In The Supreme Court of Florida

CASE NO. SC00-10

LUCIOUS TIBBS, III,

Petitioner/Appellant **,**

v.

THE STATE OF FLORIDA,

Respondent/Appellee **.**

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

INITIAL MERIT BRIEF OF PETITIONER

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_____/

PRELIMINARY STATEMENT

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

"R. __" — Record on Appeal , Vols. I through IV, including transcript of sentencing (Vol. IV);

"T. __" — Transcript of trial proceedings, Vols. V and VI.

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," "respondent," or the "state." Appellant was the defendant below, and will be referred to as "appellant," "petitioner," or as the "defendant" or by his 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

1. History of the Case and Statement of the Relevant Facts

On September 30, 1996, the state charged Mr. Tibbs by Information with trafficking in cocaine, in violation of § 893.135, Fla. Stat., an offense alleged to have been committed on [R. 19]. An amended information was filed January 12, 1998, again charging trafficking in more than 28 grams of cocaine [R. 81].

On January 13, 1998, a jury rendered verdicts finding Mr. Tibbs guilty of trafficking in cocaine of more than 28 gram, while finding his co-defendant, Daniel West, not guilty. [R. 87].

Sentencing

At sentencing on January 20, 1998 (Vol. IV), the state requested a mandatory fine of $50,000 and restitution in the amount of $1,800 to the DEA [R. 269].

The court sentenced Mr. Tibbs to 36 months imprisonment followed by 144 months on probation. The court announced there would be a civil judgment for $261 court costs, plus $3 to Teen Court. The court stated there would be $1,000 in attorney fees by a civil judgment only and explained to Mr. Tibbs that he would not have to pay it while on probation and it would not effect his probation being terminated or anything like that. [R. 269]. The court imposed a $50,000 fine. Costs of supervision would be waived for the first six months following release and would be $1 per month thereafter. Without objection, the court imposed $1,800 restitution to the DEA. [R. 270].

The court verbally ordered Mr. Tibbs to submit to substance abuse evaluation and treatment upon release, as well as random urinalysis. [R. 270].

On January 20, 1998, the court rendered a written judgment adjudicating Mr. Tibbs guilty of trafficking in cocaine, a first degree felony, and sentencing him to prison for 36 months, followed by 144 months probation, with credit for 10 days in custody. [R. 91-95].

The court further entered a separate "Charges/Costs/Fees" order totaling $51,264.00, which included the following: $50 pursuant to § 960.20; $3 pursuant to § 943.25(3); $200 pursuant to § 27.3455, all of which are mandatory costs, plus $2 pursuant to § 943.25(13); $4.00 Law Library Fee (without citation); $2 Gulf Coast Criminal Justice Assessment (without citation; $3 Teen Court (without citation); $1000 Public Defender Fee pursuant to § 27.56; and a fine of $50,000 pursuant to § 775.083 [R. 102].

On February 12, 1998, the court entered a "Judgment, Sentence and Order Placing Defendant on Probation During Portion of Sentence," which included special conditions of probation (Conditions 12-17) that required Mr. Tibbs to undergo a drug/alcohol evaluation; to submit to urinalysis tests when requested, and to pay for the same; to be screened for local prison; that attorney fees and costs would be entered in civil judgment; restitution to DEA was to be paid prior to any other monetary obligations; and to undergo a mental health evaluation and successfully complete treatment if deemed necessary. [R. 110-111].

The court rendered an "Order of Restitution and/or Civil Judgment" in favor of the Drug Enforcement Agency in the sum of $1,800.00 [R. 99], which was then followed by an "Amended Order of Restitution and/or Civil Judgment" in favor of the Bay County Sheriff's Office in a like amount [R. 108]. The court further entered a "Final Judgment" of $1,000.00 for attorney's fees pursuant to § 27.56(2)(b), Fla. Stat. [R. 101], together

with a separate "Order Assessing Attorney's Fees, Costs and Establishing Lien" for attorney's fees in the same amount [R. 103].

The record also fails to established that the defendant filed a Motion to Correct Sentence pursuant to Fla. R. Crim. P. 3.800(b) relative to the imposition of costs, attorney's fees, restitution, or the special conditions of probation imposed by the written orders, or in any other manner interposed any contemporaneous objections to them at sentencing.

