IN THE SUPREME COURT OF FLORIDA

CASE NO. 08-2001

CARLOS DEL VALLE,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW–
DIRECT CONFLICT
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

This case is before this Court on discretionary review of an express and direct conflict with *Stephens v. State*, 630 So. 2d 1090 (Fla. 1994); *Blackwelder v. State*, 902 So. 2d 905 (Fla. 2d DCA 2005); *Shepard v. State*, 939 So. 2d 311 (Fla. 4th DCA 2006); and *Osta v. State*, 880 So. 2d 804 (Fla. 5th DCA 2004).

The Petitioner, Carlos Del Valle, was the Appellant/Defendant in the proceedings below and the Respondent, State of Florida, was the Appellee/Plaintiff in the proceedings below. In this brief, the parties will be referred to as they stood in the lower courts, by proper name, or as Petitioner and Respondent. The symbol "R." will denote the record on appeal, which includes the relevant transcripts.

STATEMENT OF THE CASE AND FACTS

Preliminary Statement

The trial court entered an order modifying Mr. Del Valle's probation by extending it, and ordering him to report to Boot Camp. (R. 57). This modification was solely based on Mr. Del Valle's failure to pay the financial conditions of his probation. However, the state never presented any evidence, and the trial court never determined that Mr. Del Valle, an unemployed full-time student, was able to pay these financial conditions. Nor did the trial court determine that Mr. Del Valle's failure to pay was willful.

On appeal, the Third District affirmed the trial court's modification of probation citing *Gonzales v. State*, 909 So. 2d 960, 960 (Fla. 3d DCA 2005) (holding that pursuant to Section 948.06(5), Florida Statutes, it is the probationer's burden to prove inability to pay by clear and convincing evidence). *See Del Valle v. State*, 994 So. 2d 425 (Fla. 3d DCA 2008).

Statement of the Case and Facts

Mr. Del Valle was charged with one count of possession of cocaine, and in a separate case, one count of grand theft of a motor vehicle. (R. 1-4, 46-49). The clerk determined him to be indigent in both cases, and the public defender's office was

appointed to represent him. (R. 5-6, 10-11, 40-41, 44-45).

On December 1, 2006, he entered a plea in each case and was placed on probation for two years with the special conditions that he complete a TASC evaluation and treatment, if necessary; that he pay restitution in the amount of $1809 in the grand theft case (at the rate of $80 per month), and that he pay costs of supervision. (R. 14-15, 29-30, 51--55). The trial court reduced the costs of supervision from $40 to $25 per month.

On February 14, 2008, affidavits of violation of probation were filed against Mr. Del Valle. (R. 20-22, 56). The only basis for the alleged violations was Mr. Del Valle's failure to pay his financial conditions. According to the affidavits, Mr. Del Valle was $375 in arrears on payment of cost of supervision and $1,040.92 in arrears on payment of restitution. (R. 20, 56). The violation report, which is attached to the affidavit, indicates that Mr. Del Valle told the probation officer that he was attending Miami-Dade College to earn his Associate Degree (but he did not bring in any supporting documentation). (R. 22). The violation report also indicates that Mr. Del Valle was unemployed and was given a job referral and job search log. (R. 22).

The public defender's office represented Mr. Del Valle on his probation violation. (R. 6, 8, 41, 43). Following several preliminary hearings, at a hearing on

July 17, 2008, the State offered to reinstate Mr. Del Valle to probation. (R. 61). The trial court rejected this offer, and made a counter-offer which included boot camp. (R. 61-62). The court refused to consider any offer that did not include boot camp, and it explained that it was "not inclined to give up its sentencing authority in the case." (R. 63). The State was not ready to proceed, so the case was continued with Mr. Del Valle being released on his own recognizance. (R. 63-64).

A probation violation hearing was held on August 7, 2008. (R. 68-81). At this hearing, the state offered the testimony of two of Mr. Del Valle's probation officers. Probation Officer Francis testified that he instructed Mr. Del Valle in August 2007 regarding the conditions of his probation. (R. 71-73). Regarding the violations, he only related that Mr. Del Valle last made a payment towards his financial conditions of $25 on August 30, 2007, and that as of February 8, 2008, he was in arrears of $1040.92 on his restitution and $375 on his costs of supervision. (R. 74-75). He then testified that he stopped supervising Mr. Del Valle when he was incarcerated (on the underlying affidavit). (R. 75).

Probation Officer Villadis testified that she instructed Mr. Del Valle on the conditions of his probation on July 21, 2008, after he was released from jail following the July 17th court hearing. (R. 76-77). He made a restitution payment of $50 on July

30, 2008. (R. 77). The state did not present any evidence that Mr. Del Valle, an unemployed, full-time student, was able to pay his financial conditions. (R. 68-80).

Following the testimony, the court, without hearing argument, found Mr. Del Valle to be in violation of his probation. (R. 78). The court did not make any determination regarding Mr. Del Valle's ability to pay. (R. 78-79). Nor did it make any determination that his failure to pay was willful. The court modified probation to include a special condition that Mr. Del Valle enter and complete the Boot Camp program. Mr. Del Valle was ordered to be in court on October 27, 2008, to surrender for entry into Boot Camp. In order for Mr. Del Valle to have time to complete the Boot Camp program, the court also extended his probation by two years, with early termination upon successful completion of Boot Camp. (R. 79-80, 23-26, 37).

At the end of the hearing, the state asked the court if it was going to enter a criminal order of restitution or an order to continue paying restitution. (R. 80). The court stated yes, but that he may reduce the amount of the monthly payment. The court then asked Mr. Del Valle, for the first time in the hearing, how much he was able to pay each month. (R. 80). Mr. Del Valle told the court that he would try to pay $80 per month. (R. 80). The court asked Mr. Del Valle how much he was sure he could pay. (R. 80). Mr. Del Valle told the court that if he could get a job then he could pay $80

per month. (R. 80). The court left the amount of the restitution payment at $80 per month. But it waived the cost of supervision and any arrearages. (R. 80).

The public defender's office was appointed to represent Mr. Del Valle on appeal. After this Court accepted discretionary review of the Third District's decision affirming the modification of his probation, on March 2, 2009, the trial court terminated Mr. Del Valle's probation.

