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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 76,102

GARY STEPHEN BEASLEY,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the appellee in the court below and the prosecution in the trial court. Respondent was the appellant and defendant in the courts below. The parties will be referred to as the "State" and "Beasley". The symbol "R" and page number refers to the record, volumes I through III below. A copy of the decision below is attached as an appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Beasley pled nolo contendere to violation of section 893.135(1)(b)1, reserving the right to appeal the denial of the motion to suppress. (R 46, R 59). At the sentencing hearing on 14 August 1989, Beasley was adjudged guilty and sentenced to a guidelines sentence of four and one-half years imprisonment. Pursuant to mandatory provisions of section 893.135(1)(b)1 he was also sentenced to a minimum three year term and a fine of $50,000.00 plus a 5% surcharge of $2500 pursuant to the mandatory provisions of section 960.25 (R 58). Similarly, pursuant to the mandatory terms of sections 27.3455, 943.25(3) and 960.20, respectively, Beasley was ordered to pay predesignated costs of $200.00, $3.00,[1] and $20.00. (R 59) On appeal, the district court below affirmed the conviction but remanded for a determination of the ability to pay the costs pursuant to Mays v. State, 519 So.2d 618 (Fla. 1988) and Jenkins v. State, 444 So.2d 947 (Fla. 1984). Based on the arguments of the State that Jenkins should be reexamined, the district court certified the following question:

> WHETHER THE IMPOSITION OF COSTS AGAINST AN INDIGENT DEFENDANT IS DIFFERENT THAN THE COLLECTION OF THOSE COSTS MAKING THE

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[1] Apparently because of a scrivener's error, the $3.00 cost was shown as $5.00.

QUESTION OF ABILITY TO PAY PREMATURE UNTIL ATTEMPT IS MADE TO COLLECT SUCH COSTS?

Appendix A, page 3 of slip opinion.

The district court granted a petition for clarification and affirmed the five percent surcharge of $2500.00 on the basis that it was a fine, not a cost.

SUMMARY OF ARGUMENT

Consistent with the ex post facto clause, publication of the criminal offense and penalties thereof in Florida Statutes prior to the commission of the offense gave Beasley reasonable notice of the mandatory costs at issue here.

Beasley was given a fair opportunity to be heard in the guilt and sentencing phases by the standard procedures set forth in this Court's Florida Rules of Criminal Procedure. This conclusion is supported by controlling case law.

Statutorily mandated and fixed costs travel with, or inhere in, a judgment of guilt. The formal imposition of such statutorily mandated costs is a non-discretionary, purely ministerial, function.

The due process opportunity to be heard does not include the right to present irrelevant evidence or argument that the trial judge refuse to perform its ministerial sentencing duties. The sentencing hearing provided by rule 3.720 afforded Beasley a due process opportunity to be heard which was appropriate to the circumstances.

This Court has consistently upheld the constitutional authority of the legislature to statutorily mandate the imposition of costs.

Jenkins v. State, 444 So.2d 947 (Fla. 1984), as clarified by Bull v. State, 548 So.2d 1103 (Fla. 1989), does not require special notice and an additional hearing beyond the sentencing hearing afforded Beasley pursuant to rule 3.720.

The certified question should be answered in the affirmative and the decision below quashed.

ARGUMENT

ISSUE

BEASLEY WAS GIVEN REASONABLE NOTICE AND A FAIR OPPORTUNITY TO BE HEARD PURSUANT TO THE DUE PROCESS CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS.

For our purposes, procedural due process consists of two components: "reasonable notice" and "a fair opportunity to be heard." Goodrich v. Thompson, 96 Fla. 327, 118 So. 60, 62 (1928). It is the state's position that publication of criminal offenses and the punishments thereof in the Laws of Florida or Florida Statutes, coupled with standard trial procedures in the guilt and sentencing phases, as set forth in Florida Rules of Criminal Procedure, afforded Beasley procedural due process.