On appeal to the First District Court of Appeal, petitioner's counsel filed an *Anders* brief, but raised sentencing errors concerning certain costs and special conditions of probation imposed by the various sentencing orders or judgements, specifically: Failure to give notice of the right to a hearing to determine the amount of attorneys fees to be imposed; the failure to orally pronounce the $4 library fee, the failure to provide a citation authorizing that fee, and the imposition of that fee in an amount in excess of that authorized by law; the failure to pronounce and to provide a citation authorizing the $2 Gulf Coast Criminal Justice Assessment; the failure to provide a citation authorizing the $3 Teen Court fee (a fee which was orally pronounced at sentencing); and the failure to orally pronounce the $2 costs pursuant to § 943.25(13), which is discretionary.

Appellant's appellate counsel also challenged as error special conditions of probation that were not orally pronounced at sentencing but included in the written order of probation, to-wit: While announcing the requirement to submit to uranalysis, the court failed to announce the requirement of payment for such testing; and the unannounced

requirement that Mr. Tibbs submit to a mental health evaluation and successfully complete treatment.

In an opinion dated December 21, 1999, noting that counsel raised alleged errors in the imposition of costs, a public defender lien, and special conditions of probation, and that apparently none of the alleged errors were objected to, the First District Court of Appeal affirmed the sentences without modification "as none of the errors asserted is fundamental," citing *Locke v. State*, 719 So. 2d 1249 (Fla. 1st DCA 1998) [, *rev. granted*, Case No. 94,396], *Smith v. State*, 723 So. 2d 872 (Fla. 1st DCA 1998), and *Gaines v. State*, 724 So. 2d 139 (Fla. 2d DCA 1998), and certifying the same question certified in *Locke*: "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 30, 1996, petitioner filed a timely notice of invoke discretionary jurisdiction of this Court.

Thereafter, on January 10, 2000, this Court entered an order postponing jurisdiction and directing briefing on the merits.

SUMMARY OF ARGUMENT

The imposition of restitution without (1) a notice of the right to hearing on the question of restitution, and (2) without conducting a hearing mandated by the statute, and the granting of restitution to a law enforcement agency who was not a victim under the restitution statute was an illegal sentence in that it patently failed to comport with the limitations and provision of the statute. The imposition of restitution in this manner constituted a denial of due process, and thus was fundamental error. The district court's conclusion that the issue was not preserved by objection or motion, even if correct, does not bar addressing either an illegal sentence or fundamental error on direct appeal.

The failure to pronounce at sentencing discretionary costs and special conditions of probation failed to comport with due process requirements of notice of imposition of those costs and special conditions. The failure to do so has previously been recognized as violative of due process, which constitutes fundamental error. Moreover, for the reasons argued, a number of the unannounced costs involved other errors, including *inter alia*, imposition of costs in excess of that authorized by law, imposition of costs not authorized by law at the time of the offense in 1994, and the failure to provide citations to statutes authorizing such costs.

ARGUMENT

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 in the Imposition of $1,800 in Restitution to the Law Enforcement Agency

At sentencing, although it announced it would impose restitution in the amount of $1,800 to the DEA, the court failed to inform the defendant that he had a right to a hearing to determine whether such restitution was appropriate and/or to have a hearing to determine the amount of any such restitution. Further, the court failed to obtain from the defendant a waiver of the right to such a hearing or a stipulation by him as to the amount proposed.

Section 775.089, Fla. Stat., governs the imposition and determination of restitution in criminal cases. The statute provides, "The court, in determining whether to order restitution and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense." § 775.089(6)(a), Fla. Stat. It then provides in § 775.089(7):

> (7) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by the victim as a result of the offense is on the State attorney. The burden of demonstrating the present financial resources and the absence of potential future financial resources of the defendant and the financial needs of the defendant and his or her dependents is on the defendant. . . .

The statute clearly envisions that the two questions involved, whether to impose restitution in the first place, and the amount of restitution, in the second, will be

determined by an adversarial hearing in the event the defendant has not stipulated to the amount of restitution and waived a hearing on the issues. Facially, the statute does not expressly require the court to inform or advise the defendant at sentencing that he or she is entitled to such an adversarial hearing and determination. However, particularly with respect to adversarial determinations, due process of law under both the Federal and State constitutions mandates that the defendant be given notice of the intention of seek imposition of restitution and the right to such an adversarial hearing to determine the issues of restitution at the time of sentencing.

Defendant's counsel did not file a Motion to Correct Sentence under Rule 3.800(b) to challenge the imposition of restitution without a hearing as required by the statute. The procedure employed by the court in this case patently failed to comport with the requirements and limitations of § 775.089, and is thus an "illegal sentence." *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.'").

