IN THE SUPREME COURT OF FLORIDA

MONTAVIOUS DEON JOHNSON,

Petitioner,

v. **CASE NO. 96,797**

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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I. PRELIMINARY STATEMENT

Montavious Deon Johnson was the defendant in the trial court, "appellant before the district court, and will be referred to in this brief as "petitioner," "defendant," or by his proper name. Reference to the record on appeal will be by use of the volume number (in roman numerals) followed by the appropriate page number in parentheses. Reference to the supplemental record on appeal will be by use of the symbol "SR" followed by the appropriate page number in parentheses.

Filed with this brief is an appendix containing a copy of the opinion issued by the district court in petitioner's case, ***Johnson v. State***, 24 F.L.W. D1192 (Fla. 1st DCA May 14, 1999), as well as other documents pertinent to the case. Reference to the appendix will be by use of the symbol "A" followed by the appropriate page

number in parentheses.

The undersigned certifies this brief is using Courier New, 12 point, a non-proportional font.

II. STATEMENT OF THE CASE AND FACTS

Count I of an amended information containing four charges alleged that petitioner, on July 2, 1997, with a firearm, did rob shoes, jewelry, and money, owned by and from the person or custody of Charles Howard, contrary to Sections 775.087 and 812.13(2)(a), Florida Statutes (1997). Count II alleged that petitioner, on July 2, 1997, with a firearm, kidnaped Charles Howard with intent to facilitate a felony, armed robbery, contrary to Sections 775.087 and 787.01(1)(a)(2), Florida Statutes (1997). Count III alleged that petitioner, on July 2, 1997, with a firearm, did rob a shirt and jewelry, owned by and from the person or custody of Marcus Herrera, contrary to Sections 775.087 and 812.13(2)(a), Florida Statutes (1997). Count III alleged that petitioner, on July 2, 1997, with a firearm, kidnaped Marcus Herrera with intent to facilitate a felony, armed robbery, contrary to Sections 775.087 and 787.01(1)(a)(2), Florida Statutes (1997)(III-363-364).

Counsel for petitioner filed a Motion To Suppress Pretrial Identification And In-Court Identification,, seeking to suppress the identification testimony by Marcos Herrera and Charles Gordon. The motion alleged that the pre-trial identification was obtained through an unnecessarily suggestive procedure, which in turn tainted any in-court identification (III-366-369).

A hearing on the motion was conducted February 23, 1998. Marcus Herrera, age 17 and a resident of Connecticut, testified that on July 2, 1997, he was in Fernandina Beach, Nassau County, Florida (I-7). After 11:00 p.m., Herrera was occupying the passenger seat in a Tracker vehicle, with its top down, being driven by Charles Howard. While stopped at a stop sign on Fir Street, two men approached Herrera and Howard, one on a bicycle and the other on foot. The man on foot ran up to the driver's side with a gun and ordered Howard to pull the car over and park it, which Howard did. Herrera testified the man's face was not covered and there were streetlights in the area. The two robbers walked Herrera and Howard over to a basketball court located about 20 yards from where the Tracker was parked. Herrera got a good look at the face of the man with the gun. The men took Herrera's shirt and gold chain. After the robbery, Herrera and Howard went back to the car and drove to Howard's father's house and called the police. Herrera described the two robbers to the police (I-8-12).

About two hours after the robbery, Herrera went to the police station. After viewing about 50 mug shots displayed on a computer monitor, Herrera made an identification of the man with the gun, saying "That's him." Howard was standing next to Herrera when the identification was made. Herrera testified that Howard also said,

“That’s him” (or something similar) at almost the exact same time. (I-13-15).

At about 1:00 p.m., Herrera returned to the police station and was shown a video of the person he had identified. The officer said that the man had been arrested and the police wanted a positive identification. Herrera based his identification of the video on the man’s face. He estimated that he had viewed the suspect’s face for a total of about three minutes at the basketball court (I-15-17).

On cross-examination, Herrera testified that the first officer he gave a description to was a female officer. The description was of a black male, 18 to 25 years old, slim, about 6' tall, a goatee, wearing dark blue running pants pulled up to the knee (I-18-19). After making the identification from the computer monitor, an officer present said something like, “I’m not surprised that he did it.” (I-22). There was only one person in the video Herrera saw at the station. Herrera testified further that, just prior to his deposition, a detective showed a single photograph to Herrera and Howard, and asked if it was the same person who they had identified before (I-24-25).

