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IN THE SUPREME COURT OF THE STATE OF FLORIDA

JEAN CLAUDE NOEL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC14-274
	)	CASE NO. SC14-1952
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	
_____	)	

PETITIONER'S INITIAL BRIEF

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(561) 355-7600

TATJANA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the Fourth District Court of Appeal and the defendant in the lower tribunal. Respondent, the state of Florida, was the Respondent and the prosecution, respectively. In the brief, the parties will be referred to by name.

The following symbols will be used:

"R"	Record on appeal, followed by the appropriate volume and page numbers
"SRMay18"	Supplemental record, consisting of transcript of hearing held on May 18, 2010

STATEMENT OF THE CASE AND FACTS

Mr. Noel was convicted after a jury trial of conspiracy to racketeer and first degree grand theft. At sentencing, the trial judge asked Mr. Noel if he could make "any up front restitution"

> THE COURT: All right. Let me ask this of Mr. Noel. Mr. Noel, are you in a position where you can make any restitution on this case, as part of a – of a sentence here? In other words, you know, you heard that Mr. Berkle [a codefendant[1]] made restitution of two-hundred ten-thousand dollars towards the victims.
>
> And you heard from different people here, who were victims, and it shows, according to the chart, which only showed the documented money that you received, it shows you received two-hundred five-thousand three-hundred fifty-six dollars and two cents, which is 16.73 percent of the proceeds of the – of the charges that were alleged in the Information.
>
> What position are you in, at this point, to make any up front payment of restitution? And – I don't know because it's going to be based on your ability to tell me that.
>
> MR. JEAN CLAUDE NOEL: Well, of course, I have also been incarcerated for three years now.
>
> THE COURT: Right. That's why I am asking.

[1] According to the prosecutor, Mr. Berkle pled guilty to the charges against him, and, as a result of providing "up-front restitution" of $210,000, was sentenced to ten years probation and required to make additional monthly restitution payments (R31/2691).

MR. JEAN CLAUDE NOEL: Limited, sir. But there would be an amount that could be negotiated.

THE COURT: Well, I'm not asking for you a negotiation, I'm asking you reasonably without your family starving, because they, obviously, are not charged, not involved. So what amount of restitution, give me a range? If you don't have an exact number –

MR. HERNANDEZ [defense counsel]: Your Honor, negotiated, he didn't mean negotiate with the Court but negotiate with other members of the family.

THE COURT: That would raise money with him.

MR. HERNANDEZ: Yes that's what he intended. I don't believe he knows a figure at this juncture, because we did discuss it.

THE COURT: If you have an idea, Mr. Noel, just give me a range.

MR. JEAN CLAUDE NOEL; I'm sorry. Your Honor. I have to ask, would this be what would be made on a regular –

THE COURT: No, an up-front lump sum basis.

MR. JEAN CLAUDE NOEL: A lump up-front figure would be somewhere between twenty to forty-thousand dollars plus other things.

MR. HERNANDEZ: Just for the record, Judge, I wasn't finished with my distinguishing Mr. McNamara [another codefendant] from my client.

> THE COURT: Go ahead. I'm sorry. You know, I got sidetracked.

(R31/2691-93).

The trial judge thereafter sentenced Mr. Noel to ten years in prison followed by a ten-year term of probation, with the specific additional provision that if Mr. Noel made restitution of $20,000 within 60 days, the court would mitigate his prison sentence to eight years (R31/2734-45). Mr. Noel never was able to provide the restitution, and is serving the ten-year prison sentence imposed by the trial court.

Relying on the previous decision of the Fourth District Court of Appeal in DeLuise v. State, 72 So.3d 248 (Fla. 4th DCA 2011), Mr. Noel argued on his direct appeal that it was fundamental error for the trial judge to condition the reduction in his sentence on the payment of restitution. The Fourth District Court of Appeal entered an *en banc* decision in which, by a seven to five vote, it receded from DeLuise but recognized direct and express conflict with the decision of the Fifth District Court of Appeal in Nezi v. State, 119 So.3d 517 (Fla. 5th DCA 2013). Noel v. State, 127 So.3d 769 (Fla. 4th DCA 2013).

This Court granted jurisdiction to review decision of the Fourth District Court of Appeal in the instant case in an order dated December 5, 2014. This initial brief follows.