REASONABLE NOTICE

It is settled law that "every citizen is charged with knowledge of the domestic law of his jurisdiction." Akin v. Bethea, 33 So.2d 638, 640 (Fla. 1948). The adoption of criminal offenses and the punishment(s) thereof and their publication in the Laws of Florida and Florida Statutes gives every citizen constructive notice of the law. Thompson v. State, 56 Fla. 107, 47 So. 816 (1909); Sammis v. Bennett, 32 Fla. 458, 14 So. 90 (1893). This principle of constructive notice of statutory law

is the foundation for the ex post facto clauses of the Florida and United States constitutions. In order to prosecute, convict and punish, the state must show that, prior to the commission of the alleged offense(s), the defendant had been given "fair warning," i.e., reasonable notice, of the criminal offense(s) and the penalties thereof. Weaver v. Graham, 450 U.S. 24, 28, 67 L.Ed.2d 17,23, 101 S.Ct. 960 (1981). This prohibition against retroactive, i.e., unnoticed, application of penalties extends to the imposition of statutory costs. State v. Malone, 512 So.2d 832 (Fla. 1987) (Retroactive application of section 27.3455 violates the ex post facto clause); Gianfrancisco v. State, 509 So.2d 1331 (Fla. 2d DCA 1987) (Ditto).

Under the above law, it is uncontrovertible that prior to the commission of the offense to which he pled, and necessarily at all times thereafter, Beasley had reasonable notice of the following:

1. That it was a criminal offense to traffic in cocaine contrary to section 893.135(1)(b)1, Florida Statutes.

2. That conviction of such offense was punishable by a minimum mandatory term of three years imprisonment and a mandatory fine of $50,000.00 pursuant to section 893.135(1)(b)1 and a mandatory five percent surcharge of $2500.00 pursuant to section 960.25, Florida Statutes.

3. That conviction of this or any other criminal offense would result in the mandatory imposition of costs in the fixed sums of $200.00, $3.00, and $20.00 pursuant to, respectively, sections 27.3455, 943.25(3), and 960.20, Florida Statutes.

4. That upon adjudication of guilt of this or any other criminal offense, pursuant to Florida Rule of Criminal Procedure 3.720, the trial judge would conduct a sentencing hearing as soon as practicable at which Beasley would have the opportunity to submit evidence and arguments relevant to the sentence and to offer legal cause why sentence should not be pronounced.

This Court has consistently upheld mandatory sentencing provisions, such as those at issue here, against due process challenges of reasonable notice. In Scott v. State, 369 So.2d 330, 331 (Fla. 1979), the defendant was convicted of attempted murder in the second degree. This Court tersely stated and reiterated the law on due process challenges to mandatory sentencing provisions.

> The defendant concedes that Florida courts have consistently rejected constitutional challenges to statutes which require mandatory minimum sentences to be imposed and that as a general proposition, if the sentence given is one that has been established by the legislature and is not on its face cruel and unusual, the imposition thereof will be sustained as against attacks based on due process, equal protection, separation of powers and legislative usurpation arguments. [cites omitted].

> He [Scott] contends the statute does not meet constitutional muster because:
> 1) It does not place defendant on notice that a conviction for this crime would subject him to the penalty provisions of the statute under attack; [emphasis added]
> * * *
> 3) The statute unconstitutionally binds trial judges to a sentencing process which wipes out any chance for a reasoned judgment;
> * * *
> We reject the contentions of the defendant and hold that the statute is constitutional. [cites omitted].
>
> Id.

The rejection of contention one is directly on-point here. See, Bryant v. State, 386 So.2d 237. 241 (Fla. 1980) ("Under Florida law, however, there is no requirement that a defendant be advised of any mandatory minimum sentence."). See, also, Sireci v. State, 399 So.2d 964, 970 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862, where it was held that publication in Florida Statutes provided notice to defendants of the aggravating circumstances applicable to capital crimes.

Applying the above law to the instant case, it is apparent that under Florida law the requirement of the ex post facto clause that a defendant be given notice of criminal offenses and penalties thereof prior to the alleged commission of the offenses also serves to afford all defendants their procedural due process right of reasonable notice of crimes and penalties thereof. There is no basis for Beasley to assert that he did not have reasonable notice of the mandatory penalties at issue here.

