IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,165

THE STATE OF FLORIDA,

Petitioner,

vs.

DANIEL LAVERNE VAMPER,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

In Vamper v. State, 15 FLW (3d DCA, June 5, 1990), the Third District Court of Appeal held that inability to pay court costs, pursuant to §§ 943.25, 960.20 and 27.3455, Florida Statutes (1989) is a defense against assessment of same, but certified the following question, as one of great public importance:

> WHETHER, SUBSEQUENT TO THE EFFECTIVE DATE OF CHAPTER 86-154, LAWS OF FLORIDA, INABILITY TO PAY IS A DEFENSE TO THE ASSESSMENT (BUT NOT ENFORCEMENT) OF COSTS AGAINST A CRIMINAL DEFENDANT?

Respondent submits that the above question arises out of a fundamental misconception of the scope of this Court's holding in Jenkins v. State, 444 So.2d 947 (Fla. 1984). The district court misconstrued Jenkins to require notice and a hearing prior only to

the enforcement, but not prior to the assessment of court costs. The district court concluded that Jenkins was extended to require a hearing prior to assessment only by this Court's opinion in Wood v. State, 544 So.2d 1004 (1989). Wood, citing Jenkins, expressly requires notice and a hearing prior to assessment of court costs pursuant to § 27.3455, Florida Statutes (1985), which statute then provided for automatic loss of gain time upon failure to pay costs assessed thereunder. The district court reasoned that because the self-enforcing feature of § 27.3455 has been repealed by amendment, Chapter 86-154, Laws of Florida, the scope of Jenkins should recede from the requirement of a pre-assessment hearing for costs imposed pursuant to § 27.3455, and for costs imposed pursuant to §§ 943.25 and 960.20.

Jenkins and its progeny plainly require notice and a hearing prior to the assessment and prior to the enforcement of court costs against a criminal defendant who is indigent at the time of sentencing. That requirement is doctrinally independent of any statutory provisions for enforcement. Principles of stare decisis compel conformity with Jenkins and its progeny, in the absence of some compelling reason for reevaluation or rescission. Neither the state nor the district court has adduced any compelling reasons for rescinding or receding from Jenkins. Accordingly, the certified question must be answered in the affirmative.

ARGUMENT

In Jenkins v. State, 444 So.2d 947 (Fla. 1984), this Court held that court costs, pursuant to §§ 943.25(4) and 960.20, Florida Statutes (1989), could be assessed against a convicted indigent criminal defendant, so long as the defendant received procedural due process, as set forth in Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). In Fuller, the United States Supreme Court upheld a legislative scheme for recoupment of attorneys fees and costs, against an indigent criminal defendant, because the obligation of repayment was conditional only. The obligation could not be imposed, at sentencing, if "there is no likelihood that a defendant's indigency will end." Nor could the obligation subsequently be enforced against one who could not meet it without substantial hardship. The legislation was "tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce the obligation only against those who actually become able to meet it without hardship." 94 S.Ct. at 2125. The scheme thus contemplated two hearings: one at the time of assessment, to determine foreseeable ability; and one at the time of enforcement, to determine actual ability, without undue hardship.

Jenkins adopted the provision set forth in Fuller for a hearing prior to the assessment of costs, to determine "foreseeable ability"; and a hearing prior to enforcement, to determine actual ability without undue hardship:

> "The state must [] provide adequate notice of such assessment to the defendant with full opportunity to object to the assessment of those costs. In addition, enforcement of the

> collection of those costs must occur only after a judicial finding that the indigent defendant has the ability to pay in accordance with the principle enunciated in Fuller v. Oregon. 444 So.2d at 950.

This Court extended the requirement of notice and a hearing, prior to assessment and prior to enforcement, to costs imposed pursuant to § 27.3455, Florida Statutes (1990). See Mays v. State, 519 So.2d 618 (Fla. 1988); Shipley v. State, 528 So.2d 902 (Fla. 1988); Wood v. State, 544 So.2d 1004 (Fla. 1989). This Court has held that because notice, and a judicial determination of foreseeable ability go "to the very heart of the requirements of the due process clause of our state and federal constitutions[,] [t]he denial of these basic constitutional rights constitutes fundamental error." See Wood, 544 So.2d at 1006 (construing Jenkins as impliedly holding such due process violations are fundamental error); and Shipley, 528 So.2d at 903.[1] In quashing the decision of the District Court of Appeal in Barker v. State, 518 So.2d 450 (Fla. 2d DCA 1988), which required a contemporaneous objection to a Jenkins violation, because costs would assertedly routinely be reimposed upon remand, this Court stated:

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[1] The district court in this case found, in contravention of this fundamental error rule, that Mr. Vamper waived, by failing to assert an objection and by remaining silent, thereby apparently consenting to the assessment.

