IN THE SUPREME COURT OF FLORIDA

CASE NO. 08-2001

CARLOS DEL VALLE,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

REPLY 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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SUMMARY OF ARGUMENT

The trial court erred in automatically modifying Mr. Del Valle's probation for his failure to pay financial conditions absent evidence and findings that he was willfully responsible for the failure to pay. *Bearden* and *Stephens* both require the state to prove that the probationer had an ability to pay, but willfully failed to do so before probation can be revoked. As such, these decisions are not silent regarding the burden of proof. These decisions also require the court to conduct an inquiry and to make findings regarding the ability to pay and the willful failure to do so. The trial court's automatic modification of Mr. Del Valle's probation violates substantive due process and therefore it constitutes fundamental error. These issues were raised before the Third District. This case is not moot.

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.

Bearden and *Stephens* are not silent regarding the burden of proof.

Bearden, *v. Georgia*, 461 U.S. 660 (1983) is not silent regarding the burden of proof. In *Bearden*, the United States Supreme Court determined the question 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 Court further explained that it was addressing whether a probation revocation for failure to pay is proper "when there is **no evidence** that the petitioner was at fault in his failure to pay or that alternate means of punishment were inadequate." *Id.* at 666 & n.7 (emphasis added). The Court then held: "that 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. . . ." *Id.* at 672 (emphasis added). These statements clearly indicate that *Bearden* requires the state to introduce evidence of ability to pay in order to prove a willful failure to pay.

Stephens v. State, 630 So. 2d 1090, 1091 (Fla. 1994) is not silent about the burden of proof either. In examining the issue of whether a person can waive their right not to be imprisoned for debt, this Court reviewed *Brushingham v. State*, 460 So. 2d 523, 524 (Fla. 4th DCA 1984). The *Brushingham* court explained that the probationer agreed to be imprisoned for failure to pay his restitution "whether or not the state can prove his financial ability to make restitution." *Stephens*, 630 So. 2d at 1091. *Stephens* specifically held that this type of waiver is unenforceable as "there must be a determination that that person has, or has had the ability to pay but has

willfully refused to do so." *Stephens v. State*, 630 So. 2d 1090, 1091 (Fla. 1994) (emphasis added). The Second, Fourth, and Fifth District Courts of Appeal recognize that *Bearden* and *Stephens'* willfulness requirements mandate that the state produce evidence of ability to pay and a willful failure to do so. *See e.g. Blackwelder v. State*, 902 So. 2d 905 (Fla. 2d DCA 2005); *Shepard v. State*, 939 So. 2d 311 (Fla. 4th DCA 2006); *Osta v. State*, 880 So. 2d 804 (Fla. 5th DCA 2004).

A violation is willful when a probationer has notice of the condition and is able to comply with it. (A probationer's entitlement to explain his actions and to offer mitigating circumstances does not negate or shift the state's burden to prove willfulness). The willfulness requirement in the context of a probationer's failure to pay financial conditions was discussed by the Eleventh Circuit Court of Appeals in *United States v. Davis*, 140 Fed. Appx. 190 (11th Cir. 2005). Initially, the Eleventh Circuit noted that "the court must find the probationer's failure to pay was willful, *i.e.*, the probationer had the means or ability to pay a fine or restitution as ordered and purposefully did not do so." *Davis*, 140 Fed Appx. at 191, citing *Bearden*. It then explained: "The government may establish willful failure to pay by **producing evidence** the defendant had funds available to pay restitution and did not do so." *Davis*, 140 Fed. Appx. at 191 (citation and footnote omitted) (emphasis added).

This Court should find that in conformity with *Bearden*, *Davis*, and *Stephens* the

state has the burden of proving an ability to pay and a willful failure to do so. Placing this burden on this state is not a hardship. The probationer is already required to provide financial information to his or her officer and the state may call the probationer to testify regarding his or her financial information at a probation violation hearing.

Bearden and *Stephens* require the court to conduct an inquiry and to make findings.

The *Bearden* court explicitly held that a "that a sentencing court must inquire into the reasons for the failure to pay." *Bearden*, 461 U.S. at 672. In *Stephens*, this Court noted its agreement: "We agree . . . 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. The question of whether the trial court's failure to conduct an inquiry and to determine whether Mr. Del Valle had an ability to pay, but willfully refused to do so and the question of which party bears the burden of proof of ability to pay are integrally related. These two questions must be considered in tandem.

