IN THE SUPREME COURT OF FLORIDA

CASE NO. - 81,374

JOSEPH STEPHENS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

ON PETITION FROM THE FOURTH DISTRICT COURT OF APPEAL
WEST PALM BEACH, FLORIDA

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STATEMENT OF THE CASE

PRELIMINARY STATEMENT

This is an appeal involving Petitioner, **JOSEPH STEPHENS**, who was the Defendant below and will be referred to herein as the Defendant or by his surname. The Respondent, **STATE OF FLORIDA**, was the Plaintiff below, and will be referred to herein as the State, the prosecutor, or by the surname of the prosecutor.

The following designations will be used to cite to the Appeal file:

(**R-v:D-#**) - to designate the Record. "R" followed by a number will reflect the volume of the record and "D" followed by a number will indicate the document number of that record.

(**T-v:p**) - to designate the volume and page number of the record where the trial transcript is found. The number following the "T" is the record volume number. The number following the colon will be the page number(s).

(**E**) - to designate the record excerpts.

ALL EMPHASIS IS ADDED UNLESS OTHERWISE SPECIFIED.

STATEMENT OF THE DEFENDANT'S CUSTODY STATUS

Defendant **STEPHENS** is presently on probation.

STATEMENT OF THE PROCEEDINGS AND DISPOSITION BELOW

On June 14, 1988, the State Attorney for the Seventeenth Judicial Circuit filed an information charging STEPHENS with one count of Grand Theft in the First Degree for taking $100,000 from Robert Neal Sklare in violation of *F.S.* § 812.014(1)(a), *F.S.* § 812.014(1)(b) and *F.S.* § 812.014(2)(a). (R-5:D-81) On October 31, 1988, STEPHENS pled *nolo contendere* and was placed on five (5) years probation with the requirement to make restitution in the amount of $100,000.00 to Robert Sklare. (R-5:D-82-84) The Trial Court withheld adjudication of guilt. (R-5:D-82-84)[1]

Thirty-three (33) months later, on July 11, 1991, STEPHENS' probation officer filed an affidavit for violation of probation alleging that STEPHENS had failed to pay the agreed amount of $1,725.00 per month for restitution to Robert Sklare, and that as of July 3, 1991, STEPHENS was $55,200.00 in arrears with said payments. (R-5:D-86) A warrant was issued and STEPHENS was arrested. On February 25, 1992, following STEPHENS' initial appearance and at the suggestion of the trial court, an amended affidavit of violation of probation was filed setting forth four conditions of probation that STEPHENS violated. In addition to the his being $55,200.00 in arrears of his restitution payments, the amended affidavit and warrant alleged that STEPHENS failed to: (1) report as instructed; (2) submit monthly written reports from July, 1991 through January, 1992 and (3) pay his cost of supervision in that he was in arrears $240.00. (R-5:D-88)

On February 28, 1992, STEPHENS admitted to the allegations set forth in the amended affidavit for violation of probation and was sentenced to one year incarceration

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[1] Under the State Sentencing guidelines, STEPHENS fell in the first cell with a guideline range of any non state prison sanction. (R-5:D-85)

in the Broward County Jail followed by ten (10) years probation. While on probation, the Trial Court placed a special condition that he make restitution and that one half of the amount must be paid in five (5) years and the balance to be paid within nine and one half (9 1/2) years. The Trial Court also allowed the Defendant to be released from jail in five (5) months if he paid $50,000.00. The Trial Court **required** the Defendant to waive his constitutional right not to be imprisoned for debt in order to received the above sentence. (R-5:D-90) This latter condition was objected to by Defense counsel but agreed to STEPHENS. His appeal from this judgment and sentence, was affirmed. However, the Fourth District Court of Appeal certified conflict of it's case of *Brushingham v. State*, 460 So.2d 523 (Fla. 4th DCA 1984) with the Third District Court of Appeal case of *Hamrick v. State*, 519 So.2d 81 (Fla. 3rd DCA 1988). *Stephens v. State*, 18 Fla. L. Weekly D 509 (Fla. 4th DCA February 17, 1993).