FAIR OPPORTUNITY TO BE HEARD

Under article V, section 2(a) of the Florida Constitution, it is the responsibility of this Court to "adopt rules for the practice and procedure in all courts." This responsibility to adopt procedural rules for courts and the concomitant constitutional responsibility to ensure that such rules afford parties their procedural due process rights coalesce, inter alia, in Florida Rules of Criminal Procedure. Sentencing procedures under these rules are contained in section XIV, or, more specifically as they apply here, rule 3.720, titled Sentencing Hearing. The mandatory costs and surcharge at issue here are all contingent on a judgment of guilty at the conclusion of the guilt phase. The question for this Court is whether rule 3.720 affords Beasley, and other similarly situated, a fair opportunity to be heard on whether mandatory fixed costs and surcharges should be imposed. It is the state's position that they do and that it is not necessary for this Court to revisit and amend the rule. In determining whether this assertion is correct, the Court should note the well settled principle that procedural due process is situational, it is not a fixed set of procedures applicable in all circumstances. As the Supreme Court said in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972):

> Once it is determined that due process applies, the question remains what process

> is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.
>
> * * *
>
> To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Id.

Rule 3.720 requires trial judges to conduct sentencing hearings "as soon as practicable" after an adjudication of guilt. At this hearing, defendants are given an opportunity to show legal cause why sentence should not be pronounced. More significantly, the parties are given the opportunity to submit evidence and argument relevant to the sentence. Bearing in mind that "as soon as practicable" urges expeditious sentencing, continuances may be granted if the parties have relevant evidence or argument which for good cause cannot be immediately submitted. Denial of motions for continuance are subject to an abuse of discretion standard with its heavy deference to the trial judge's decision. Manigault v. State, 534 So.2d 856 (Fla. 1st DCA 1988).

Rule 3.720 requires that parties be given the opportunity to present relevant evidence. Bearing in mind the Morrissey rule

that due process is situational, the parties at sentencing hearings are entitled to point out relevant sentencing statutes to the court and to present evidence and argument on whether such statutes are mandatory or discretionary. To the degree, if any, that sentencing statutes are discretionary, the parties are entitled to submit evidence and argument as to how that discretion should be exercised. However, neither rule 3.720 nor due process, or section 90.402 of the Florida Evidence Code, require that a court offer parties an opportunity to submit irrelevant evidence or argument urging the court to refuse to perform a ministerial duty by not imposing a statutorily mandated sentence, i.e., to urge the court to impose an illegal sentence. The imposition of mandatory penalties, whether they involve fines, surcharges, costs, or minimum terms of imprisonment, is not discretionary. Indeed, should the judge fail to impose a mandatory sentence, the sentence itself is illegal and subject to reversal and remand for resentencing. D'Alessandro v. State, 360 So.2d 774 (Fla. 1978). Reversal for imposition of a mandatory sentence does not violate double jeopardy even if the illegal sentence has commenced. Bozza v. United States of America, 330 U.S. 160, 67 S.Ct 645, 91 L.Ed 818 (1947). See, also, United States v. Purcell, 715 F.2d 561 (11th Cir. 1983) (When sentencing court discovers a sentence imposed by it does not conform to applicable statute, it has the duty to correct sentence even

though serving of first sentence has begun.) Similarly, see also, Florida Rule of Criminal Procedure 3.800(a), "a court may at anytime correct an illegal sentence." To illustrate even more vividly the complete absence of discretion on whether to impose a mandatory penalty, even the extraordinary writ of mandamus will lie to require a trial judge to impose a mandatory sentence. D'Alessandro.

