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JUN 30 1993  
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By \_\_\_\_\_  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA  
CASE NO. - 81,374

JOSEPH STEPHENS,  
Petitioner,

vs.

STATE OF FLORIDA,  
Respondent.

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**PETITIONER'S REPLY BRIEF ON THE MERITS**

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

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## ISSUE ON APPEAL

WHETHER THE PETITIONER'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?

## 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*, 460 So.2d 523 (Fla. 4th DCA 1984) 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). Stated differently, the issue is whether a defendant can waive his right not to be incarcerated for failing, due to his indigency, to make restitution or to pay a fine or other legal debt. Respondent has argued to this court that Petitioner knew what he was doing when he agreed to the plea agreement and thus should be bound by his contract with the court and state. It must be made clear to this court that Petitioner is not arguing that (1) his plea was not knowingly or involuntarily made<sup>1</sup> (2); he cannot be incarcerated for failing to make restitution; (3) or that the trial court erred in determining that he violated his probation. The sole issue is whether

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<sup>1</sup>This issue was raised below and rejected by the appellate court.

he can waive this right not to be incarcerated for failing to make restitution without the State first having to show that his failure was deliberate or willful and waive his defense that failure to pay was because he is indigent.

Respondent sets forth facts before this court as if there was a hearing on the merits of his probation violation allegations. Although there were hearings<sup>2</sup>, there never was a hearing on the merits of the probation violation allegations. Thus, Respondent's conclusions that Petitioner deliberately refused to make restitution is not correct.<sup>3</sup>

In *Hamrick*, supra., the Third District Court of Appeal pointed several constitutional rights that cannot be waived or conditions of probation that are invalid:

"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)." *Id.*

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<sup>2</sup>The hearings were: (1) Initial appearance; (2) application for bond; and (3) Petitioner's entry of his plea to probation violation.

<sup>3</sup> Since there is no contesting of his violation per se or that the sentence imposed, except for the special *Brushingham* condition, was illegal, Petitioner makes this point only for accuracy. Likewise, Petitioner's explanation that his failure to make restitution payments was because of the economic impact of the special 10% luxury tax imposed by the federal government on the boating industry, goes only as an explanation for his conduct. Had STEPHENS proceeded to a final hearing, Petitioner believes that his explanation for his failure to make restitution, if believed, would have been sufficient to defeat that allegation of probation violation, since his failure to pay was not deliberate or willful.

As *Hamrick* point out:

"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)." *Id.*

*Hamrick's* conclusion is most revealing and helpful in resolving the issue before this court:

"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)." *Id.*, at pages 81, 82.

Petitioner does not argue that he cannot waive constitutional rights. He did that when

he pled to the probation violation allegations. Thus he gave up his **right to have the State prove to satisfaction of the court conscience that he violated his probation conditions.** In criminal cases, it has been approved that a Defendant may waive his right to remain silent, his right to counsel, his right to a jury trial with all the constitutional rights attenuated thereto and his right to appeal. *Tucker v. State*, 559 So.2d 218 (Fla.1990) However, the constitution through the due process clause, still requires the State to establish a prima facie case before the acceptance of the guilty plea. Although an accused may waive his right to counsel during a custodial interrogation, he may recant that waiver in the future. Although he may waive his right to be protected for unreasonable searches and seizures, he may **not** waive them in the future. Although one may enter contracts and be bound by their terms, several contracts have been determined to be against public policy.

In looking at those rights that a Defendant waives, Petitioner could not find any that involved waivers of **future** conduct. Could a Defendant as a special condition of probation agree that if he is arrested for any crime that he agrees to go to jail for the maximum sentence without a hearing to determine the merits of the charges? Could he agree to waive future probation revocation hearing and agree to be incarcerated on mere allegations? Could he agree to waive any future State burdens to establish the elements of any probation violation or of a future crime? From all of the cases examined, it is clear that the Petitioner can waive his rights pertaining to past conduct and present matter, but **not to those in the future.** The reason is clear that to allow the waiving of future rights for conduct that is beyond the control of the Defendant or probationer is not dispensing justice. If Petitioner becomes disabled, would justice allow his incarceration for failure to make restitution? If



Petitioner is employed but only earns enough money to pay for his own basic necessities, would justice allow his incarceration for failure to make restitution? If Petitioner's failure to make restitution is the result of some future event that is outside of his control, would justice allow his incarceration for failure to make restitution?

Petitioner is not arguing that if he fails to make timely restitution payments that the court may not order his incarceration. Petitioner is **arguing that in order for the court to do so, the State must establish deliberate or willful failure to pay.** As *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 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.

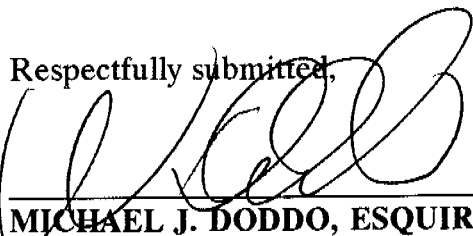
In the case *subjudice*, STEPHENS is challenging his future **automatic** incarceration for failing make restitution **not** his recent sentence of incarceration. STEPHENS does not contest that if there was a **willful** failure to make restitution he can be incarcerated. STEPHENS believes that this 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*, 580 So.2d 139 (Fla. 1991), 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 his Initial Brief on the Merits and this Reply Brief on the Merits, Petitioner prays that this Honorable Court will remand for resentencing.

Respectfully submitted,

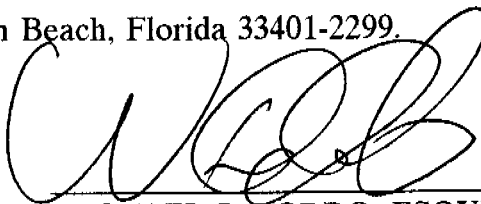


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### CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on the 28th day of June, 1993, a true copy of the forgoing Petitioner's brief on the merits was mailed to the Attorney General of Florida, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401-2299.



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**MICHAEL J. DODDO, ESQUIRE**