

>> PLEASE RISE.

>> LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING.

>> GOOD MORNING.

AND MAY IT PLEASE THE COURT,
SHANNON PATRICIA MCKENNA ON
BEHALF OF MR. DEL VALLE.

THE COURTS HAVE LONG BEEN
SENSITIVE TO INDIGENTS IN THE
CRIMINAL JUSTICE SYSTEM.

DUE PROCESS CLAUSES ASSURE THAT
AN INDIGENT DEFENDANT IS NOT
INCARCERATED SOLELY BECAUSE
OF --

>> COULD WE GET REAL PRACTICAL
IN THIS CASE?

>> YES.

>> I MEAN, I THINK ALL OF US SEE
BEARDEN, WE ALSO SEE STEPHENS,
WE SEE THE CASES IN THIS AREA,
AND WE ALSO SEE A VERY, VERY
CLEAR STATUTE.

AND I THINK REALLY THIS CASE
COMES DOWN TO AN ISSUE CAN THE
TWO COEXIST, BECAUSE WE KNOW WE
HAVE TO FOLLOW BEARDEN FOR SURE,
BUT I'D LIKE FOR YOU TO EXPLAIN
TO US WHY THE STATUTE CANNOT
EXIST AND THEN THE STATE, THE
REVERSE IS HOW CAN THEY COEXIST.
SO IF WE ASSUME THAT HAS TO BE
WILLFUL, IS THERE A REAL PROBLEM
IN AFTER STATEMENTS ON THE
FAILURE TO PAY IN SAYING THAT

THE DEFENDANT NEEDS TO COME FORWARD IF THEY WANT TO CONTEST THAT AND PRESENT EVIDENCE?

LET'S GO THERE.

WE KNOW THESE OTHER THINGS AND NICE SPEECHES ARE GREAT, BUT WE NEED TO WORK THIS OUT.

>> YES, YOUR HONOR.

THE STATUTE IS IRRECONCILABLE WITH BEARDEN AS THE SECOND, FOURTH, AND FIFTH DISTRICT COURTS OF APPEAL HAVE FOUND.

THEY HAVE ESSENTIALLY EITHER IGNORED THE STATUTE OR SAID DESPITE THE STATUTE.

THE STATUTE'S IRRECONCILABLE BECAUSE UNDER ITS PLAIN LANGUAGE IN CASES OF FAILURE TO PAY ALL THE STATE HAS TO SHOW IS THERE WAS A NONPAYMENT OF THE FINANCIAL CONDITIONS OR PROBATION.

>> HOW ABOUT IF WE LOOK AT THIS AS THOUGH BEARDEN DOES REQUIRE SOMETHING ABOUT THE ABILITY THAT THE STATE WOULD HAVE THAT, BUT IF YOU REALLY WANT TO SHOW THAT THERE'S AN INABILITY THAT THAT WOULD BE ON THE DEFENDANT, NOT THE STATE TO PROVE THE CONTRARY, YOU UNDERSTAND WHAT I'M SAYING? HOW DO YOU PROVE THE NEGATIVE FROM AFFIRMATIVE?

>> YES.

AS YOU RECOGNIZE, BEARDEN REQUIRES THE AFFIRMATIVE.

WHERE THIS BECOMES IMPORTANT IN THE STATUTES, BURDEN-SHIFTING REQUIREMENTS BECOME IMPORTANT IS IN TWO TYPES OF SCENARIOS.

UNDER ANY SCENARIO FIRST THIS TYPE OF INFORMATION IS READILY AVAILABLE TO EITHER PARTY.

IN FACT, UNDER FLORIDA STATUTE THE PROBATIONER'S REQUIRED TO GIVE HIS FINANCIAL INFORMATION TO THE APPROPRIATIONS OFFICER. ADDITIONALLY, THE DEPARTMENT OF CORRECTIONS IS REQUIRED TO LOOK AT ABILITY TO PAY CONCERNS WHEN LOOKING AT COST OF SUPERVISION.

THE TWO SCENARIOS WHERE THIS STATUTE BECOMES SIGNIFICANT IS THE SCENARIO IN THIS CASE WHERE THE ONLY EVIDENCE PRESENTED IS A NONPAYMENT OF A FINANCIAL CONDITION.

THE SECOND SCENARIO WHICH HAPPENS A LITTLE MORE OFTEN IS A SCENARIO WHERE THERE'S EVIDENCE OF ABILITY TO PAY AND EVIDENCE OF INABILITY TO PAY.