It is clear from the above that a trial judge at a sentencing hearing is not required to entertain evidence and argument calling for the illegal exercise of discretion in a non-discretionary setting. It is also clear that neither Beasley, nor any other person similarly situated, is denied due process by the imposition of mandatory costs and surcharge, as here, under sections 27.3455, 943.25(3), 960.20, and 960.25 without a special hearing, i.e., other than the sentencing hearing pursuant to rule 3.720. This conclusion is also supported by reference to the standard judgment and sentence form promulgated by this Court in rule 3.986. The judgment portion of this form contains an unequivocal preprinted order that the defendant pay court costs pursuant to sections 960.20 and 943.25(3). This imposition of costs does not require even as much as a check mark by the trial judge, the imposition automatically travels with, or inheres in, the judgment of guilt. Similarly, the judgment form contains a check mark provision for the imposition of additional costs.

This requires that the trial judge fill in the applicable sum from the schedule contained in section 27.3455 based on the offense committed, i.e., felonies - $200.00, misdemeanors and criminal traffic offenses - $50.00. The five percent surcharge on any fine imposed pursuant to section 960.25 appears under the sentencing portion of the form because, of course, not all criminal offenses are subject to mandatory fines and the judge must perform the mathematical calculations when a fine is imposed.

Section 3.720 permits a defendant to raise legal causes why a sentence should not be imposed. A defendant could, of course, raise a constitutional challenge to any sentencing statute, whether mandatory or discretionary. Although Beasley raised no such challenge below, or any other challenge for that matter, the state considers it prudent and relevant to point out that this Court has previously upheld the constitutional authority of the legislature to prescribe mandatory costs and surcharges, i.e., penalties, on criminal defendants convicted of either violent or nonviolent criminal offenses. See State v. Champe, 373 So.2d 874, 880 (Fla. 1979):

> Unlawful taxes. Appellees' remaining point, never addressed by the trial court, is that the charge imposed by Section 960.20 is not a "cost," and that the charge imposed by Section 960.25 is not a "fine," but rather that both are illegal taxes. They assert that fines must be imposed strictly as punishment for the commission of crimes, and

> that costs must be expenses incident to case prosecution. The latter contention was specifically rejected in State v. Young, 238 So.2d 589 (Fla. 1970). As to the former, the five percent surcharge in Section 960.25 may quite properly be considered as a form of punishment for the offense. Punishment in the form of restitution is not a novel concept, and this form of punitive measure is valid unless so "excessive" or "harsh" as to be "plainly and undoubtedly in excess of any reasonable requirements for redressing the wrong." The five percent surcharge in the statute is reasonably and uniformly proportionate to the gravity of the offense, and therefore constitutionally sound.

Id. See, also, Scott v. State, 369 So.2d at 331 quoted above, "Florida courts have consistently rejected constitutional challenges to statutes which require mandatory minimum sentences to be imposed ... if the sentence given is one that has been established by the legislature and is not on its face cruel and unusual, the imposition thereof will be sustained as against attacks based on due process, equal protection, separation of powers and legislative usurpation arguments." Champe is also useful in that it clearly recognizes that costs, surcharges, and fines are all subsumed within penalties and are subject to the same constitutional constraints and analysis.

The limited right to be heard when the legislature mandates a particular penalty for a criminal offense, consistent with the flexible nature of due process, is also illustrated by the penalty for escape under section 944.28(1), Florida Statutes

(1989). This statute provides for automatic forfeiture of gain-time without notice or hearing when a prisoner is convicted of escape. This provision has been upheld against due process challenge. Morgan v. Cook, 344 So.2d 577 (Fla. 1977); Wright v. Wainwright, 359 So.2d 11 (Fla. 1st DCA 1978); Hands v. Wainwright, 360 So.2d 783 (Fla. 1st DCA 1978). The last decision is noteworthy because the court articulated the rationale for the decision: "the judicial determination of guilt in the escape attempt was sufficient due process for the [mandatory] forfeiture of gain time." Id. From a constitutional due process viewpoint, the mandatory provisions of section 944.28(1) are analogous to the mandatory provisions at issue here. The mandatory costs and surcharge, just like the mandatory forfeiture of gain time, are automatically imposed upon a finding of guilty, due process has been satisfied and nothing further is required. Contrast application of the same principle in Rankin v. Wainwright, 351 F.S. 1306 (U.S.D.C. M.D. Fla. 1972), where the court, relying on Morrissey, held that where there was no adjudication of guilt the prisoner must be given due process in an administrative hearing with an opportunity to be heard.