STANDARD OF REVIEW

An appellate court generally applies an abuse of discretion standard when reviewing a trial court's decision to revoke probation. *See Lawson v. State*, 969 So. 2d 222, 229 (Fla. 2007), citing *by example State v. Carter*, 835 So. 2d 259, 262 (Fla. 2002). However, when the only issue involved in a probation revocation case is a question of law, the appellate court applies the de novo standard of review. *Id.*, citing *Koile v. State*, 934 So. 2d 1226, 1229 (Fla. 2006).

SUMMARY OF ARGUMENT

The trial court erred in automatically modifying Mr. Del Valle's probation for his failure to pay restitution and costs of supervision absent evidence and findings that he was willfully responsible for the failure to pay. The courts have long been sensitive to the treatment of indigents in the criminal justice system. The United States Constitution's Equal Protection and Due Process Clauses ensure that an indigent defendant is not incarcerated solely because of his inability to pay a monetary obligation. Florida's Constitution further guarantees that "no person shall be imprisoned for debt, except in cases of fraud." Art. I, § 11, Fla. Const.

In *Bearden v. Georgia*, 461 U.S. 660 (1983), the United States Supreme Court held that a person's probation cannot be revoked without evidence and findings that he willfully failed to pay his or financial conditions. The Court emphasized that a trial court's focus should not be on whether a probationer disobeyed a prior court order to pay a fine as "this is no more than imprisoning a person solely because he lacks funds to pay the fine, a practice we condemned in *Williams* and *Tate*." *Bearden*, 461 U.S. at 674. The Florida Supreme Court, in *Stephens v. State*, 630 So. 2d 1090 (Fla. 1994), underscored its agreement with *Bearden* finding that before a probationer can be imprisoned for failing to financial conditions "there must be a determination that that

person has, or has had, the ability to pay but has **willfully** refused to do so." *Stephens*, 630 So. 2d at 1091 (emphasis added).

In 1984, interpreting the United State Supreme Court's decision in *Bearden*, the Florida Legislature enacted Section 948.06(4), Florida Statutes. (This section was renumbered in 1997 to Section 948.06(5)). Pursuant to this statute, in any probation revocation hearing, after the state establishes a failure to pay financial conditions, it is the probationer's burden to show an inability to pay. However, this portion of the statute completely ignores *Bearden's* requirement of a willful violation, and it is in direct contravention of *Bearden's* requirement that there must be evidence and findings of ability to pay before probation can be revoked for the non-payment of financial conditions. *See Bearden*, at 461 U.S. 665. Instead, it only requires the state to prove the non-payment of the probationer's financial conditions. Thus, a probationer's liberty is solely conditioned on the amount of money he or she has.

This "automatic" finding violates substantive due process, fundamental fairness, and the right to be free from imprisonment for debt. *See* Amends. V & XIV, U.S. Const.; Art. §§ 2, 9, & 11, Fla. Const. *See also Bearden*, 461 U.S. at 668 & 672-673; *Black*, 471 at 611 & 615. It also conflicts with this Court's *Stephen's* decision, and its decisions in *Hewett v. State*, 613 So. 2d 1305 (Fla. 1992), *Clark v. State*, 579 So. 2d

109 (Fla. 1991) and *State v. Carter*, 835 So. 2d 259 (Fla. 2002), which hold that probation cannot be violated in absence of a willful violation.

Since the statute's enactment, the District Courts of Appeal have split on whether evidence and findings of a willful failure to pay are still required before probation can be revoked for the non-payment of financial conditions. Without addressing its constitutionality, the First and Third District Courts have stated that Section 948.06(5) requires probationers to prove their inability to pay. The Third District, additionally, does not require the trial court to make a determination that the probationer had an ability to be but willfully failed to do, if the probationer has not produced any evidence of inability to pay. The First District, however, still requires the trial court to make this determination.

In direct conflict, recognizing the statute's constitutional infirmities, the Second, Fourth, and Fifth District Courts of Appeal, have ignored the statute's burden-shifting requirements. Despite the statute, the Second, Fourth, and Fifth District Courts, continue to require that the state must produce evidence of ability to pay and the court must make a determination that the person had an ability to pay, but willfully failed to do so.

This Court should disapprove the decisions of the First and Third District Court of Appeal which apply Section 948.06(5)'s burden-shifting requirement. It should also disapprove the decisions of the Third District which do not require the trial court to make a determination that the probationer had an ability to pay but willfully failed to do so, when the probationer does not produce evidence of an inability to pay. Instead, in line with the Constitutions of the United States and Florida, the decisions of the United States Supreme Court, the decisions of this Court, and the decisions of the Second, Fourth, and Fifth District Courts, this Court should find that Section 948.06(5) is constitutionally infirm and that, before probation may be revoked for the non-payment of a financial condition, the state must produce evidence and the trial court must determine that the probationer had an ability to pay but willfully failed to do so.

In the case below, the trial court automatically found Mr. Del Valle to be in violation of his probation for his non-payment of financial conditions without any evidence or findings of an ability to pay. The trial court only found that Mr. Del Valle did not make these payments. Without such evidence and findings, Mr. Del Valle's liberty was solely conditioned on the amount of money he has. This finding violates fundamental fairness. Therefore, this Court should reverse the trial court's finding that Mr. Del Valle violated his probation.

ARGUMENT

THE TRIAL COURT ERRED IN AUTOMATICALLY MODIFYING MR. DEL VALLE'S PROBATION FOR HIS FAILURE TO PAY RESTITUTION AND COSTS OF SUPERVISION ABSENT EVIDENCE AND FINDINGS THAT HE WAS WILLFULLY RESPONSIBLE FOR THE FAILURE TO PAY.

The courts have long been sensitive to the treatment of indigents in the criminal justice system. Over a half-century ago, United States Supreme Court Justice Black "declared that 'there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.' *Griffin v. Illinois*, 351 U.S. 12 (1956) [ ] (plurality opinion)." *Bearden v. Georgia*, 461 U.S. 660, 664 (1983). The United States Constitution's Equal Protection and Due Process Clauses ensure that an indigent defendant is not incarcerated solely because of his inability to pay a monetary obligation. *See Bearden*, 461 U.S. at 666 and n.8, and cases cited therein. *See also*, Amends. V & XIV, U.S. Const. Florida's Constitution further guarantees that "no person shall be imprisoned for debt, except in cases of fraud." Art. I, § 11, Fla. Const. *See also* Art. I, §§ 2 & 9, Fla. Const. (guaranteeing equal protection and due process).

