# In The Supreme Court of Florida

**NO. 94,348**



*WAVELL HEIRD*,

Petitioner,

v.

*THE STATE OF FLORIDA*,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. 94,348**

WAVELL HEIRD,

Petitioner,

v.

THE STATE OF FLORIDA,

Appellee.

_____/

## PRELIMINARY STATEMENT

Citations in this brief to designate record references are as follows:

"R. __" — Record on Direct Appeal, Vol. I, including transcript of sentencing.

"T. __" — Transcript of trial proceedings, Vol. II.

All cited references will be followed by the relevant page number(s). All other citations will be self-explanatory or will otherwise be explained. Appellee, State of Florida, was the plaintiff below, and will be referred to as "appellee" or the "state." Appellant was the defendant below, and will be referred to as "appellant," "petitioner," "defendant," or by his proper name.

Pursuant to an Administrative Order of the Supreme Court dated July 13, 1998, counsel certifies this brief is printed in 14 point Notebook, a proportionately spaced, computer generated font related to Times Roman.

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**Rules, Statutes and Constitutional Provisions**

## STATEMENT OF THE CASE AND THE FACTS

1. History of Proceedings and Statement of Facts

Mr. Heird was charged and convicted by a jury of resisting correctional officers with violence, an offense committed on March 17, 1996 [R. 1, 13; T. 22]

A sentencing guidelines scoresheet scored 48 total sentence points, resulting in a presumptive sentence of 20 months, with a discretionary sentencing range of 15 to 25 months [R. 19-21; 30-32].

Mr. Heird was sentenced on March 7, 1997. The court adjudicated him guilty of resisting an officer with violence, in violation of § 843.01, Fla. Stat., a third degree felony, and sentenced him to 15 months incarceration with credit for 356 days in custody. [R. 24-28; R. 76].

The court entered a written cost order totaling $500 in fines, fees and costs, which included, among others, $40.00 for an "Application Fee . . ., Ch. 96-232 & 96-376, Laws of Florida" (Indigent Criminal Defense Fund), $2.00 pursuant to § 943.25(13) (Criminal Justice Education by Municipalities and Counties), and a fine of $385.00 pursuant to § 775.083, plus $20.00 as a 5% surcharge required by § 960.25, Fla. Stat. [R. 22]. At sentencing, the court orally announced only that there would be "charges, costs and fees in the amount of $500," without explaining or announcing what was actually included in the gross sum of $500.00 that was announced. [R. 48].

There is no record that defendant's trial counsel filed a motion pursuant to Amended Rule 3.800(b) to correct any perceived sentencing errors. During sentencing, no objections were made to the $500 in "charges, costs and fees" as announced. [*See* R. 48].

On appeal to the district court, appellant's counsel filed an *Anders* brief in which he challenged the imposition of the $40 application fee, discretionary $2 cost, and fine as minor sentencing errors.

Appellee filed an Answer Brief to the appellant's *Anders* brief.

Subsequently, appellee filed an Amended Answer Brief pursuant to an order of the First District Court dated April 8, 1998. By that order, the court directed the appellee to address the following issues:

> 1. Whether the trial court erred as a matter of law by imposing costs in the amount of $40 pursuant to section 27.52(1)(c), Florida Statutes, without affording the defendant notice and an opportunity to contest the amount and his ability to pay.
>
> 2. Whether the trial court erred as a matter of law by imposing a $2 costs for Criminal Justice Education pursuant to section 943.25(13), Florida Statutes, without affording defendant notice and an opportunity to be heard.
>
> 3. Whether the trial court erred as a matter of law by imposing a fine of $385 pursuant to section 775.083, Florida

> Statutes, plus $20 as a 5% surcharge pursuant to section 960.25, Florida Statutes, without affording the defendant notice and an opportunity to be heard.

The Court further directed the appellee to address the implications of Florida Rule of Criminal Procedure 3.800(b) and section 924.051(8), Florida Statutes (1996), both of which became effective on July 1, 1996.

The appellant filed a reply brief to the Appellee's Amended Answer Brief addressing the questions posed by the district court.

On November 12, 1998, the First District Court rendered an opinion *per curiam* affirming the conviction and sentence, citing *Locke v. State*, Case No. 976-2431, [23 Fla. L. Weekly D2399] (Fla. 1st DCA October 21, 1998), and certifying the following question to be one of great public importance:[1]

> DOES THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTE FUNDAMENTAL ERROR?