Charles Gordon Howard testified that he lives in Connecticut but was in Fernandina Beach, Florida, on July 2, 1997 (I-26). He

testified that he was driving a vehicle in which Herrera was the passenger. Howard testified that a man came up to the driver's side and pointed a gun at him. He could see the man's face because of streetlights (I-26-27). The man forced Howard to park the car. He then made Herrera and Howard get out of the car. The robbers led Herrera and Howard to a basketball court located about 30 yards away. The gunman ordered Howard to take off his shirt and shoes, which he did. The man tore off Howard's chain and took his money. After the robbery, Howard and Herrera were told to turn around, leave, and never return to the swamp. Howard drove to his father's house and called the police. Howard told the officer who responded that the gunman was about 6' tall, wearing baggy dark running pants, white tank top, and short puffy hair (I-28-32).

About 90 minutes after the robbery, the police asked Howard and Herrera to come to the police station. Together, Howard and Herrera looked at about a dozen pictures on a computer monitor. Both Herrera and Howard made an identification, almost simultaneously. Howard and Herrera returned to the police station the next afternoon and were shown a videotape of the same person they had identified (I-33-37).

On cross-examination, Howard testified that when he and Howard were asked to come to the police station to look at the video, an

officer mentioned that the person in the video was the person they had picked (II-42-43). Also, prior to his deposition, a detective displayed a single photograph to Howard and asked him if it was the person he had picked (I-43-44).

Detective Robert Severance of the Fernandina Beach Police Department testified that he met Howard and Herrera at the police station during the late hours of July 2, or the early morning hours of July 3, 1997(I-44-45). He showed them how to operate the computer photo imaging system, which had been programed for “black male.” When petitioner’s picture came up, both Herrera and Howard said, “That’s him.” Detective Coe, who was present, mentioned that the picture was of Montavious Johnson. Both witnesses said they were positive in their identifications (I-46-49).

Officer Severance testified he arrested petitioner at 2:55 a.m., took him to the station, and placed him in a holding cell. He then contacted Howard and Herrera and asked them to come to the station. When they arrived, Severance displayed a new video of petitioner, taken about a half-hour earlier. They both identified petitioner and mentioned his clothing (I-50-51).

State Exhibit A for identification was described as the original image of petitioner that Howard and Herrera had selected (I-51). It was placed into evidence as State Exhibit No. 1 at the

hearing (I-52). State Exhibit B for identification was described as the image of petitioner that Howard and Herrera viewed during their second trip to the station, the picture taken about a half-hour earlier. This was placed into evidence as State Exhibit No. 2 at the hearing (I-53-54).

Officer George Coe of the Fernandina Beach Police Department was called as a defense witness. He testified that it is the better practice to separate possible witnesses when they attempt to make an identification (I-63-65). The witnesses in the instant case view the pictures together. Coe also admitted that while it best to not to make any statements regarding identification, in this case me may have said to Severance, “I’m not surprised that’s the person who did it” (I-65-66).

Counsel for the parties conducted legal argument (I-67-74). The trial court denied the motion (I-75).

Counsel for petitioner filed a Motion In Limine, seeking to preclude the state from introducing portions of the videotape where the defendant appeared to point (III-382-383). Just prior to trial, the court denied the motion (I-80-82). Counsel then renewed the objections made during the suppression hearing to the admissibility of the out-of-court and in-court identifications (I-83-84).

The first witness in the state's case was Marcus Herrera (I-104). Herrera testified that, on July 2, 1997, he and his friend, Charles Howard, were in Florida on vacation. They went to a pool hall that evening. They left at about 11:00 p.m. and were driving around in a Tracker with the top off. Howard was driving; Herrera was in the passenger seat. While parked at the stop sign on Fir Street, a black male on a bicycle rode in front of them and stopped. A second black male came running up, with a gun (I-104-108).

The man with the gun ordered Charles Howard park the car, which he did. The gunman ordered Howard and Herrera out of the car and walked them to a basketball court. The guy who had been on the bicycle took a gold chain from Herrera; the gunman took a chain from Howard. One of the robbers went through Herrera's wallet, but he had no money. The gunman ordered Herrera to take his shirt off, which he did. At this point, the gunman told them to scat, and to never return to the swamp. Herrera and Howard went back to the Tracker and drove to Howard's father's house. The police were called (I-109-113). Herrera went to the police station and identified a photograph. Over an objection based upon the pretrial motion, petitioner was identified in court as the robber who carried the gun (I-116-117).

Herrera went onto testify about viewing the videotape the next afternoon (I-118-119).

Charles Howard, the next state witness, testified that on July 2, 1997, he and a friend, Herrera, were visiting Howard's father in Fernandina Beach, Florida (I-126-128). After 11:00 p.m. that evening, while stopped at a stop sign, a black male with a gun ran up to them. There was another person also, riding a bike. The gunman forced Howard to park the car. He then ordered Howard and Herrera out of the car, and walked them to a basketball court nearby (I-120-133). Both Herrera and Howard were told to take off their shirts and shoes. The man with the gun took Howard's change, and also his money, $23.00. The man with the gun told them to scat, and to never return to the swamp. They drove to Howard's father's house and called the police (I-133-135).