An "illegal" sentence constitutes fundamental error. Thus, this error may be addressed for the first time on direct appeal even under the terms of the Criminal Appeals Reform Act ("CARA"), § 924.051(3), Fla. Stat., which limits appeals in criminal cases from a judgment or order of the court to those "properly preserved," or if not preserved, to those that "would constitute fundamental error."[1]

[1]"Preserved," for the purpose of the statute, means "an issue, legal argument, or objection to evidence that was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor." § 924.051(1)(b), Fla. Stat.

In enacting CARA, the Legislature, when incorporating the term "fundamental error," did not seek to define what it meant by "fundamental error," not did it seek to redefine, limit or alter the circumstances in which the courts of Florida had found to constitute fundamental error. Indeed, the legislature must be presumed to have known what constituted fundamental error under the decisions of this state's courts when it employed the same term in the statute. In short, what constituted "fundamental error" as a matter of law before the enactment, remains "fundamental error" after the effective date of the new statute (July 1, 1996), including sentencing errors which had been declared to result in an "illegal sentence" or "fundamental error."

Moreover, this error constitutes fundamental error as a denial of due process. What constitutes fundamental error has numerous formulations and expressions in the cases. It has been said that fundamental error is "error which goes to the foundation of the case or goes to the merits of the cause of action." *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). The most pervasive express of fundamental error, however, is in terms of denial of procedural due process: "[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). *See also*, *Hopkins v. State*, 632 So. 2d 1372, 1374 (Fla. 1994); *Jenkins v. State*, 444 So. 2d 947 (Fla. 1984).

This Court has previous addressed the general question of imposition of monetary

obligations upon defendants in criminal cases in several contexts. In *Wood v. State*, 544 So. 2d 1004 (Fla. 1989), the trial court informed Wood that costs would be assessed again him pursuant to § 27.3455. The court concluded in that case that the defendant had costs and statutory liens imposed upon him without prior notice or hearing, but noted the defendant failed to object to those costs at sentencing. In finding that this error constituted fundamental error, this court said:

> Our opinion in *Jenkins* is founded upon constitutional rights of due process and the most basic requirements of adequate notice and meaningful hearing prior to termination of substantive rights or some other state-enforced penalty. In *Jenkins* we held that court costs could not be assessed against a defendant without adequate notice and judicial determination that the defendant has the ability to pay. *Id*. at 950. This holding goes to the very heart of the requirements of due process clauses of our state and federal constitutions. The denial of these basic rights constitutes fundamental error.
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>
> . . . . It is the rights of these people whom the due process clause seeks to protect, and it is fundamental error for a court to fail to protect those rights. Without adequate notice and meaningful hearing, a court has no way of knowing who should pay costs and who should not. Without adequate notice and a meaningful hearing, the requirements of due process have not been met.

See also, *Henriquez v. State*, 545 So. 2d 1340 (Fla. 1989); *Sliney v. State*, 699 So. 2d 662 (Fla. 1997)(discretionary attorney fees and costs may not be imposed without affording the defendant "proper notice and an opportunity to be heard."); *Bull v. State*, 548 So. 2d 1103, 1104-1105 (Fla. 1989).

Wood, *Henriquez*, and *Bull* all dealt with the question of due process in the imposition of attorney costs and liens. Fla. R. Crim. P. 3.720(d)(1) specifically requires the sentencing court to notify the accused of the imposition of a lien for services of the

public defender, but further requires the court to give notice at sentencing of the accused's right to a hearing to contest the amount of the lien. While the statute permitting the imposition of restitution does not facially mandate like notice be given to the defendant, it also clearly envisions and provides for an adversarial hearing, as does the attorney lien statute and rule. Impliedly, notice of the right to that hearing is required by the restitution statute. But like the imposition of the attorney liens, notice of the right to a hearing to contest restitution or the amount thereof is required by state and federal constitutions' mandate of due process. *Wood*; *Henriquez*; *Bull*; *Sliney*; *Jenkins*. Here, without a hearing, and without notice of the right to a hearing, the court imposed restitution against the petitioner. There was a complete absence of procedural due process in this case.