The state attempts to separate out the burden of proof issue when it suggests that the issue before this Court is "whether, in a probation revocation proceeding, the state courts can find that a probationer has the burden of proving inability to pay, pursuant to the statute." (Answer Brief on Merits at 8-9). Absent evidence, an inquiry, and a finding, these questions cannot be separated. The state acknowledges that an inquiry and a finding are required under *Bearden* and *Stephens*. (Answer Brief on Merits at

12, 24, 31-32). The state however suggests that "a court may legitimately conclude, in light of [the probationer's failure to produce evidence of inability to pay], that the ability to pay exists." (Answer Brief on Merits at 23).

This presumption is only correct if the probationer stands mute after he or she is confronted with evidence of ability to pay, the court conducts an inquiry, and the court makes a finding. Without evidence, an inquiry, and a finding, it cannot be assumed that a probationer had an ability to pay, but willfully refused to do so because the probationer was never confronted with any evidence that he or she had an ability to pay and the court never asked if he or she had an ability to pay. This presumption based on the complete lack of evidence, an inquiry, and a finding is more constitutionally infirm than the explicit waiver deemed unenforceable in *Stephens.* At least in *Stephens*, the probationer was aware of the rights he was waiving.

Section 948.06(5), Florida Statutes unconstitutionally negates the requirements under *Bearden* and *Stephens*, as it permits a violation of probation solely based on evidence of failure to pay and it does not require an inquiry or a finding of ability to pay and a willful refusal to do so. Even if it were deemed that Section 948.06(5), Florida Statutes, permissibly shifts the burden of proof (which Mr. Del Valle strenuously contests it does not), the trial court is still required to conduct an inquiry and make a finding that the probationer had an ability to pay and willfully failed to do

so. The First District recognizes this fact in *Odom v. State* 34 Fla. L. Weekly D1278, *5 (Fla. 1st DCA June 24, 2009). The state cites to decisional and statutory law from 21 states in support of its argument that the burden of proving inability to pay is properly placed on the probationer. These 21 states do permit the burden to be shifted to the probationer. However, all but one of these states continue to additionally require the trial court to make an inquiry and a finding regarding ability to pay.[1, 2] Therefore,

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[1] **Alaska:** *Jones v. State*, 1986 WL 1161027 *4-5 (Alaska App. 1986) (reviewing state statute, court finds there must be inquiry and determination of ability to pay, and must show actions intentional or in bad faith); **Arkansas:** *Jordan v. State*, 939 S.W.2d 255, 256-257 (Ark. 1997) (must be findings of fact of willful failure to pay); **Arizona:** *State v. Robinson*, 689 P.2d 555, 556 (Ariz. App. 1984) (must inquire if there was an ability to pay); **California:** *People v. Cookson*, 54 Cal.3d 1091, 1096 (Cal. 1991) (by statute, court must determine if there was an ability to pay and a willful failure to pay); **Hawaii:** *State v. Huggett*, 525 P.2d 1119 (Hawaii 1974), *superseded by statute on other grounds* (pre-*Bearden* decision finds courts must explore whether non-payment of fine is due to inability to pay or willful behavior); **Kansas:** *State v. Duke*, 699 P.2d 576, 578-579 (Kan. App. 1985) (trial court must consider reasons for nonpayment); **Maryland:** *Smith v. State*, 506 A.2d 1165, 1169 (Md. App. 1986) (must be inquiry and finding of ability to pay); **Nevada:** *Gilbert v. State*, 669 P. 2d 699, 702-703 (Nev. 1983) (citing pre-*Bearden* decision in *Burke v. State*, 611 P.2d 203, 205 (Nev. 1980) (probation cannot be revoked for failure to pay fine absent finding defendant not indigent) and holding in non-probation context that defendant may not be imprisoned for failure to pay without court hearing to determine ability to pay); **New Hampshire:** *State v. Fowlie*, 636 A.2d 1037, 1039 (N.H. 1994) (court must inquire regarding ability to pay); **New Jersey:** *State v. Townsend*, 536 A.2d 782, 785 (N.J. Super. A.D. 1988) (noting that N.J.S.A. 2C:45-3a(4) requires evidence and findings of willful failure to pay); **New Mexico:** *State v. Parsons*, 717 P.2d 99, 103 (N.M. App. 1986) (must be inquiry and determination); **North Carolina:** *State v. Jones*, 337 S.E.2d 195, 198 (N.C. App. 1985) (trial court must inquire into reasons to pay); **North Dakota:** *State v. Jacobsen*, 746 N.W. 405, 409-411 (N.D. 2008) (requires inquiry and findings of ability to pay); **Ohio:** *State v. Majoras*, 2001 WL 640929 *2 (Ohio App. 6 Dist. 2001)