On November 16, 1998, appellant/petitioner filed a timely Notice to Invoke Discretionary Jurisdiction of this Court pursuant to Fla. R. App. P. 9.030(a)(2)(A)(v)

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[1]The First District Court has also certified the identical question in *Locke v. State*, Case No. 97-2431, 23 Fla. L. Weekly D2399 (Fla. 1st DCA October 31, 1998)(General Division en banc).

and Art. V, section (3)(b)(4), Fla. Const.

On November 19, 1998, this Court entered an order postponing its decision on jurisdiction and directing briefing of the merits.

## SUMMARY OF THE ARGUMENT

At sentencing, the trial court to individually announce that it was imposing a $40 fee for the filing of an application of indigency, a $2 discretionary cost, and a $385 discretionary fine (plus statutory surcharges). The statutes authorizing these costs, while gtiving constructive notice that the discretionary costs *may* be imposed in any given case, fail to give constructive notice that the discretionary costs *will actually be* imposed in the petitioner's case. Further, the court failed to give Petitioner notice of its intent to impose the discretionary cases. The failure to give such notice has been held by his Court to be fundamental error. *Beasley v. State*, 580 So. 2d 139 (Fla. 1990); *Henriquez v. State*, 545 So. 2d 1340 (Fla. 1989). Furthermore, in this particular case, petitioner committed the offense and filed the application of indigency long before the statute authorizing the "application fee" was first enacted. Because there was no statute authorizing the imposition of this fee when the offense was comitted, it was an illegal sentence, one patently not comporting with the statutes, *State v. Mancino*, 23 Fla. L. Weekly S301 (Fla. June 11, 1998), and thus fundamental error.

## ARGUMENT

### ISSUE

**DOES THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTE FUNDAMENTAL ERROR?**

Respectfully, Petitioner suggests that the question certified by the district court is somewhat too broadly stated because, as phrased, it seems to ask whether both mandatory and discretionary costs and fees imposed at sentencing without individually being pronounced is fundamental error.

It appears to be well settled that the imposition of mandatory costs and fees need not be individually pronounced at sentencing under the rationale that the statutes authorizing and requiring the imposition of mandatory fees give constructive notice to the defendant that such fees and costs will be imposed in his or her case. This Court has held that costs which are, by statute, to be mandatorily imposed in every case, do not require notice of the intent to impose them at the time of sentencing because the statutes themselves are deemed to provide constructive notice of those mandatory costs, thus satisfying the requirements due process. *State v. Beasley*, 580 So. 2d 139, 142 (Fla. 1990). This Court also noted that constructive notice is limited, however, to

mandatory costs.[2] *Id.*, n.4.

With respect to discretionary fees, costs and fines, which are at issue in this case, Petitioner contends that the while statutes authorizing the imposition of discretionary fees give notice of the authority for their imposition and that they *may* imposed in a case, because of their discretionary nature the statutes fail to give notice to the defendant that they will actually be imposed in his or her individual case, and therefore must be orally pronounced at sentencing and, notice of the right to contest the imposition or the amount of any such cost, fee or fine must also be given to satisfy due process of law.

Generally, before the effective date of the Criminal Appeal Reform Act, it was well established that discretionary costs[3] must be orally pronounced and, in addition, the statutory authority for such costs must be orally announced or included in the written cost order, and that the failure to orally pronounce discretionary fees and costs was fundamental error permitting the errors to be raised for the first time on appeal.

The First District Court rejected Petitioner's claims of error in reliance on its

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[2]At present, the mandatory costs in criminal cases, as provided by statute, appear to be a $50 costs pursuant to § 960.20, Fla. Stat.; $3 pursuant to § 943.25(3), Fla. Stat.; and costs pursuant to § 27.3455, Fla. Stat. ($500 in felony cases).