SUMMARY OF THE ARGUMENT

It is a violation of an indigent defendant's due process and equal protection rights to condition reduction of a prison sentence on the immediate payment of restitution regardless of his financial resources and ability to pay. Florida statutes permitting consideration of restitution in fashioning an appropriate sanction cannot be read to authorize the increase of a prison sentence for those who cannot afford to pay a "get out of jail" premium.

ARGUMENT

THE TRIAL COURT VIOLATED MR. NOEL'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION WHEN IT IMPOSED A HARSHER SENTENCE BECAUSE HE WAS UNABLE TO MAKE AN IMMEDIATE RESTITUTION PAYMENT OF $20,000.

The United States Constitution prohibits disparate treatment of defendants based solely on their economic status.

The United States Supreme Court "has long been sensitive to the treatment of indigents in our criminal justice system," Bearden v. Georgia, 461 U.S. 660, 664 (1983), and over the years since Griffin v. Illinois, 351 U.S.12 (1956), has "reaffirm[ed] allegiance to the basic command that justice be applied equally to all persons." Williams v. Illinois, 399 U.S. 235, 241 (1970). In Griffin, the Supreme Court declared that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 351 U.S. at 664.

In a line of cases after Griffin, the United States Supreme Court established that sentences which amounted to imprisonment solely because of indigency violated the Fourteenth Amendment's Equal Protection Clause. In Williams v. Illinois, the Court invalidated state law that allowed an indigent to be imprisoned beyond the statutory maximum term so that he might "work off" a fine imposed as part of his sentence. The Court held that the Equal Protection Clause requires that "the statutory ceiling

placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." 399 U.S. at 244. On the same day, the Court decided Morris v. Shoonfield, 399 U.S. 508 (1971), remanding the case for reconsideration in light of Williams. In a concurring opinion, Justice White stated:

> [T]he same constitutional defect condemned in *Williams* also adheres in jailing an indigent for failing to make an 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 to and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.

Id. at 509.

In Tate v. Short, 401 U.S. 395 (1971), decided the next term, the Court applied Williams in holding that it is a denial of equal protection to limit punishment to payment of a fine for those who are able to pay it but to convert the fine to imprisonment for those who are unable to pay.

In Bearden v. Georgia, 461 U.S. 660, the Court addressed "whether a court can revoke probation for failure to pay a fine and restitution 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 66 n. 7. As the Court acknowledged, the

holdings in both Williams and Tate were "vital to a proper resolution" of this issue. *Id.* at 667. The Court explained, "The rule of *Williams* and *Tate*, then, is that the State cannot 'impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.' " *Id.* (quoting Tate, 401 U.S. at 398). Noting that the case was one where "[d]ue process and equal protection principles converge," *id.* at 665, the Court described the resolution of this issue as involving "a delicate balance between the acceptability . . . 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." *Id.* at 661.

Although the Court had emphasized equal protection in earlier case law, the Court in Bearden signaled a preference for the due process approach. *Id.* at 666 n. 8. However, "as a practical matter," the two clauses "largely converge." Smith v. Robbins, 528 U.S. 259, 276 (2000). The question whether differential treatment violates equal protection is "substantially similar" to asking the due process question of whether the State's treatment of an indigent defendant is fundamentally unfair or arbitrary. Bearden, 461 U.S. at 666.

The Bearden Court concluded 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." *Id*. at 661-62. The Court acknowledged that if a probationer sentenced to pay restitution "has willfully refused to pay . . . when he has the means to pay," he may be imprisoned. *Id.* at 668. But, the Court held, "it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available" where the defendant "could not pay despite sufficient bona fide efforts to acquire the resources to do so[.]" *Id*. at 668-69. The Bearden Court concluded that the problem in that case was that the State was seeking "to use as the *sole* justification for imprisonment the poverty of a probationer[.]"