Howard and Herrera was taken to the police station where Howard made a photo identification (I-136-139). Petitioner was identified in court as the person carrying the gun (I-143). Later that afternoon Howard made an identification from a video (I-144).

Detective Robert Severance of the Fernandina Beach Police Department testified that he was assigned to investigate the instant case (I-151-152). Both Herrera and Howard selected petitioner's picture from those contained in a computer

identification system (I-152-154). Based on that identification, petitioner was arrested (I-154-155). Another video of petitioner was made after his arrest. That afternoon, Herrera and Howard each identified petitioner from the video (I-157-159).

At this point in the proceedings, the state rested (I-173). Petitioner's motion for judgment of acquittal was denied (I-174).

The first witness in the defense's case was Officer Rhonda Sanderson of the Fernandina Beach Police Department. She testified that she interviewed Howard and Herrera. They said they had a few drinks, and she could smell a faint odor of alcohol. They also said the man with the gun was wearing black pants (I-175-179).

Marcos Herrera was called to the stand as a defense witness. He admitted not mentioning anything about the man with a gun having a goatee in his written statement (I-182-183).

Elizabeth Clark testified that she lives on Lime Street and that petitioner is her cousin. On July 2, 1997, petitioner arrived at her house at about 8:00 p.m. She cannot recall precisely what time petitioner left her home, but did recall that it was late (I-193-195).

On cross-examination, over objection, Ms. Clark testified that she knows Tauras Flemming; Flemming is the father of one of her children. Petitioner and Flemming are cell-mates, and she saw them

during a visit to the jail in January of 1998 (I-197-II-206).

On redirect, Ms. Clark testified that she did not speak with either Flemming or petitioner about petitioner's case (II-208).

Petitioner's sister, Marquisa Johnson, testified that petitioner lived with her, her mother, and her baby on Fir Street in July of 1997 (II-208). The evening before petitioner's arrest, Marquisa worked at Baron Oil until about 11:40 p.m. Just before she left work, she spoke to petitioner by phone. At that time, petitioner was at his cousin Elizabeth's house. Marquisa drove home. Shortly thereafter, petitioner arrived at her house (II-209-211).

Petitioner took the stand on his own behalf and testified that in July of 1997 he lived with his mother and sister on Fir Street. At about 8:00 p.m. on July 2, 1997, he walked to his cousin's house and played with his little cousins. While there, he talked to his sister on the phone. He then walked to his house. Petitioner denied committing the offenses charged (II-214-217).

At the conclusion of petitioner's testimony, the defense rested (II-222).

Detective Severance was recalled to the stand as a rebuttal witness. He did not smell alcohol on either Herrera or Howard. Detective Coe was called as a rebuttal witness. He did not smell

alcohol on either Herrera or Howard (II-223-229).

Charles Howard testified for the state on rebuttal that he did not have any alcohol to drink that night, nor did he see Herrera drink any alcohol (II-230-231).

The state announced rest (II-231).

After argument of counsel and the trial court's instructions on the law, and after deliberation, the jury returned verdicts finding petitioner guilty as charged of two counts of armed robbery, and two counts of armed kidnaping (III-425-428, II-320-321).

At sentencing, petitioner was adjudged guilty and sentenced to four, concurrent, terms of 155 months imprisonment, with a three-year mandatory minimum, to be followed by three years probation (II-338-339, III-462-493).

Notice of appeal was timely filed (III-459), petitioner was adjudged insolvent (III-460-461), and the Public Defender of the Second Judicial Circuit was designated to handle the appeal (III-502).

Before the district court, the following two issues were raised:

> ISSUE I:
>
> THE TRIAL COURT ERRED IN ALLOWING THE STATE TO "IMPEACH" DEFENSE WITNESS ELIZABETH CLARK WITH FACTS NOT LATER PROVED, THEREBY DEPRIVING APPELLANT OF HIS RIGHT TO DUE PROCESS OF LAW SECURED BY BOTH THE STATE AND FEDERAL CONSTITUTIONS.
>
> ISSUE II:
>
> THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY ENTERING A PUBLIC DEFENDER LIEN WITHOUT NOTICE OR HEARING.

By opinion dated May 14, 1999, the district court affirmed the convictions and sentences appealed from, including the public defender lien, but certified to the Court the same issue certified in ***Locke v. State***, 719 So.2d 1249, 1252 (Fla. 1st DCA 1998):

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

Johnson v. State, supra (A-1).