[3]Hereinafter, by reference to "costs," Petitioner is referring to court costs, fees, public defender's attorney's fees and costs, and fines generally that are discretionary in nature.

decision in *Locke*. In *Locke v. State*, 23 Fla. L. Weekly D2399 (Fla. 1st DCA October 21, 1998)(General Division en banc), Judge Webster filed a vigorous dissent, which we are adopting as the Petitioner's argument in this case. Judge Webster's discussion and analysis so cogently states the essence of the Petitioner's arguments here that Petitioner could not hope to improve upon it. Judge Webster wrote, in pertinent part:

* * *

> The majority first concludes that the trial court's imposition of "statutorily authorized" discretionary costs without affording appellant notice of its intent to do so or a meaningful opportunity to be heard prior to imposition was not error. In support of this conclusion, the majority relies upon *State v. Beasley*, 580 So. 2d 139 (Fla. 1991), *State v. Hart*, 668 So. 2d 589 (Fla. 1996), and *A.B.C. v. State*, 682 So. 2d 553 (Fla. 1996). According to the majority, those three decisions, collectively, "stand for the proposition that a defendant is on notice of all statutorily authorized costs and conditions that may be imposed at the time of sentencing." I have no quarrel with the proposition that a defendant is on constructive notice that statutorily authorized discretionary costs (such as a lien for the services of a public defender) *may* be imposed. Where I part ways with the majority is with regard to its conclusion that, as a result, a defendant need not be afforded notice of the intent to impose such a discretionary cost and a meaningful opportunity to contest it.
>
> In *Jenkins v. State*, 444 So. 2d 947 (Fla. 1984), the court held that due process of law required that, before a court imposes costs, a defendant be afforded adequate notice of the intent to do so and an opportunity to be heard. Subsequently, in *State v. Beasley*, the court receded from

*Jenkins* "to the extent that it require[d] a trial court to give the defendant actual notice of the imposition of *mandatory* costs. 580 So. 2d 16 142 n.4 (emphasis added). The justification for the decision in *Beasley* was that publication of the mandatory costs provision in the Florida Statutes give the defendant constructive notice of the fact that such costs will be imposed. *Id.* at 142. I have not discovered any subsequent decision which expressly extends the *Beasley* rationale to *discretionary* costs, and the majority cited none. Instead, the majority relies upon *Hart* and *A.B.C.*, neither of which involves the issue of whether discretionary costs may be imposed without notice or an opportunity for a hearing. Rather, *Hart* addressed whether a standard condition of probation may be imposed although not orally pronounced at sentencing (668 So. 2d at 591), and *A.B.C.* addresses whether a standard condition of juvenile community control may be imposed although not orally pronounced at disposition, 682 So. 2d at 554. Because both rely on *Beasley*, it seems to me that, properly read, they were intended only to stand for the propositions that *standard* (as opposed to special) conditions of probation or community control need not be orally pronounced. Therefore, it seems to me that neither was intended to expand the holding of *Beasley* to the imposition of discretionary costs.

The justification for treating the imposition of mandatory costs differently from the imposition of discretionary costs was, perhaps, best explained in *Reyes v. State*, 655 So. 2d 111 (Fla. 2d DCA 1995)(en banc). There, Judge Altenbernd, speaking for the full court, said:

> Statutory costs that are truly "mandatory" must be imposed in every judgment against every defendant convicted of a similar offense. The trial judge has no discretion to dispense with these costs, and the defendant's circumstances and his or her ability to pay are

> not relevant to the decision. Publication of these costs in the Florida Statutes provides every defendant with adequate notice. *State v. Beasley*, 580 So. 2d 139 (Fla. 1991). The trial court is not obligated to announce orally the dollar amount of these costs or to separately identify the legal basis for these costs at the sentencing hearing.
>
> Statutory costs that are "discretionary are costs that the trial court may decide to impose or not to impose, depending upon the defendant's ability to pay and other circumstances involved in the case. The statutes place the defendant on notice that these costs are a possibility, but not a certainty. As such, the trial court must give the defendant notice of these costs at sentencing. Discretionary costs must be individually announced in a manner sufficient for the defendant to know the legal basis for the cost imposed. If the statute does not specify a dollar amount for the discretionary cost, the trial court must make certain that the defendant in on notice of the dollar amount assessed. The defendant must have an opportunity in open court to object to the imposition of these discretionary costs.

*Id.* at 116 (footnote omitted). *Reyes* continues to be followed in the Second District. *E.g., Gonse v. State*, 713 So. 2d 1114 (Fla. 2d DCA 1998). It also continues to be followed by other districts, including this one. *See, e.g., Dodson v. State*, 710 So. 2d 159, 160 (Fla. 1st DCA 1998)(citing *Reyes* for the proposition that "[i]f a costs is discretionary under a statute, it must be orally pronounced at sentencing and the defendant must be given an opportunity to object"), *review pending*, No. 93,077 (Fla. filed May

26, 1998).