But in Jenkins, as here, court costs were first orally assessed, at sentencing, without objection or claim of inability to pay, by either Jenkins or his counsel. See 444 So.2d at 950 (Alderman, dissenting). This Court has held that Jenkins' silence at this juncture did not constitute consent, or a waiver of his objection. See Wood, 544 So.2d at 1004; Shipley, 528 So.2d at 903. Therefore, Mr. Vamper cannot be held to have consented, or waived objection to the failure of notice in this case, which constituted fundamental error.

> Were this true in every case, there would be no need for notice and hearings. Unfortunately, costs are sometimes incorrectly assessed against defendants. It is the rights of these persons whom the due process clause seeks to protect, and it is fundamental error for a court to fail to protect those rights. Without adequate notice and a meaningful hearing, a court has no way of knowing who should pay costs and who should not. Without adequate notice and a meaningful hearing, the requirements of due process have not been met.

Wood, 544 So.2d at 1006.

This Court's consistent requirement of notice and a hearing prior to assessment was not therefore a response to any self-enforcing characteristic of the cost statutes to which its holdings were addressed: the cost statutes implicated in Jenkins, the progenitor of Wood, contain no self-enforcing features. The requirement of pre-assessment notice in Jenkins was designed to ensure specifically against the requirement of repayment from one whose indigency will not, in all likelihood, cease; and to ensure generally against an inaccurate or erroneous assessment for any other reason. Therefore, the question certified to this court:

> WHETHER, SUBSEQUENT TO THE EFFECTIVE DATE OF CHAPTER 86-154, LAWS OF FLORIDA, INABILITY TO PAY IS A DEFENSE TO THE ASSESSMENT (BUT NOT ENFORCEMENT) OF COSTS AGAINST A CRIMINAL DEFENDANT?

must be answered in the affirmative.

The state has not, in its brief to this Court, adduced any basis for this Court to recede from its rule that the state and federal procedural due process provisions require notice and a hearing prior to the assessment of costs against an indigent defendant. The state has cited United States v. Pagan, 785 F.2d 378 (2d Cir.), cert. denied, 479 U.S. 1017, 107 S.Ct. 667, 93

L.Ed.2d 719 (1986); United States v. Rivera-Velez, 839 F.2d 8 (1st Cir. 1988); and United States v. Cooper, 870 F.2d 586 (11th Cir. 1989); for the proposition that notice and a hearing are required only prior to enforcement, but not prior to assessment of costs pursuant to a mandatory cost provision, such as those involved below. Needless to say, the legislature cannot, by mandating the assessment or enforcement of court costs, or the imposition of any penalty, extinguish a defendant's right to procedural due process. In any case, Pagan, which is the basis for Cooper and Rivera-Velez, holds only that the substantive due process and equal protection provisions of the federal constitution do not forbid the assessment of court costs against an indigent defendant.[2] Fuller says the same thing, with the proviso that the defendant's rights to procedural due process must be met. Neither Pagan nor its progeny purport to abolish, nor even address the procedural due process requirements established in Fuller and Jenkins.

There is, therefore, nothing in those federal cases cited by the state that would require this Court to recede from the holding of Jenkins, Wood, Mays and Shipley that the procedural due process provisions of the state and federal constitutions guarantee a defendant notice and a hearing prior to the assessment and

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[2] It is important to note that the holding in Jenkins explicitly rests not only on the United States Constitution, Amendments 5 and 14, but also on Article I, § 9 of the state constitution, which is more expansive, and more protective of the criminal defendant than is the Fourteenth Amendment to the United States Constitution. See State v. Glosson, 462 So.2d 1082 (Fla. 1985); Brown v. State, 484 So.2d 1324 (Fla. 3d DCA), review denied, 492 So.2d 1330 (Fla. 1986); Lee v. State, 422 So.2d 928 (Fla. 3d DCA), review denied, 431 So.2d 989 (Fla. 1983).

prior to the enforcement of court costs, pursuant to §§ 943.25, 960.20, 27.3455, Florida Statutes.

The rule of stare decisis, that is, "[t]o abide by, or adhere to, decided cases", Black's Law Dictionary 1577 (rev. 4th ed. 1968), "is a fundamental principle of Florida law." State v. Dwyer, 332 So.2d 333, 335 (Fla. 1976). While "its application is not obligatory in any particular case, it is considered appropriate in most instances in order to produce consistency in the application of legal principles unless for some compelling reason it becomes appropriate to recede therefrom." Forman v. Florida Land Holding Corporation, 102 So.2d 596, 598 (Fla. 1958). Thus, as the United States Supreme Court has cautioned:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors.

Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970).

Neither the reasoning of the district court, nor the argument of the state supports departure from this Court's consistent and unambiguous command that a defendant receive notice and a hearing prior to the assessment and the enforcement of court costs. There is no empirical evidence that this clear command has imposed significant hardship, or has worked substantial

injustice. Absent such evidence, or some pertinent change of circumstance in the six years since Jenkins was decided, this Court should adhere to its solid line of precedent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, ANITA GAY, 401 N.W. Second Avenue, Suite N-921, Miami, Florida 33128 this 28 day of September, 1990.

_____
VALERIE JONAS
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