By order dated June 1, 1999, the district court sua sponte extended the time for either party to file a motion for rehearing to 15 days after this Court's decision in Locke becomes final (A-2). Petitioner thus timely filed a Motion For Rehearing on August 30, 1999 (A-3-9), which was denied by order dated October 18, 1999 (A-10).

Notice To Invoke Discretionary Jurisdiction was timely filed October 19, 1999 (A-2-3). This brief on the merits follows.

III. SUMMARY OF THE ARGUMENT

At trial, the defense presented the testimony of Elizabeth Clark, an alibi witness. On cross-examination, over strenuous objection by counsel for petitioner, the state was allowed to cross-examine Ms. Clark on certain subjects. Specifically, the state was allowed to bring out the fact that one Tauras Flemming is the father of one of Clark's children, that Flemming and petitioner were cell-mates at the jail, and that petitioner was present when Clark visited Flemming at the jail. The state suggested that Clark based her testimony, not on the truth, but instead upon information gained as a result of the jail visit. The defense noted that there was no evidence of that except conjecture and speculation (I-198-201, II-205-207).

Petitioner contends in Issue I, infra, that the trial court erred in allowing the state to "impeach" Ms. Clark in this manner, since the so-called impeaching facts were never proved.

Issue II, infra, involves the certified question. Petitioner requests the Court to answer the certified question in the affirmative. Statutory notice of costs and fees in not sufficient, as there is no certainty that such fees and costs will be imposed. Failure of adequate notice constitutes a violation of due process,

which is fundamental error not requiring a contemporaneous objection to preserve the issue for review on appeal.

IV. ARGUMENT

ISSUE I:

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO "IMPEACH" DEFENSE WITNESS ELIZABETH CLARK WITH FACTS NOT LATER PROVED, THEREBY DEPRIVING PETITIONER OF HIS RIGHT TO DUE PROCESS OF LAW SECURED BY BOTH THE STATE AND FEDERAL CONSTITUTIONS.

Because the Court has jurisdiction by virtue of the certified question, the Court may consider any other issue that may affect the case. ***Trushin v. State***, 425 So.2d 1226 (Fla. 1983). Since the trial court judge committed reversible error, which was not even discussed by the first district, petitioner urges the Court to rule upon this issue.

Petitioner was charged with two counts of robbery and two counts of kidnaping. The state supplied a Statement Of Particulars And Demand For Notice Of Intention To Claim Alibi, representing that the offenses were committed "[a]pproximately between 10:00 p.m. - 11:59 p.m." on July 2, 1997 (III-350). The defense responded with a Notice Of Intention To Claim Alibi listing several witnesses to the alibi, including Elizabeth Clark (III-377).

During trial, the two alleged victims testified they were kidnaped and robbed by petitioner and another person on July 2, 1997, at about 11:15 or 11:20 p.m. (I-109, 131). While these two victims made several out-of-court identifications and in-court

identifications, none of the stolen property was ever recovered, petitioner did not make an admission or confession, and no prints tied petitioner to the offenses.

The first witness in the defendant's case was Ms. Clark. She testified that petitioner is her cousin (I-19-194). On the evening in question, petitioner came over to her house on Lime Street at around 8:00 p.m. She can't recall precisely when he left, other than it was late, and that he left on foot (I-195-196).

On cross-examination, over strenuous objection by counsel for petitioner, the state was allowed to cross-examine Ms. Clark on certain subjects. Specifically, the state was allowed to bring out the fact that one Tauras Flemming is the father of one of Clark's children, that Flemming and petitioner were cell-mates at the jail, and that petitioner was present when Clark visited Flemming at the jail. The state suggested that Clark based her testimony, not on the truth, but instead upon information gained as a result of the jail visit. The defense noted that there was no evidence of that except conjecture and speculation (I-198-201, II-205-207).

Petitioner contends the trial court erred in allowing the state to "impeach" Ms. Clark in this manner, since the so-called impeaching facts were never proved.

In ***Smith v. State***, 414 So.2d 7 (Fla. 3d DCA 1982), Judge

Daniel S. Pearson observed:

> The difference between a prosecutor's questions to a defense witness which insinuate impeaching facts, the proof of which is non existent, so clearly impermissible, [citations omitted] and questions, such as those asked below, insinuating impeaching facts which, although said to exist, are not later proved, is one of degree only, and either interrogation, because not followed by actual impeachment, is condemnable.

414 So.2d at 7.

In the instant case, the prosecutor represented that it was during time that Ms. Clark visited Flemming in jail that she learned of the facts giving rise to her alibi testimony. The rub is, as noted by Judge Pearson, is that there was simply no proof of what was discussed during her visit, which was the basis of defense counsel's objection.