This Court explained the concept of due process as follows:

> . . . . One of the most basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process. Art. I, Sec. 9, Fla. Const. While we often have said that "due process" is capable of no precise definition, e.g. *Gilmer v. Bird*, 15 Fla. 410 (1875), there nevertheless are certain well-defined rights clearly subsumed within the meaning of the term.
>
> The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. *Tibbetts v. Olson*, 91 Fla. 824, 108 So. 679 (1926). Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. *State ex rel. Munch v. Davis*, 143 Fla. 236, 244, 196 So. 491, 494 (1940). In this respect the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See art. I, Sec. 9, Fla. Const.

Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990). Such denial of due process is fundamental error, and may be addressed on direct appeal notwithstanding the failure to

interpose a contemporaneous objection below or to move to correct the sentence under Rule 3.800(b). Indeed, because the error would have been perceived by trial counsel as fundamental error, imposed in the absence of notice of the right to a hearing and without a hearing mandated by the statute, counsel could have very likely concluded that under the Criminal Appeals Reform Act, which permitted fundamental error to be raised on appeal without other preservation, that a motion to correct would be unnecessary as an act to preserve the fundamental error for appeal. The district court's conclusion that the issue could not be addressed on direct appeal because it was not preserved by objection or motion, even if correct, does not bar addressing either an illegal sentence or fundamental error on direct appeal under the act.

There is a further patent error in the imposition of restitution in favor of the law enforcement agency in this case. The investigating law enforcement agency is patently not a "victim" within the ambit the statute which authorizes it to recover restitution. § 775.089(1)(c), Fla. Stat. (1996); *Sam v. State*, 24 Fla. L. Weekly D2333 (Fla. 2d DCA October 6, 1999); *Rodriguez v. State*, 691 So. 2d 568 (Fla. 2d DCA 1997); *Knaus v. State*, 638 So. 2d 156 (Fla. 2d DCA 1994); *Taylor v. State*, 672 So.2d 605 (Fla. 4th DCA 1996); *Staudt v. State*, 616 So. 2d 600 (Fla. 4th DCA 1993); *Bain v. State*, 559 so. 2d 106 (Fla. 4th DCA 1990). The $1,800 in restitution to the DEA was apparently for recovery of the like amount expended by the DEA in connection with the investigation (see Testimony of DEA Agent Brian McLaurin, T. 21].

If the amount imposed as restitution was actually in the nature of costs of prosecution, the state then also failed to comply with the requirements of § 939.01, Fla.

Stat. (1996), by failing to request costs of investigation and to document the same, which, if disputed, must be determined by hearing. If the costs can now be treated properly as costs of prosecution, the court failed to advise the defendant of the right to contest such costs and a hearing thereon. Again, the failure to give such notice is fundamental error under the authorities discussed above.

For each of the foregoing reasons, petitioner requests this court to determine that the imposition of restitution without notice of the right to a hearing, and without a hearing, and in favor of a law enforcement agency that is not a "victim" under the restitution statute, constitutes fundamental error as a denial of due process.

Fundamental Error in the Failure to Give Notice of the Right to a Hearing to Determine the Amount, if any, of the Public Defender Lien

Based on the principals and authorities discussed above, the failure to advise the defendant of the right to a hearing to determine the amount of attorney's fees, if any, prior to CARA had been held to be fundamental error. After CARA, it remains fundamental error addressable on direct appeal. *Wood*; *Henriquez*; *Bull*; *Sliney*; *Jenkins*. Fla. R. Crim. P. 3.720(d) specifically requires the sentencing court to notify the accused of the imposition of a lien for services of the public defender, but further requires the court to give notice at sentencing of the accused's right to a hearing to contest the amount of the lien. The procedure employed by the court in this case patently failed to comport with the requirements and limitations of Fla. R. Crim. P. 3.720(d)(1)§ 775.089, and is thus an "illegal sentence." *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.'").

Fundamental Error in the Failure to Announce Discretionary Costs at Sentencing, Imposition of Costs Not Authorized by Law or In Excess of Costs Authorized by Law

The imposition of costs in this case involved, for the most part, multiple errors. First, as to the costs that were discretionary, the court announced a lump sum rather than individually pronouncing the imposition of each individual discretionary costs.

Second, several of the discretionary costs, as revealed in the written cost order, fail to provide a citation to the statutory authorities for their imposition. This alone was error, but one that could not become apparent until the written order was examined.

Third, in the case of the $4 Law Library fee only, not only was it not pronounced or supported by a citation to authority, to the extent it is authorized by law, the amount exceeds the authorized maximum for that purpose, which is $2.