Over a quarter-century ago, in *Bearden v. Georgia*, the United States Supreme Court decided the exact issue before this Court today: whether "a sentencing court can revoke a defendant's probation for failure to pay financial conditions of probation,

absent **evidence** and **findings** that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate." *Bearden,* 461 U.S. at 665 (emphasis added). The resolution of this issue "involve[d] 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." *Bearden,* 461 U.S. at 661.

The Court analyzed the issue by first reviewing its earlier decisions in *Williams v. Illinois*, 399 U.S. 235 (1970) and *Tate v. Short*, 401 U.S. 395 (1971). In *Williams*, the defendant was held in jail 101 days beyond the maximum prison sentence to "work out" a fine, which he could not pay because of his indigency. The United States Supreme Court "struck down the practice, holding that '[o]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.'" *Bearden*, 461 U.S. at 667, quoting *Williams*, 399 U.S. at 241-242.

In *Tate*, the statutory penalty only permitted a fine. Relying on *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970), the *Tate* court held that "'the same

constitutional defect in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine.'" *Bearden*, 461 U.S. at 667, quoting *Tate*, 401 U.S. at 398.

The *Bearden* Court summarized *Williams* and *Tate* as holding "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." *Bearden*, 461 U.S. at 667-668. It noted, however, that "[b]oth *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." *Bearden*, 461 U.S. at 668.

The Court observed that the reason for non-payment is a critical distinction: "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." *Id.* (citation omitted). The Court further observed that "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." *Id.* In this situation, the state is also justified in revoking probation and imprisoning a defendant. *See id.* However, "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, [footnote omitted] it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." *Id.* at 668-669.

Based on these findings the *Bearden* Court held:

> [I]n a revocation proceeding for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay.

Id. at 672. The Court emphasized: "To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment. [footnote omitted]." *Id.* at 672-673.

In applying its holding to the facts before it, the *Bearden* court concluded that the trial court erred in automatically revoking probation without determining whether Bearden was at fault for failing to make the payment. *See id.* at 662. The Court emphasized that the trial court's focus should not have been on whether the defendant disobeyed a prior court order to pay the fine as "this is no more than imprisoning a person solely because he lacks funds to pay the fine, a practice we condemned in *Williams* and *Tate*." *Bearden*, 461 U.S. at 674. The Court continued: "By sentencing petitioner to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turned a fine into a prison sentence." *Id.*

In *Black v. Romano*, 471 U.S. 606 (1985), the Court further discussed its *Bearden* holding, in considering whether Due Process generally requires a sentencing court to consider alternatives to incarceration before revoking probation.[1] The Court observed that the "Due Process Clause of the Fourteenth Amendment imposes

[1] The *Black* Court ultimately declined to consider "whether concerns for fundamental fairness would preclude the automatic revocation of probation in circumstances other than those involved in *Bearden*." *Black*, 471 U.S. at 615. It then held that the trial court's decision to revoke the defendant's probation, based on his arrest on an unrelated charge, satisfied the requirements of due process. *See id.* at 616.

procedural and substantive limits on the revocation of the conditional liberty created by probation." *Black*, 471 U.S. at 610, citing *Bearden*, 461 U.S. at 666 and n.7. It explained that its decisions in *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) outline the minimal procedural safeguards required by due process, but neither decision restricts the substantive grounds for revoking probation. *See Black*, 471 U.S. at 611. Its decision in *Bearden*, however, "recognized **substantive** limits on the automatic revocation of probation where an indigent defendant is unable to pay a fine or restitution." *Black*, 471 U.S. at 611 (emphasis added).

The Florida Supreme Court, in *Stephens v. State*, 630 So. 2d 1090 (Fla. 1994), underscored its agreement with *Bearden*. In *Stephens*, this Court examined the issue of whether a person can waive their right not to be imprisoned for debt. The trial court, in *Stephens*, after a probation revocation hearing, sentenced Stephens to one year in jail followed by ten years probation, which was conditioned on his payment of restitution. If Stephens did not make the restitution payments, then he would automatically be imprisoned. After conducting an inquiry pursuant to *Brushingham v. State*, 460 So. 2d 523 (Fla. 4th DCA 1984), the trial court determined that Stephens voluntarily waived his right not to be imprisoned for debt.

In *Brushingham*, the Fourth District Court of Appeal held that a person's waiver of their right not to be imprisoned for debt is not void against public policy and it is enforceable. Whereas in *Hamrick v. State*, 519 So. 2d 81 (Fla. 3d DCA 1981), the Third District disagreed and held that this type of agreement, without any determination of ability to pay before incarceration for debt "subverts the requirements of due process and equal protection and the prohibition of imprisonment for debt." *Stephens*, 630 So. 2d at 1091, quoting *Hamrick*, 519 So. 2d at 82.

After examining *Bearden*, this Court, in *Stephens*, found: "We agree and hold that, before a person on probation can be imprisoned for failing to make restitution, there must be a determination that that person has, or has had, the ability to pay but has **willfully** refused to do so." *Stephens*, 630 So. 2d at 1091 (emphasis added). This Court then specifically approved the decision in *Hamrick* holding that a person cannot waive their right not to be imprisoned for debt.

In its earlier decision in *Hewett v. State*, 613 So. 2d 1305 (Fla. 1992), this Court similarly highlighted this willfulness requirement. In *Hewett*, this Court considered whether a trial court could extend the probationary period of a person

who did not have the ability to pay restitution.[2] In so doing, this Court found:[3] "There is no ability to extend probation in the absence of **willful** violation of the terms of probation." *Hewett*, 613 So. 2d at 1307, citing *Clark v. State*, 579 So. 2d 109 (Fla. 1991) [("Absent proof of a violation, the court cannot change an order of probation or community control by enhancing the terms thereof, even if the defendant has agreed in writing with his probation officer to allow such a modification and has waived notice and hearing.").] (emphasis added).