The principles mentioned by Judge Pearson in the ***Smith*** case were applied by the third district in ***Marsh v. State***, 202 So.2d 222 (Fla. 3d DCA 1967), and by the Court in ***Thorpe v. State***, 350 So.2d 552 (Fla. 1st DCA 1997). In ***Marsh***, it was held that the prosecutor should not have been allowed to law a foundation for impeachment of the defendant, by asking the defendant if he had boasted to a barmaid that he was going to commit a crime, where the prosecutor did not have such a statement from the barmaid.

In ***Thorpe***, the prosecutor asked the defendant if he recalled

being convicted of possession of heroin. In fact, the witness had been accused of possession of heroin but had not been convicted. On appeal, it was held that the prosecutor erred by permitting the false inference to remain with the jury.

Based upon ***Smith***, ***Thorpe***, and ***Marsh***, petitioner argues he has demonstrated that the trial court erred in allowing the state to cross examine Ms. Clark in such as way as to suggest the existence of impeaching evidence, namely, that Clark received information during a jail visit, where no actual proof of such evidence was ever made.

Petitioner further contends that the error cannot be considered harmless. First of all, this is hardly an "overwhelming evidence" case as there was no physical evidence tying petitioner to the offenses charged. Rather, the only proof of guilt was eyewitness identification, fraught with the possibility of mistake. Moreover, the prosecutor harped upon the improper evidence during cross examination. See ***State v. Lee***, 531 So.2d 133 (Fla. 1988). It cannot be said beyond a reasonable doubt that the error had no

effect on the jury verdict. See ***State v. DiGuilio***, 491 So.2d 1129 (Fla. 1986).

ISSUE II:

THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED COST INDIVIDUALLY AT THE TIME OF SENTENCE CONSTITUTES FUNDAMENTAL ERROR, THEREFORE, THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY ENTERING A PUBLIC DEFENDER LIEN WITHOUT NOTICE OR HEARING.

At sentencing, defense counsel requested a public defender lien in the amount of $500.00, which the court imposed without ever asking the defendant if he objected to the amount, or wished to have a hearing on the issue (II-339-340). The trial court entered a written Final Judgment Setting Attorney's Fees And Costs And Imposition Of Lien For Public Defender Services (III-494).

On appeal, petitioner contended it was fundamental error to impose the public defender lien without notice or hearing. The Court rejected the argument, but certified the following issue to the Court:

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

(A-1).

Petitioner requests the Court to answer this question in the affirmative. The same issue is presently pending before the Court in at least two cases, ***Locke v. State***, No. 94,396, and ***Heird v. State***, No. 94,348. This brief adopts the arguments set forth in

Locke and ***Heird***.

It appears to be settled law that the imposition of mandatory costs and fees need not be individually pronounced at sentencing because the statutes authorizing and requiring the imposition of mandatory fees give constructive notice to the defendant of such fees and costs.

With respect to discretionary costs and fees, however, petitioner contends that the statutes authorizing the imposition of such fees give notice only of the authority for their imposition, but because of their discretionary nature, fail to give notice to the defendant that they will be imposed in his or her individual case. Therefore, discretionary fees and costs must be orally pronounced at sentencing and, if required by statute or rule, 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.

Before the effective date of the Criminal Appeal Reform Act, it was well-established that discretionary costs must be orally pronounced and, in addition, the statutory authority for such costs must be orally announced or included in the written court order.

Rule 3.800(b), Fla.R.Crim.Pro., 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. This rule initially allowed ten days in which to file such a motion, but was subsequently amended to allow 30 days in which to do so.

Section 924.051(3), Florida Statutes (1997), 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. State. (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 is also the Legislature's intent that all procedural bars to direct appeal and collateral review be fully enforced by the courts of this state.

In ***Neal v. State***, 688 So. 2d 392 (Fla. 1st DCA), rev. den, 698 So. 2d 543 (Fla. 1997), the First District addressed the effects of s. 924.051(3), Fla. Stat. (1996), and Florida Rule Of Criminal Procedure 3.800(b), both effective July 1, 1996, and concluded that s. 924.051(3) was procedural and did not violate the constitutional

prohibitions on ex post facto laws. Rejecting Neal's claim that the sentence was an 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 court concluded that the failure to provide such notice and opportunity to be heard was fundamental error, relying 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 primary rationale of the holding by Florida's appellate courts that certain costs and fees errors are fundamental is that procedural due process must be satisfied. Procedural due process requires (1) notice of the assessment and a full opportunity to object 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. ***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 attorneys' fees has been held to be fundamental error by this court. ***Jenkins***, supra, (implied holding); ***Wood***, supra, (explicit holding); ***Henriquez***, supra, (following ***Wood***, supra); and ***State v. Beasley***, 580 So. 2d 139 (Fla. 1990).

This court has also held that costs which are mandatorily imposed by statute 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 of due process. ***State v. Beasley***, supra. Such constructive notice is limited, however, to mandatory costs. Id., n.4.