The conclusion that rule 3.720 does not require a special hearing, beyond the routine sentencing hearing, to impose mandatory, predesignated costs is also supported by specific provisions of the rule. Rule 3.720(d) implements section 27.56,

Florida Statutes by providing for a cost lien to be imposed on all convicted defendants who receive the assistance of appointed counsel. The rule specifically provides that the defendant shall be given notice and an additional hearing to contest the "amount" of the lien, which, of course, cannot be determined in advance. This special provision is significant for two interrelated reasons. First, the fact that the rule requires notice and hearing only on attorney costs, and none of the other mandatory costs, brings to mind the principle of statutory interpretation that the mention of one thing implies the exclusion of all others, i.e., no other statutory costs require special notice and a hearing. Thayer v. State, 335 So.2d 815 (Fla. 1976). Second, this first principle is reinforced by the obvious distinction between the mandatory costs of sections 27.3455, 943.25(3), 960.20, 960.25, the amounts of which are fixed in advance and require no introduction of evidence, and the mandatory attorney cost lien of section 27.56 which requires the usual evidence concerning the hours expended by the attorney in defending the case in order to fix the amount of the fee. Logically, the latter requires notice and an evidentiary hearing; just as logically, the first group of fixed costs requires no hearing and no notice. This logic is confirmed by this Court's recent holding in Bull v. State, 548 So.2d 1103, 1104-1105 (Fla. 1989):

> Petitioner argues that rule 3.720(d)(1) is deficient in that he must be given an opportunity to challenge the

> imposition of any lien for the services of an appointed attorney. We disagree. Section 27.56 provides for the assessment of fees and costs as a matter of law. It is only the amount which is potentially at issue. There is no constitutional bar to advising an indigent defendant that he may be required to repay the costs of appointed counsel and to collecting those costs at some later time if the defendant becomes solvent. Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Further, contrary to petitioner's argument, we see no conflict with Jenkins v. State, 444 So.2d 947 (Fla. 1984), where we held that notice and an opportunity to be heard must be given and a judicial determination made that the defendant is able to pay before repayment is enforced. Notice and an opportunity to be heard have been afforded, and enforcement of the lien will require a civil action during which petitioner may show an inability to repay the debt.
>
> Id.

Bull makes clear that there is no procedural due process right to a hearing to contest the mandatory provisions of a statute beyond those afforded in all sentencing procedures. A special hearing is only required if the amount is at issue and the trial judge has discretion, i.e., the cost is not fixed in the statute. Moreover, relying on Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974), Bull makes clear that there is no constitutional bar to assessing costs against an indigent defendant provided collection is not attempted until the defendant is solvent. Federal case law following Fuller is consistent with Bull. See United States v. Pagan, 785 F.2d 378, 381 (2d Cir.), cert. denied, 479 U.S. 1017, 107 S.Ct. 667, 93 L.Ed.2d 719 (1986) ("the imposition of assessments on an

indigent, per se, does not offend the Constitution. Constitutional principles will be implicated here only if the government seeks to force collection of the assessments at a time when [Pagan is] unable through no fault of his own to comply"); United States v. Cooper, 870 F.2d 586 (11th Cir. 1989); United States v. Rivera-Velez, 839 F.2d 8 (1st Cir. 1988).

In connection with Fuller, Pagan, and Bull, it should be noted that none of the statutes at issue here mandating the assessment of costs have any provisions penalizing the indigent who is unable to pay the costs. We are not dealing with the situation condemned in State v. Yost, 507 So.2d 1099 (Fla. 1987), Mays v. State, 519 So.2d 618 (Fla. 1988), and Wood v. State, 544 So.2d 1004 (Fla. 1989), where section 27.3455, Florida Statutes (1985), in it's previous form, not only assessed costs but contained penalty provisions preventing the convicted defendant from earning gain-time until the costs were either paid in money or community services. See Chapter 86-154, Laws of Florida, section 1, amending section 27.3455, to delete penalty provisions.