STATEMENT OF THE FACTS

The Defendant was a yacht salesman. During the course of his work, he came in contact with Robert Sklare who was interested in having a yacht built. He place a $100,000.00 deposit with the Defendant. The sale was subsequently canceled, but Sklare did not receive his money back. As a result of this transaction, STEPHENS was charged with Grand Theft. (R-5:D-81). He subsequently pled nolo contendere and was placed on five (5) years probation with a special condition that he make restitution to Sklare. After thirty-three (33) months on probation, he was charged with violating the foregoing four conditions of probation.

At his initial appearance, his defense counsel was willing to admit to the allegations

in exchange for the Defendant being placed on community control. (T-1:4) The defense pointed out that the primary basis for the violation was STEPHENS failure to make any restitution payments. (T-1:2) The Trial Court recognized that the sentencing guidelines placed the Defendant in a sentencing range of probation to three and one half (3 1/2) years in the State Penitentiary and because of the type of crime the Defendant would probably serve six (6) to seven (7) months confinement. (T-1:5) The victim was at the initial appearance and wanted the Trial Court to give STEPHENS three (3) years imprisonment followed by two (2) years of house arrest. (T-1:5,6) The Trial Court, in order to protect the victim, suggested that the probation officer file an amended probation violation warrant and continued the hearing. (T-1:7, 8, 10)

Subsequent to the initial hearing, the Defendant made application for bond which was denied. (T-2:15) However, during the hearing the Trial Court learned that the Defendant was employed and had a yacht large sale pending that could result in substantial payment towards restitution. (T-2:6) At the revocation hearing, the Trial Court heard evidence that STEPHENS' financial difficulty was the result of a substantial decline in the sale of yachts in the United States because of the large luxury tax that was in acted by the Federal Government.

At the final hearing, the State offered the Defendant one year incarceration in the Broward County jail followed by ten years probation. During the discussion of the proposed sentence, the Trial Court stated:

> "Here is what I am looking at right now, and that's the State's offer was the year in the county jail followed by ten years probation, which I can live with, and I said I wouldn't want to prevent Mr. Scholar from getting all of his money with the

interest, it's up to two hundred thousand."

...

"If Mr. Scholar gets all his money in five years, if he pays it in three, it will still be no less than five, but he will be terminated at the end of five, should he pay it within five.

I also want this to be a *Brushingham* plea. In other words, he waives his constitutional right not to be in prison for debt." (T-5:23)

The Defense objected arguing that he is not familiar with the *Brushingham* decision and he finds that condition repugnant. (T-5:24) The Trial Court explained that the Fourth District Court of Appeal decision in *Brushingham v. State*, 460 So.2d 523 (Fla. 4th DCA 1984) allows a Defendant to waive his constitutional right not to be in prison for debt. (T-5:24) The Trial Court went on to explain to the Defendant what the *Brushingham* decision meant. The following is what was said during that discussion:

"THE COURT: ... Brushingham v. State is a case which allows you to waive your constitutional right not to be in prison for debt. You have a right under the Florida Constitution. Understanding the constitution of the United States to not be in prison for debt; do you understand that?

THE DEFENDANT: Yes. (T-4:73)

THE COURT: I am not allowed to put you in prison for debt, but that is one of the rights you are allowed to waive and give up in order to get the other benefits of this plea.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: What that means, even though both constitutions say you cannot be in prison for debt, that if you fail to pay half of the restitution in five years or total restitution in nine and a half years that you can be in prison for debt even

though you have no ability to pay.

Do you understand that?

THE DEFENDANT: Yes.

The Trial Court then engaged in a discussion of the law with defense counsel.