In 1984, interpreting the United State Supreme Court's decision in *Bearden*, the Florida Legislature enacted Section 948.06(4), Florida Statutes. *See* Laws of Fla., 1984, c. 84-337, §3. *See also* Senate Staff Analysis and Economic Impact Statement, CS/SB 929 ("Staff Analysis") at 1-2, (June 11, 1984). It was observed, in the Staff Analysis, that under then current Florida case law, the state bears the burden to show that the probationer has the ability to pay and that he or she willfully refused to pay.

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[2] The *Hewett* decision analyzed the second part of Section 948.06(4), Florida Statutes (1991). *See supra* at page 20 (the non-underlined portion of the statute), which is the same as the 1991 version analyzed in *Hewett.*

[3] More specifically, this Court found that the legislature did not intend the term "alternate measures" to include "coercive forms of detention or control" and therefore, the trial court was not authorized to extend the defendant's probation, absent a willful violation. *See Hewett*, 613 So. 2d at 1307. *See also* § 948.06(4), Fla. Stat. 1991.

See Id. It was then pronounced that the "bill would track the language of the Supreme Court in *Bearden v. Georgia* and place the burden on the probationer or offender asserting inability to pay . . . ." *Id*.

The current version[4] of Section 948.06, Florida Statutes in its entirety states:

> In any hearing in which the failure of a probationer or offender in community control to pay restitution, or the cost of supervision as provided in s. 948.09, as directed, is established by the state, if the probationer or offender asserts his inability to pay restitution or cost of supervision, it is incumbent upon that probationer or offender to prove by clear and convincing evidence that he or she does not have the present resources available to pay the restitution or cost of supervision despite sufficient bona fide efforts legally to acquire the resources to do so. If the probationer or offender cannot pay restitution or the cost of supervision despite sufficient bona fide efforts, the court shall consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the state's interests in punishment and deterrence may the court imprison a probation or offender in community control who has demonstrated sufficient bona fide efforts to pay restitution or the cost of supervision.

§ 948.06(5), Fla. Stat. (2008) (emphasis added).

[4] Other than a few minor technical changes, the current version of the statute remains the same today as when it was enacted in 1984. (It was renumbered from Section 948.06(4) to Section 948.06(5) by the passage of Laws of Fla., 1997, c. 97-299, § 13).

Contrary to the staff analysis' assertion, the second half of the statute (the non-underlined portion) is the only portion that tracks the language of *Bearden*. *See Bearden*, at 461 U.S. 665. The first half of the statute (the underlined portion) completely ignores *Bearden's* requirement of a willful violation, and it is in direct contravention of *Bearden's* requirement that there must be evidence and findings of ability to pay before probation can be revoked for the non-payment of financial conditions.[5] *See Bearden*, at 461 U.S. 665. Instead, it only requires the state to prove the non-payment of the probationer's financial conditions. Thus, a probationer's liberty is solely conditioned on the amount of money he or she has.

This is the exact type of "automatic" finding rejected by the *Bearden* Court. *See Bearden*, 461 U.S. at 674. This "automatic" finding violates substantive due process, fundamental fairness, and the right to be free from imprisonment for debt. *See* Amends. V & XIV, U.S. Const.; Art. §§ 2, 9, & 11, Fla. Const. *See also Bearden*, 461 U.S. at 668 & 672-673; *Black*, 471 at 611 & 615.

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[5] As this case involves probation, not community control, the terms used will be "probation" and "probationers," rather than "community control" and "offender." However, the analysis of the statute applies equally to both classes of persons.

The statute's failure to require evidence and findings of a willful failure to pay also conflicts with this Court's holding in *Stephens.*[6] *See Stephens*, 630 So. 2d at 1091. Additionally, it contravenes *Hewett's* and *Clark's* requirements that probation cannot be violated in absence of a willful violation. *See Hewett*, 613 So. 2d at 1307, citing *Clark v. State*, 579 So. 2d 109 (Fla. 1991). *See also State v. Carter*, 835 So. 2d 259, 262 (Fla. 2002) ("the decision to revoke [ ] probation should be made with no less care [than the decision to place someone on probation], and only when the probation violation is both willful and substantial so as to indicate that probation will not work for that defendant.").

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[6] The statute additionally conflicts with Section 948.032, Florida Statutes, which requires the court, before revoking probation for failure to pay restitution, to specifically consider the probationer's employment status, earning ability, financial resources, as well as, the willfulness of his or her failure to pay. *See* § 948.032, Fla. Stat. (2008).

It should be noted that the restitution statute, Section 775.089, Florida Statutes, also provides that the trial court must consider the financial circumstances of the defendant at the time of enforcement of the restitution order. *See* § 775.089(6)(b), Fla. Stat. (2008). However, similar to Section 948.06(5), and contrary to Section 948.032's willfulness requirement, it places the burden of proof of inability to pay on the defendant. Other than making the payment of restitution a condition of probation or community control though, Section 775.089 only authorizes enforcement through civil judgments. To any extent that the enforcement of a restitution order under Section 775.089 leads to the loss of liberty, rather than a civil judgment, this section is also unconstitutional.

Before the statute's enactment, Florida's District Courts of Appeal all required evidence and findings of a willful failure to pay before probation could be revoked for the non-payment of a financial condition. Universally, these courts held that the state must produce evidence of ability to pay and the court must make a finding of ability to pay before probation can be revoked for the willful non-payment of a financial condition.[7]

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[7] For cases from the First District Court of Appeal *see Sampson v. State*, 453 So. 2d 919 (Fla. 1st DCA 1984); *Gammon v. State*, 451 So. 2d 1042 (Fla. 1st DCA 1984); *Haynes v. State*, 440 So. 2d 661 (Fla. 1st DCA 1983); *Williams v. State*, 406 So. 2d 86 (Fla. 1st DCA 1981); *Winfield v. State*, 406 So. 2d 50 (Fla. 1st DCA 1981); *I.P.J. v. State*, 402 So. 2d 1373 (Fla. 1st DCA 1981); *Young v. State*, 388 So. 2d 639 (Fla. 1st DCA 1981); *Peterson v. State*, 384 So. 2d 965 (Fla. 1st DCA 1980); *Page v. State*, 363 So. 2d 621 (Fla. 1st DCA 1978); *Williams v. State*, 365 So. 2d 201 (Fla. 1st DCA 1978); *Depson v. State*, 363 So. 2d 43 (Fla. 1st DCA 1978); *Jones v. State*, 360 So. 2d 1158 (Fla. 1st DCA 1978). *Cf. Douglas v. State*, 433 So. 2d 12 (Fla. 1st DCA 1983) (defendant's guilty plea to allegation of non-payment waives any necessity for evidence or finding of ability to pay).