The district court below relied primarily on Jenkins v. State, 444 So.2d 947 (Fla. 1984) (Jenkins II). This case requires examination in light of the above analysis and Bull V. State, 548 So.2d 1103 (Fla. 1989).

In Jenkins v. State, 422 So.2d 1007 (Fla. 1st DCA 1982) (Jenkins I), the issue was whether a trial court could assess costs of $10.00 and $2.00 under sections 960.20 and 943.25(4) on an indigent defendant. Although the court was purportedly examining the question of assessing the costs, the analysis and language used by the court reveals that it was thinking in terms of not only assessing but simultaneously collecting the costs.

> Section 27.52, Florida Statutes (1981), establishes the criteria for a determination of indigency. Even the most cursory reading of that statute, as well as common sense, reveals that a defendant may be unable to afford attorneys and the large court costs dealt with in State v. Byrd, 378 So.2d 1231 (Fla. 1979), or Arnold v. State, 356 So.2d 862 (Fla. 1st DCA 1978), but is still easily able to pay $12.00 or $24.00. Jenkins was given ample opportunity to object and to convince the trial judge of his inability to pay the charge. He failed to take advantage of either.

Id.

On review of Jenkins I, in apparent recognition that the district court below had failed to make the critical distinction between assessment of costs and the collection of such costs, this Court explicitly stated that indigency does not prevent assessment of costs provided a judicial determination of ability to pay is subsequently made before collection is attempted. Nevertheless, the language in Jenkins II at 950 that the "state must, however, provide adequate notice of such assessment ... with full opportunity to object to the assessment of those costs"

overlooked the fact that, consistent with the ex post facto clause, Jenkins had notice of the penalty provisions of the statutes prior to the commission of the offense and was given a full opportunity during the trial to show that he did not commit the offenses and was not subject to the mandatory penalties. It may be that the state did not clearly present the distinctions between assessment and collection and between mandatory and discretionary penalties to the Court because the focus of both Jenkins I and Jenkins II appears to have been whether an indigent for the purposes of receiving the expensive services of an appointed counsel can nevertheless be required to immediately pay relatively modest costs such as those at issue in Jenkins.

From a procedural due process viewpoint, the distinction between assessing mandatory fixed costs and attempting to collect those costs is critical. When the fixed costs are being mandatorily imposed as a matter of law, indigency is irrelevant, and the costs may be assessed without special notice or hearing. Only if there is an effort to collect does indigency become relevant and the defendant must then be given the opportunity to show an inability to pay. These distinctions were addressed in Bull v. State, 548 So.2d 1103, 1104-1105 (Fla. 1989), discussed above, in a manner which should have cleared up any ambiguity in Jenkins II:

> Petitioner argues that rule 3.720(d)(1) is deficient in that he must be given an

> opportunity to challenge the imposition of any lien for the services of an appointed attorney. We disagree. Section 27.56 provides for the assessment of fees and costs as a matter of law. It is only the amount which is potentially at issue. There is no constitutional bar to advising an indigent defendant that he may be required to repay the costs of appointed counsel and to collecting those costs at some later time if the defendant becomes solvent. Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Further, contrary to petitioner's argument, we see no conflict with Jenkins v. State, 444 So.2d 947 (Fla. 1984), where we held that notice and an opportunity to be heard must be given and a judicial determination made that the defendant is able to pay before repayment is enforced. Notice and an opportunity to be heard have been afforded, and endorsement of the lien will require a civil action during which petitioner may show an inability to repay the debt.
>
> Id.