Discretionary costs which may be imposed by the court do, however, require notice and an opportunity to object at sentencing because the statute does not constructively notify the defendant that the discretionary cost will be imposed in his or her case.

The same is true with respect to attorneys' fee liens imposed

pursuant to s. 27.56, Fla. Stat., because that statute does not mandate the imposition of a specific fee, but leaves the determination of the amount 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***, supra; ***Henriquez***, supra; ***Bull v. State***, 548 So. 2d 1103 (Fla. 1989).

Notice of the right to contest and the right to a hearing is also embodied in the Florida Rules of Criminal Procedure. Rule 3.710(d), Fla.R.Crim.Pro., provides:

At the sentencing hearing:

* * *

> (d)(1) If the accused was represented by a public defender or special assistant 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.

In addition to the due process rationale supporting a finding of 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. 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, "[i]t 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 s. 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 held certain cost errors to

be fundamental under certain conditions, it must be presumed that when the Florida Legislature enacted s. 924.051(3), which permits fundamental errors to be raised on appeal notwithstanding the failure to preserve the issues in the trial court by contemporaneous objection or a motion to correct, the legislature was aware of which sentencing errors previously had been determined to be fundamental error and the basis or rationale for these holdings. Nothing in s. 924.051(3) indicates an 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 it had been applied in pre-existing case law.

Petitioner is cognizant of the en banc decision of the Fifth District Court of Appeal in ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA 1998) which held there are no longer any fundamental errors in sentencing subsequent to the effective date of s. 924.051 and Rule 3.800(b) on July 1, 1996. The court in ***Maddox*** viewed the rule as a "failsafe" which obviates the need for the concept of fundamental error in sentencing.

Petitioner contends that this view is perhaps idealistic, because the hard truth is that the written judgments and sentences–-which disclose the errors such as those complained of here–-are not served on the defendant or defense counsel. If the

necessary documents are not timely served, then counsel is unable to seek correction for something of which he or she is ignorant. Thus, Rule 3.800(b) is far from a "failsafe" for the average defendant.

V. CONCLUSION

Based upon the foregoing analysis and authorities, petitioner contends reversible error has been demonstrated. Since the trial court erred in permitted the state to impeach defense witness Clark, but did not actually prove the impeaching facts, as argued under Issue I, supra, the convictions and sentences appealed from must be reversed and the cause remanded to the trial court with directions to conduct a new trial.

Also, since the trial court imposed a public defender lien without notice or hearing, as argued under Issue II, supra, the certified question must be answered in the affirmative and the lien stricken.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. McGINNES
ASSISTANT PUBLIC DEFENDER
FLA. BAR #230502
LEON COUNTY COURTHOUSE
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(850) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Sherri T. Rollison, Assistant Attorney General, by delivery to The Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, Florida, 32301, and a copy has been mailed to Montavious D. Johnson, DOC# J04464, Hamilton Corr. Institution, 11419 S.W. County Road #249, Jasper, FL 32052, on this ____ day of October, 1999.

_____

CARL S. McGINNES

IN THE SUPREME COURT OF FLORIDA

MONTAVIOUS DEON JOHNSON,

Petitioner,

v. CASE NO. 96,797

STATE OF FLORIDA,

Respondent.

APPENDIX

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1.	*Johnson* v. State, 24 F.L.W. D1192 (Fla. May 14, 1999).	A-1
2.	District *Court Order of June 1, 1999 Extending Time For Filing Rehearing.*	A-2
3.	*Motion For Rehearing* filed August 30, 1999.	A-3-9
4.	*District* Court *Order Of October 18, 1999, Denying Motion For Reharing.*	A-10
5.	*Notice To Invoke Discretionary Jurisdiction* filed October 19, 1999.	A-11-12

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIMEEXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

MONTAVIOUS JOHNSON,

Appellant,

v.

CASK NO. 98-1598

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed May 14, 1999.

An appeal from the Circuit Court for Nassau County. Bill Parsons, Judge,.

Nancy A. Daniels, Public Defender; Carl. S. McGinnes, Assistant Public Defender, Tallahassee, for Appellant-

Robert A. Butterworth, Attorney General; Sherri Tolar Rollison and Trisha E. Megga, Assistant Attorneys General, Tallahassee, for Appellee.

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MAY 14 1999
PUBLIC DEFENDER
CIRCUIT

RECEIVED
MAY 14 1999
PUBLIC DEFENDER

PER CURIAM.

We affirm appellant's conviction and sentence, including the public defender lien that was imposed without being orally pronounce& in open court, However, as in Locke v. State;, 719 So. 2d 1249, 1252 (Fla. 1st DCA 1998), we certify to the supreme court the following question as being 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?

