ORIGINAL

In The Supreme Court of Florida

CASE NO. 94,640

MICHAEL JEROME McCRAY,

Petitioner/Appellant,

v.

THE STATE OF FLORIDA,

Respondent/Appellee.

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

BRIEF OF PETITIONER ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,640

MICHAEL JEROME McCRAY,

Petitioner/Appellant,

v.

THE STATE OF FLORIDA,

Respondent/Appellee.

_____/

PRELIMINARY STATEMENT

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

"R. __" — Record on Direct Appeal, Vol. I;

"T. __" — Transcript of proceedings, Vols. II through IV.

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." Petitioner was defendant and appellant below, and will be referred to as "Petitioner" or as the "defendant" or by name.

Pursuant to an Administrative Order of the Supreme Court dated July 13, 1998,

counsel certifies this brief is printed in 14 point Times Roman, a proportionately-spaced, computer-generated font.

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STATEMENT OF THE CASE AND THE FACTS

Mr. McCray was charged with, and following a jury trial, was found guilty of possession of cocaine [R. 9, 21; T. 184].

On December 12, 1996, the court entered a judgment adjudicating Mr. McCray guilty of possession of cocaine, a third degree felony, and sentencing him to the Duval County Jail for a term of 12 months, with credit for 157 days in custody, consecutive to a sentence imposed in another case [R. 27-28; T. 195].

At sentencing, the court orally announced that $353 were imposed in costs [T. 195]. The court also announced that it was imposing a $200 lien for services of a public defender [T. 196].

The transcript of sentencing reveals that the court did not detail or individually identify or individually pronounce the costs contained in the lump sum of $353 in costs it orally imposed. The transcript also shows that the court did not give the defendant notice of its intent to impose $200 in attorney's fees, or that the court gave notice that the defendant had a right to contest the amount or notice that the defendant had a right to a hearing on the amount of attorney's fees to be imposed, if any.

The court entered a written "Charges/Costs/Fees" order which reflected the imposition of the following costs: $50 pursuant to § 960.20; $3 pursuant to § 943.35(3); $200 pursuant to § 27.3455; and a cost simply noted as "CLTF: $100.00." The

"CLTF" costs was indicated in the order without further identification or explanation of the nature of this cost and without a citation to the statutory authority authorizing its imposition. [R. 27].

On direct appeal to the First District Court, Mr. McCray's appellant counsel filed an *Anders* brief in which he raised errors in the imposition of the "CLTF" costs and in the imposition of a public defender lien without notice of the right to contest the amount.

By an order dated January 23, 1998, the District Court directed the Appellee to file an Amended Answer Brief addressing the minor cost and fee issues raised by the Appellant's counsel in the *Anders* brief and which the District Court found to be arguable on the merits, as follows:

> 1. Whether the trial court erred as a matter of law by imposing costs in the amount of $100 designated as "CLTF" without explanation or reference to statutory authority.
>
> 2. Whether the trial court erred as a matter of law by imposing a $200 lien for the services of the public defender without affording the defendant notice and opportunity to contest the amount of the lien.

By that order, the District Court further directed the state to

> brief the implications on this case 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. It shall also address the implications of this court's holding in Neal v. State, 688 So. 2d 392 (Fla. 1st DCA), rev. den., 698 So. 2d 543 (Fla. 1997), in light of the Florida Supreme Court's holdings in Jenkins v. State, 444 So. 2d 947 (Fla. 1984); Wood v. State, 544 So. 2d 1004 (Fla. 1989), Henriquez v. State, 545 So. 2d 1340 (Fla. 1989), and State v. Beasley, 580 So. 2d 139 (Fla. 1991), and Florida Rule of Criminal Procedure 3.720(d).

In accordance with the order, the appellee filed an Amended Answer Brief. Mr. McCray filed a reply arguing that both errors were fundamental errors addressable on direct appeal.

On December 28, 1998, the District Court affirmed per curiam, and certified as a matter of great public importance, the same question that was certified in *Locke v. State*, 23 Fla. L. Weekly D2399 (Fla. 1st DCA October 21, 1998)(General Division en banc), *rev. pending*, Case No. 94,396. In *Locke*, the District Court certified the following question:

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

On December 31, 1998, Petitioner filed a timely Notice of Invoke Discretionary Jurisdiction of the Court pursuant to Fla. R. App. P. 9.303(a)(2)(A)(v) and Art. V, section 3(b)(4) of the Florida Constitution.

On January 12, 1999, this Court entered an order postponing its decision on jurisdiction and directing briefing of the merits.

SUMMARY OF ARGUMENT

At sentencing, the trial court failed to individually announce that it was imposing a $100 cost for "CLTF". Neither the oral pronouncement of a lump sum of $353 in costs nor the written cost order identified the nature of this costs or cited the statutory authorizing its imposition. The statutes authorizing the imposition of discretionary costs, while giving constructive notice that such discretionary costs *may* be imposed in a given case, fail to give constructive notice that the discretionary costs *will actually be* imposed in the Petitioner's case. However, the trial court never identified this cost or the statutory authority supporting it.