The state submits that the above analysis of procedural due process and the case law and sentencing rules applicable to statutorily mandated fixed costs shows that Beasley has not been denied due process and that no error has occurred. Moreover, Jenkins II, as clarified by Bull, does not require that special notice and hearings be afforded on whether legislatively mandated sentencing provisions should be imposed. Should the Court decide otherwise, the state submits that reversal and remand would be a useless and wasteful act because the "error," even if it exists, will always be harmless because Beasley, or any other person similarly situated, cannot make the requisite showing of

prejudice. §§59.041 and 924.33, Fla. Stat. Consider the following. The costs and surcharge at issue are statutorily mandated. Unless the trial judge is prepared to enter an illegal sentence on remand, the costs and surcharge will be automatically reimposed. Should the trial judge enter an illegal sentence, the reversible error will be subject to correction on appeal, by rule 3.800(a) motion, or by writ of mandamus. D'Alessandro, Bozza, Purcell, rule 3.800(a). The harmlessness of the "error" brings to mind this Court's comments in State v. Strasser, 445 So.2d 322, 323 (Fla. 1983).

> On virtually identical facts, in Burney, the Second District refused to remand for new trial, noting, "We are not required to do a useless act nor are we required to act if it is impossible for us to grant effectual relief." 402 So.2d at 39. We agree. Strasser would gain nothing from a new trial. The only effect would be to increase the pressures on the already overburdened judicial system and, ultimately, on the taxpayer. We will not ignore the substance of justice in a blind adherence to its forms.

Id.

See, also, Boston v. State, 411 So.2d 1345 (1st DCA), rev. denied, 418 So.2d 1278 (Fla. 1982) (reversal and retrial would be pointless because result would be the same). In connection with the reference to an already overburdened judicial system see In re CERTIFICATION OF JUDICIAL MANPOWER, 558 So.2d 1002 (Fla. 1990), State v. Hatten, 561 So.2d 562 (Fla. 1990), In re ORDER ON

PROSECUTION OF CRIMINAL APPEALS BY THE TENTH JUDICIAL CIRCUIT PUBLIC DEFENDER, 15 F.L.W 278 (Fla. May 3, 1990), and the over six hundred citations to Jenkins II in Shepard's Florida Citations.

CONCLUSION

The state submits that from a procedural due process viewpoint there is no constitutional distinction between a mandatory "sentence," a mandatory "fine" or a mandatory "cost." From a notice viewpoint, the statutes provide notice prior to the commission of the offense. From a right to be heard viewpoint, the right to be heard during the guilt phase and the right during the sentencing hearing to show legal cause why a mandatory sentence should not be imposed affords procedural due process to Beasley and all others similarly sentenced. The state asks the Court to note the absurdity which results from the artificial and irrational distinction drawn between the procedural due process afforded in imposing mandatory fines or terms of imprisonment and the procedural due process afforded in imposing mandatory "costs," such as those at issue here. Section 893.135 statutorily mandates the imposition of fines as high as $500,000.00 and minimum terms of imprisonment as high as twenty-five years. §893.135(1)(c)3. Such mandatory sentences are routinely imposed during rule 3.720 sentencing hearings, and

properly so, as in the case at hand, without any suggestion or claim that the convicted defendant has any procedural due process rights to special notice and hearing. By contrast, the imposition of relatively insignificant mandatory fixed costs, which are indistinguishable from other mandatory penalties on either generic or procedural due process grounds, causes well over six hundred citations to Jenkins II in Shepard's Florida Citations and reversals and remands. The state urges the Court to put an end to this absurd situation which has already devoured an inordinate and unjustified amount of critical judicial resources. The certified question should be answered in the affirmative and the decision below quashed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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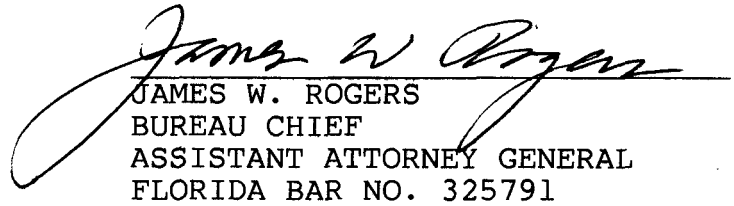

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to Allen J. DeWeese, Assistant Public Defender, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 3rd day of ~~July~~ August, 1990.

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