Recent cases largely reaffirm the Williams and Tate holdings that forbid imposing a longer term of imprisonment due to a defendant's inability to pay restitution. For example, in United States v. Burgum, 633 F.3d 810 (9th Cir. 2011), the Ninth Circuit reversed the defendant's sentence because the trial court committed plain error when it considered the defendant's inability to pay restitution as an "aggravating factor" in sentencing. "It is well established that the Constitution forbids imposing a longer term of imprisonment based on a defendant's inability to pay restitution." *Id*. at 814. The Court explained: "*Bearden*'s allowance for limited consideration of the defendant's financial background *does not undermine the core*

constitutional prohibition against imposition of a longer prison term as a substitute for a monetary penalty." *Id*. (emphasis added). "[T]reating defendants who could not pay restitution as more culpable than those who could would result in discrimination against poor and indigent defendants." United States v. Rangel, 697 F.3d 795, 804 (9th Cir. 2012).

> *The trial court below imposed a greater sentence based solely on Mr. Noel's inability to make an immediate restitution payment.*

In the instant case, the trial court similarly imposed a harsher sentence on Mr. Noel solely because he was unable to make a substantial restitution payment to the victims within sixty days of the imposition of his prison sentence. After inquiring of Mr. Noel how much restitution he believed he might be able to pay in an immediate, lump sum amount, the trial court sentenced him to ten years in prison followed by ten years probation, but announced that it would reduce the prison sentence to eight years if Mr. Noel made a payment of $20,000 within sixty days. When Mr. Noel was unable to make the requisite payment, the ten-year sentence stood.

The trial court never further asked Mr. Noel about his ability to pay the restitution nor did it consider any bona fide efforts he may have made to acquire that amount of cash within the necessary time frame. Such an inquiry was required where, as Mr. Noel noted, he had been incarcerated for three years prior to his trial and

sentencing and would have to rely on his relations to provide the money the trial court required in order for him to receive the lesser sentence of eight years.[2] Thus, as summarized in the dissenting opinion of Judge Taylor in the instant case, "Put simply, Noel received a longer prison term because of his financial inability to meet the restitution obligation." Noel v. State, 127 So.3d 769, 781 (Fla. 4th DCA 2013) (Taylor, J., dissenting).

> *The trial court violated due process when it never determined that Mr. Noel willfully failed to pay restitution despite his ability to do so.*

In Scully v. State, 569 So.2d 1251 (Fla. 1990), this Court described what is meant by due process:

> The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. [Citation omitted.] Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. [Citation omitted.] In this respect the term "due process" embodies a fundamental concept of fairness that derives ultimately from the natural rights of all individuals.

As suggested in Bearden, 461 U.S. 660, a due process analysis in the

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[2]Mr. Noel further notes that, although he was represented by retained counsel at trial and sentencing, the Public Defender was appointed to represent him in his appeal based on his indigency (R3/469, 473; SRMay18/19).

sentencing context requires determination of "whether [the sentencing court's] consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process." *Id.* at 666. The crucial inquiry in deciding whether a defendant has been unfairly sentenced because of his poverty is the willfulness of his failure to pay. *See id*. at 667-68; United States v. Parks, 89 F.3d 570, 572 (9th Cir. 1996).

The trial court must assess the defendant's ability to pay at the point when the defendant has failed to make the required restitution payment and incarceration is just a jail cell door click away. *See* United States v. Ryan, 874 F.2d 1052, 1054 (5th Cir. 1989). Thus, in Vincent v. State, 699 So.2d 806, 807 (Fla. 1st DCA 1997), the appellate court held:

> While the trial court made a finding of fact on the record that Vincent had the ability to pay, this finding appears to have been based not on the evidence introduced during the revocation hearing, but on the previous determination of ability to pay that the trial court had made when it modified Vincent's probation. This automatic fact-finding resulted in the imprisonment without a determination of Vincent's ability to pay in violation of his right to due process and equal protection of the law as well as the prohibition against imprisonment for failure to pay a debt.

Consequently, it was unconstitutional for the sentencing court in this case to render a sentencing plan which automatically imposed a greater prison term based on

Mr. Noel's failure to immediately pay restitution without first addressing whether that failure was willful or not. The Constitution requires that a non-paying defendant be given a chance to explain the non-payment in open court, and "anything less is antithetical to the basic fairness which is deeply rooted in the American justice system." Noel, 127 So.3d at 789 (Ciklin, J., dissenting).