AND IN THOSE CLOSE SITUATIONS THE TRIAL COURT OFTEN FINDS THAT THE PROBATIONER SINCE THE BURDEN ON HIM IS TO PROVE THE INABILITY TO PAY IN CLOSE SITUATIONS -- ALSO HERE --

>> SO STOP ON THAT BECAUSE THAT'S AN IMPORTANT --

>> YES.

>> -- FIRST OF ALL, THIS HAS

BEEN HAPPENING FOR, WHAT, 25
YEARS IN THE THIRD DISTRICT?

>> WELL --

>> I MEAN, THE STATUTE WENT INTO
EFFECT IN 1984.

>> YES.

AND IF IT HADN'T BEEN FOR
SOMEBODY JUST LOOKING A LITTLE
MORE CAREFULLY, IT WOULD HAVE
CONTINUED.

SO WHAT YOU'RE SAYING IS THE
STATE'S GOT TO PROVE ABILITY TO
PAY --

>> YES.

>> SO EVEN THE STATE'S AGREEING
THERE HAS TO BE SOME EVIDENCE
THEY'VE GOT TO PUT ON.

BUT THEN IF BECAUSE IT'S CLEAR
AND CONVINCING FOR THE
DEFENDANT, THAT THAT IS, THAT
IT'S TOO HIGH FOR THE DEFENDANT
TO HAVE TO REBUT ON CLEAR AND
CONVINCING, OR IS IT JUST THE
FACT OF THEM HAVING TO PUT
ANYTHING ON?

IN OTHER WORDS, IF THERE'S AN
ABILITY TO PAY AND THE DEFENDANT
DOESN'T DO ANYTHING --

>> IN THAT SITUATION THEN, YOU
KNOW, THE STATE HAS PRESENTED
SUFFICIENT EVIDENCE OF ABILITY
TO PAY.

>> OKAY.

SO YOU THINK IN ANY EVENT EVEN
THE STATE WOULD ACKNOWLEDGE
UNDER BEARDEN THAT THEY'VE GOT

TO FIRST SHOW ABILITY TO PAY.

>> YES.

>> BUT THEN THE QUESTION IS WHEN
THERE'S INABILITY TO PAY --

>> YES.

>> -- HOW DOES THE STATE MEET
ITS BURDEN OF PREPONDERANCE OF
THE EVIDENCE?

THEY STILL HAVE TO -- DOESN'T --
I DON'T UNDERSTAND, I GUESS,
WHAT YOU'RE -- YOU KNOW, IN A
CLOSED CASE EITHER THE STATE HAS
MET ITS BURDEN IN THE
PREPONDERANCE OF THE EVIDENCE OR
IT HASN'T.

>> CORRECT.

MY UNDERSTANDING IN SPEAKING TO
THE TRIAL LAWYERS --

>> IN DADE COUNTY.

>> IN DADE COUNTY.

WHAT HAPPENED SINCE THE DEL
VALLE DECISION, REALLY SINCE
THEN THE PROSECUTORS IN COURT
AND THE JUDGES HAVE BEEN MORE
ATTUNED BECAUSE THE TRIAL JUDGES
ANECDOTALLY WILL SAY, WELL, WHO
HAS THE BURDEN OF PROOF?
AND THE STATE WILL SAY, WELL,
YOU KNOW, IT'S THE DEFENDANT'S
BURDEN OF PROOF WHICH IS A
HIGHER BURDEN THAN THE STATE HAS
TO PROVE AT A PROBATION
VIOLATION PROCEEDING --

>> WELL, ISN'T THAT --

>> THAT'S WHAT THE STATUTE SAYS.

>> YES.

THE STATUTE PROVIDES FOR CLEAR AND CONVINCING EVIDENCE, BUT I'LL NOTE THIS IS THE ONLY TYPE OF PROBATION VIOLATION WHERE THE BURDEN IS SHIFTED TO THE DEFENDANT, AND THE ONLY TYPE OF PROBATION VIOLATION WHERE THE BURDEN OF PROOF IS CLEAR AND CONVINCING EVIDENCE.

>> WELL, IS THAT IN AND OF ITSELF SUFFICIENT TO ESTABLISH A CONSTITUTIONAL VIOLATION? THAT'S THE ONLY BASIS THAT THIS COURT WOULD HAVE TO REJECT THE STATUTE OR EVEN PART OF THE STATUTE.

SO IS JUST THAT BURDEN, IS THAT UNCONSTITUTIONAL AND HAS THAT BEEN PRESENTED AND REALLY ADEQUATELY TALKED ABOUT?

>> WELL, TWO THINGS.

THE STATUTE ITSELF AS THE THIRD DISTRICT INTERPRETS IT AND AS A READING OF THE STATUTE IT SAYS THAT ALL THE STATE HAS TO PRESENT IS EVIDENCE OF NONPAYMENT.