The authorizing statute for the Criminal Justice Education for Local Government was then § 943.25(13), Fla. Stat. (1996), which provided that the court "may assess" such $2.00 cost. This cost is discretionary, not mandatory. Because it is discretionary, this cost must be individually pronounced at sentencing. *Dodson v. State*, 710 So. 2d 159, 160 (Fla. 1st DCA 1998)("[i]f a costs is discretionary under a statute, it must be orally pronounced at sentencing and the defendant must be given an opportunity to object"), *review pending*, No. 93,077 (Fla. May 26, 1998); *Henriquez v. State*, 545 So. 2d 1340 (Fla. 1989); *Jenkins v. State*, 444 So. 2d 947 (Fla. 1984), *as modified*, *State v. Beasley*, 580 So. 2d 139 (Fla. 1991)(mandatory costs need not be pronounced); *Bull v. State*, 548

So. 2d 1103 (Fla. 1989); *Sliney v. State*, 699 So. 2d 662 (Fla. 1997)(reaffirming that discretionary attorney fees and costs may not be imposed without affording the defendant "proper notice and an opportunity to be heard"); *Reyes v. State*, 655 So. 2d 111 (Fla. 2d DCA 1995)(en banc). This cost, however, was not individually pronounced, but was apparently included an a lump sum amount announced by the court ("$261.00), which in itself was error. *Rhodes v. State*, 638 So. 2d 640 (Fla. 1st DCA 1996); *Brooks v. State*, 676 So. 2d 48 (Fla. 1st DCA 1996); *Harmon v. State*, 678 So. 2d 10 (Fla. 1st DCA 1996); *Bryant v. State*, 661 So. 2d 1315 (Fla. 1st DCA 1995)(oral imposition of lump sum costs; court failed to provide notice and failed to consider defendant's financial resources and other factors in making decision to assess discretionary costs). The failure to individually pronounce this discretionary fee was error.

Likewise, the $2.00 Gulf Coast Criminal Justice Assessment fee was error because it was not pronounced and is further unsupported by any statutory authority for its imposition. Again, the oral announcement of a lump sum at sentencing failed to disclose to the Defendant at the time of sentencing that this cost, or any particular costs, was in fact being imposed. *Rhodes v. State*, 638 So. 2d 640 (Fla. 1st DCA 1996); *Brooks v. State*, 676 So. 2d 48 (Fla. 1st DCA 1996); *Harmon v. State*, 678 So. 2d 10 (Fla. 1st DCA 1996); *Bryant v. State*, 661 So. 2d 1315 (Fla. 1st DCA 1995)(oral imposition of lump sum costs; court failed to provide notice and failed to consider defendant's financial resources and other factors in making decision to assess discretionary costs). The imposition of a fee that is not statutory authorized is, of course, illegal; and it is likewise error to impose a fee, even though an authorizing statute may ultimately be found,

without citation to such statutory authority. *Bradshaw v. State*, 638 So. 2d 1024 (Fla. 1st DCA 1994)(costs cannot be assessed in criminal case unless there is statutory authority for their imposition); *Nguyen v. State*, 655 So. 2d 1249 (Fla. 1st DCA 1995); *Spencer v. State*, 650 So. 2d 228 (Fla. 1st DCA 1995). This fee is also not one of those recognized as being mandatory in all cases, *see* §§ 938.01-938.06. Therefore, it is required that it be oral announced individually at sentencing, which it was not. The failure to individually pronounce this discretionary fee, and the further failure to support it with a citation of statutory authority, was error.

The court also imposed, without announcing the same individually, a $4 fee for the law library. Nor did the court provide in the written order a citation to a statutory authority authorizing this law library fee. Both were errors.

Furthermore, to the extend a statutory authority may be found for the Bay County law library, it exceeds the amount authorized by law. In *Sprouse v. State*, 682 So.2d 1237, 1237-38 (Fla. 1st DCA 1996), the court held:

> However, we reduce the award of $4.00 in costs attributable to the Bay County law library to $2.00. Ch. 69-835, s 7, at 106, Laws of Fla. We strike the award of $2.00 in costs pursuant to section 943.25(3), Florida Statutes (1995) (for criminal justice education by municipalities and counties), because such an award is discretionary and, therefore, cannot be made without affording a defendant notice and an opportunity to be heard. *Brooks v. State*, 676 So. 2d 48 (Fla. 1st DCA 1996). For the same reason, we also strike the award of $312.00 for attorney fees. E.g., *Bryant v. State*, 661 So. 2d 1315 (Fla. 1st DCA 1995); *L.A.D. v. State*, 616 So. 2d 106 (Fla. 1st DCA), *review denied*, 624 So. 2d 268 (Fla.1993).