at a minimum, the trial court below erred when it failed to conduct an inquiry and to make a finding that Mr. Del Valle was able to pay his financial conditions, but willfully failed to do so.

The trial court's automatic modification of Mr. Del Valle's probation violates substantive due process and, therefore, it is fundamental error.

As previously discussed, the automatic modification of Mr. Del Valle's probation in this case violates substantive due process. The denial of the basic constitutional right of due process is fundamental error. *See Wood v. State*, 544 So. 2d

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(must be determination probationer willfully refused to pay); *State v. Walden*, 561 N.E.2d 995, 998 (Ohio. App. 2 Dist. 1988) (same); **Pennsylvania:** *Miller v. Pennsylvania*, 784 A.2d 246, 248 (Commonwealth Court Penn. 2001) (trial court must inquire into reasons for parties failure to pay and make findings pertaining to willfulness, citing *Commonwealth v. Eggers*, 742 A.2d. 174, 175-176 (Pa. Super. 1999)); **Rhode Island:** *State v. Laroche*, 883 A.2d 1151, 1154 (R.I. 2005) (sentencing court must inquire into reasons for failure to pay); **Tennessee:** *State v. Dye*, 715 S.W.2d 36, 41 (Tenn. 1986) (must be finding willfully refused to pay); **Texas:** *Ortega v. State*, 860 S.W.2d 561, 564 (Tex. App.—Austin 1993) citing *Smith v. State*, 790 S.W.2d 366 (Tex. App.—[1 Dist.]Houston 1990) (state has burden to prove probationer's conduct intentional regardless to whether the affirmative defense of inability to pay is raised); **Washington:** *State v. Bower*, 823 P.2d 1171 (Wash. App. Div. One 1992) (placement of burden does not eliminate court's duty to inquire); *Smith v. Whatcom County District Court*, 52 P.3d 485, 492-493 (Wash. 2002) (statute requires court to conduct inquiry into ability to pay, failure to pay must be intentional); **Wyoming:** *Ramsdell v. State*, 149 P.3d 459, 465 (Wyo. 2006) (citing *Bearden's* requirement that court must inquire into the reasons for failure to pay).

[2] The remaining state, Illinois, permits probation to be revoked solely on the basis that a probationer failed to pay their probation fee. *See People v. Walsh*, 652 N.E.2d 1102, 1106 (Ill.App.1st.Dist. 1995). However, in its decision, the appellate court never discussed *Bearden's* requirement of an inquiry and a finding. *See id.*

1004 (Fla. 1989) (cost assessment without adequate notice and judicial determination of ability to pay denies due process and is fundamental error); *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003) ("[A]n error is deemed fundamental when it goes to the foundation of the case or the merits of the cause of action and is equivalent to the denial of due process." (internal quotation and citation omitted)). When the evidence is totally insufficient as a matter of law, then the error is also deemed fundamental. *See F.B.*, 852 So. 2d at 230.

In this case, the evidence of failure to pay was totally insufficient as a matter of law because the failure to pay is <u>only</u> a violation when the probationer had an ability to pay, but willfully failed to do so. In *Odom*, the trial court did not make a determination that Odom had an ability to pay, but willfully refused to pay his costs of supervision. The First District held: "Because ability to pay is an essential element for a finding that a probationer willfully violated probation for failure to pay supervisory costs, the revocation of [Odom's] probation based on [this alleged violation] constitutes fundamental error." *Odom*, 34 Fla. L. Weekly D1278 at *5 (citation omitted).