> *Courts of other states have rejected sentences which penalize a defendant because of his indigency.*

Where, as here, there is no showing that the defendant willfully refused to pay when he had the ability to do so, other courts have vacated sentences which were to be reduced or suspended upon payment of restitution. Thus, in People v. Collins, 607 N.W.2d 760 (Mich. Ct. App. 1999), the Michigan Court of Appeals held, in a case similar to this one, that requiring a defendant convicted of embezzlement and larceny to pay $31,505.50 in restitution as a condition of suspending a portion of his jail term violated his equal protection rights as well as the State's restitution statute. There, the defendant, who said that he was unable to make the restitution payments, sought relief from the jail sentence, arguing that it violated his right to equal protection. The defendant argued, and the appellate court agreed, that the trial court's sentencing order, which rewarded restitution payments with a suspension of jail time, violated these principles." *Id*. at 765. The appellate court expressly rejected the prosecution's

response that "the trial court did not impose a jail sentence because defendant failed to pay restitution, but rather allowed for suspension of a jail sentence if defendant met the restitution obligation," *id.* , stating

> We agree with defendant that this is a distinction without a difference. The sentencing order that allowed the defendant reduced jail time if he paid restitution is not materially different from a sentence order that would require defendant to serve additional jail time if he did not pay restitution. regardless of how the trial court phrases its order, the result is a shorter term for defendant if he can and does pay, a longer term if he cannot and does not pay – a result clearly prohibited by the Equal Protection Clause and the statute.

Id.

Likewise, in Reddick v. State, 608 A.2d 1246 (Md. App. Ct. 1992), the Maryland Court of Appeals held that due process and equal protection were violated by a sentencing court's offer to suspend five years of an indigent defendant's thirty-year sentence if he paid restitution for funeral and medical expenses to the victim's mother. The court agreed with the defendant's argument that it is "unconstitutional to incarcerate an indigent defendant for a term longer than that imposed on a similarly situated nonindigent defendant who would be able to make the requisite monetary payment." *Id.* at 1248. "Since imprisonment for a lack of financial resources is illegal, Reddick is entitled to the sentence that a defendant with the financial

wherewithal to make the payment would have received under the same circumstances." *Id.*

The Supreme Court of Montana also vacated a sentence that violated the defendant's due process rights by sentencing him to the maximum ten-year prison term simply because the trial judge believed that he would not be able to make restitution within that time. State v. Farrell, 676 P.2d 168 (Mont. 1984). Noting the lack of findings regarding the defendant's financial resources and his ability to make restitution, the court expressed its concern that indigency may have been the basis for imposing the sentence. *Id.* at 176-77.

Although the case was decided prior to Bearden and was later vacated as moot, the decision in Barnett v. Hopper, 548 F.2d 550 (5th Cir. 1977) is instructive. Somewhat like the instant case,[3] the plea agreement offered to the two defendants in that case provided that they would receive a probation term fo ten years if they immediately paid a fine and court costs of $2,000. One defendant could afford to make the payment: he got the probation term as promised. The second defendant could not afford the payment: he got ten years in prison. The circuit court granted the second defendant's petition for habeas corpus, observing that "when a defendant is

[3]Another defendant, Berkle, who was able to make a restitution payment of $210,000 before sentencing, was placed on probation for ten years (R31/2691).

imprisoned for financial inability to pay a fine immediately, he is treated more severely than a person capable of paying a fine immediately. The sole distinction is one of wealth, and therefore the procedure is invalid." *Id.* The court concluded that "[t]o imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws." *Id*. at 554.

The courts of Florida have rejected the imposition of a greater sentence based on the defendant's indigency.

Florida courts have also applied the principles stated in Williams and Tate in invalidating increased sentences that resulted solely from indigency. Thus, the Second District Court of Appeal cited Tate in holding that an indigent juvenile who failed to pay restitution could not be committed where the sentencing judge had offered to place the juvenile on community control if she paid restitution. V.H. v. State, 498 So.2d 1011, 1011 (Fla. 2d DCA 1986). In that case, the appellate court found it unconstitutional for a trial judge to make a more lenient sentence expressly conditional on the defendant's payment of restitution even where the defendant had no ability to pay restitution.

In Smith v. State, 933 So.2d 723, 725 (Fla. 2d DCA 2006), the same Court found "morally repugnant" a plea agreement that made nonpayment of restitution a

basis for an increase in the sentence and questioned the "wisdom of plea agreements that permit longer prison terms for poor people whose relatives have failed to raise the money needed to buy their freedom."