Because the law library fee was not supported by a citation of to statutory authority and because, in any event, it apparently exceeds any amount the legislature may have

authorized by Ch. 69-835, §7, Laws of Florida, it was fundamental error, exceeding the statutory authorization in amount as well as failing to comport to the limitations and restrictions of the law authorizing this fee. *Cf. Davis v. State*, 661 So. 2d 1193 (Fla. 1995)(an illegal sentence is one exceeding the statutory maximum); *State v. Mancino*, 714 So. 2d 429 (Fla. 1998).

The fundamental error involved in the failure to pronounce each of the foregoing discretionary costs is that the failure to do so prevented the defendant from contemporaneously objecting to those costs and was a failure to give the defendant due process notice of the costs actually being imposed.

The court did announce the imposition of a $3 fee for the Teen Court at sentencing, but then failed to provide a statutory authority for its imposition, an error revealed only upon examination of the cost order which is suppose to memorialize the sentence relative to costs as orally imposed. This error may, perhaps, be described as a scrivener's error. But, the offense in this case was committed on October 22, 1994, although the sentencing occurred in 1998. The defendant was not liable for the Teen Court cost if no statute exited at the time of the offense in 1994 establishing and authorizing that fee. If not then authorized by statute, its imposition was an illegal sentence or exaction and fundamental error. *Bradshaw v. State*, 638 So. 2d 1024 (Fla. 1st DCA 1994)(costs cannot be assessed in criminal case unless there is statutory authority for their imposition).

In *Locke v. State*, 719 So. 2d 1249 (Fla. 1st DCA 1998))(en banc), *rev. granted*,

Case No. 94,396, Judge Webster filed a vigorous dissent, which we adopt as the petitioner's argument in this case. Judge Webster's discussion and analysis so cogently states the arguments that petitioner could not hope to improve upon it. Judge Webster argued, in pertinent part:

* * *

> The majority first concludes that the trial court's imposition of "statutorily authorized" discretionary costs without affording appellant notice of its intent to do so or a meaningful opportunity to be heard prior to imposition was not error. In support of this conclusion, the majority relies upon *State v. Beasley*, 580 So. 2d 139 (Fla. 1991), *State v. Hart*, 668 So. 2d 589 (Fla. 1996), and *A.B.C. v. State*, 682 So. 2d 553 (Fla. 1996). According to the majority, those three decisions, collectively, "stand for the proposition that a defendant is on notice of all statutorily authorized costs and conditions that may be imposed at the time of sentencing." I have no quarrel with the proposition that a defendant is on constructive notice that statutorily authorized discretionary costs (such as a lien for the services of a public defender) *may* be imposed. Where I part ways with the majority is with regard to its conclusion that, as a result, a defendant need not be afforded notice of the intent to impose such a discretionary cost and a meaningful opportunity to contest it.
>
> In *Jenkins v. State*, 444 So. 2d 947 (Fla. 1984), the court held that due process of law required that, before a court imposes costs, a defendant be afforded adequate notice of the intent to do so and an opportunity to be heard. Subsequently, in *State v. Beasley*, the court receded from *Jenkins* "to the extent that it require[d] a trial court to give the defendant actual notice of the imposition of *mandatory* costs. 580 So. 2d 16 142 n.4 (emphasis added). The justification for the decision in *Beasley* was that publication of the mandatory costs provision in the Florida Statutes give the defendant constructive notice of the fact that such costs will be imposed. *Id*. at 142. I have not discovered any subsequent decision which expressly extends the *Beasley* rationale to *discretion-*

ary costs, and the majority cited none. Instead, the majority relies upon *Hart* and *A.B.C.*, neither of which involves the issue of whether discretionary costs may be imposed without notice or an opportunity for a hearing. Rather, *Hart* addressed whether a standard condition of probation may be imposed although not orally pronounced at sentencing (668 So. 2d at 591), and *A.B.C.* addresses whether a standard condition of juvenile community control may be imposed although not orally pronounced at disposition, 682 So. 2d at 554. Because both rely on *Beasley*, it seems to me that, properly read, they were intended only to stand for the propositions that *standard* (as opposed to special) conditions of probation or community control need not be orally pronounced. Therefore, it seems to me that neither was intended to expand the holding of *Beasley* to the imposition of discretionary costs.

