their attorneys to sandbag the system and squander precious judicial resources. In the absence of some automatic system of prior notice, it is not too onerous a burden to require a defendant to object when he feels assessments are wrongly being imposed in order to preserve the question for appellate review.

It would be far better for defense counsel to bring to the trial judge's attention that Jenkins requires notice and hearing prior to the imposition of costs on an indigent defendant, and give the trial judge and the state the opportunity to meet the Jenkins requirements.

Barker 13 F.L.W. 217, 218.

Because the failure to afford the defendant formal notice prior to the imposition of fine, costs and liens is not fundamental error, the failure to object constitutes a waiver of the right to appeal the imposition of these assessments. Accordingly, the imposition of such costs should be affirmed.

CONCLUSION

Based on the foregoing and authority and argument, respondent respectfully requests this Court to affirm the Second District Court of Appeal's decision in Henriquez v. State, supra, and affirm the imposition of the assessments determined by the trial court in this matter.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

Lauren Hafner Sewell  
LAUREN HAFNER SEWELL  
Assistant Attorney General  
1313 Tampa Street, Suite 804  
Park Trammell Building  
Tampa, Florida 33602  
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to D. P. Chanco, Assistant Public Defender, Polk County Courthouse, P. O. Drawer 9000, Drawer PD, Bartow, Florida 33830, this 10<sup>th</sup> day of February, 1988.

Lauren Hafner Sewell  
OF COUNSEL FOR RESPONDENT.