It seems to me that, had the supreme court intended to recede from the prior decisions such as *Henriquez v. State*, 545 So. 2d 1340 (Fla. 1989), and *Bull v. State*, 548 So. 2d 1103 (Fla. 1989), holding that due process of law requires notice and a meaningful opportunity for a hearing before discretionary costs may be imposed, it would have done so. Instead, as recently as last year the court reaffirmed that discretionary attorney fees and costs may not be imposed without affording the defendant "proper notice and an opportunity to be heard." *Sliney v. State*, 699 So. 2d 662 (Fla. 1997).[4] Accordingly, I am constrained to dissent from the majority's conclusion that the trial court's imposition of discretionary costs without affording appellant notice and a meaningful opportunity to be heard was not error.

The majority next concludes that, even if error, the trial court's failure to afford appellant notice and an opportunity to be heard before imposing discretionary costs is not longer fundamental error. Again, I am unable to agree.

In *Neal v. State*, 688 So. 2d 392, 396 (Fla. 1st DCA), *review denied*, 698 So. 2d 543 (Fla. 1997), the panel relied upon *Henriquez* for its holding that it is fundamental error to order a criminal defendant to pay discretionary attorney fees without first affording the defendant notice and a meaningful opportunity to be heard. The majority concedes that *Henriquez* stand for that proposition. However, it asserts that *Henriquez* was premised upon the concern that, unless such an error were treated as fundamental (and, therefore, capable of presentation on appeal even if not preserved by a contemporaneous objection), a defendant would be deprived of all opportunity to raise the issue. (This seems to

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4*Sliney*, however, involved an offense committed in 1991.

me a rather strained reading of the case because, even if the issue could not have been raised on direct appeal because it had not been preserved, it could still have been raised collaterally by a motion filed pursuant to Florida Rule of Criminal Procedure 3.850 alleging ineffective assistance of counsel.) The majority the concludes that such a concern is no longer valid because of the supreme court's adoption of Florida Rule of Criminal Procedure 3.800(b), pursuant to the terms of which a defendant "may file a motion to correct the sentence or order of probation within thirty days after the rendition of the sentence."

Accepting, the purposes of discussion, the majority's reasoning that the imposition of discretionary costs is a part of a "sentence" and, therefore, may be challenged by a motion pursuant to rule 3.800(b), it seems to me that its conclusion is nothing more than an exercise in prognostication. Its guess at what the supreme court intended when it adopted Rule 3.800(b)(i.e., that it intended to overrule *Henriquez*) might be correct. However, it seems to me that such efforts are not the type of work with which this court should be concerning itself.

The fact remains that the supreme court has not expressly receded from *Henriquez*. In the absence of more compelling evidence of such an intent than I am able to find in the majority's opinion, it seems to me that we are obliged to follow *Henriquez*, although we may certainly express our concern regarding its continued vitality, and certify a question to the supreme court. *See Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

* * *

(Footnote added).

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Fla. R. Crim. P. 3.800(b) (1996), effective July 1, 1996, states:

> **(b) Motion to Correct Sentencing Error.** A defendant may file a motion to correct the sentence or order of probation within thirty days after rending of the sentence.

675 So. 2d 1374 (Fla. 1996); 685 So. 2d 1253 (Fla. 1996). This rule initially allowed ten days in which to file such a motion, but was subsequently amended to allow thirty days in which to do so. 685 So. 2d 1253 (Fla. 1996).

Section 924.051(3), Fla. Stat., also effective July 1, 1996, states:

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

Section 924.051(8), Fla. Stat. (Supp. 1996), further provides:

> It is the intent of the Legislature that all terms and conditions of direct appeal and collateral review be strictly enforced including the application of procedural bars, to ensure that all claims of error are raised and resolved at the first opportunity. It s also the Legislature's intent that all procedural bars to direct appeal and collateral review be fully enforced by the courts of this state.

