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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **CASE NO. 93,163**

EZEKIAS MIKE,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, who was the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referred to as "Mr. Mike" in this brief. Petitioner, who was the Appellee in the First District Court of Appeal and the State in the trial court, will be referred to as "Petitioner". The record on appeal comprises three volumes, which will be referred to by consecutive Roman numerals, followed by the applicable page number.

Petitioner's Brief will be referenced as "PB".

STATEMENT OF THE FACTS AND THE CASE

Mr. Mike accepts Petitioner's statement of the facts and case as accurate and relevant for the purposes of this appeal.

SUMMARY OF ARGUMENT

In *Mike v. State,* 23 Fla. L. Weekly D1141 (Fla. 1st DCA May 5, 1998), the First District Court of Appeal followed binding precedents from this Court and its own court to hold that fundamental error occurred when Mr. Mike did not receive prior notice of the public defender lien that was imposed upon him.

Fundamental error remains fundamental error even in light of the Criminal Appeal Reform Act. Fundamental error is that error which can be raised for the first time on appeal.

Mr. Mike respectfully requests this Court find that he was not given proper notice of the public defender lien and hold that such error on the trial court's part is fundamental. In so doing, Mr. Mike urges this Court to approve the decision of the First District Court of Appeal and disapprove the conflicting decisions of the Fourth District Court of Appeal.

ARGUMENT

ISSUE I:
WHETHER THE ASSESSMENT OF A PUBLIC DEFENDER LIEN WITHOUT NOTICE IS FUNDAMENTAL ERROR THAT CAN BE RAISED ON APPEAL WITHOUT OBJECTION IN THE TRIAL COURT.

This issue presented by the certified question is prsently pending before this Court in *Matke v. State*, 23 Fla. L. Weekly D469 (Fla. 1st DCA February 13, 1998), *rev. pending*, No. 92.476 (Fla. March 4, 1998).

A. Fundamental Error

Once again, the answer to the certified question is simply, "yes." Fundamental error is still fundamental error. As this Court has already held, lack of notice prior to imposing a public defender lien is fundamental error. *Henriquez v. State*, 545 So.2d 1340 (Fla. 1989). *See also Wood v. State*, 544 So.2d 1004, 1006 (Fla. 1989)(adequate notice and proper hearing are the most basic rights protected by due process and because such goes to the very heart of the federal and state constitutions, failure to inform a defendant of these rights is fundamental error); *Jenkins v. State*, 444 So.2d 947 (Fla. 1984)(the right to notice and hearing is a due process right).

Petitioner argues that this Court should revisit and recede from the above precedents because of the amended Criminal Appeal Reform Act. *See generally* Chapter 924, Fla.

Stat. (1997). (PB:4, 8-9). The Reform Act, however, still allows for fundamental error to be addressed for the first time on appeal:

> 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 in the trial court or, if not properly preserved, would constitute fundamental error.

§ 924.051(3), Fla. Stat. (1997) (emphasis added).

Clearly then, an error that has been previously determined to be fundamental can still be raised. The plain language of the amended statute states exactly that. Further, the statute does not contain a new definition of what might constitute fundamental error (see definition for "prejudicial error"). Therefore, the logical position is that fundamental error is still as viable as it was prior to the Reform Act's amendment.[1]

More importantly, as noted above, this Court has determined this error to be fundamental because it stems from basic due process rights. Art. I, § 9, Fla. Const.; U.S. Const. amend XIV. *See Henriquez; Wood; Jenkins, supra.* This Court has a duty to interpret each statute in a way that renders it constitutional.

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[1] *Contra Maddox v. State,* 23 Fla. L. Weekly D720 (Fla. 5th DCA March 13, 1998).

State v. Stalder, 630 So.2d 1072 (Fla. 1994). Therefore, the only logical reading of section 924.051, Florida Statutes, is that fundamental error still occurs where constitutional rights are violated. *See Amendments to the Florida Rules of Appellate Procedure,* 685 So.2d 773, 775 (Fla. 1996).

B. Notice

A defendant is entitled to due process rights of notice of the public defender lien and a hearing to contest the amount if he or she so chooses. § 27.56(7), Fla. Stat. (Supp. 1996). Rule 3.720(d)(1), Fla.R.Crim.Pro. *See, e.g., Warren v. State,* 701 So.2d 404 (Fla. 1st DCA 1997); *Brantley v. State,* 692 So.2d 282 (Fla. 1st DCA 1997).

The Fourth District Court of Appeal disagrees with the binding precedents of this Court with regard to due process and adequate notice. The Fourth DCA has held that it is not fundamental error to deny a defendant his due process rights to notice and hearing on costs and fees. *Bryant v. State,* 677 So.2d 932 (Fla. 4th DCA 1996); *Gomez v. State,* 684 So.2d 879 (Fla. 4th DCA 1996); *Holmes v. State,* 658 So.2d 1185 (Fla. 4th DCA 1995).

