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

REPLY BRIEF OF PETITIONER

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_____/

PRELIMINARY STATEMENT

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

"R. __" — Record on Appeal to this Court;

"T. __" — Transcripts of Proceedings in the Trial Court.

"AB. _" — Appellee's Answer Brief.

All cited references will be followed by the relevant page number(s). All other citations will be self-explanatory or will otherwise be explained.

Pursuant to an Administrative Order of this Cout dated July 13, 1998, counsel certifies that this brief is printed in 14 point Times romana proportionately-spaced, computer-generated font.

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ISSUE

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

Fundamental Error before CARA Remains Fundamental Error After CARA

What constituted fundamental error before the Criminal Appeals Reform Act ("CARA", *see generally*, § 924.051, Fla. Stats.), is fundamental error after CARA. The Legislature, perhaps wisely, did not seek to define, redefine, limit or alter what had been held judicially to be fundamental error when it enacted CARA. Indeed, the Legislature is presumed to have known what had been held to be fundamental error when it enacted the statute without seeking to define or redefine the term, which is without question a term of art in appellate law. We respectfully invite this Court's attention to the recent decision of the Second District in *Bain v. State*, 24 Fla. L. Weekly D314 (Fla. 2d DCA January 29, 1999), wherein that court discussed this very point, among other issues significant to the question presented here. Prior to CARA, the failure to give such notice or to announce the imposition of discretionary costs 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). After CARA, such errors

remain fundamental error.

The appellee argues in reliance on *Maddox v. State*, 708 so. 2d 617 (Fla. 5th DCA 1998), *rev. pending*, Case No. 92,805, that because of the provisions of CARA, and the availability of a procedural remedy in the trial court under 3.800(b), Fla. R. Crim. P., to seek correction of the sentencing errors, "'fundamental error' no longer exists in the sentencing context." That notion, of course, is contrary to the decisions of this Court in *Davis v. State*, 661 So. 2d 1193 (Fla. 1995); *State v. Gallaway*, 658 So. 2d 983 (Fla. 1995), and *State v. Mancino*, 714 So. 2d 429 (Fla. 1998), for example, in which the court held that various kinds of sentencing errors resulted in "illegal sentences." "Illegal" sentences are fundamental error in every instance.[1]

Even more significantly, this Court laid down in *Mancino* a definition of what constituted an "illegal sentence" that went far beyond the specific issue presented of whether the failure to grant credit for pre-sentence time served was an "illegal sentence" (which this Court concluded it was): i.e., that "[a] sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.'" The

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1 The First District has rejected *Maddox* expressly or by implication in *State v. Hewitt*, 702 So. 2d 633 (Fla. 1st DCA 1997); *Sanders v. State*, 798 So. 2d 377 (Fla. 1st DCA 1997); *Johnson v. State, 701 So. 2d 382 (Fla. 1st DCA 1997); Mason v. State (Fla. 1st DCA 1998); and Nelson v. State, 23 Fla. L. Weekly D2241 (Fla. 1st DCA October 1, 1998) (General Division en banc).*

breadth of that definition reaches theprecise issues raised in this case and supports the conclusion that the unpronounced discretionary costs were fundamentalerrors, as this Court has previously held, because, for the reasons fully presented in the Petitioner's Initial Brief, each of the errors patently failed tocomport the requirements of statutory law or failed to comport with procedural due process in the manner in whichthey were imposed. It is to be noted also that the appellee has not specifically addressed or attempted to refute in its Answer Brief the arguments made by Petitioner's Initial Brief as to why the errors patently failed to comport with statutory and constitutional limitations and, thus, are fundamental error whichmay be addressed for the first time on direct appeal.

The state merely asserts in reference to § 893.13(8)(b), Fla. Stat. (1995), that the "CLTF" fee of $100 imposed in this case was "statutorily authorized, "without distinguishing that the fee is discretionary, but not mandatory, and without specifically addressing the petitioner's argument that a statute authorizing imposition ofa discretionary fees does not give constructive notice to the defendanthat the fee or cost may be imposed in his or her case, a point that the Court itself made in*State v. Beasley*, 580 So. 2d 139, 142 n.4 (Fla. 19), in which it 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." 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 endopportunity to be heard. The justification for the decision in *Beasley* was that publication of the *mandatory* costs provision in the Florida Statutes gives the defendant constructive notice of the fact that such *costs will be impose. Id.* at 142. It is not so with respect to *discretionary* costs. *Henriquez v. State*, 545 So. 2d 1340 (Fla. 1989), and*Bull v. State*, 548 So. 2d 1103 (Fla. 1989), hold that due process of law requires notice and a meaningful opportunity for a hearing beforediscretionary costs may imposed,and a violation of due process constitutes fundamental error.