In support of its argument that this error is not fundamental, the state relies on *Spivey v. State*, 531 So. 2d 965, 967 & n.2 (Fla. 1988) and *I.M. v. State*, 917 So. 2d 927 (Fla. 1st DCA 2005). In each of these cases, the courts held that the defendants waived their right to challenge their restitution orders on the basis of inability to pay, as they

failed to object and present evidence of inability to pay. However, both *Spivey* and *I.M.* concerned ability to pay in the context of setting the amount of the restitution order. Unless the payment of restitution is made a condition of probation, the restitution order is only enforceable through the civil judgment process. However, if payment of the restitution order is made a condition of probation, it is enforceable through the probation violation process which could lead to a defendant's loss of liberty. It is this loss of liberty that implicates *Bearden's* substantive due process rights. Therefore, any error is fundamental.

<u>The issues raised in this Court were raised before the Third District Court of Appeal.</u>

This case is about whether a trial court can find a person in violation of probation for failure to pay restitution and court costs when the only evidence presented to the trial court is the failure to make these payments, and when the trial court fails to conduct an inquiry and make a finding that the probationer had an ability to pay, but willfully failed to do so. As argued before this Court and the Third District, under *Bearden* and *Stephens*, and their interpretations of the constitutional right to due process, the answer to this question is clearly no. The question of whether the trial court's failure to conduct an inquiry and to determine whether Mr. Del Valle had an ability to pay, but willfully refused to do so and the question of which party bears the burden of proof of ability to pay are integrally related. Under *Bearden* and *Stephens*,

these two questions must be considered in tandem.

Focusing in on the fact that different words were used to express the questions presented in Mr. Del Valle's briefs before this Court and the Third District, the state alleges that the argument advanced in this Court differs from the argument advanced in the Third District. Specifically, the state alleges that, in the Third District, Mr. Del Valle only advanced the argument "whether Florida, by statute, shifted the burden of going forward with evidence of inability to pay to the probationer." (Answer Brief on Merits at 25). With this argument, the state loses sight of the fact that the court's duty to inquire and to make a finding is intertwined with the burden of proof.

In the briefs below, Mr. Del Valle discussed *Bearden* and *Stephens'* requirement that the trial court must determine whether the probationer had an ability to pay, but willfully refused to do so. (Initial Brief at 4, 5; Reply Brief at 1, 2, 3, 4). Mr. Del Valle also explained that every other district court of appeal has recognized that the holding in *Stephens* trumps the statute. (Initial Brief at 4, 6; Reply Brief at 5). In the reply brief, he additionally discusses the court's duty to inquire and to find that the violation was willful. (Reply Brief at 1, 2). In its answer brief in the Third District, the state itself specifically addressed this Court's decision in *Stephens*, and argued that *Stephens* did not address the issue of which party bore the burden of proof. (Answer Brief at 9). In response to these issues, the state maintained that any error based on the

trial court's failure to make a specific finding was harmless and relief on the Third District's precedent in *Guardado v. State*, 562 So. 2d 696 (Fla. 3d DCA 1990) and *McQuitter v. State*, 622 So. 2d 590, 592 (Fla. 1st DCA 1993). (Answer Brief at 11).

The state also mistakenly alleges that there was no argument below that Section 948.06(5) is unconstitutional. In briefs, Mr. Del Valle specifically discussed *Bearden* and *Stephens'* reliance on the requirements of due process, and he specifically alleged that the trial court's actions violated the Fourteenth Amendment. (Initial Brief at 4; Reply Brief at 6). Further, in his notice of supplemental authority below, he cited several cases which held that the deprivation of due process is fundamental error.

The state additionally alleges that there was no argument below that the trial court was automatically modifying probation due to a failure to pay. In doing so, the state seems to find fault with the use of the term "automatic." The term "automatic" is a term of art used by the *Bearden* Court to describe a situation where a probationer is imprisoned simply because he could not pay a fine without consideration of the reasons for the inability to pay or for alternative orders. *See Bearden*, 461 U.S. at 674 ("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."). This is the exact type of factual

scenario presented in this case—the trial court modified Mr. Del Valle's probation solely based on evidence of his failure to pay restitution and court costs without any additional inquiry or consideration.

<u>This case is not moot.</u>

"An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect. . . . A case is 'moot' when it presents no actual controversy or when the issues have ceased to exist. . . ." *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992). In its answer brief, and more fully in its motion to dismiss, the state argues that this case is moot as Mr. Del Valle's probation was terminated during the pendency of this appeal. This case is not moot as Mr. Del Valle challenges the fact that the court violated his probation; he is not challenging the sentence imposed upon the finding of violation.