For cases from the Second District Court of Appeal *see Kennedy v. State*, 460 So. 2d 590 (Fla. 2d DCA 1984); *Brown v. State*, 429 So. 2d 1983 (Fla. 2d DCA 1983); *Grimsley v. State*, 408 So. 2d 1075 (Fla. 2d DCA 1982); *Rodriguez v. State*, 405 So. 2d 794 (Fla. 2d DCA 1981); *Abel v. State*, 383 So. 2d 325 (Fla. 2d DCA 1980); *Sampson v. State*, 375 So. 2d 325 (Fla. 2d DCA 1979); *Young v. State*, 370 So. 2d 832 (Fla. 2d DCA 1979); *Martin v. State*, 366 So. 2d 141 (Fla. 2d DCA 1979); *Coxon v. State*, 365 So. 2d 1067 (Fla. 2d DCA 1979).

For cases from the Third District Court of Appeal *see Pope v. State*, 444 So. 2d 1161 (Fla. 3d DCA 1984); *Mack v. State*, 440 So. 2d 602 (Fla. 3d DCA 1983); *Edwards v. State*, 439 So. 2d 1028 (Fla. 3d DCA 1983); *Lattimore v. State*, 433 So. 2d

These early decisions relied on the United States Supreme Court's decisions in *Tate* and *Williams*, discussed above, and *Fuller v. Oregon*, 417 U.S. 40 (1974) (which held that an Oregon recoupment statute, which retains all the exemptions accorded to civil judgment debtors and an opportunity to show that recovery of legal defense costs will impose hardship, does not violate equal protection clause). *See e.g.*, *Coxon v. State*, 365 So. 2d 1067 (Fla. 2d DCA 1979); *Jones v. State*, 360 So. 2d 1158 (Fla. 1st DCA 1978); *Robbins v. State*, 318 So. 2d 472 (Fla. 4th DCA 1975).

Since the statute's enactment, the District Courts of Appeal have split on whether evidence and findings of a willful failure to pay are still required before probation can be revoked for the non-payment of financial conditions. Without

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56 (Fla. 3d DCA 1983); *Aaron v. State*, 400 So. 2d 1033 (Fla. 3d DCA 1981); *Smith v. State*, 377 So. 2d 250 (Fla. 3d DCA 1979); *Smith v. State*, 373 So. 2d 76 (Fla. 3d DCA 1979).

For cases from the Fourth District Court of Appeal *see Murphy v. State*, 442 So. 2d 1047 (Fla. 4th DCA 1983); *Deason v. State*, 404 So. 2d 1140 (Fla. 4th DCA 1981); *Kimble v. State*, 396 So. 2d 815 (Fla. 4th DCA 1981); *Smith v. State*, 380 So. 2d 1175 (Fla. 4th DCA 1980; *Woodard v. State*, 371 So. 2d 708 (Fla. 4th DCA 1979); *Cohen v. State*, 365 So. 2d 1052 (Fla. 4th DCA 1978); *Murrell v. State*, 364 So. 2d 96 (Fla. 4th DCA 1978); *Robbins v. State*, 318 So. 2d 472 (Fla. 4th DCA 1975).

For cases from the Fifth District Court of Appeal *see Henderson v. State*, 461 So. 2d 1984 (Fla. 5th DCA 1984); *Shaw v. State*, 391 So. 2d 754 (Fla. 5th DCA 1980); *Holt v. State*, 385 So. 2d 1133 (Fla. 5th DCA 1980); *Baran v. State*, 381 So. 2d 323 (Fla. 5th DCA 1980).

addressing its constitutionality, the First and Third District Courts have stated that Section 948.06(5) requires probationers to prove their inability to pay. *See e.g., Martin v. State*, 937 So. 2d 714 (Fla. 1st DCA 2006); *Gonzales v. State*, 909 So. 2d 960, 960 (Fla. 3d DCA 2005). The Third District, additionally, does not require the trial court to make a determination that the probationer had an ability to be but willfully failed to do, if the probationer has not produced any evidence of inability to pay. *See Guardado v. State*, 562 So. 2d 696, 696-697 (Fla. 3d DCA 1990) (finding any error to be harmless); *Del Valle v. State*, 994 So. 2d 425 (Fla. 3d DCA 2008) (affirming trial court's finding of probation violation in absence of any determination). The First District, however, still requires the trial court to make this determination. *See e.g., Martin.*

In direct conflict, recognizing the statute's constitutional infirmities, the Second, Fourth, and Fifth District Courts of Appeal, have ignored the statute's burden-shifting requirements. Despite the statute, the Second, Fourth, and Fifth District Courts, continue to require that the state must produce evidence of ability to pay and the court must make a determination that the person had an ability to pay, but willfully failed to do so. *See e.g., Blackwelder v. State*, 902 So. 2d 905 (Fla. 2d DCA 2005);[8] *Shepard v.*

[8] *See also Thompson v. State*, 974 So. 2d 594 (Fla. 2d DCA 2008); *Guderian v. State*, 933 So. 2d 17 (Fla. 2d DCA 2006); *Warren v. State*, 924 So. 2d 979 (Fla. 2d DCA 2006); *Sprague v. State*, 920 So. 2d 1248 (Fla. 2d DCA 2006); *Connor v. State*,

State, 939 So. 2d 311 (Fla. 4th DCA 2006);[9] *Osta v. State*, 880 So. 2d 804 (Fla. 5th DCA 2004).[10]