Further, the court failed to give Petitioner notice of its intend to impose the discretionary costs. The failure to give such notice has been held by this Court to be fundamental error. *Beasley v. State*, 580 So. 2d 139 (Fla. 1990); *Henriquez v. State*, 545 So. 2d 1340 (Fla. 1989). The inclusion of the discretionary cost in the lump sum announced was only revealed by the written cost order filed subsequent to the oral imposition of sentence. However, the record fails to demonstrate that the written order, first disclosing the discretionary costs, was ever served on defense counsel or that defense counsel ever knew of the inclusion of these costs.

Because the costs and fee are discretionary, not mandatory, the absence of notice, actual or constructive, that the costs and fee will be imposed and without notice

of the right to contest the fee and have a hearing thereon, the imposition was violative of procedural due process and statutory requirements, which constitutes fundamental error. Nothing in the Criminal Appeal Reform Act, which still allows the defendant to raise fundamental error for the first time on direct appeal despite preserving the error below by a contemporaneous objection or filing of a Rule 3.800(b) motion to correct sentence, clears indicates that the Legislature intended to change or redefine what constitutes fundamental error. Indeed, the Legislature must be presumed to have known what the appellate courts had defined as fundamental error when the legislature enacted the statute without redefining the term.

The imposition of a $200 public defender lien was done without notice to the defendant of the right to contest and have a hearing on the amount of the fee, if any, to be imposed, contrary to the explicit requirements of Fla. R. Crim. P. 3.702(d)(1)-(2) and the dictates of procedural due process requiring the giving of notice and an opportunity to be heard. Under *State v. Mancino*'s holding that the patent failure to comport with statutory and constitutional requirements renders a sentence "illegal," and thus fundamental error which can be addressed on direct appeal notwithstanding the failure to otherwise preserve the issue in the trial court, the imposition of the discretionary cost and public defender lien without notice, in the manner it was done in this case, patently failed to comport with statutory and constitutional requirements

and constituted fundamental error. Consequently, Petitioner requests the Court answer the certified question in the affirmative and disapprove the decision of the district court.

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?

The First District Court rejected petitioner's claims of error in reliance on its decision in *Locke v. State*, 23 Fla. L. Weekly D2399 (Fla. 1st DCA October 21, 1998)(General Division en banc), *rev. pending*, Case No. 94,396.[1]

Judge Webster filed a vigorous and well reasoned dissent in *Locke*, which cogently states the essence of the Petitioner's arguments, and which we adopt as Petitioner's argument in this case. 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 discre-

[1]The identical question has also been certified in *Heird v. State*, Case No. 94,348.

tionary 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 wall required that, before a court imposes costs, a defendant be afforded adequate notice of the intent to do so and end 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 139, 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 impose. *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, they majority relies upon *Hart* and *A.B.C.*, neither of which involves the issue of whether discretionary costs may be imposed without notice or at opportunity for hearing. Rather, *Hart* addressed whether a standard condition of probation may be imposed although not orally pronounced at sentencing (668 So. 2d at 951), 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 be 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 be 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 sum or 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 vs. Beasley*, 580 So. 2d 139 (Fla. 1991). The trial court is not obligated to announce orally the dollar amount of these costs were too separately identified the legal basis for these costs at the sentencing hearing.
>
> Statutory costs that all 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 with defendant on notice that these costs are a possibility, but not a certainty. As such, the trout 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 doll or amount for the discretionary cost, the trial court must make certain that the defendant is 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 cost is discretionary under a statute, it must be orally pronounced at sentencing and the defendant must be given and opportunity to object"), *pending review*, 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 wall requires notice any meaningful opportunity for a hearing before discretionary cost may imposed, it would have done so. Instead, as recently as last year the court reaffirmed that discretionary attorneys fees and costs may not be imposed without affording the defendant "proper notice and an opportunity to be heard." *Sliney v. State*, 669 So. 2d 662 (Fla. 1997). Accordingly, I am constrained to dissent from the majority's conclusion that the trout court's imposition of discretionary cost without affording appellant notice any meaningful opportunity to be heard was not ever.

The majority next concludes that, even if there are, the trial court's failure to afford appellant notice added opportunity to be heard before imposing discretionary costs is no longer fundamental error. Again, I am unable to agree.