Not surprisingly, Petitioner relies on these cases as the basis of its argument. [Petitioner's Initial Brief in *Matke v. State,* 23 Fla.L.Weekly D469 (Fla. 1st DCA February 13, 1998), *rev. pending,* No. 92.476 (Fla. March 4, 1998, as adopted by Petitioner's Initial Brief herein.]

Several of the Fourth DCA's cases rely on Judge Pariente's

decision in *Norman v. State,* 676 So.2d 7 (Fla. 4th DCA 1996), *rev. denied,* 686 So.2d 580 (Fla. 1996). Respondent respectfully aserts that the reasoning in *Norman* is incorrect.

In *Norman,* the defendant entered a plea of nolo contendere. He was then notified that the state intended to seek prosecution costs. At his sentencing hearing, the trial court questioned:

> THE COURT: Is there any reason I should not enter a judgment for $200 attorney's fees, $255 statutory court costs and $50 cost of prosecution fee?
>
> DEFENDANT: No, sir.

Id. at 8.

The defendant was asked whether there was any reason not to impose a judgment. He wasn't asked if he had been given reasonable notice that costs of prosecution would be assessed; he wasn't asked if he had had sufficient time to consult with an attorney; he wasn't asked if he thought the amount was reasonable; he wasn't asked if he had any ability to pay. Yet the Fourth DCA found, "Having been provided with notice and an opportunity to be heard, defendant agreed to the imposition of all costs ...." *Id.* This conclusion is simply not supported by the facts contained within the opinion.

Here, Mr. Mike was told that his attorney was seeking a $1,000 legal fee, and asked if he thought the attorney's services to be worth more than that. There is nothing further in the record to demonstrate that Mr. Mike had prior notice. His affirmative answer that his attorney's services were worth more

than $1,000 does not satisfy a proper notice requirement under the principles of due process. He might have agreed that the attorney's services were worth $50,000, but that does not equate with notice, an opportunity to consult with counel, an agreement to pay such an amount, or an acknowledgement that he had the ability to pay that amount. The *Norman* case is flawed in regard to proper notice, and should not be approved by this Court.

The case of *Hyden v. State*, 23 Fla. L. Weekly D1342 (Fla. 4th DCA, June 3, 1998), cited by Petitioner as additional authority in its Initial Brief, adds nothing significant to the debate.

The *Hyden* court held that pronouncement at sentencing of Public Defender fees is sufficient notice, and that error could be addressed through a hearing pursuant to Rule 3.800(b).

The logic, if there is any, flies in the face of the recent revisions of the appellate rules. The purpose of many revisions, including that of Rule 3.800(b), was to allow a trial court to correct error at the trial level. The purposes was not to add an additional, unnecessary court hearing at any level. It would be far more logical and more parsimonious of judicial resources to require the state to follow through on its obligation to provide notice *prior* to the attempt to impose such a fee, thereby allowing a defendant inclined to do so to challenge the fee *prior to sentencing*, and allowing the trial judge to settle the matter in one hearing rather than two or more.

Mr. Mike urges this Court to approve on the decisions of the First District Court of Appeal which have followed this Court's binding precedents, such as *Matke v. State,* 23 Fla. L. Weekly D469 (Fla. 1st DCA February 13, 1998); *Strickland v. State,* 693 So.2d 1142 (Fla. 1st DCA 1997)(reiterating that failure to inform a defendant of his right to notice and hearing on public defender lien is fundamental error); and *Neal v. State,* 688 So.2d 392, 396 (Fla. 1st DCA 1997).

Petitioner argues on a second front that this Court should find that Mr. Mike was given proper notice because he was on constructive notice through the Florida Statutes. For this argument, Petitioner relies on *State v. Beasley,* 580 So.2d 139, 142 (Fla. 1991). In *Beasley,* however, this Court found the constructive notice to be sufficient for mandatory statutory costs. *Id.* at 142, n. 4 [receding to that extent from *Jenkins v. State,* 444 So.2d 947 (Fla. 1984)].

Unlike *Beasley,* Mr. Mike's lien was not a mandatory fee nor was it a set fee. Actual notice was required to satisfy the safeguards of due process. Yet, the transcript of the sentencing hearing is devoid of any notice or any mention of a possible hearing. Failure of the trial court to enlighten Mr. Mike about his due process rights requires reversal for an opportunity to contest the public defender lien. *Robinson v. State,* 667 So.2d 384 (Fla. 1st DCA 1995); *Willis v. State,* 665 So.2d 354 (Fla. 1st DCA 1995).

CONCLUSION

In light of the foregoing, and on the strength of authority cited, Mr. Mike respectfully requests this Court hold that he was not given proper notice of the public defender lien and hold that such error on the trial court's part is a denial of due process rights, therefor fundamental error. Mr. Mike urges this Court to approve the decision of the First District Court of Appeal and disapprove the conflicting decisions of the Fourth District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers and L. Michael Billmeier, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL; and a copy has been mailed to appellant on this 31st day of July, 1998.

Respectfully submitted,

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