> "MR. WRUBEL: (Defense counsel): I don't think he is following the Fourth DCA laws. The United States constitution has not ruled on this. The Fourth DCA --
>
> THE COURT: Right. That's the only way I will take this plea."(T-4:74)"
>
> ...
>
> "THE COURT: He has got to waive the constitutional right.
>
> MR. WRUBEL: I can't waive his United States constitutional right. He can abide by the Fourth DCA law and understand that the Fourth DCA says that this is legal.
>
> THE COURT: He has a constitutional right not to be in prison for debt. That has got to be waived. Now, like I said before, the third DCA says it's not a waivable right.
>
> MR. WRUBEL: That's my point.
>
> THE COURT: The Fourth DCA says it's not [sic] a waivable right. We're covered with that, but until the Fourth DCA says it's not a waivable right --
>
> MR. WRUBEL: He is waiving and I am protecting it saying it's not waivable. In other words, I want the record to be clear if it's in court, if it's not waivable that I perfect to that objection.
>
> THE COURT: If the Fourth DCA says it's not a waivable right.
>
> MR. WRUBEL: I agree.
>
> THE COURT: Do you understand that, sir?
>
> THE DEFENDANT: Yes, sir. (T-4:75)

THE COURT: You are willing to waive your constitutional right not to be in prison for debt?

THE DEFENDANT: Yes, sir. (T-4:76)

Following this discussion, the Trial Court addressed the Defendant to make sure he understood what he was agreeing to and that no one was forcing him to enter this plea.

"THE COURT:...You can still withdraw your plea. I am not forcing your plea.

THE DEFENDANT: I have to accept it.

MR. WRUBEL: I can't hear what he is saying.[2]

THE DEFENDANT: I guess I have to accept it.

THE COURT: No, you don't have to accept it. I thought I made this clear that there was no force or pressure that is placed upon you?

It has to be voluntarily [sic]. You got to do that because you think, whether you like it or not, it's got to be in your best interest as you perceive it to be.

THE DEFENDANT: I can't find the word. It's in -- In order to immediately begin to turn money to pay this back, I have to get out and start to work now. Five months from now --

THE COURT: We already debated that issue and we already came to this conclusion you spend five months in if you accept this plea. (T-4:77)

THE DEFENDANT: I except [sic] this plea.

THE COURT: Nobody is putting any pressure on you, are they?

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[2]During the taking of guilty pleas Judge Goldstein addresses all of those entering pleas at the same time while they are seated in the jury box, hand cuffed and away from their attorney. That is why his defense counsel could not hear the Defendant's response.

THE DEFENDANT: I guess not. (T-4:78)"

Following these colloquies, the Trial Court accepted the Defendant's plea and sentenced him to one year in the Broward County Jail followed by ten (10) years probation with a special condition that he make restitution and to waive his constitutional right not to be imprisoned for debt. (R-5:D-90).

ARGUMENT

ISSUE ON APPEAL

THE DEFENDANT'S AGREEMENT TO MAKE RESTITUTION AS A CONDITION OF PROBATION REGARDLESS OF HIS ABILITY TO PAY WAS INVALID AND VIOLATED CONSTITUTIONAL SECTIONS GOVERNING DUE PROCESS, EQUAL PROTECTION AND PROHIBITION OF IMPRISONMENT FOR DEBT.

This issue raises the conflict with the Fourth District Court of Appeal's decision in *Brushingham v. State*, supra. and the Third District Court of Appeal's decision in *Hamrick v. State*, 519 So.2d 81 (Fla. 3rd DCA 1988) as well as *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). In *Brushingham*, supra., there were two issues raised. The first issue was whether "the trial court erred in finding that he knowingly, intelligently, and voluntarily entered into a guilty plea based on a plea agreement for probation." *Id.* at 524. The second issue was whether the plea agreement that required Brushingham to make restitution payments within a six month period as a condition of probation and that he waive the requirement that the state establish his financial ability to make restitution in order to prove violation of probation for failure to make restitution payments was unenforceable as against public policy. *Id.*

In addressing the second issue, the Fourth District wrote:

> "We deal with the second point first and note that this court has already spoken to a similar issue in the case of *Doherty v. State*, 448 So.2d 624 (Fla. 4th DCA 1984). Based on the reasoning of *Doherty* we conclude that a person charged with a crime can legally enter into a plea bargain agreement with the state that he receive probation rather than be imprisoned on conditions that he make restitution within a set period of time and that he waive his right to be imprisoned for failure to pay a debt if he fails to make restitution as he has agreed, whether or not the state can prove his financial ability to make restitution. Such an agreement is not void as against public policy and is enforceable." *Id.*

Over three years later, the Third District Court of Appeal rendered it's decision in *Hamrick*, supra. and found that even though Hamrick "specifically agreed to make restitution regardless of his ability to pay", the Third District found that Hamrick could not waive his constitutional prohibition against imprisonment for debt and found "the *Brushingham* holding that the constitutional prohibition against imprisonment for debt may be waived as a condition of probation thoroughly unpersuasive." *Id.* at 82.

