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PRELIMINARY STATEMENT

P was the . in the trial court and the  
l i the Fourth District Court of Appeal. Respondent was  
the or c i in the trial court and t appellee in the di  
court. He will be referred to as tioner in this ef

The following symbol will be d:

R = Record on Appeal.

RB = Respondent s Brief on the M s

STATEMENT OF THE CASE AND FACTS

Petitioner relies upon his statement of the case and facts as set forth in his initial brief.

## ARGUMENT

THE TRIAL COURT ERRED IN RESENTENCING PETITIONER TO 18 MONTHS PROBATION WITH PAYMENT OF A \$10,000.00 FINE AS A SPECIAL CONDITION.

Respondent notes that petitioner's probation expires in July, 1990. (RB). Any inference of mootness however, is inappropriate for two reasons. First, failure to pay the fine may constitute a basis for violation of probation which would subject petitioner in all likelihood to incarceration while he litigates his ability to pay. Section 948.06, Fla.Stat. Second, imposition of a fine is a lien which constitutes a cloud on appellant's financial status for as long as it remains unpaid. 1953-54 Op.Atty.Gen. 688.

As to Respondent's waiver argument, petitioner maintains it is not well-founded. Petitioner is not merely challenging imposition of the fine as a condition of probation. Petitioner's claim is that imposition of a fine for the first time on resentencing after appeal violated the double jeopardy clause of the Florida and Federal Constitutions. A double jeopardy violation may be raised for the first time on direct appeal because it is fundamental error. See Benton v. Maryland, 395 U.S. 784, 794-796, 89 S.Ct. 2056 (1969); Menna v. New York, 423 U.S. 61, 96 S.Ct. 241 (1975) (guilty plea does not waive double jeopardy clause). Second, an illegal sentence may be challenged at any time. See State v. Rhoden, 448 So.2d 1013,1016 (Fla. 1984) ("The purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge"). Third, the record establishes that

petitioner objected to the imposition of any punishment other than straight incarceration, (R-14-16,17).

Respondent's effort to analogize an increase in court costs to an increase in a fine overlooks the difference between the two. Unquestionably a fine is a penalty. Section 775.083, Fla.Stat. By contrast, court costs are imposed as reimbursement to the state for cost of the prosecution. Section 939.01, Fla. Stat.; Smith v. State, 543 So.2d 348 (Fla. 5th DCA 1989). The courts have consistently treated the two differently. Compare Long v. State, 540 So.2d 903 (Fla. 2d DCA 1989) (defendant not entitled to notice prior to imposition of fine) and Jenkins v. State, 444 So.2d 947 (Fla. 1986) (notice required prior to imposition of costs). Thus, any effort to gloss over this distinction must fail.

CONCLUSION

Wherefore, petitioner respectfully requests this Court strike the imposition of probation and the fine.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to JOHN KOENIG, JR., Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 9th day of July, 1990.

  
\_\_\_\_\_

MARCY K. ALLEN  
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