THAT'S WHAT THE STATUTE SAYS. THAT'S HOW THE THIRD DISTRICT COURT OF APPEAL INTERPRETS THE STATUTE.

UNDER BEARDEN V. GEORGIA AND STEPHENS IT WAS SPECIFICALLY SAID --

>> WELL, NOW ISN'T IT THE CASE THAT GEORGIA LAW AT ISSUE IN

BEARDEN DIDN'T EVEN ALLOW
CONSIDERATION OF A CLAIM BY, OF
THE PROBATIONER OF INABILITY TO
PAY?

THEY SAID IT DOESN'T MATTER,
WE'RE NOT HEARING THAT.

IF YOU DON'T PAY, YOU'RE GETTING
REVOKED, AND YOU'RE GOING TO
PRISON.

ISN'T THAT -- WASN'T THAT WHAT
THE GEORGIA LAW SAID?

>> YES, IT IS.

>> SO THAT WAS THE ISSUE THERE,
AND THE SUPREME COURT SAID, NO,
YOU CANNOT DO THAT.

BUT THE WHOLE ISSUE ABOUT WHO
HAS THE BURDEN OF ESTABLISHING
ABILITY OR INABILITY WAS NOT
REALLY AT ISSUE IN BEARDEN, WAS
IT?

>> WELL, THE TERM "BURDEN" WAS
NOT USED IN BEARDEN --

>> WELL, BUT THAT'S BECAUSE --
ISN'T THAT BECAUSE THAT WASN'T
AT ISSUE?

>> WELL, IT WAS AT ISSUE BECAUSE
THE BEARDEN COURT SPECIFICALLY
HELD THEY WERE CONSIDERING THE
CASE WHERE THERE WAS NO EVIDENCE
OF ABILITY TO PAY WHETHER
PROBATION CAN BE REVOKED.
AND THAT'S EXACTLY THE SAME TYPE
OF FACTUAL SITUATION WE HAVE
HERE IN THE COURT BELOW.

>> WELL, I THOUGHT --
RESPECTFULLY, I DIDN'T THINK

THAT'S THE WAY THEY WORDED IT.
I THOUGHT THEY WERE SAYING YOU
HAD TO BE A FINDING OR
DETERMINATION OF WILLFULNESS NOT
AS YOU PHRASED IT BECAUSE IN THE
PHRASING OF THAT STATEMENT IT
SORT OF CHANGES THE FUNDAMENTAL
PRINCIPLE.

>> WELL, IF I CAN AND I JUST --

>> SURE, PLEASE.

>> -- WANT TO POINT TO THE
ACTUAL STATEMENT, AND THE COURT
SAYS HE IS ADDRESSING, THE ISSUE
IT WAS ADDRESSING WAS WHEN THERE
IS NO EVIDENCE THAT THE
PETITIONER WAS AT FAULT IN HIS
FAILURE TO PAY FOR THAT
ALTERNATIVE PUNISHMENT OR
ADEQUATE, THE COURT ADDITIONALLY
STATED WE'RE CONSIDERING THE
SITUATION WHERE A COURT CAN
REVOKE A DEFENDANT'S PROBATION
ABSENT EVIDENCE AND FINDINGS.
THAT'S EXACTLY THE SITUATION WE
HAVE HERE.

THE THIRD DISTRICT COURT OF
APPEALS PERMITS PROBATIONERS,
INDIGENT PROBATIONERS' PROBATION
TO BE REVOKED SOLELY BASED ON
THE NONPAYMENT OF A FINANCIAL
CONDITION.

>> SO IF WE GET TO, THOUGH, THE
IDEA TO RECONCILE THE TWO AND
THAT'S WHAT WE'RE TRYING TO DO,
THE JUDGE -- IF NOTHING IS
PRESENTED, THEN WHAT WE WOULD

SAY IS, NO, YOU CAN'T REVOKE
PROBATION BECAUSE YOU'VE GOT TO
MAKE A FINDING OF WILLFULNESS.

>> YES.

>> BUT IF THE STATE SHOWS, COMES
FORWARD -- AND I'M ASKING ABOUT
THE FIRST DISTRICT APPROACH
REALLY WHICH SEEMS TO TRY TO
RECONCILE THE TWO -- THAT THE
STATE COMES FORWARD WITH
EVIDENCE THAT THE PROBATIONER
HAS THE ABILITY TO PAY, PUTS IN
THE RECORDS, WHATEVER.
AND THEN AT THAT POINT IS THE
BURDEN BACK TO THE DEFENDANT TO
SHOW, NO, HE DID NOT HAVE THE
ABILITY TO PAY?