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891 So. 2d 1182 (Fla. 2d DCA 2005); *Oates v. State*, 872 So. 2d 351 (Fla. 2d DCA 2004); *Davis v. State*, 867 So. 2d 608 (Fla. 2d DCA 2004); *Reed v. State*, 865 So. 2d 644 (Fla. 2d DCA 2004); *Hanania v. State*, 855 So. 2d 92 (Fla. 2d DCA 2003); *Glasier v. State*, 849 So. 2d 444 (Fla. 2d DCA 2003); *Stevens v. State*, 823 So. 2d 319 (Fla. 2d DCA 2002); *Hartzog v. State*, 816 So. 2d 774 (Fla. 2d DCA 2002); *Knight v. State*, 801 So. 2d 160 (Fla. 2d DCA 2001); *Robinson v. State*, 773 So. 2d 566 (Fla. 2d DCA 2000); *McCoy v. State*, 730 So. 2d 804 (Fla. 2d DCA 1999); *Cherry v. State*, 718 So. 2d 294 (Fla. 2d DCA 1998); *Garcia v. State*, 701 So. 2d 607 (Fla. 2d DCA 1997); *Maines v. State*, 621 So. 2d 679 (Fla. 2d DCA 1993); *Haynes v. State*, 571 So. 2d 1380 (Fla. 2d DCA 1990); *Jackson v. State*, 546 So. 2d 745 (Fla. 2d DCA 1989); *Neves v. State*, 502 So. 2d 1343 (Fla. 2d DCA 1987); *Griffin v. State*, 481 So. 2d 1312 (Fla. 2d DCA 1986); *Jordan v. State*, 489 So. 2d 224 (Fla. 2d DCA 1986); *Fogarty v. State*, 465 So. 2d 625 (Fla. 2d DCA 1985). *But see McNeil v. State*, 908 So. 2d 556 (Fla. 2d DCA 2005) (where there is sufficient evidence of ability to pay and a willful failure, the burden shifts to the probationer to prove inability to pay); *Clark v. State*, 510 So. 2d 1202 (Fla. 2d DCA 1987) (same); *White v. State*, 693 So. 2d 119 (Fla. 2d DCA 1997) (where state establishes willful failure to pay burden shifts to probationer to prove inability to pay).

[9] *See also Wilson v. State*, 967 So. 2d 1107 (Fla. 4th DCA 2007); *Hoey v. State*, 965 So. 2d 360 (Fla. 4th DCA 2007); *Aidone v. State*, 763 So. 2d 1127 (Fla. 4th DCA 1999); *Dirico v. State*, 728 So. 2d 763 (Fla. 4th DCA 1999); *Thompson v. State*, 710 So. 2d 80 (Fla. 4th DCA 1998); *Allen v. State*, 662 So. 2d 380 (Fla. 4th DCA 1995); *Smith v. State*, 642 So. 2d 1105 (Fla. 4th DCA 1994).

[10] *See also Johnson v. State*, 890 So. 2d 490 (Fla. 5th DCA 490); *Edwards v. State*, 892 So. 2d 1192 (Fla. 5th DCA 2005); *Oliver v. State*, 880 So. 2d 794 (Fla. 5th DCA 2004); *Spruills v. State*, 643 So. 2d 1191 (Fla. 5th DCA 1994); *Kolovrat v. State*, 574 So. 2d 294 (Fla. 5th DCA 1991). *But see Laird v. State*, 762 So. 2d 541 (Fla. 5th DCA 2000) (affirming trial court's revocation of probation for failure to pay financial conditions as per 948.06(5) it is the defendant's burden to prove inability to pay).

The Second District, in *Blackwelder v. State*, 902 So. 2d 905 (Fla. 2d DCA 2005), specifically addressed the tension between Section 948.06(5) and due process. In *Blackwelder*, the probationer was alleged to have failed to pay his costs of supervision, amongst other alleged violations. At the revocation hearing, the probation officer testified that he explained the conditions of probation to Blackwelder and that he was behind in his cost of supervision payments. He also related that to the best of his knowledge Blackwelder was employed up until the previous month. On cross, he admitted that he did not know if Blackwelder was able to make the payments or the specifics of his economic situation. The defense argued that the state failed to prove that Blackwelder had the ability to pay his costs of supervision. The trial court held that if the defense had raised this issue during the hearing, then the burden would have shifted to the state.

The Second District agreed with the defense. Initially, the Second District pointed out that the state carries the burden of proving a willful violation of probation. It then highlighted this Court's decision in *Stephens* holding that before a probationer may be violated for failure to pay financial conditions, there must be a determination that the person has the ability to pay and willfully failed to do so. Then the court held: "Accordingly, the State is required to present evidence of the probationer's ability to

pay to demonstrate the willfulness of the violation." *Blackwelder*, 902 So. 2d at 907, citing *Reed v. State*, 865 So. 2d 644, 647 (Fla. 2d DCA 2004); *Glasier v. State*, 849 So. 2d 444, 445 (Fla. 2d DCA 2003); *Robinson v. State*, 773 So. 2d 566, 567 (Fla. 2d DCA 2000). *See also Mabrey v. Florida Parole Commission*, 891 So. 2d 1164 (Fla. 2d DCA 2005). The court concluded that "the State does not meet its burden merely by introducing evidence that establishes the specific amount the probation is in arrears." *Blackwelder*, 902 So. 2d at 907 (citations omitted).

The Second District then specifically rejected the trial court's view that the defense had to raise the issue to shift the burden to the state. In support of this burden-shifting argument, the state cited to Section 948.06(5), and the following decisions: *McQuitter v. State*, 622 So. 2d 590 (Fla. 1st DCA 1993); *Green v. State*, 620 So. 2d 1126 (Fla. 1st DCA 1993); *Word v. State*, 533 So. 2d 893 (Fla. 3d DCA 1988). The Second District explicitly rejected this argument finding that Section 948.06(5) "cannot relieve the State of its burden to prove that the violation was willful by proving the probationer's ability to pay." *Id.* at 907 and n.1, citing *Osta v. State*, 880 So. 2d 804 (Fla. 5th DCA 2004). Regarding *McQuitter*, *Green*, and *Word*, the court remarked that "it is doubtful that these pre-*Stephens* cases remain valid." *Blackwelder*, 902 So. 2d at 907 and n.1.

In *Shephard*, the Fourth District Court of Appeal, agreed with the Second District's analysis in *Blackwelder*. Shephard was charged with violating his probation for failure to pay court costs and costs of supervision, amongst other charges. At the probation violation hearing, Shephard's probation officer testified that Shephard was advised that he was required to pay his financial conditions. He also related that Shephard told him that he was having trouble finding employment and paying costs, and that he had been in custody for several months. The defense argued that the state failed to prove that Shephard had the ability to pay these costs and that his violation was not substantial or willful. Citing Section 948.06(5), the trial court concluded that it was the probationer's duty to prove his inability to pay and it found that Shephard did not meet this standard.