**All The Errors Constituted Fundamental Error Addressable on Direct Appeal**

In *Neal v. State*, 688 So. 2d 392 (Fla. 1st DCA), *rev. den.*, 698 So. 2d 543 (Fla. 1997), the First District Court addressed the effects of § 924.051(3), Fla. Stat. (1996), and Fla. R. Crim. P. 3.800(b), both effective July 1, 1996, and concluded that § 924.051(3) was procedural and did not violate the constitutional prohibitions on *ex post facto* laws.[5] Rejecting Neal's claim that the sentence was a improper departure because that issue had not been preserved in the trial court either by objection or by filing of a motion to correct the sentence, the *Neal* court nevertheless reversed the imposition of a lien for services of the public defender because the trial court had failed to give notice and an opportunity to be heard. The district court concluded that the failure to provide such notice and opportunity to be "fundamental error" in reliance on *Henriquez v. State*, 545 So. 2d 1340 (Fla. 1989), which in turn had cited *Wood v. State*, 544 So. 2d 1004 (Fla. 1989). *See also Beasley v. State*, 695 So. 2d 1313 (Fla. 1st DCA 1997); *Strickland v. State*, 693 So. 2d 1142 (Fla. 1st DCA 1997); *Springer v. State*, 557 So. 2d 188 (Fla. 1st DCA 1990); *Ford v. State*, 556 So. 2d 483 (Fla. 2d DCA 1990); *Cruz v. State*, 554 So. 2d 586 (Fla. 3d DCA 1989). The district court's conclusion in *Neal* was consistent with previous decisions of this Court that the failure to give notice of the right to contest the amount of the lien violated procedural due process and was, thus,

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[5]*See Amendment to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800*, 675 So. 2d 1374 (Fla. 1996).

fundamental error. *See also Matke v. State*, 23 Fla. L. Weekly D469 (Fla. 1st DCA February 13, 1998), following *Neal*, but certifying conflict with *Bryant v. State*, 677 So. 2d 932 (Fla. 4th DCA 1996), and *Holmes v. State*, 658 So. 2d 1185 (Fla. 4th DCA 1995)(each holding such error not fundamental).

However, the various holdings by Florida's appellate courts that certain costs and fee errors are fundamental rest on more than a single underlying rationale. The primary rationale is whether procedural due process has been satisfied by notice and an opportunity to be heard. Procedural due process requires (1) notice of the assessment and a full opportunity to objection to the assessment and (2) enforcement of collection of those costs only after a judicial finding that the indigent defendant has the ability to pay them (an issue not present at this time in this case). *Jenkins v. State*, 444 So. 2d 947 (Fla. 1984), citing *Fuller v. Oregon*, 417 U.S. 40 (1974). *See also Bearden v. Georgia*, 461 U.S. 660, 665 (1983)("[d]ue process and equal protection principles converge in the Court's analysis in these cases.").

The failure to comply with procedural due process requirements with respect to costs and attorney's fees has been held to be fundamental error by this Court. *Jenkins v. State*, 444 So. 2d 947 (Fla. 1984)(implied holding); *Wood v. State*, 544 So. 2d 1004 (Fla. 1989)(explicit holding); *Henriquez v. State*, 545 So. 2d 1340 (Fla. 1989)(following *Wood v. State*); *State v. Beasley*, 580 So. 2d 139 (Fla. 1990).

However, discretionary costs — which by authorizing statute *may* be imposed by the court — do require notice and an opportunity to object at sentencing because in the absence of such notice the statute does not constructively apprise the defendant that the discretionary cost *will be imposed* in his or her case. *Beasley*. The same is true with respect to attorney's fee liens imposed pursuant to § 27.56, Fla. Stat., because that statute does not mandate the imposition of a specific fee, but leaves the determination of the amount of the fee to the discretion of the trial court. Thus, notice of the right to contest the amount and to require a hearing at sentencing of the opportunity to contest the amount of the fee is required by procedural due process. *Jenkins*; *Henriquez*; *Bull v. State*, 548 So. 2d 1103 (Fla. 1989).

Notice of the right to contest and the right to a hearing is also affirmatively embodied in the Florida Rules of Criminal Procedure with respect to the imposition of costs and fees for the Public Defender's services.. Fla. R. Crim. P. 3.720(d) provides:

> At the [sentencing] hearing:
>
> * * *
>
> (d)(1) If the accused was represented by a public defender or special assistance public defender, the court shall notify the accused of the imposition of a lien pursuant to section 27.56, Florida Statutes. The amount of the lien shall be given and a judgment entered in that amount against the accused. **Notice of the accused's right to a hearing to contest the amount of the lien shall be given at the time**

**of sentence.**

(2) If the accused requests a hearing to contest the amount of the lien, the court shall set a hearing date within 30 days of the date of sentencing.

(Emphasis added).

In addition to the due process rationale supporting a finding fundamental error, fundamental error has also been found where, for example, investigative costs were imposed without a request for such costs or documentation to support the assessment as required by statute, and, therefore, the imposition of that cost was illegal. *See, e.g. Bisson v. State*, 696 So. 2d 504 (Fla. 5th DCA 1997); *Abbott v. State*, 1998 WL 25574 (Fla. 4th DCA 1997); *Golden v. State*, 667 So. 2d 933 (Fla. 2d DCA 1996).