IF HE DOESN'T PUT ON OR SHE PUT
ON ANY EVIDENCE YOU WOULD AGREE
IN THAT SITUATION UNLESS THEY
FIND IT'S NOT CREDIBLE THEY
ESTABLISH A WILLFUL VIOLATION.

>> YES, YOUR HONOR.

THE PROBLEM HERE IS THAT'S NOT
WHAT THE STATUTE ALLOWS, AND
SECOND OF ALL THE SITUATION
WHERE YOU HAVE AN INDIGENT WHO
CANNOT PAY A FINE, THAT'S WHAT
WE'RE LOOKING AT HERE --

>> WELL, ON THIS ONE, LET ME ASK
YOU THIS ONE QUESTION ALSO GOING
IN.

AM I MISTAKEN, BUT IT APPEARS
THIS PARTICULAR PROBATIONER
AFTER ALL THE FINDINGS AND
EVERYTHING AND AFTER THE BOOT

CAMP, HE SAYS, YEAH, I CAN PAY
\$80 A MONTH.

>> WELL, IF YOU LOOK AT IT MORE
SPECIFICALLY, HE SAYS I CAN PAY
\$80 A MONTH, AND HE SAYS, WELL,
I THINK I CAN PAY.

AND THE TRIAL COURT SAYS, HOW
MUCH CAN YOU PAY?

AND HE SAYS, WELL, IF I GET A
JOB.

>> WELL --

>> SO WE HAVE THAT CONDITIONAL
SITUATION.

>> NOT THAT THAT'S MADE TO BRING
UP HERE BECAUSE YOU DON'T
CONFUSE YOUR CASES, BUT IF
YOU'RE A TRIAL JUDGE, IT IS A
LITTLE AGGRAVATING BECAUSE
THEY'RE REALLY TRYING TO WORK
OUT, IT LOOKS LIKE THE TRIAL
JUDGE IS TRYING TO WORK WITH THE
PROBATIONER, NOT STICK THE
PROBATIONER IN JAIL OR PRISON,
BUT JUST TRY TO WORK IT OUT.
YOU KNOW, FROM, YOU KNOW, KEEP
HIM FROM DOING SOMETHING WORSE.
THAT'S THE TENOR OF THE
COLLOQUY.

TALKING ABOUT IMPRISONING
SOMEBODY, BUT BE THAT AS IT MAY,
YOU'RE SAYING THE STATUTE
WOULDN'T EVEN ALLOW, WOULDN'T
REQUIRE THE STATE TO PUT ON
ANY --

>> THE STATUTE BY ITSELF UNDER
THE PLAIN LANGUAGE SAYS IF THE

STATE PRESENTS EVIDENCE THAT THEY'VE NOT PAID THE FINANCIAL CONDITION, THEN IT'S THE PETITION, THE DEFENDANT'S RESPONSIBILITY TO RAISE INABILITY TO PAY, PROVE IT BY CLEAR AND CONVINCING EVIDENCE, AND ONLY IF THE DEFENDANT RAISES THOSE CASES IS THE COURT THEN TO LOOK AT AND DETERMINE IF ALTERNATE FORMS OF PUNISHMENT ARE ADEQUATE.

NOW, WHAT I WAS REFERRING TO BEFORE IS IN NO OTHER TYPE PROBATION VIOLATION DOES THE DEFENDANT HAVE A BURDEN, AND IN NO OTHER TYPE IS IT BY CLEAR AND CONVINCING EVIDENCE.

>> BUT DOES THAT RENDER IT UNCONSTITUTIONAL?

ISN'T THAT OUR BOTTOM LINE, NOT WHETHER WE LIKE IT OR WHETHER WE WOULD DO IT DIFFERENTLY, BUT DOES WHAT YOU SAY RENDER IT UNCONSTITUTIONAL?

OTHER STATES HAVE DONE THAT.

>> OTHER STATES HAVE DONE THIS. ALL OF THEM DO REQUIRE A THRESHOLD INQUIRY IN FINDING, THEY REQUIRE THE ISSUE TO COME UP.

YOU KNOW, IN THIS CASE THE ISSUE NEVER COMES UP.

WHERE IT DOES BECOME IMPORTANT IS WHERE THE ISSUE DOESN'T COME UP IN CLOSE CASES AND WHAT THE

TRIAL ATTORNEYS ARE TELLING ME
IS THAT THE TRIAL COURTS ARE
LOOKING IN CLOSE CASES WHERE THE
STATE SAYS, WELL, HE MADE \$500 A
WEEK, AND THE DEFENDANT IS
SAYING, YES, BUT MY RENT WAS
\$200 A WEEK OR A MONTH, AND I
HAVE, YOU KNOW, FOUR CHILDREN,
AND I CARE FOR AN AILING MOTHER.