In Nezi v. State, 119 So.3d 517 (Fla. 5th DCA 2013), the defendant was convicted of organized fraud. The trial judge imposed a ten-year prison sentence followed by twenty years probation on the 52-year-old defendant and ordered her to pay $70,000 restitution. The court then offered to consider mitigation and modification of the sentence but "I'm going to have to have some money you're going to have to come up with." *Id.* at 521. In ruling on the defendant's motion to correct sentencing error, the trial court concluded that the equal protection violation could be cured simply by striking the provision of the defendant's sentence which stated, "Court will consider mitigation of sentence upon payment of restitution."

On appeal, the Fifth District Court of Appeal held:

> While a defendant's willingness and capacity to pay restitution can be among the reasons a judge may decide to impose a lower sentence, the equal protection clause prohibits a judge from conditioning a lower sentence on the payment of restitution. *DeLuise v. State*, 72 So.3d 248 (Fla. 4th DCA 2011). Here, the trial court violated Nezi's equal protection rights by imposing a harsher sentence after making it clear that if Nezi, at the time of the sentencing hearing, had the financial means to pay a large part of the agreed-upon restitution, it would have imposed lesser sanctions. . . . A sentencing order that allows a defendant

> to reduce the length of incarceration if she pays restitution is not materially different from a sentencing order that requires the defendant to serve more time if she does not pay restitution.

Id. at 522.

> *Florida sentencing statutes do not authorize an unconstitutional sentencing scheme.*

In its decision in the instant case, the Fourth District Court of Appeal relied on Section 921.185, Fla. Stat., which authorizes a trial court, in its discretion, to consider a defendant's payment of restitution as a mitigating factor in imposing sentence. However, in fashioning an appropriate sentence under this statute, a trial judge must exercise its discretion in a manner which comports with constitutional standards. Without an assessment of a defendant's financial resources and his ability to pay, the offer to mitigate the sentence in exchange for payment of restitution within sixty days results in an unconstitutional application of the statute. A defendant who cannot and does not provide restitution will have to serve additional time in prison solely because of his poverty. Appropriate findings of fact about the defendant's ability to pay restitution are therefore a necessary safeguard to avoid a due process violation. The need for such findings is in no way reduced by the existence of Section 921.185.

By the same token, Section 932.285, Fla. Stat., which extends "to all defendant an apparently equal opportunity for limiting confinement" by satisfying a restitution

obligation, Williams v. Illinois, 399 U.S. at 242, amounts to an "illusory choice for [the defendant] or any indigent who, by definition, is without funds." *Id.* As stated by Judge Ciklin in his dissent in the instant case:

> The majority attempts to draw a distinction between (1) a sentencing order that requires the defendant to pay restitution or else be imprisoned, which, I assume, the majority would consider unconstitutional, and (2) a sentencing order that imprisons a defendant but then, within minutes after the imposition of an *initial* sentence, announces to the defendant that he or she may pay restitution in exchange for a reduced sentence (or hearing or opportunity to be heard), which the majority considers constitutionally sound. The majority goes to great lengths to suggest that the trial courts here were involved in an "exhibition of leniency" and only the reduction of an initial sentence was being offered – not more prison time for non-payment. Slip Op. at 10. Pay restitution, so goes the act of mercy, and your prison sentence shall automatically be *reduced*. Fail to pay – regardless of financial ability or willfulness issues surrounding the non-payment – and incarcerated you shall remain. This is a distinction without a discernible due process difference. *See People v. Collins*, 607 N.W.2d 760, 765 (Mich,. Ct. App. 1999) ("The sentencing order that allowed defendant reduced jail time if he paid restitution is not materially different from a sentence order that would require defendant to serve additional jail time if he did not pay restitution."). The trial court's sleight of hand in this regard, as sanctioned by the majority, is as transparent as it is unconstitutional. And the fact that the offer of a reduced prison term came at the *initial* sentencing is inconsequential under a due process analysis and just as unconstitutional.

Noel, 127 So.3d at 788-89, Judge Ciklin, dissenting.

Conditioning Mr. Noel's receipt of a reduced eight-year prison sentence on his immediate payment of restitution violated his rights to equal protection and due process.