JOANOS, MINER and DAVIS, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 323994 851,
Telephone No. (850) 488-6151

June 1, 1999 .

CASE NO.: 1998-1598
LT. No. : 97-447-CF

Montavious Johnson v. State Of Florida

Appellant / Petitioner(s), Appellee I Respondent(s).

BY ORDER OF THE COURT:

It appears this case presents the same issue pending before the Supreme Court of Florida in Locke v. State, case number 94,396. It is, therefore, sua sponte ordered that time for filing a motion for rehearing in this case is extended to 15 days after the decision of the Supreme Court in Locke v. State becomes final. Rule 9.330(a).

The appellee's motion to stay issuance of mandate and further proceedings filed May 19, 1999, is denied as moot.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

JON S. WHEELER, CLERK

Served:

Nancy Daniels
Sherri T. Rollison
Angela Shelley
Joseph M. "Chip" Oxley, Jr.
Carl S. Mcginnes, A.P.D.

JUN 1 1999
PUBLIC DEFENDER
JUDICIAL CIRCUIT

A-2

IN THE FIRST DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MONTAVIOUS JOHNSON,	:	
Appellant,	:	
v.	:	CASE NO. 98-1598
STATE OF FLORIDA,	:	
Appellee.	:	

MOTION FOR REHEARING

Appellant Montavious Johnson, through undersigned counsel, pursuant to Florida Rules of Appellate Procedure 9.300, 9.330, and; the Court order dated June 1, 1999, hereby moves tha Court for rehearing regarding its opinion dated May 14, 5999, and as grounds would argue:

I. Statement of Timeliness and/or Jurisdiction

Ths opinion in the instant case, in which a question was certified to the supreme court, was issued May 14, 1999. The state moved to stay issuance of mandate by pleading dated May19, 1999. By order dated June 1, 1999, this Court ruled:

> It appears this case presented the same issue pending before the Supreme Court of Florida in Locke v. State, case number 94,396, It is, therefore, sua sponte ordered that time for filing a motion for rehearing in this case is extended to 15 days after the decision of the Supreme Court in Locke v. State become final. Rule 9.330(a).

Thereafter, appellant filed a timely Notice *To Invoke Discretionary Jurisdiction,* and the supreme court requested and received a merit brief. However, because of the fact that the time for rehearing had been extended and no rehearing was filed, the supreme court dismissed the petition for review,

Since this pleading is within the time frame of the Court's order, and the order in no way requires appellant to wait until the supreme court acts in the *Locke* case, this motion for rehearing is proper,

Appellant notes that if rehearing in granted, it will obviate the need to pursue the certified question, If rehearing is denied, appellant will then pursue the certified question in the supreme court .

II. Motion For Rehearing

Appellant was charged with two counts of robbery and two counts of kidnaping, The state supplied a Statement Of *Particulars* And Demand For *Notice Of* Intention *To* Claim *Alibi,* representing that the offenses were committed "[a]pproximately between 10:00 p.m. -11:59 p.m." Oh July 2, 1997 (III-350). The defense responded with a *Notice Of Intention* To *Claim* Alibi listing several witnesses to the alibi, including Elizabeth Clark (III-377).

During trial, the two alleged victims testified they were kidnaped and robbed by appellant and another: person on July 2, 1997, at about 11:15 or 11:20 p.m. (I-109, 131). While these two

victims made several out-of-court identifications and in-court identifications, none of the stolen property wag ever recovered, appellant did not make an admission or confession, and no prints tied appellant to tha offenses.

The first witness in the defendant's case was Ms, Clark, She testified that appellant is her cousin (I-19-194). On tha evening in question, appellant came over to her house on Lime Street at around 8:00 p.m. She can't recall precisely when he left, other than it was late, anck that he left on foot (I-195-196).

On cross-examination, over strenuous objection by counsel for appellant, tha state was allowed to cross-examine Ms. Clark on certain subjects, Specifically, the state was allowed to bring out the fact that one Tauras Flemming is the father of one of Clark's children, that Flemming and appellant were cell-mates at the jail, and that appellant was present when Clark visited Flemming at the jail. The state suggested that Clark base& her testimony, not on the truth, but instead upon information gained as a result of the jail visit. The defense noted that there was no evidence of that except conjecture and speculation (I-198-201, II-205-207).

Because the state never adduced any proof supporting its "impeachment" of Ma; Clark, the following issue was raised on appeal as Issue I:

> THE TRIAL COURT ERRED IN ALLOWING THE STATE TO "IMPEACH"' DEFENSE WITNESS ELIZABETH CLARK WITH FACTS NOT LATER PROVED, THEREBY DEPRIVING APPELLANT OF HIS RIGHT TO DUE PROCESS OF LAW

SECURED BY BOTH THE STATE AND FEDERAL CONSTITUTIONS.