Further, "It is well established that a court lacks the power to impose costs in a criminal case unless specifically authorized by statute. . . Thus, the imposition of those costs are, in a sense, illegal." *Holmes v. State*, 658 So. 2d 1185 (Fla. 4th DCA 1995). If illegal because the costs are not authorized by statute, or because the court has failed to identify an authorizing statute for such costs, it would constitute fundamental error. This is also true where the cost imposed is in excess of that authorized by statute. *Primm v. State*, 614 So. 2d 658 (Fla. 2d DCA 1993); *Robbins v. State*, 413 So. 2d 840 (Fla. 3d DCA 1982).

Prior to the enactment of § 924.051(3), Fla. Stat., as part of the Criminal Appeal Reform Act, the question of whether certain sentencing errors with respect to the imposition of costs, fees and attorney fee liens constituted fundamental error had been repeatedly addressed by this Court and the district courts, as discussed above. Because the appellate courts have clearly held certain cost errors to be fundamental under certain conditions, it must be presumed that when the Legislature enacted § 924.051(3) — which permits fundamental errors to be raised on appeal notwithstanding the failure to otherwise preserved the issues in the trial court by contemporaneous objection or a motion to correct — the Legislature was aware of which sentencing errors concerning discretionary costs previously had been determined by the courts to be fundamental error and the basis or rationale for those holdings. Nothing in § 924.051(3) indicates an clear intent on the part of the Legislature to limit or redefine the meaning of "fundamental" error as the term is used in this statute or as "fundamental error" has been applied in the pre-existing case law.

Petitioner is aware that in *Maddox v. State*, 23 Fla. L. Weekly D720 (Fla. 5th DCA March 13, 1998), the Fifth District Court *en banc* concluded that there are no longer any "fundamental" errors in sentencing subsequent to the effective date of § 924.051 and Rule 3.800(b) on July 1, 1996. We are also aware that the court in

*Maddox* viewed Rule 3.800(b) as "failsafe," and thus obviating the need for fundamental error in sentencing.

Respectfully, the notion that Rule 3.800(b) is a "failsafe" means of correcting sentencing errors in the trial court in all cases is somewhat myopic. For example, this record — as do most of the records before this court — fails to demonstrate that the written orders complained of (typically the judgments, probation orders, and/or cost orders) in fact have been served on the defendant's counsel or upon the defendant. It is the written orders which so often disclose variances between the oral and written sentences, or contain unannounced conditions of probation, or disclose for the first time the existence of the imposition of a discretionary charge, cost or fine that was not specifically pronounced, or reveals the failure of the court to adequately identify and to provide a citation to an authority to support a cost imposed by the cost order.

If the record fails to demonstrate that the defendant or counsel has been timely served with these documents, it follows that the need to seek a correction of an error regarding an unannounced discretionary cost revealed in these documents by a Rule 3.800(b) motion would not be readily apparent or known to the defendant's counsel. Thus, the rule is by no means failsafe. Moreover, while the rule is intended to provide a vehicle by which the defendant may bring to the trial court's attention perceived sentencing errors (assuming the errors have been disclosed), this Court has not changed

its formulation or application of what constitutes fundamental error in the context of discretionary costs.

## I. Imposition of a Discretionary Application Fee Without Notice and Opportunity to be Heard, and Without Determination of Ability to Pay Same, is Fundamental Error

In this case, the offense was committed on March 17, 1996 [T. 23], and sentencing occurred on March 7, 1997 [R. 28].

Effective January 1, 1997, § 27.52(c) provided with respect to the determination of indigency of a criminal defendant that, upon filing of an affidavit of indigency:

> (c) A fee of $40 shall be paid into the county depository at the time the affidavit is filed. However, the affidavit shall be accepted without the fee if the court finds, after reviewing the financial information contained in the affidavit, that the fee should be reduced, waived, or assessed at disposition.
>
> (d) If the court finds that the accused person applying for representation appears to be indigent based on the factual information provided, the court shall appoint the public defender to provide representation. If the fee is not paid prior to the deposition of the case, the sentencing judge shall be advised of this fact **and may**:
>
> 1. Assess the fee as part of the sentence or as a condition of probation; or
>
> 2. Assess the fee pursuant to s. 27.56.[6]

[6] § 27.56 is the statute providing for the imposition of a lien for payment of (continued...)