The Defendant believes that the reasoning of both *Hamrick*, supra. and *Bearden*, supra. as well as decisions of this court set forth very strong reasons in support of Defendant's argument that he his "agreement to make restitution as a condition of probation regardless of his ability to pay was invalid and violated constitutional sections governing due process, equal protection and prohibition of imprisonment for debt." Thus, Defendant maintains that this court should resolve the conflict between *Brushingham* and *Hamrick* in favor of *Hamrick*'s reasoning.

In *Doherty v. State*, supra., cited by *Brushingham*, supra., as the basis for its holding, Doherty was charged with aggravated battery and violation of his probation. A negotiated plea was entered into after much discussion regarding the ramifications to the Defendant

if he failed make $800.00 restitution to the victim within one week, wherein if he did make restitution, the Trial Court would sentence him to one year in the county jail for probation violation. If Doherty failed to make restitution in the one week period for whatever reason, the Trial Court would be free to sentence him to the maximum sentence allowed by law. Doherty agreed. One week later, Doherty did not make the restitution payment and the Trial Court sentenced him to five years in the State Penitentiary. The *Doherty* Court, in upholding the five year sentence, reasoned:

> "The jurisprudence of this state is filled with cases requiring the state to comply with plea bargains. We see no reason why a defendant should not be required to comply also, **assuming the agreement is not illegal**. Here, appellant asked the court to withhold sentencing him for the aggravated battery if he made restitution to the victim. To ignore the reciprocity of such an agreement would have a deleterious affect upon any plea bargain in which restitution is an ingredient. The defendant could enter into such an agreement knowing he could not perform but then preclude subsequent action by the state by showing de did not have the ability to perform." *Id.* 625

STEPHENS contends that *Bearden v. Georgia*, supra., does make automatic incarceration of a person because he has failed to pay a fine or make restitution without determining whether such failure is deliberate *unconstitutional* and thus illegal. Consequently, if the State in *Doherty* failed to show that Doherty's failure to pay was deliberate then Doherty should not have been given a longer period of incarceration.[3]

In *Hamrick*, supra., the Defendant had agreed that he would make restitution

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[3]In the dissenting opinion, it was disclosed that Doherty's failure was not deliberate. He was expecting funds from a friend. Prior to giving the money to Doherty, the friend became incapacitated and could cont disburse the funds to him. Thus, his failure was not deliberate nor did he enter into the agreement expecting not to comply. His failure to pay was the result of an unfortunate set of circumstances.

regardless of whether he could pay. On appeal Hamrick's court appointed attorney filed an *Ander*'s brief citing *Brushingham* as the basis for denying him relief. However, the State of Florida confessed error in the trial court's decision, arguing that the trial court erred by incarcerating Hamrick for his failure to make restitution.. *Hamrick, Id.* 81. The *Hamrick* court, in agreeing with the State's confessed error position, reasoned and quoted at length on pages 81, 82:

> A broad variety of conditions of probation have been struck down as ones which improperly preclude the defendant's subsequent reliance upon constitutionally protected rights. E.g. *Grubbs v. State*, 373 So.2d 905 (Fla.1979) (waiver of Fourth Amendment right to reasonable search and seizure as probationary condition invalid); *McGeorge v. State*, 386 So.2d 29 (Fla. 5th DCA 1980) (waiver of due process right to notice of hearing of assessment of public defender's lien as probationary condition invalid); see *Gryca v. State*, 315 So.2d 221 (Fla. 1st DCA 1975) (waiver of due process right to hearing for assessment of public defender's lien invalid condition of insolvency affidavit required for appointment of public defender).
>
> These holdings apply with even greater force to the issue before us. The requirement that one may be found in violation of a probationary condition to make money payments only if he is or could reasonably be financially in a position to do so, see: *Mack v. State*, 440 So.2d 602 (Fla. 3d DCA 1983) at 602; *Smith v. State*, 373 So.2d 76, 77 (Fla. 3d DCA 1979); *Jones v. State*, 360 So.2d 1158 (Fla. 1st DCA 1978) at 1159-60, is one of constitutional dimensions which, since the defendant would otherwise be subject to jail simply for not paying an amount due regardless of the circumstances, subverts the requirements of due process and equal protection and the prohibition of imprisonment for debt. *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *United States v. Barrington*, 662 F.2d 1046 (4th Cir.1981); *Butterfield v. State*, 488 So.2d 920 (Fla. 3d DCA 1986) (citing *Bearden*); *State v. Duke*, 10 Kan.App.2d 392, 395, 699 P.2d 576, 578 (1985) ("The clear message in *Bearden* is that when determining whether to revoke

> probation, the trial court must consider why a probationer failed to pay a fine or court costs or make restitution as required by the conditions of probation. Automatic revocation and imprisonment of the probationer is prohibited by the Fourteenth Amendment."; see *Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970).
>
> It is inconceivable that such a right may be the subject of a valid waiver. Certainly if it is impermissible, both by statute, § 55.05, *Fla.Stat.* (1985), and judicially determined public policy, see *Carroll v. Gore*, 106 Fla. 582, 143 So. 633 (1932); *Pettijohn v. Dade County*, 446 So.2d 1143 (Fla. 3d DCA 1984), for the borrower to execute a cognovit note precluding the right to contest the entry of a judgment against him if he does not pay, he may not agree in advance to being imprisoned for the same reason. In making this determination, we follow *State v. Dye*, 715 S.W.2d 36 (Tenn.1986), which squarely so holds. See also *Duke*, 10 Kan.App.2d at 395-96, 699 P.2d at 578- 79; *State v. Walding*, 477 S.W.2d 251 (Tenn.Cr.App.1971)."

In a trilogy of cases[4] dealing with the incarceration of the poor for failing to pay fines, court costs or make restitution, the United States Supreme Court found that a person could not be incarcerated for failing to pay court assessment if the only reason for his failure was because he was poor. This does not mean, however, that the poor would not required to pay fines, court costs or make restitution. In addressing this latter point, Justice O'Connor writing the majority opinion in *Bearden*, supra., held:

> "The question in this case is whether the Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution. Its resolution involves a delicate balance between the acceptability, and indeed wisdom, of considering all relevant factors when determining an appropriate sentence for an individual and the impermissibility of imprisoning a defendant solely because of his lack of financial resources. We conclude

[4] *Williams v. Illinois, supra., Tate v. Short*, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971) and *Bearden v. Georgia, supra..*

> that the trial court erred in automatically revoking probation because petitioner could not pay his fine, without determining that petitioner had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist." at U.S. 661, 662; at S.Ct. 2066, 2067.

In discussing the two previous decisions of *Williams v. Illinois*, supra., and *Tate v Short*, supra., Justice O'Connor observed:

> " 'The rule of *Williams* and *Tate*, then, is that the State cannot "impos [e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.' *Tate*, supra, at 398, 91 S.Ct., at 671. In other words, if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it. Both *Williams* and *Tate* carefully distinguished this substantive limitation on the imprisonment of indigents from the situation where a defendant was at fault in failing to pay the fine. As the Court made clear in *Williams*, 'nothing in our decision today precludes imprisonment for willful refusal to pay a fine or court costs.' 399 U.S., at 242, n. 19, 90 S.Ct., at 2023, n. 19. Likewise in *Tate*, the Court 'emphasize [d] that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so.' 401 U.S., at 400, 91 S.Ct., at 672.
>
> **This distinction, based on the reasons for non-payment, is of critical importance here. If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection.** See ALI, Model Penal Code s 302.2(1) (Proposed Official Draft 1962). Similarly, a probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense. But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically

> without considering whether adequate alternative methods of punishing the defendant are available. This lack of fault provides a 'substantial reaso[n] which justifie[s] or mitigate[s] the violation and make[s] revocation inappropriate.' *Gagnon v. Scarpelli*, [411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1972)] at 790, 93 S.Ct., at 1764. Cf. *Zablocki v. Redhail*, 434 U.S. 374, 400, 98 S.Ct. 673, 688, 54 L.Ed.2d 618 (1978) (POWELL, J., concurring) (distinguishing, under both due process and equal protection analyses, persons who shirk their moral and legal obligation to pay child support from those wholly unable to pay). *Bearden v. Georgia*, supra., at U.S. 667-669, at S.Ct. 2070-
>
> 2071.

In addressing the State's interest in punishing both the rich and the poor, Justice O'Connor reasoned:

> "The State, of course, has a fundamental interest in appropriately punishing persons -- *rich* and poor -- who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment. Thus, when determining initially whether the State's penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources. See *Williams v. New York*, 337 U.S. 247, 250, and n. 15 (1949). As we said in *Williams v. Illinois*, '[a]fter having taken into consideration the wide range of factors underlying the exercise of his sentencing function, nothing we now hold preclude a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law.' 399 U.S., at 243, 90 S.Ct., at 2023." *Bearden v. Georgia*, supra., at U.S. 669-670, at S.Ct. 2071.

Bearden, supra., also addressing the State's concern and reasons for finding it constitutional to waive the right to go to jail for failing to meet your court accessed financial obligation even if you are indigent, when it concluded:

> "The State nevertheless asserts three reasons why imprisonment is required to further its penal goals. First, the State argues that revoking probation furthers its interest in ensuring that restitution be paid to the victims of crime. A rule that

> imprisonment may befall the probationer who fails to make sufficient bona fide efforts to pay restitution may indeed spur probationers to try hard to pay, thereby increasing the number of probationers who make restitution. Such a goal is fully served, however, by revoking probation only for persons who have not made sufficient bona fide efforts to pay. Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming. Indeed, such a policy may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation. Second, the State asserts that its interest in rehabilitating the probationer and protecting society requires it to remove him from the temptation of committing other crimes. This is no more than a naked assertion that a probationer's poverty by itself indicates he may commit crimes in the future and thus that society needs for him to be incapacitated. We have already indicated that a sentencing court can consider a defendant's employment history and financial resources in setting an initial punishment. Such considerations are a necessary part of evaluating the entire background of the defendant in order to tailor an appropriate sentence for the defendant and crime. But it must be remembered that the State is seeking here to use as the sole justification for imprisonment the poverty of a probationer who, by assumption, has demonstrated sufficient bona fide efforts to find a job and pay the fine and whom the State initially though it unnecessary to imprison. Given the significant interest of the individual in remaining on probation, see *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), the State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty. *Bearden v. Georgia*, supra., at U.S. 670-671, at S.Ct. 2072.

In case *subjudice*, STEPHENS is challenging the **automatic** incarceration for failing make restitution. STEPHENS does not contest that if there was a **willful** failure to make restitution he can be incarcerated. However, STEPHENS maintains that he can not be required to waive his constitutional right not to be imprisoned **solely** for debt. This Court

in *State v. Beasley*, 580 So.2d. 139 (Fla. 1991), completed a trilogy of cases dealing with the procedural due process protection,[5] finding that procedural due process requires that a defendant be given notice of an intent to impose a mandatory fine and an opportunity to be heard on the matter. *Beasley* concluded that there was notice given to Beasley by virtue of the publishing of mandatory fine statute and he had an opportunity to be heard prior to the fine's imposition. Thus the imposition of the mandatory fine was proper. Although *Beasley* found the imposition of the mandatory fine was proper, this court concluded that if:

> "the defendant has adequate notice and an opportunity to be heard prior to assessing a mandatory fine, there is no due process violation *unless and until the state seeks to enforce collection of the fine without a judicial determination of the defendant's ability to pay*." *State v. Beasley*, supra., at 143.