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

> Statutory costs that are truly "mandatory" must be imposed in every judgment against every defendant convicted of a similar offense. The trial judge has no discretion to dispense with these costs, and the defendant's circumstances and his or her ability to pay are not relevant to the decision. Publication of these costs in the Florida Statutes provides every defendant with adequate notice. *State v. Beasley*, 580 So. 2d 139 (Fla. 1991). The trial court is not obligated to announce orally the dollar amount of these costs or to separately identify the legal basis for these costs at the sentencing hearing.
>
> Statutory costs that are "discretionary are costs that the trial court may decide to impose or not to impose, depending upon the defendant's ability to pay and other circumstances involved in the case. The statutes place the defendant on notice that these costs are a possibility, but not a certainty. As

> such, the trial court must give the defendant notice of these costs at sentencing. Discretionary costs must be individually announced in a manner sufficient for the defendant to know the legal basis for the cost imposed. If the statute does not specify a dollar amount for the discretionary cost, the trial court must make certain that the defendant in on notice of the dollar amount assessed. The defendant must have an opportunity in open court to object to the imposition of these discretionary costs.

Id. at 116 (footnote omitted). *Reyes* continues to be followed in the Second District. *E.g., Gonse v. State*, 713 So. 2d 1114 (Fla. 2d DCA 1998). It also continues to be followed by other districts, including this one. *See, e.g., Dodson v. State*, 710 So. 2d 159, 160 (Fla. 1st DCA 1998)(citing *Reyes* for the proposition that "[i]f a costs is discretionary under a statute, it must be orally pronounced at sentencing and the defendant must be given an opportunity to object"), *review pending*, No. 93,077 (Fla. filed May 26, 1998).

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

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

In *Neal v. State*, 688 So. 2d 392, 396 (Fla. 1st DCA),

review denied, 698 So. 2d 543 (Fla. 1997), the panel relied upon *Henriquez* for its holding that it is fundamental error to order a criminal defendant to pay discretionary attorney fees without first affording the defendant notice and a meaningful opportunity to be heard. The majority concedes that *Henriquez* stand for that proposition. However, it asserts that *Henriquez* was premised upon the concern that, unless such an error were treated as fundamental (and, therefore, capable of presentation on appeal even if not preserved by a contemporaneous objection), a defendant would be deprived of all opportunity to raise the issue. (This seems to me a rather strained reading of the case because, even if the issue could not have been raised on direct appeal because it had not been preserved, it could still have been raised collaterally by a motion filed pursuant to Florida Rule of Criminal Procedure 3.850 alleging ineffective assistance of counsel.) The majority the concludes that such a concern is no longer valid because of the supreme court's adoption of Florida Rule of Criminal Procedure 3.800(b), pursuant to the terms of which a defendant "may file a motion to correct the sentence or order of probation within thirty days after the rendition of the sentence."

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

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

* * *

Judge Webster's analysis with regard to Rule 3.800(b) is now buttressed by this Court's subsequent recognition that the supposedly "failsafe" provisions of Rule 3.800(b) simply were not adequate or effective. This Court, in its recent decisions amending Rule 3.800(b) and related rules, concluded that Rule 3.800(b) was not functioning as the "foolproof remedy" the court had intended it to be to correct and preserve sentencing errors for appeal. *Amendments to Florida Rules of Criminal Procedure 3.111(e), 3.800 and Florida Rules of Appellate Procedure 9.020(h) and 9.600*, Case No. 95,707, 24 Fla. L. Weekly S530 (Fla. November 12, 1999), *opinion corrected* 24 Fla. L. Weekly S576 (Fla. November 22, 1999); and *Amendments to Florida Rules of Criminal Procedure 3.670 and 3.700(b)*, Case No. 95.117, 24 Fla. L. Weekly S527 (Fla. November 12, 1999), *opinion corrected* 24 Fla. L. Weekly S576 (Fla. November 22, 1999)("[W]e recognize this apparent failure of rule 3.800(b) to provide "a 'failsafe' method to detect, correct and preserved sentencing errors." "[M]any times sentencing errors are not detected until appellate counsel reviews the transcripts of the sentencing hearing and the written judgment and sentence. At that point, counsel is left to argue that the error constitutes fundamental error under section 924.041(3), Florida Statutes (1997)"). Similarly, this Court earlier recognized in *State v. Hart*, 668 So. 2d 589 (Fla. 1996), that in many instances, defendants placed on probation do not see the probation order until they report to the probation office sometime after sentencing, by which time it is too late to object to the unannounced special conditions imposed in the written order.