Permitting the trial judge to offer reduction of a defendant's sentence if he makes an immediate and substantial restitution payment amounts to an unconstitutional resort to a criminal penalty to compel payment to the victim. *See* Ex parte Watson, 757 So.2d 1107, 1112 (Ala. 2000) (holding that the sentencing "court does not act as an enforcer and compel payment to the victim through the imposition of a criminal penalty upon the indigent debtor"). The effect is identical to the procedure which was found impermissible in Moody v. State, 716 So.2d 562 (Miss. 1998). There, a pre-trial payment of a $500 fine gained the accused a *nolle prosequi* in a bad check case, but the indigent, unable to pay, was sentenced to five years in prison. Condemning this practice, the appellate court recognized the inescapable effect of the scheme:

> Thus, one who is unable to pay will always be in a position of facing a felony conviction and jail time, while those with adequate resources will not. The automatic nature of the fine is what makes it discriminating to the poor, in that only the poor will face jail time. We hold that an indigent's equal protection rights are violated when all potential defendants are offered one way to avoid prosecution and that one way is to pay a fine.

Id. at 565.

The use of an increased prison sentence as a bludgeon to induce immediate payment of restitution without regard to whether a defendant has the financial resources and ability to pay results in a procedure which "subverts the very essence of the Due Process Clause." Noel, 127 So.3d at 792. As Judge Ciklin warned in his dissenting opinion:

> Under the majority's decision, nothing would prevent a trial court from initially imposing the maximum sentence in every economic crimes case followed immediately by an offer from the bench to reduce the sentence to the minimum, or indeed below the minimum through a downward departure, if the defendant makes restitution. [Footnote omitted.] For example, in this case, the state requested a sentence of fifteen years and the defense requested a sentence of 3.8 years. Under the majority's reasoning, the trial court could have lawfully imposed a maximum sentence of thirty years with the possibility of mitigation and a downward departure to no jail or prison time had Noel made restitution in an amount unilaterally established by the trial court. Or, conversely, the trial court could have automatically kept Noel behind bars for thirty years upon non-payment regardless of whether there was a scintilla of willfulness associated with the non-payment and without ever permitting the defendant to be heard on the issue of non-payment. This hypothetical example clearly illustrates why the trial court's sentencing plan, as approved and tolerated by the majority, is a denial of fundamental due process.

Noel, 127 So.3d at 783-84.

In sum, the decision of the Fourth District Court of Appeal in DeLuise v. State, 72 So.2d 248 (Fla. 4th DCA 2011), receded from in its decision below, properly relied on United States Supreme Court precedent holding that sentences based solely on a defendant 's inability to pay fines or restitution are fundamentally unfair and violated the defendant's rights under the Fourteenth Amendment. As the Ninth Circuit said in United States v. Burgum, 633 F.3d 810, 816, "class and wealth distinctions . . .have no place in criminal sentencing." A sentencing court's reliance on a defendant's inability to pay "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 814 (citing United States v. Olano, 507 U.S. 725, 736 (1993)).

The dissenting opinion of Judge Taylor in Noel speaks urgently to the federal constitutional concerns which rise when the courts waver from the principle that "justice be applied equally to all persons." Noel, 127 So.3d at 779, Taylor, J., dissenting. As Judge Taylor notes, the United States Supreme Court has long emphasized that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.*, quoting Griffin v. Illinois, 351 U.S. 12, 19. To avoid this unacceptable result, Mr. Noel's ten-year sentence must accordingly be reversed and this cause remanded for imposition of an eight-year sentence in its stead, or, in the alternative, for a hearing to determine whether he had

the financial resources and ability to pay the $20,000 restitution amount at the time of sentencing.

CONCLUSION

Based on the foregoing argument and the authorities cited, Mr. Noel requests that this Court reverse the decision of the Fourth District Court of Appeal below and remand this cause for resentencing.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 3rd Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600
Appeals@pd15.state/fl.us

/s/ Tatjana Ostapoff
TATJANA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief has been prepared in 14 point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Tatjana Ostapoff
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Melynda Melear, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by e-mail at CrimAppWPB@myfloridalegal.com this 30th day of DECEMBER, 2014.

/s/ Tatjana Ostapoff
Assistant Public Defender