Shephard appealed, again arguing that it was the state's burden to prove that he willfully violated his probation by proving his ability to pay. The Fourth District agreed and it began its analysis, similar to *Blackwelder*, by emphasizing the willfulness requirement: "It is well-settled that probation may be revoked only upon a showing that the probationer deliberately and willfully violated one or more conditions of probation." *Shephard*, 939 So. 2d at 313 (citations omitted). The court then observed that this case demonstrates the tension between this willfulness requirement and

Section 948.06(5). Examining the holdings of *Bearden*, *Stephens*, and *Blackwelder*, the Court then concluded: "Despite the language of the statute, where the violation alleged is a failure to pay costs or restitution, there must be evidence and a finding that the probationer had the ability to pay." *Shephard*, 939 So. 2d at 314 (citing *Warren v. State*, 924 So. 2d 979, 980-981) (Fla. 2d DCA 2006). The Fourth District reversed the trial court's finding of a probation violation on this issue as there was no finding of ability to pay, and there was no evidence to support such a finding.

Similar to *Blackwelder* and *Shephard*, in *Osta v. State*, 880 So. 2d 804 (Fla. 5th DCA 2004), the Fifth District also found that

> [A]lthough a plain reading of the statute appears to place the burden of proving ability to pay restitution on the probationer, our courts have held that in order to revoke probation for failure to pay restitution the burden is on the State to prove the "willfulness" of the violation, and in order to prove "willfulness" the State must provide evidence that the probationer has the ability to pay restitution but willfully refuses to do so.

Osta, 880 So. 2d at 807, citing *Stephens*, *Hartzog v. State*, 816 So. 2d 774 (Fla. 2d DCA 2002). Ultimately, examining the facts in the case before it, the Fifth District found that the state met its burden of proof that the probationer had the ability to pay restitution, but willfully failed to do so.

In contrast to the Second, Fourth, and Fifth Districts, the First District has remarked that Section 948.06(5) requires a probationer to prove his inability to pay. *See Martin v. State*, 937 So. 2d 714 (Fla. 1st DCA 2006) (noting burden-shifting requirement, but reversing since the trial court did not make a finding regarding ability to pay); *Bass v. State*, 473 So. 2d 1367 (Fla. 1st DCA 1985) (same). In another case though, the First District held that the burden only shifts to the probationer after the state proves a willful failure to pay. *See Green v. State*, 620 So. 2d 1126 (Fla. 1st DCA 1993). Yet, in several other cases, the First District held that this burden shifts as soon as the state shows that the probationer did not make the required financial condition payments. *See McQuitter v. State*, 622 So. 2d 590 (Fla. 1st DCA 1993); *Paterson v. State*, 612 So. 2d 692 (Fla. 1st DCA 1993); *Shamburger v. State*, 484 So. 2d 1365 (Fla. 1st DCA 1986). In all of these above cited cases, the First District merely applies the statute, it neither discusses the constitutionality of the statute nor does it discuss the impact of *Bearden* or *Stephens* on the statute.

Despite its application of the statute, the First District, however, does require the trial court to make a determination that a probationer has the ability to pay before it can violate his or her probation. *See Friddle v. State*, 989 So. 2d 1254 (Fla. 1st DCA

2008); *Smith v. State*, 892 So. 2d 513 (Fla. 1st DCA 2004); *Ziegel v. State*, 793 So. 2d 997 (Fla. 1st DCA 2001); *Whidden v. State*, 701 So. 2d 1224 (Fla. 1st DCA 1997).

Similar to the First District, the Third District also applies Section 948.06(5)'s burden shifting language to probationers who fail to pay financial conditions. Also similar to the First District, the Third District has not discussed the constitutionality of Section 948.06(5), nor has it discussed the impact of *Bearden* or *Stephens* on the statute. In contrast to the First District though, the Third District does not require a finding of ability to pay before probation can be revoked, if the probationer does not produce any evidence of an inability to pay. *See Guardado v. State*, 562 So. 2d 696, 696-697 (Fla. 3d DCA 1990). The Third District, additionally, does not require the trial court to make a determination that the probationer had an ability to pay but willfully failed to do so, if the probationer has not produced any evidence of inability to pay. *See Guardado*, 562 So. 2d at 696 (finding any error to be harmless); *Del Valle v. State*, 994 So. 2d at 425 (affirming trial court's finding of probation violation in absence of any determination).

In the instant case, the Third District did not provide any reasoning for its decision; it only cited to its earlier decision in *Gonzales v. State*, 909 So. 2d 960 (Fla. 3d DCA 2005). *See Del Valle*, 994 So. 2d at 425. In *Gonzales*, the trial court found

that the probationer failed to pay court ordered court costs and restitution. On appeal, relying on an earlier Third District case, *Edwards v. State*, 439 So. 2d 1028 (Fla. 3d DCA 1983), Gonzalez argued that the state must prove ability to pay before probation may be revoked for the failure to pay financial conditions. The Third District disagreed holding "[t]hat part of the *Edwards* decision is no longer good law. It is now provided by statute [Section 948.06(5)] that the burden of proof on this issues rests on the defendant." *Gonzales*, 909 So. 2d at 960.

The *Gonzalez* decision did not provide any reasoning for its holding, it merely cited to the statute and an earlier Third District case, *Guardado*, 562 So. 2d at 696. In *Guardado*, also without any discussion, the Third District noted: "[I]t is true that there should have been a finding of ability to pay[,] [citation omitted] However, under subsection 948.06(4), Florida Statutes (1989), inability to pay the cost of supervision is a defense which the probationer must prove by clear and convincing evidence." *Guardado*, 562 So. 2d at 696. The court then held that as the probationer offered no evidence regarding his inability to pay, the court's failure to make a finding was harmless.