This record facially contains no evidence whatever that the cost order or the order of probation, which contain errors and are inconsistent with the oral pronouncement of

the conditions of probation, were promptly or timely served on the defendant's counsel —or in fact ever served — after they were entered such that the 3.800(b) motion and to take the steps to do so in order to preserve the issues for direct appeal. Obviously, defense counsel would be aware of the need to seek to correct the errors by a Rule 3.800(b) motion only upon receipt of such orders.

The Failure to Orally Announce Special Conditions of Probation was Fundamental Error

In addition to the issue of restitution, costs and attorney's fees, the court failed to orally pronounce two special conditions of probation that were subsequently included in the written probation order which was file some 23 days after sentencing. The special conditions that were not orally announced at sentencing are the requirements that petitioner pay for urinalysis tests the court did orally impose, and the further special condition that he undergo a mental health evaluation and successfully complete treatment of deemed necessary.

It has long been the law that written orders of probation must conform to the conditions orally announced and that special conditions of probation are required to be orally pronounced at sentencing. *Shaddix v. State*, 599 So. 2d 269 (Fla. 1st DCA 1992); *State v. Williams*, 712 So. 2d 762 (Fla. 1998). Where the oral pronouncement and the written order conflict, the oral announcement prevails. *Justice v. State*, 674 So. 2d 123 (Fla. 1996).

The requirement of payment for testing is such a special condition that must be pronounced. *State v. Williams*, *supra*. The failure to orally pronounce special conditions of probation (later imposed in a written probation order) is such a serious error that this

Court will not permit them to be imposed upon remand following an appeal. *Justice v. State*, 674 So. 2d 123 (Fla. 1996)(to subsequently enhance or extend the conditions of probation would violate double jeopardy).

Of prime significance is that this Court's decision in *State v. Williams*, *supra*, was founded directly on due process requirements and recognized that the failure to orally pronounce special conditions of probation did not comport with due process, again distinguishing general conditions of probation for which notice is provided by statute or the Fla. R. Crim. P. 3.986(e) (Paragraphs 1 through eleven).

> . . . . The rationale for this rule is that statutes and court rules provide constructive notice of the subject matter contained therein and that such notice comports with procedural due process. *Hart [v. State]*, 668 So. 2d [589,] at 592; *Vasquez [v. State,]*, 663 So. 2d [1343,] at 1346.
>
> On the other hand, a special condition of probation is one which is not statutorily authorized or mandated and not found in rule 3.986(e)(paragraphs one through eleven). Because the defendant is not on notice of special conditions of probation, these conditions must be pronounced orally at sentencing in order to be included in the written probation order. *Hart*, 668 So. 2d at 592.

State v. Williams, 712 So. 2d at 763. *See also State v. Hart*, 668 So. 2d 589 (Fla. 1996); *Vasquez v. State*, 663 So. 2d 1343 (Fla. 4th DCA 1995); *Justice v. State*. In order to comply with the notice requirement of due process, the trial court is required by Fla. R. Crim. P. 3.700(b) to orally pronounce such conditions of probation at sentencing.

Although the Court in *Justice* did not specifically declare the failure to pronounce special conditions of probation to be fundamental error, an issue apparently not directly raised in the case, the Court clearly rooted its decision on the need to comply with the

notice requirement of procedural due process in imposing such conditions where constructive notice is absent. Because the failure of pronounce special conditions of probation deprives the defendant of notice of their imposition (where later included in a written order), there has been a denial of procedural due process, which is fundamental error. "[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). *See also*, *Hopkins v. State*, 632 So. 2d 1372, 1374 (Fla. 1994); *Jenkins v. State*, 444 So. 2d 947 (Fla. 1984).

Although the certified question is facially directed to the failure to individually pronounce *costs*, the failure to pronounce special conditions of probation, we contend, is reasonably within the ambit of the certified question, involving the same error albeit in a different but related context, and should likewise be found to be fundamental error.

CONCLUSION

Petitioner, LUCIOUS TIBBS, III, based on all of the foregoing, respectfully urges the Court to vacate the judgments of restitution, to remand the case to the First District Court of Appeal for reconsideration, and to grant all other relief which the Court deems just and equitable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to: James W. Rogers, 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 June 15, 2000.

Fred P. Bingham II