Assuming *arguendo* that the "CLTF" fee in this case is the fee referred toin that statute, the state fails to quote the entire statute, and fails to address the statutorily required predicate to the authorizationfor the imposition of this discretionary fee — that the court must**"find[] 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." The trial court did not do so in this ase, and thereby failed to comply with the statutory mandate when it imposed it unannounced. Under *Mancino*, the erroneous imposition of the fee in the absence of compliance with the expressed requirements of the statute's predicates render it atype of "illegal" sentence In other words, it renders the imposition of the fee fundamental error because it

patently fails to comport with the limitations imposed by this statute.

We must further note that in *Bain v. State* the Second District also addressed questions concerning CARA, upon which the state relies here, in the context of several provisions of the Florida Constitution. We respectfully adopt the discussion in *Bain* as Petitioner's arguments, rather than attempting to set them forth in full detail here. In light of *Bain*, and in reliance on its constitutional analysis, we contend that CARA is violative of Article I, section 21 (access to the courts), Article II, section 3 (separation of powers), and Article V, section 4(b)(1) (appeals from final orders may be taken as a matter of right).[2]

Further, if CARA is procedural, then it is also unconstitutional because it violates the separation of powers doctrine because the Florida Constitution grants to the Court, not the legislature, the sole power to establish procedure in the courts of

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[2]Article V, section 4(b)(1), states: "District court of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts . . . ." The court in *Bain*, concluded that "there is a right to appeal all final order, because the constitution nowhere grants authority to designate which final orders are appealable by right, and which is not," while undermining the assumption expressed in *Amendments*, 696 so. 2d at 1104, that "the legislature may implement this constitutional right and place reasonable restrictions upon it so long as they do not thwart the litigants' legitimate appellate rights." The court in *Bain* doubted "that the legislature may condition, limit, or qualify our jurisdiction to hear appeals of final order, when the constitution declares that all final order may be appealed as a matter of right," but feeling compelled to defer to the Court's expressions in that regard in *Amendments*.

Florida. A statute which purports to create or modify a procedural rule of court is constitutionally infirm. *Markert v. Johnson*, 367 So. 2d 1003 (Fla. 1978). Establishing the appropriate standard of review on appeal is inherent in the Supreme Court's rule-making authority. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Ciccarelli v. State*, 531 So. 2d 129, 131 (Fla. 1988)(Grimes, J., specially concurring). In addition to establishing the proper standard of review, the courts' inherent powers include examining records on appeal to determine whether an objection is sufficient to preserve an alleged error for appellate review or whether an error constitutes fundamental reversible error in the absence of an objection. *SeeDewey v. State*, 135 Fla. 44, 186 So. 224, 227 (1938)(on rehearing) ("established rules of practice and procedure" such as the rule that issues not presented below cannot be considered in the appellate court, should not be violated "unless it is shown that it is essential to do so to administer justice"); *Bateh v. State*, 101 So. 2d 869, 874 (Fla. 1st DCA 1958)(on rehearing)(rule that questions not presented in the trial court will not be considered on appeal "is procedural in nature"); *see also, Bennett v. State*, 127 Fla. 759, 173 So. 817, 819 (1937)("to meet the ends of justice or to prevent the invasion or denial of essential rights," appellate courts may, in the exercise of their power of review, "take notice of errors appearing upon the record which deprived the accused of substantial means of enjoying a fair and impartial trial, although no exceptions were preserved, or the

question is imperfectly presented."), and Fla. R.App. P. 9.040(d)("At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits. In the absence of amendment, the court may disregard any procedural error or defect that does not adversely affect the substantial rights of the parties").

On the other hand, if CARA is a statute that limits or restricts the jurisdiction of the courts with respect to criminal appeals — as the state has almost universally contended in the district courts — the statute is unconstitutional because it attempts to limit or alter by legislative act the jurisdiction of the courts as established by the Florida Constitution. The jurisdiction of the courts as established by the constitution can only be limited or altered by an amendment of the constitution itself. This cannot be done constitutionally by a legislative act as CARA actually does, according to the state's oft repeated arguments. For all of those reasons, CARA is not determinative of the issue presented here because the statute is constitutionally infirm.

If, as contended, the statute is unconstitutional on the various grounds cited, then the sentencing errors claimed in this case may be addressed on direct appeal notwithstanding the statute under the pre-CARA case law holding that such errors were correctable on appeal notwithstanding the absence of preservation. And again, the errors are fundamental under pre-CARA law because CARA, even if constitutionally

valid, does not change or purport to change what was and is fundamental error in Florida. In *Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103 (Fla. 1996), the Court reaffirmed the view that an illegal or unlawful sentence may still be raised on direct appeal, even without an objection below:

> The other issue immediately before us is the effect of the Act on the proposed rule on appeals from pleas of guilty or nolo contendere without reservation. In *Robinson v. State*, 373 So. 2d 898 (Fla. 1979), this Court addressed the validity of section 924.06(3), Florida Statutes (1977) which read:
>
> > A defendant who pleads guilty or nolo contendere with no express reservation of the right to appeal shall have no right to a direct appeal. Such defendant shall obtain review by means of collateral attack.
>
> The Court agreed that the statute properly foreclosed appeals from matters which took place before the defendant agreed to the judgment of conviction. However, the Court held that there was a limited class of issues which occur contemporaneously with the entry of the plea that may be the proper subject of an appeal. These included: (1) subject matter jurisdiction; (2) **illegality of the sentence**; (3) failure of the government to abide by a plea agreement; and (4) the voluntary intelligent character of the plea. *Robinson*, 373 So. 2d at 902.
>
> Section 924.051(b)(4) is directed to the same end, but is worded slightly differently. Insofar as it says that a defendant who pleads nolo contendere or guilty without expressly reserving the right to appeal a legally dispositive issue cannot appeal the judgment, we believe that the principle of *Robinson* controls. **A defendant must have the right to appeal that limited class of issues described in *Robinson*.**

* * *

> In view of our decision in *Davis v. State*, 661 So. 2d 1193 (Fla. 1995), clarifying the definition of illegal sentences, **we have provided in rules 9.140(b)(1)(D) and (c)(1)(J) that direct appeals may be taken from both illegal and unlawful sentences.**

(Emphasis added).

It would is exceedingly odd indeed that a defendant who has been convicted and sentenced as a result of a plea of nolo contendere or guilty may appeal from both an illegal and an unlawful sentence despite the provision of CARA, while a defendant who has exercised his constitutional right to a jury trial and is convicted as a result cannot, under CARA's language, appeal from both an illegal and an unlawful sentence Any statutory scheme which allows a defendant who is convicted following a plea the right to appeal either an illegal or an unlawful sentence but denies that same right to a defendant who is convicted follow exercise of the constitutional right to a trial and receives the same illegal or unlawful sentence implicates serious due process and equal protection concerns. In light of the previous decision in *Davis*, holding a sentence in excess of the statutory maximum was an "illegal" sentence, it would hardly seem logical that when speaking in *Amendments* that this Court was not cognizant of the legal distinction that it itself had made between an "illegal" sentence and an "unlawful" sentence; and, therefore, meant what it said in the last sentence quoted above regarding the appeals of both illegal and unlawful sentences lying as a matter of right.

Indeed, Article V, section 4(b)(1) (appeals from a final order as a matter of right) of the Florida Constitution mandates it.

Otherwise, petitioner will rely on the arguments presented in his merit brief.

CONCLUSION

Petitioner, MICHAEL JEROME McCRAY, based on the foregoing, respectfully urges the Court to answer the certified question in the affirmative, to disapprove the decision of the District Court and toremand accordingly, and to grant such other relief the Court deems just and equitable.

March 13, 1999.

Respectfully submitted,

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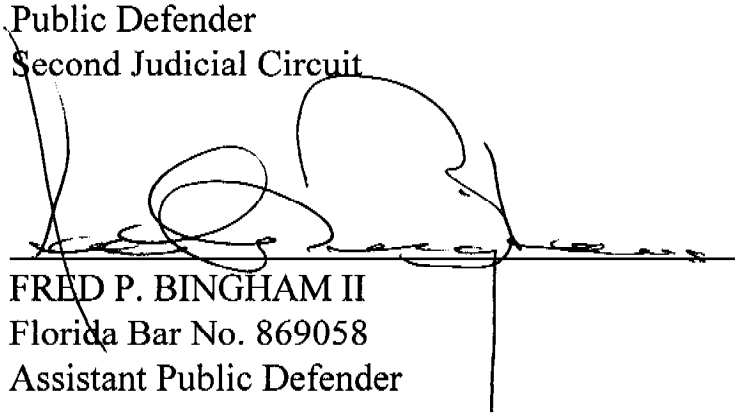

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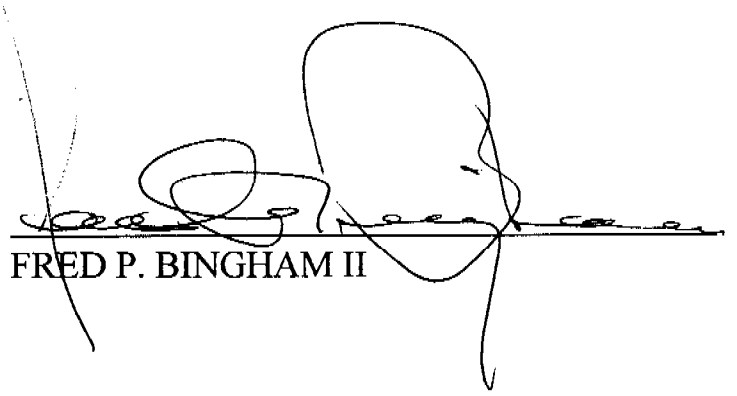
CERTIFICATE OF SERVICE

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 Appellant by U.S. Mail, first-class postage prepaid, on March 15, 1999.



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