>> BUT I THOUGHT THIS --

>> THOSE TYPES OF SITUATIONS.

YES, YOUR HONOR.

>> BUT I THOUGHT THE REAL
PROBLEM THAT YOU WERE FACING OR
BRINGING TO US IS THAT UNDER THE
STATUTE IT APPEARS THAT THE
STATE WOULD NOT HAVE TO SAY
ANYTHING OTHER THAN THIS
PROBATIONER WAS ON PROBATION.
AS A CONDITION OF HIS PROBATION,
HE HAD TO PAY \$100.

HE HAS NOT PAID THAT \$100 IN
THREE MONTHS, AND THAT WOULD BE
THE END OF IT, AND IT WOULD THEN
SHIFT TO THE DEFENDANT TO SAY I
HAVEN'T PAID THAT \$300 BECAUSE
TWO MONTHS AGO OR FOUR MONTHS
AGO I LOST MY JOB, AND I HAVE
BEEN UNABLE TO FIND ANOTHER JOB.
THAT'S NOT THE ISSUE THAT WE'RE
LOOKING FOR?

>> IT IS BECAUSE THE THIRD
DISTRICT PERMITS PROBATIONERS'
PROBATION TO BE REVOKED OR
MODIFIED SOLELY BASED UPON
NONPAYMENT.

WHAT I WAS LOOKING AT WAS THE SITUATION IF THIS COURT FINDS THAT THE ISSUE MUST BE ADDRESSED AND THERE MUST BE SOME EVIDENCE OF ABILITY TO PAY, IS IT THEN PERMISSIBLE TO SHIFT THE BURDEN? AND WHAT WE ARE SAYING IS THAT UNDER BEARDEN AND STEPHENS I DO BELIEVE THAT THAT WOULD BE UNCONSTITUTIONAL.

AND THEN I WAS TALKING ABOUT THE EFFECT ON THE TRIAL COURTS WHEN THEY HEAR EVIDENCE FROM BOTH PARTIES, THE TRIAL COURT IS LOOKING AT THE EVIDENCE FROM BOTH PARTIES AND SAYING, WELL, IT'S A CLOSE CASE, THE DEFENDANT HAS THE BURDEN, I'M FINDING THAT HE VIOLATED HIS --

>> YOU'RE SAYING THAT, WHAT YOU'RE SAYING IS THE PROBLEM IN CLOSE CASES THE STATUTE SAYS THE DEFENDANT HAS THE BURDEN, THAT THEY'RE GIVING THE BENEFIT OF THE DOUBT TO THE STATE.

>> YES.

>> WELL, WE DON'T HAVE THAT -- THE PROBLEM IS AT THIS POINT WE DON'T HAVE THAT CASE IN FRONT OF US.

>> CORRECT.

>> TO DEAL WITH AT LEAST THE EVIDENCE.

AND THEN THE QUESTION I DON'T KNOW IF IT WAS BRIEFED AT ANY LEVEL, BUT IN OTHER CASES WHEN

WE'RE TALKING -- I KNOW ONE OF THE ISSUES WAS MENTAL RETARDATION, WHAT THE BURDEN OF PROOF IS FOR MENTAL RETARDATION, IS THE BURDEN OF PROOF WHETHER IT'S CLEAR AND CONVINCING, IS THAT A LEGISLATIVE, SUBSTANTIVE OR IS IT --

>> THAT ISSUE HAS NOT, HAS NOT BEEN AND IT WAS NOT RAISED BELOW THIS COURT.

AND I'M NOT SURE IF IT WOULD BE TERMED PROCEDURAL OR --

>> WELL, IT MUST NOT BE HELPFUL TO YOU.

IF IT WAS PROCEDURAL, YOU'D SAY IT WAS UNCONSTITUTIONAL BECAUSE IT'S PROCEDURAL.

>> YES.

NOW, IF YOU LOOK AT IT, THOUGH, MOST AFFIRMATIVE DEFENSES ARE CLEAR AND CONVINCING EVIDENCE BECAUSE THEY APPLY IN THE CONTEXT OF THE TRIAL.

IN THE PROBATION REVOCATION PROCEEDING OR PROBATION VIOLATION HEARING, THE STATE'S BURDEN IS PREPONDERANCE OF THE EVIDENCE.

SO AT THAT POINT YOU REALLY SEE A DISPARITY WITH THE STATE'S BURDEN IS PREPONDERANCE OF THE EVIDENCE AND THEN THE DEFENSE HAS TO OVERCOME THAT.