In *Neal v. State*, 668 So. 2d 392, 396 (for a first 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 any meaningful opportunity to be heard. The majority concedes that *Henriquez* stands for that proposition. However, it asserts that *Henriquez* was promised upon the concerned that, and less such an error was 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 be 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 council.) The majority then 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, for the purposes of discussion, the majorities 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 may that its conclusion is nothing more than an exercise in prognostication. Its gas 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 be 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 then I am able to find in the majorities opinion, it seems to May that we are

> obligated to follow *Henriquez* , although we may certainly express our opinion regarding its continued vitality, and certify a question to the Supreme Court. *See Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).
>
> * * *

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

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

675 So. 2d 1374 (Fla. 1996); 685 So. 2d 1253 (Fla. 1996). This rule initially allowed 10 days in which to file such a motion, but was subsequently amended to allow thirty days in which do so. 675 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. The judgment or sentence maybe 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., further provides:

> It is the intent of the Legislature that all turns a 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 resolve at the first opportunity. It is also the Legislature's intent that all procedural bars to correct appeal and collateral review the fully enforced by the courts of this state.

Appellant anticipates that the state will argue that "'fundamental error' no longer exists in the sentencing context" in reliance on *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998), *rev. pending*, Case No. 92,805, and upon Rule 3.800(b).

Respectfully, the notion that fundamental error no long exists in the sentencing context simply eviscerates the statutory provision preserving review of issues of fundamental error, *see* § 924.051(3), Fla. Stat. (1997), and is contrary to decisions of this Court finding fundamental error in the context of sentencing. *See, e.g., State v. Mancino*, 714 So. 2d 429 (Fla. 1998) ("A sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.'").

The very concept of fundamental error, and the manner in which it has been defined by case law, does not have a single expression or basis. In *Hopkins v. State*, 632 So. 2d 1372, 1374 (Fla. 1994), this Court said that fundamental error is "error which goes to the foundation of the case or goes to the merits of the cause of action." *See also, Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970). If a procedural defect is declared fundamental error, then the error can be considered on appeal even though no objection was raised in the lower court. *Id.;Ray v. State*, 403 So. 2d 956, 960 (Fla.

1981). "[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993).

The concept of fundamental error is not limited solely to "illegal" sentences, as the State may suggest, although "illegal" sentences are clearly fundamental error. *See, Davis v. State*, 661 So. 2d 1193 (Fla. 1995); *State v. Gallaway*, 658 So. 2d 983 (Fla. 1995); *State v. Mancino, supra*. Indeed, the most pervasive expression of fundamental error seems to be rooted in the concept of a denial of procedural due process. *See, e.g., State v. Johnson, supra*. 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 discretionary 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*); and *State v. Beasley*, 580 So. 2d 139 (Fla. 1990).

This Court also 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, satisfying the requirements due process. *State v. Beasley*, 580 So. 2d at 142. Such constructive notice is limited, however, to mandatory costs as distinguished from discretionary costs.[2] *Beasley.*, n.4.

Consequently, 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 inform the defendant that the discretionary cost *will be imposed* in his or her individual case. 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 rather leaves the determination of the amount of the fee to the discretion of the trial court. Thus,

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[2]The mandatory costs in criminal cases, as then provided by statute, appear to be a $3 pursuant to § 943.25(3), Fla. Stat.; $50 costs pursuant to § 960.20, Fla. Stat.; and $200 felony pursuant to § 27.3455, Fla. Stat. Those same costs have been reenacted and are currently authorized by Part I of Ch. 938, which is entitled "Mandatory Costs in All Cases, and being §§938.01, 938.03, and 938.05(1)(a), respectively.

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). Due process right to notice of the right to contest and the right to a hearing is also affirmatively embodied in and mandated by the Florida Rules of Criminal Procedure. Fla. R. Crim. P. 3.720(d)(1)-(2) provides that 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.**
>
> [d](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 and bracketed material 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 cases are, in a sense, illegal." *Holmes v. State*, 658 So. 2d 1185 (Fla. 4th DCA 1995). *Compare with, State v. Mancino, supra.* 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 also constitute fundamental error. This is also true where the amount of the cost imposed is in excess of the amount 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., 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 the Florida Supreme Court and the district courts, as discussed above.

Because the appellate courts had held certain cost errors to be fundamental error 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 objection or by a

3.800(b) motion to correct, the Legislature was aware of, or must be presumed to have been aware of, which sentencing errors previously had been determined to be fundamental and the basis or rationale underpinning those holdings. Nothing in § 924.051(3), indicates any intent on the part of the Legislature to limit, redefine, alter or abandon the meaning of "fundamental" error as that term is used in the statute and as it had been previously defined and applied in the case law of this state.

Imposition of a $100 "CLTF" Cost Without Oral Pronouncement and Without Finding of an Ability to Pay the Assessment

The court imposed this costs as an undisclosed part of a lump sum $353 in costs the court announced at sentencing. It is identified in the written order only as "CLTF" without a citation to statutory authority.