> Notwithstanding any provisions of law or local order to the contrary, the collecting entity shall assign the first $40 to the Indigent Criminal Defense Trust Fund, if created by law . . . .

Effective January 1, 1997, the legislature created the Indigent Criminal Defense Fund, Ch. 96-376, Fla. Laws. *See* § 27.525 (1997).

It appears that this cost is (1) discretionary, (2) cannot be assessed at sentencing without a determination of the defendant's ability to pay, (3) and like the PD attorney's fees , requires notice and the opportunity to object to the amount proposed (is the case with all other attorney costs assessable under § 27.56).

The version of § 27.52(1) (Supp. 1996), in effect between January 1, 1997, and May 24, 1997, when the section was amended, applies in this case, <u>if it applies at all</u>. It is Petitioner's contention that the statute cannot be applied to him at all based upon the date of commission of his offense.

Mr. Heird had his first appearance in this case, and made application for an appointed attorney by filing of an affidavit of insolvency, in 1996, well prior to the

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(...continued)
attorney's fees or costs. Prior to 1/1/97, an effective when the defendant here committed the offense, subsection (1)(a) said the court **may** assesses attorney's fees and costs. As of 1/1/97, the statute says that a defendant who has had a PD, special PD, or the like appointed, *but is not indigent under s. 72.52(2), or has been determined indigent but able to contribute, may be assessed attorney fee's and costs*. Subsection (2)(a) provides for the imposition of a lien when payment of attorney's fees and costs have been ordered.

effective date of the earliest version of this statute. When he applied for a public defender, no statutes required or authorized an "application fee" as a condition of that application. Under the subsequently enacted statute, any liability for payment of an "application fee" attaches at the time of the filing of the application, although imposition of the fee itself may be delayed until sentencing or disposition of the case. However, because the law imposing this discretionary fee was not in effect at the time Petitioner applied for the services of a public defender, it was fundamental error, Petitioner contends, to impose the application fee which was not then authorized by law. In the absence of an existing statute authorizing this fee at the time Mr. Heird applied for an appointed attorney, the imposition of this fee is "illegal." Costs not authorized by statute may be attacked for first time on appeal. *Pazo v. State*, 684 So. 2d 898 (Fla. 5th DCA 1996). "It is well established that a court lacks the power to impose costs in a criminal case unless specifically authorized by statute. . . Thus, the imposition of those costs are, in a sense, illegal." *Holmes v. State*, 658 So. 2d 1185 (Fla. 4th DCA 1995). *See also Spencer v. State*, 650 So. 2d 228 (Fla. 1st DCA 1995); *Dodson v. State*, 710 So. 2d 159, 160 (Fla. 1st DCA 1998). *See, State v. Mancino*, 23 Fla. L. Weekly S301, S303 (Fla. June 11, 1998)("A sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal'").

Moreover, the application fee is by the very terms of the statute discretionary and may be waived or reduced depending on the financial circumstances of the defendant. Because it is discretionary, it was fundamental error to impose it without notice and an opportunity to be heard at the time it was imposed. Additionally, because the fee could be waived or reduced, it was fundamental error to impose the application fee without a determination by the court of the defendant's ability to pay the fee and a determination of whether the fee should be waived or reduced. This fee was buried in the orally announced grand total of $500 in costs, fees and fine, and its imposition was only disclosed by the cost order then entered by the court. As noted, this record is devoid of any evidence that this cost order was served upon the defendant or his counsel so that he ever knew, until the record was reviewed after filing of the appeal, that the discretionary fee was in fact being imposed. The absence of notice violated procedural due process, which is fundamental error, which permits the court to address and correct this error on direct appeal.

## II. Imposition of a $2 Discretionary Cost Pursuant to § 943.25(13) Without Notice and Opportunity to Be Heard is Fundamental Error

Beyond cavil, this cost is discretionary. *Dodson v. State*, 710 So. 2d 159, 160 (Fla. 1st DCA 1998). Because it is discretionary, the statute authorizing it fails to give constructive notice that the costs will be imposed at sentencing in any given case, and

in the absence of notice of intent to impose it at the time of sentencing, the defendant is deprived of an opportunity to object at sentencing and denied an opportunity to be heard why the cost should not be imposed. Again, in the absence of proof of service of the cost order that for the first time disclosed the cost was being imposed, there is nothing to show that the defendant knew the discretionary costs was imposed. For the reasons discussed above, the absence of notice and meaningful opportunity to be heard is a denial of procedural due process, which by definition is fundamental error.