While the Court's opinion of May 14, 1999, does mention another issue raise& on appeal, it wholly fails to discuss the issue framed above,

In ruling against appellant, appellant contends the Court has seemingly overlooked the case of *King v. State*, 525 So.2d 924 (Fla. 3d DCA 1988). In *King*, the defense contended that the victim of King's offenses was in reality a drug dealer, On deposition, the victim had asserted his fifth amendment privilege against self-incrimination when asked about drug-related activities.

On appeal, King contended the trial court erred in restricting, his cross-examination of the victim about invoking the privilege or his status as a drug dealer.

On appeal, the appellate court affirmed, reasoning that King should have laid a proper foundation by calling his own witnesses, and not by pursuant a line a questioning designed to insinuate impeaching facts.

King suggests that the line of cross-examination in this case was improper, because the state did not actually adduce proof of the so-called "impeachment." As noted by Judge Pearson in *Smith v. State*, 414 So.2d 7 (Fla. 3d DCA 1982):

> The difference between a prosecutor's questions to a defense witness which insinuate impeaching facts, the proof of which is nonexistent, so clearly impermissible [citations omitted] and questions, such as

> those asked below, insinuating impeaching facts which, although said to exist, are not later proved, is one of degree only, and either interrogation, because not followed by actual impeachment, is condemnable,

414 So.2d at 7.

The only "consistency" between *King* and the-instant case is that the government has prevailed in both instances,

Appellant contends that in rejecting his claim;- tha Court has seemingly overlooked *Castillo v. State*, 466 So.2d 7 (Fla. 3d DCA 1985) approved, 486 So.2d 565 (Fla. 1986). Thr appellate court in that case found error in the state's cross-examination; of the defendant's mother-in-law which attempted to portray her as involved in a plot to bribe a witness, where there was no evidence to support the suggestion.

The mother-in-law in *Castillo* occupies tha same- position as defense witness Clark does in this case, Appellant requests rehearing in light of *Castillo*.

In rejectinq tha issue raised by appellant, the Court has evidently also overlooked *Harris v. State*, 447: So.2d 1020 (Fla. 3d DCA 1984). In that case, the prosecutor cross-examined the defendant and his girlfriend to the effect he was a pip, and she was in prostitute, although the prosecutor failed to proffer evidence sufficient to show there was any truth to the allegations. On appeal, the appellate court reversed, citing to *Smith*.

As Harris, Castillo, and King have thus far not been relied upon by appellant, appellant contends they are proper subjects for rehearing&-

III. Conclusion

Based upon the foregoing, appellant requests the; Court to grant rehearing, reverse the convictions and sentence+ appealed from, and remand the cause to the trial court with directions to conduct a new trial.

Respectfully submitted,

NANCY A, DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. McGINNES
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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the- foregoing has been furnished to Sherri T. Rollison, Assistant Attorney General, by delivery to The Capitol, Criminal Appeals Division, Plaza- Level, Tallahassee, Florida, 32301, and a copy has been mailed to Montavious D. Johnson, DOC# J04464, Hamilton Corr. Institution, 11419 S.W. County Road #249, Jasper, FL 32052, on this 30th day of August, 1999.

Carl S. McGinnes

CARL S. McGINNES

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

October 18, 1999

CASE NO,: 1998-1598
L.T. No.: 97-447-CF

Montavious Johnson v. State Of Florida

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion filed August 30, 1999; for rehearing is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Angela Shelley
Sherri T. Rollison, A.A.G.
[redacted] Nancy- Daniels

jm

JON S. WHEELER, CLERK

DISTRICT COURT OF APPEAL • FIRST DISTRICT • STATE OF FLORIDA

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PUBLIC DEFENDER
2ND JUDICIAL CIR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

MONTAVIOUS D. JOHNSON,

Appellant/Petitioner,

v. CASE NO. 1998-1598

STATE OF FLORIDA,

Appellee/Respondent.

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that Appellant/Petitioner, MONTAVIOUS D. JOHNSON, invokes the discretionary jurisdiction of the Supreme Court to review this Court's decision rendered October 18, 1999. This decision passes upon a question certified to be of great public importance.

Respectfully submitted,

CARL S. McGINNES
Assistant Public Defender
Fla. Bar No. 230502
Leon County Courthouse
Suite 401
301 S. Monroe Street
Tallahassee, Florida 3230f
(850) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to Assistant Attorney General, Sherri F. Rollison, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and a copy has been mailed to Montavious D. Johnson, DOC# J04464, Hamilton Corr. Institution, 11419 S.W. County Road #249, Jasper, FL 32052, on October 19, 1999.

CARL S. McGINNES