Although the statute required a mandatory imposition, this court upheld it since the failure to collect the mandatory fine would not **automatically** require Beasley incarceration. *Beasley* found that procedural due process **requires** a judicial determination of his ability to pay **before** such incarceration takes place. Consequently, *Beasley* found **three** requirements that must be satisfied in order to afford a defendant procedural due process protection **prior to incarcerating** a defendant for failure to pay a mandatory fine:

1. Notice of an intent to impose the fine;

2. A hearing to determine whether the facts of the case justify the imposition of the fine; and

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[5] *Jenkins v. State*, 444 So.2d. 947 (Fla. 1984) and *Mays v. State*, 519 So.2d. 618 (Fla. 1988) are the other two.

3. A determination, **prior to incarceration**, of whether the defendant's failure to pay the imposed fine was willful.

STEPHENS argues that his case is analogous to *Beasley*. Here, STEPHENS was given notice of the trial court's decision to imposed mandatory[6] restitution for the money owed as a condition of probation and STEPHENS had a hearing prior to that decision being made. However, unlike *Beasley*, STEPHENS will be incarcerated **automatically** if he fails to make restitution. This **automatic** incarceration without a hearing, does not satisfy the constitutional procedural due process protection. At the time of his sentence, STEPHENS had a good faith intention to pay the restitution. He also believed that the yacht brokerage business will improve and thus he honestly believed that he would be able to comply with the conditions. Thus, STEPHENS acquiesced into waiving his procedural due process protection because of this genuine belief of his ability to pay. None-the-less, because no one has the ability to predict the future, his ability to make restitution may fail for any number of innocent reasons i.e. he may become disabled, he may not be able to obtain employment or his income may only be enough to live at poverty level. As a result, STEPHENS would therefore be incarcerated not because he **intentionally** refused to comply with the probationary conditions but because he is unable, indigent. This was prohibited in the trilogy of United States Supreme Court cases discussed earlier and with the principles set forth in this court's trilogy of cases. *Hamrick* recognized this principle and STEPHENS respectfully suggests that *Hamrick*'s reasoning and legal argument presented therein presents the law

[6] The trial court's placed **mandatory** requirement that STEPHENS complete restitution during probation and if he failed to do so for whatever the reason he goes to jail without a **hearing.**

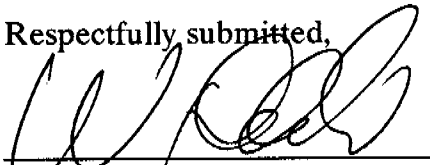
that is required to satisfy the constitutional due process protection.

It is clear from the colloquies with the defense that STEPHENS' failure to pay was not deliberate. The financial condition of the country as well as the luxury tax imposed on his industry by the Federal Government resulted in his failure to make restitution. Furthermore, the Trial Court became an advocate in the proceedings requiring the Defendant to waive his right against imprisonment for failure to pay a debt. As *Hamrick*, noted there has been previous attempts to have defendants waive various constitutional rights set as conditions of probation which have been found that unconstitutional by this court. STEPHENS believes that this is another one of those constitutional protections that can not be waived. Based upon the principals of *Williams v. Illinois*, supra, *Grubbs v. State*, supra., *Bearden v. Georgia*, supra, *State v. Beasley*, supra., and *Hamrick v. State*, supra., STEPHENS prays that this Honorable Court will reverse the holding in *Brushingham*, supra., agree with the holding of *Hamrick*, supra., and remand for resentencing.

CONCLUSION

Based on the authorities cited and the arguments presented in the issues presented, the defendant prays that this Honorable Court will remand for resentencing.

Respectfully submitted,



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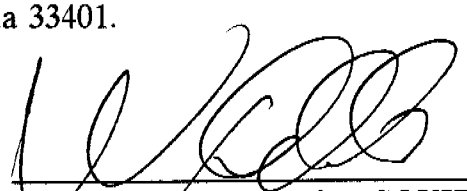
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of April, 1993, a true copy of the forgoing Petitioner's brief on the merits was mailed to the Attorney General of Florida 1111 Georgia Avenue Suite 204 West Palm Beach, Florida 33401.



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