>> SO YOU WOULD SAY IF IT'S JUST PREPONDERANCE OF THE EVIDENCE

BACK AND IT WAS IN --

[INAUDIBLE]

IT WOULD BE OKAY BECAUSE THEN IF
THE DEFENDANT'S TESTIMONY
CANCELED OUT THE STATES, IT
COULDN'T BE WILLFUL.

SO IF THE STATUTE WAS
PREPONDERANCE, THEN WOULD IT BE
OKAY?

>> IT WOULD BE BETTER, BUT IT
WOULD NOT MAKE IT OKAY BECAUSE
AS WITH EVERY OTHER TYPE OF
PROBATION VIOLATION, THE STATE
SHOULD BE HELD TO ITS BURDEN TO
APPROVE A WILLFUL VIOLATION.
ESPECIALLY IN A CASE LIKE THIS
WHERE THE COURTS IS SUPPOSED TO
BE --

>> WELL, YOU SEEM TO BE CARRYING
WITH THAT PROVING WITH THE
ABILITY TO PAY IS DISPROVING --
ALONG WITH IT, DISPROVING
INABILITY.

BECAUSE IF YOU GO FORWARD WITH
ABILITY, YOU KNOW, THE MAN HAS A
JOB OR THE LADY HAS A JOB AND
THE NUMBERS ARE ALL PUT FORWARD,
THEN -- AND A PROBATIONER DOES
NOT RESPOND OR RESPONDS WITH
INADEQUATE OR WHATEVER, THEN
THERE CAN BE A FINDING OF
WILLFULNESS, CORRECT?

>> YES, THERE CAN BE.

>> SO YOU'RE NOT SUGGESTING THEN
THAT THE STATE HAS THE BURDEN,
ANY BURDEN, WITH REGARD TO

ESTABLISHING OR ADDRESSING THE
ABSENCE OF INABILITY.

>> NO.

>> OKAY.

>> THE STATE ONLY HAS TO ADDRESS
THE ABILITY TO PAY.

>> OKAY.

>> SO IF A DEFENDANT COMES IN,
SAYS, YES, YOU'RE RIGHT, I DO
HAVE A JOB, BUT I AM PAYING
ALIMONY IN THIS AMOUNT, AND I AM
PAYING CHILD SUPPORT HERE, AND I
HAVE TO PAY WHATEVER TO GET, IN
ORDER TO HAVE TRANSPORTATION TO
GET TO MY JOB, ARE THOSE THE
KINDS OF SITUATIONS THEN WHERE,
THAT YOU ARE CONCERNED ABOUT?
BECAUSE UNDER THOSE
CIRCUMSTANCES IT SEEMS TO ME
THAT A TRIAL JUDGE COULD, IN
FACT, SAY, WELL, YOU DO HAVE A
JOB AND THAT YOU HAVE SOME
ABILITY TO PAY THIS AMOUNT OF
MONEY.

>> SEE, THERE'S CERTAIN
SITUATIONS WHERE THE TRIAL COURT
LOOKS AT THE CREDIBILITY, THE
TRIAL COURT MAY PUNCH THE
NUMBERS.

THE STATE SHOWED THAT, YOU KNOW,
NOT ONLY DID HE HAVE EMPLOYMENT,
BUT THAT HE TRAVELED OUT OF
STATE.

THAT HE, WHEN RESTITUTION WAS
INITIALLY SET, HE OWNED SEVERAL
RESTAURANTS.

SO, I MEAN, THERE ARE WAYS OF SHOWING THAT NOT HAVING A JOB IS JUST NOT ENOUGH.

NOW, WHAT WE'RE LOOKING AT HERE, THOUGH, IS WHEN THE TRIAL COURT SAYS, YOU KNOW, 50/50.

AND THE TRIAL COURT SAYS, OKAY, BECAUSE IT'S YOUR BURDEN TO PROVE INABILITY TO PAY RATHER THAN A STATE'S BURDEN TO PROVE ABILITY TO PAY, I'M GOING TO FIND, I'M GOING TO GO WITH THE STATE IN THIS SITUATION.

>> BUT WE DON'T HAVE THAT CASE HERE.

BUT YOU'RE SAYING -- SO IT'S A HARD THING TO EVALUATE.

I THINK, YOU KNOW, I UNDERSTAND THAT THAT WOULD BE A CONCERN, AND YOU'RE SAYING IN THE FOURTH DISTRICT, THE FIFTH DISTRICT, THE SECOND DISTRICT --

>> YES.

>> -- IT WOULD GO, THE STATE WOULDN'T BE ABLE TO ESTABLISH A VIOLATION.

>> CORRECT.

>> WHAT HAPPENS IN THE FIRST DISTRICT IF THAT OCCURS?