## III. Imposition of a Fine is Discretionary and Imposition of Fine Without Oral Pronouncement is Fundamental Error

Section 775.083, Fla. Stat., provides:

> A person who has been convicted of an offense other than a capital felony **may be sentenced to pay a fine** in addition to any punishment described in s. 775.082.

The imposition of a fine is clear discretionary under this statute ("may be sentenced to pay a fine"). Moreover, if a fine is a sentence, the court failed to specifically pronounce that portion of this portion of the sentenvce at sentencing. The announcement of a lump sum of $500 in costs did not apprise Mr. Heird of the additional sentence to pay a fine. The absence of notice of intent to impose this discretionary sentence of a fine in addition to a sentence of incarceration, and the total absence of actual pronouncement of this portion of the sentence, is violative of

procedural due process and thus, we contend, is fundamental error addressable on direct appeal.

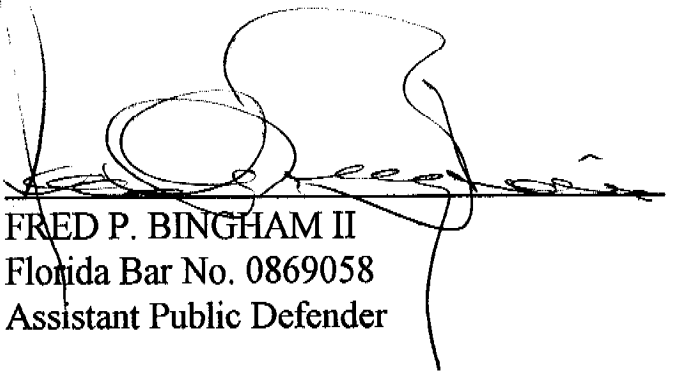
For each of the foregoing reasons, Petitioner requests that the Court answer the certified question in the affirmative, determine that each of the discretionary costs not individually announced at sentencing constituted fundamental error, and disapprove the decision of the district court.

## CONCLUSION

Appellant/Petitioner, WAVELL HEIRD, based on all of the foregoing, respectfully urges the Court to answer the certified question in the affirmative, disapprove the decision of the First District Court, and to remand the case to the First District Court for further consideration, and to grant all other relief which the Court deems just and equitable.

Respectfully submitted,

NANCY A. DANIELS
Public Defender
Second Judicial Circuit



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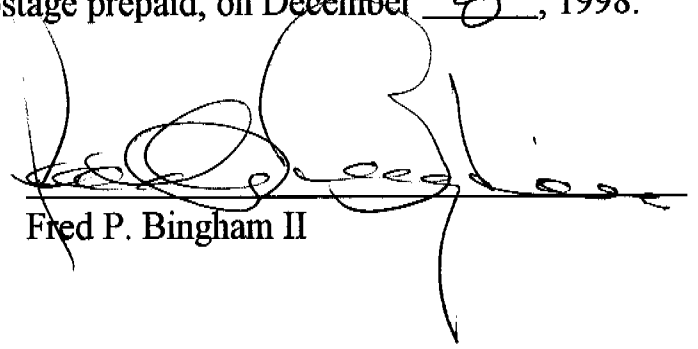
Attorney for Petitioner

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to: Trisha E. Meggs, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Petitioner by U.S. Mail, first-class postage prepaid, on December 8, 1998.



Fred P. Bingham II

# The Supreme Court of Florida

**CASE NO. 94,348**

*WAVELL HEIRD*,

Petitioner,

v.

*THE STATE OF FLORIDA*,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

APPENDIX

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COUNSEL FOR PETITIONER

# INDEX

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

WAVELL HEIRD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 97-1385

_____/

Opinion filed November 12, 1998.

An appeal from the Circuit Court for Jackson County.
Judge Michael Overstreet.

Nancy A. Daniels, Public Defender, and Fred Parker Bingham II, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and James W. Rogers, Senior Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Affirmed: Locke v. State, Case No. 97-2431 (Fla. 1st DCA Oct. 21, 1998). As in Locke, we certify the following question to be one of great public importance:

> DOES THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTE FUNDAMENTAL ERROR?

BARFIELD, C.J., JOANOS and WOLF, JJ., CONCUR.