One might suspect that "CLTF" refers to something like "Crime Lab Testing Fee." Possibly, the court intended to impose a cost or assessment under then § 893.13(4)(b), Fla Stat., which provided:

> (b) the court *may assess* any defendant who pleads guilty, or nolo contendere to, or is convicted of, a violation of any provision of this section, without regard to whether adjudication was withheld, in addition to any fine and other penalty provided or authorized by law, an amount of $100.
> . . . .
>
> **The court is authorized** to order a defendant to pay such

> assessment <u>if</u> **it finds that the defendant has the ability to pay** the fine and additional assessment and will not be prevented thereby from being rehabilitated or from making restitution.

(Italic emphasis added). The above-quoted statute, applicable to the appellant's offense, has been re-enacted, and effective July 1, 1997, is found in § 938.25, Fla. Stat., and in essentially the identical language.

The trial court in this case made no inquiry to whether, and made no finding whatsoever that, the defendant had the ability to pay an assessment under this statute. Under the language of the statute (as it is now), the court is patently <u>not authorized</u> to impose the assessment unless it finds the defendant has the ability to pay. It is only upon such a finding that the court has the authority to make the assessment. Additionally, the assessment is clearly discretionary ("may assess"), and thus must be pronounced individually at sentencing. The court did neither in compliance with the statute. The court's summary imposition of this assessment — first, as part of a lump sum and, second and significantly, in the absence of findings of ability to pay as explicitly required by the statute — patently fails to comport with statutory limitations on the statute authorizing such a discretionary fee. *See*, *State v. Mancino*. Thus, it is fundamental error because the error is essentially "illegal" as *Mancino* would define such an error.

Imposition of the Public Defender Lien Without Notice of the Right to Contest the Amount and Right to a Hearing

Rule 3.720(d)(1)-(2) has been quoted verbatim above. The requirement of notice of the right to contest and the defendant's right to a hearing thereon cannot be more explicitly set forth than in this rule. The rule, if followed, is clearly intended to ensure that procedural due process is afforded before a public defender lien is imposed. For the reasons fully discussed above, the trial court simply failed to comply with the due process requirement mandated by the rule and by the state and federal constitutions. This is fundamental error, as this Court has long ago held. The Court's recent expanded definition of an "illegal" sentence as one that patently fails to comport with statutory and constitutional limitations in *Mancino* would also tend to support a conclusion of fundamental error in this case.

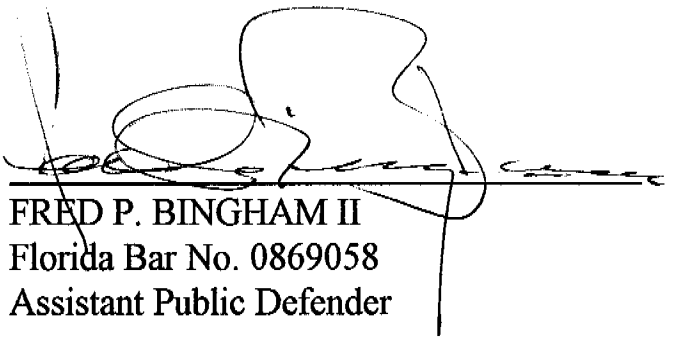
For all of the foregoing reasons, Petitioner requests that this Court answer the certified question in the affirmative.

CONCLUSION

Petitioner/Appellant, MICHAEL JEROME McCRAY, based on all of the foregoing, respectfully urges the Court to answer the certified question in the affirmative and to vacate the costs and fees imposed and remand the case to the District Court for reconsideration, 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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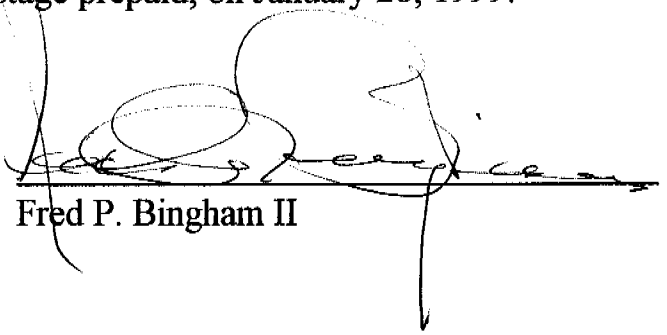
CERTIFICATE OF SERVICE

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 January 28, 1999.



Fred P. Bingham II

The Supreme Court of Florida

CASE NO. 94,640

MICHAEL JEROME McCRAY,

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ON DISCRETIONARY REVIEW OF A DECISION
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PETITIONER'S APPENDIX

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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.

MICHAEL JEROME McCRAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 96-4950

Opinion filed December 28, 1998.

An appeal from the Circuit Court for Duval County.
Judge John D. Southwood.

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. We certify to the Florida Supreme Court, as a matter of great public importance, the same question that was certified in Locke v. State, 23 Fla. L. Weekly D2399 (Oct. 21, 1998).

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