>> WELL, TO BE HONEST WITH YOU I'M A LITTLE UNSURE BECAUSE BEFORE THE FIRST DISTRICT'S MOST RECENT SET OF OPINIONS IN ODOM V. STATE, THE DEFENDANT HAS THE ABILITY -- BURDEN TO PROVE ABILITY TO PAY, BUT THE COURT

MUST MAKE A DETERMINATION IN REGARD TO ABILITY TO PAY. BLACKWELDER IS THE SECOND DISTRICT COURT OF OPINION AND SAID DESPITE ALL OF THIS THE STATE STILL HAS A BURDEN TO WILLFULLY SHOW ABILITY TO PAY. SO I'M NOT REALLY SURE HOW TO INTERPRET HOW THE FIRST DISTRICT COURT OF APPEAL WOULD APPLY IN A FACTUAL SITUATION.

IN THIS SITUATION THE PRIMARY IMPORTANCE OF THE THIRD DISTRICT IS ALLOWING PROBATIONERS' PROBATION TO BE VIOLATED SOLELY UPON THE FACT THAT THE FINANCIAL CONDITIONS WERE NOT PAID.

>> IN THIS CASE THERE'S A MODIFICATION TO THE PROBATION, RIGHT?

>> YES, YOUR HONOR.

>> NOW, NONE OF IT ADDRESSES THE REVOCATION OF PROBATION.

DOES IT MATTER IN THE CONSTITUTIONAL ANALYSIS WHETHER IT IS A REVOCATION AS OPPOSED TO A MODIFICATION?

>> NO, YOUR HONOR.

AND WHAT WE HAVE HERE IS THE TRIAL COURT MODIFIED HIS PROBATION NOT FOR, WELL, INSTEAD OF PAYING IN THREE MONTHS YOU PAY IT IN SIX MONTHS, YOU KNOW, WITHOUT EXTENDING PROBATIONARY TERMS THAT THIS COURT ACTUALLY SENTENCED HIM TO BOOT CAMP WHICH

IS THE EQUIVALENT OF JAIL.

SO IN THIS CASE IT DOES NOT MAKE
A DIFFERENCE WHETHER IT'S A
MODIFICATION OF REVOCATION.

>> WHAT IS IT THAT YOU'RE ASKING
US TO DO?

WHAT IS IT THAT YOU THINK SHOULD
BE THE HOLDING HERE?

THAT THE STATE HAS TO COME
FORWARD WITH EVIDENCE OF ABILITY
TO PAY IN ORDER TO SATISFY THE
WILLFULNESS PRONG, CORRECT?

>> CORRECT.

>> AND THEN WHAT?

>> THE STATE HAS TO COME FORWARD
WITH EVIDENCE OF ABILITY TO PAY,
AND THROUGHOUT THE PROCEEDING
THE BURDEN OF PROOF ON ABILITY
TO PAY RESTS WITH THE STATE.

>> AND THAT HAS TO BE BECAUSE
THE STATUTE'S UNCONSTITUTIONAL.

>> YES.

>> I MEAN, THAT'S THE ONLY WAY
YOU GET THERE.

>> YES.

>> OKAY.

>> LET ME MAKE SURE I UNDERSTAND
WHY YOU'RE SAYING THE STATUTE IS
UNCONSTITUTIONAL, AND YOU'RE
SAYING THE STATUTE IS
UNCONSTITUTIONAL BECAUSE IT PUTS
TOO HIGH A BURDEN OF PROOF ON
THE DEFENDANT.

>> TWO REASONS.

IT PUTS TOO HIGH A BURDEN OF
PROOF ON THE DEFENDANT, AND IT

ALSO PERMITS A VIOLATION OF
PROBATION SOLELY BASED UPON
NONPAYMENT.

AND AS THE BEARDEN COURT AND THE
STEPHENS COURT SAID THERE HAS TO
BE SOME EVIDENCE OF AN ABILITY
TO PAY AND A WILLFUL --

>> GO AHEAD.

>> THE STATUTE DOESN'T HAVE ANY
LANGUAGE IN IT THAT SAYS THAT
THE STATE HAS ANY BURDEN
CONCERNING PAYMENT.

>> CORRECT.

AND EVEN MORE SO THE STATUTE
DOESN'T EVEN REQUIRE A
DETERMINATION BY THE COURT.
AND IN THIS TYPE OF SITUATION
THAT'S EXACTLY WHAT BEARDEN AND
STEPHENS WERE TRYING TO AVOID,
AT LEAST IN -- YES, YOUR HONOR.

>> GO AHEAD, I'LL LET YOU FINISH
YOUR STATEMENT BEFORE I ASK A
QUESTION.