Defendants who have completed their sentences can still challenge the legality of their conviction. *See Hagan v. State*, 853 So. 2d 995 (Fla. 5th DCA 2003). In *Hagan*, the defendant challenged his conviction for indirect criminal contempt raising several violations of due process. The Fifth District held that, even though a defendant has served their sentence, their appeal is not necessarily moot because the "possibility of removing the stigma of a conviction represents a significant practical purpose demonstrating the continuing viability of the appeal." *Hagan v. State*, 853 So. 2d 995,

998 (Fla. 5th DCA 2003) (citation omitted). Similarly, Mr. Del Valle's appeal continues to be viable to remove the stigma of the probation violation in his record. In the future, the fact of this violation could be used by another court against him to show that he is not amenable to another probationary sentence or that he should be sentenced more harshly in the future.

The continued viability of an issue involving guilt, after the sentence has been served, is further illustrated in *Cherry v. State*, 718 So. 2d 294 (Fla. 2d DCA 1998). In *Cherry*, Ms. Cherry was charged with welfare fraud and sentenced to five years of probation with payment of restitution as one of its conditions. The trial court found she violated her probation, even though the state failed to present any direct evidence of ability to work or pay. Ms. Cherry challenged this finding of violation and the sentence imposed upon this violation. The Second District reversed the finding of violation, but did not decide the sentencing issue finding it to be moot since her sentence was terminated.

In its motion to dismiss, the state cites four cases in support its allegation of mootness. None of these cases support a dismissal based on mootness in this case. Two of these cases, *Raines v. State*, 34 Fla. L Weekly D884 (Fla. 2d DCA May 1, 2009) and *Vazquez v. State*, 930 So. 2d 860 (Fla. 2d DCA 2006), only involved issues regarding the defendants' sentences. The two remaining cases, *Prado* and *Creamer*,

actually support the continuing viability of Mr. Del Valle's appeal. In *Prado v. State*, 755 So. 2d 178 (Fla. 2d DCA 2000), the Second District dismissed as moot a sentencing challenge based on the validity of the 1995 sentencing guidelines, while it affirmed on the merits the denial of the motion to suppress. In *Creamer v. State*, 900 So. 2d 773 (Fla. 1st DCA 2005), the First District related that the issue regarding defendant's probation revocation was moot as the probationary term had since expired. Yet, it still decided the merits of the issue, found that probation was incorrectly revoked, and ordered the trial court it withdraw the order revoking probation and to reverse the adjudication of guilt.

Even if this case were deemed moot, it is well-settled that mootness does not destroy an appellate court's jurisdiction. *See Holly v. Auld*, 450 So. 2d 217, 218 & n.1 (Fla. 1984). An appellate court may decide an otherwise moot case "when the questions raised are of great public importance or are likely to recur." *Id.* (citations omitted). An appellate court may also decide an otherwise moot case that is capable of repetition but likely to evade review. *See N.W. v. State*, 767 So. 2d 446, 447 & n.2 (Fla. 2000). *See also Sims v. State*, 998 So. 2d 494, 503 & n.8 (Fla. 2008); *State v. Matthews*, 891 So. 2d 479, 484 (Fla. 2004).

This case is of great public importance. It involves the deprivation of substantive due process. It also involves an issue which the courts have long been

sensitive to—the treatment of indigents in the criminal justice system. Additionally, the Third District is the only appellate court in the state which does not require the trial court to conduct an inquiry and to make a finding of ability to pay and a willful failure to do so, when a probationer fails to pay court financial conditions. If this conflict is not resolved, then persons in Miami-Dade County and Monroe County will be treated differently than all other persons in this state. This case is likely to recur, especially in these difficult economic times. This case is also capable of repetition yet evading review. Modifications and revocations of probation and community control are likely to evade review due to their usually short nature. *See N.W.* 767 So. 2d at 447 & n.2.

CONCLUSION

Based on the arguments presented in the briefs, Mr. Del Valle respectfully requests that this court reverse the trial court's finding that he violated his probation.

Respectfully submitted,
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CERTIFICATE OF SERVICE

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CERTIFICATE OF FONT COMPLIANCE

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