In *Word v. State*, 533 So. 2d 893 (Fla. 3d DCA 1988), the Third District similarly held, without discussion, that the state does not bear the burden of showing

ability to pay. Instead, the burden shifts to the probationer to show an inability to pay once the state shows that the financial conditions were not paid. *See Word*, 533 So. 2d at 893-894, citing *Clark v. State*, 510 So. 2d 1202 (Fla. 2d DCA 1987); *Morgan v. State*, 491 So. 2d 326 (Fla. 1st DCA 1986); *Bass v. State*, 473 So. 2d 1367 (Fla. 1st DCA 1985); §948.06(4), Fla. Stat. (1985).

This review of the post-statutory case law clearly shows a conflict between the First and Third Districts, and the remaining District Courts of Appeal and this Court on whether the state must produce evidence of ability to pay and a willful failure to do so. Additionally, this review also shows that the Third District's position conflicts with that of all of the other courts in this state on whether the trial court must make a determination that the probationer had an ability to pay but willfully failed to do so, even if the probationer does not produce evidence of an inability to pay.

This Court should disapprove the decisions of the First and Third District Courts of Appeal which apply Section 948.06(5)'s burden-shifting requirement. It should also disapprove the decisions of the Third District which do not require the trial court to make a determination that the probationer had an ability to pay but willfully failed to do so, when the probationer does not produce evidence of an inability to pay. Instead, in line with the Constitutions of the United States and Florida, the decisions of the

United States Supreme Court, the decisions of this Court, and the decisions of the Second, Fourth, and Fifth District Courts, this Court should find that Section 948.06(5) is constitutionally infirm and that, before probation may be revoked for the non-payment of a financial condition, the state must produce evidence and the trial court must determine that the probationer had an ability to pay but willfully failed to do so.

Section 948.06(5) only requires the state to prove the non-payment of the probationer's financial conditions. Thus, a probationer's liberty is solely conditioned on the amount of money he or she has. This is the exact type of "automatic" finding rejected by the *Bearden* Court. *See Bearden,* 461 U.S. at 674. The United States and Florida Constitutions require more than a ministerial act before a person can be imprisoned for failure to pay a monetary obligation. Absent evidence and findings of ability to pay and a willful failure to pay, the trial court's automatic revocation for failure to pay financial conditions violates substantive due process, fundamental fairness, and the right to be free from imprisonment for debt. *See* Amends. V & XIV, U.S. Const.; Art. §§ 2, 9, & 11, Fla. Const. *See also Bearden,* 461 U.S. at 668 & 672-673; *Black*, 471 at 611 & 615.

This automatic revocation contradicts this Court's holding in *Stephens* which requires evidence and findings of a willful failure to pay. *See Stephens*, 630 So. 2d at

1091. It also contravenes *Hewett's* and *Clark's* requirements that probation cannot be violated in absence of a willful violation. *See Hewett*, 613 So. 2d at 1307, citing *Clark v. State*, 579 So. 2d 109 (Fla. 1991). *See also State v. Carter*, 835 So. 2d 259, 262 (Fla. 2002).

Placing the burden on the state to prove a willful failure to pay is not a hardship. The probationer is already required to provide employment, earning ability, dependent support, and financial resource information to his or her supervising officer. *See* §§ 948.03 & 948.032 Fla. Stat. (2008). Additionally, if the probation officer does not know any specific details regarding the probationer's ability to pay his or her monetary obligations, then the state may call the probationer to testify to this information at a revocation hearing. *See State v. Heath*, 343 So. 2d 13, 16 (Fla. 1977) (holding that a probationer's agreement to accept the terms of probation effectively waives his Fifth Amendment privilege against self-incrimination regarding all necessary information for his supervision and to explain his non-criminal conduct).

In the instant case, the state did not present any evidence regarding Mr. Del Valle's ability to pay his financial conditions. (R. 10-11, 44-45). The only evidence before the trial court was that Mr. Del Valle was an unemployed full-time student, whom the clerk's office had determined to be indigent. (R. 10-11, 22, 44-45, 80). The

trial court did not make any determination that Mr. Del Valle had an ability to pay his financial conditions. (R. 79-80). Nor did it make any finding that Mr. Del Valle willfully failed to pay his financial conditions. (R. 79-80). The trial court only found that Mr. Del Valle violated his probation by failing to pay his financial conditions. (r. 80). It then modified his probation by extending it and ordering him to report to Boot Camp. (R. 80).

The trial court did not even address Mr. Del Valle's financial status until the end of the hearing. (R. 80). At this point, Mr. Del Valle advised the court that he was unemployed, but if he was able to find work he could pay $80 per month in restitution. (R. 80). Upon hearing this information, the trial court waived his costs of supervision and any arrearages. (R. 80). Based on its earlier decisions, the Third District affirmed the trial court's modification of Mr. Del Valle's probation finding that pursuant to Section 948.06 the probationer has the burden to prove his inability to pay his financial conditions.

This Court should reverse the Third District's decision. The trial court automatically found Mr. Del Valle to be in violation of his probation for his non-payment of financial conditions without any evidence or findings of an ability to pay. The trial court only found that Mr. Del Valle did not make these payments. Without

such evidence and findings, Mr. Del Valle's liberty was solely conditioned on the amount of money he has. This finding violates fundamental fairness.

As Justice Marshall explained in his concurring opinion in *Black*:

> [Under *Bearden*] the decision to revoke probation must be based on a probation violation that logically undermines the State's initial determination that probation is the appropriate punishment for the particular defendant. *Bearden* held that probation cannot be revoked for failure to pay a fine and restitution, in the absence of a finding that the probationer has not made bona fide efforts to pay or that adequate alternative forms of punishment do not exist. If a probationer cannot pay because he is poor, rather than because he has not tried to pay, his failure to make restitution or pay a fine signifies nothing about his continued rehabilitative prospects and cannot form the basis of a valid revocation decision. Revocation under these circumstances, the Court said, would be "fundamentally unfair."

Black, 471 U.S. at 620, quoting *Bearden*, 461 U.S. at 666 and n.7.

CONCLUSION

The trial court erred in automatically modifying Mr. Del Valle's probation for his failure to pay restitution and costs of supervision absent evidence and findings that he was willfully responsible for the failure to pay. Mr. Del Valle respectfully requests that this Court reverse the trial court's finding that he violated his probation by failing to pay costs of supervision and restitution.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered by U.S. mail to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida this ___ day of May, 2009.

By: _____
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CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the type used in this brief is 14 point proportionately spaced Times New Roman.

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