>> AT LEAST IN STEPHENS YOU LOOK
AT THE SITUATION WHERE A
DEFENDANT COULD WAIVE HIS RIGHT
TO HAVE THE STATE APPROVE
ABILITY TO PAY.

EVEN IN THAT SITUATION THIS
COURT SAYS, NO, THAT'S A
NONENFORCEABLE WAIVER.

IN THIS CASE THE DEFENDANT
WASN'T EVEN AWARE OF SUCH A
RIGHT BECAUSE THE ISSUE WAS
NEVER BROUGHT UP.

THE ONLY ISSUE THAT WAS BROUGHT

UP WAS THE NONPAYMENT OF
FINANCIAL CONDITION.

>> IS THERE ANYTHING THAT WOULD
PROHIBIT US FROM INTERPRETING
THE STATUTE AS WE ARE REQUIRED
TO DO RATHER THAN STRIKING IT IF
WE CAN INTERPRET IT AS BEING
CONSTITUTIONAL?

THAT'S WHAT WE'RE SUPPOSED TO
DO.

IF WE WOULD INTERPRET THE
STATUTE IN LIGHT OF BEARDEN AND
BEARDEN WOULD AT LEAST FIND
WILLFULNESS, THAT THE REST OF
THE STATUTE COULD THEN BE
APPLIED ABOUT THE SHIFTING OF
THE BURDEN?

>> NO, YOUR HONOR, BECAUSE EVEN
THE SHIFTING OF THE BURDEN IS
CONSTITUTIONAL --

>> OKAY, WELL, THEN --

>> THANK YOU VERY MUCH.

>> OKAY.

>> GOOD MORNING, MAY IT PLEASE
THE COURT, I'M TOM DUFFY.

>> MR. DUFFY, IF THERE WAS NO
STATUTE, WHAT IS THE LAW WITH
OTHER PROBATION VIOLATIONS?
WHAT WOULD -- IS THERE -- IS THE
PETITIONER CORRECT THAT THERE IS
NO BURDEN SHIFTING, THAT THE
STATE HAS TO PROVE SOMETHING
WILLFULLY?

SO IF THEY DON'T SHOW UP AT A
PROGRAM, THEY'D HAVE TO PROVE
THAT, AND THEN THE DEFENDANT

COULD PUT ON EVIDENCE THAT,
WELL, I DIDN'T KNOW WHERE THE
PROGRAM WAS, AND THAT'S WHY I
DIDN'T SHOW UP.

THEY DON'T HAVE TO SHOW THAT BY
CLEAR AND CONVINCING.

HOW WOULD IT BE IF THERE WAS NO
STATUTE?

>> ALL THAT HAS TO BE SATISFIED
TO SHOW A REVOCATION OF
PROBATION IS THAT THE CONSCIOUS
OF THE COURT HAS TO BE
SATISFIED.

>> BUT THAT'S THE --

>> AND IT'S CLEAR, IT'S
PREPONDERANCE.

>> BUT IT HAS TO BE WILLFUL.

>> IT HAS TO BE WILLFUL AND
SUBSTANTIAL, YES.

>> OKAY.

SO HOW DOES -- SO, THEREFORE, IT
WOULD SUGGEST THAT THE BURDEN OF
ESTABLISHING WILLFULNESS WOULD
BE ON THE STATE TO PROVE IT BY A
PREPONDERANCE OF THE EVIDENCE.

>> YES.

>> AND ANY STATUTE IT JUST SEEMS
TO ME THAT ANY STATUTE THAT SAID
THE STATE IS RELIEVED OF THAT
BURDEN WOULD BE A PROBLEM.

>> BUT IT DOESN'T RELIEVE THE
STATE OF THE BURDEN OF SHOWING
WILLFULNESS.

WHAT WE'RE TALKING ABOUT HERE IS
WHAT WILLFULNESS MEANS OR, WELL,
YEAH.

WHAT WILLFULNESS MEANS.

IN THIS CASE OR WHAT EVIDENCE
SHOWS WILLFULNESS.

IN THIS CASE THE STATE SHOWED
THAT HE KNEW HE HAD TO PAY, THEY
SHOWED THAT HE HAD PAID SOME AND
THAT HE HAD QUIT PAYING.

AND OUR POSITION IS THAT'S
SUFFICIENT TO SHIFT THE BURDEN
OVER TO THE DEFENDANT, THE
PROBATIONER TO SHOW BY CLEAR AND
CONVINCING EVIDENCE THAT IT'S,
THAT HE LACKED THE ABILITY TO
PAY.

>> BUT WHAT CASE DO YOU RELY ON
THAT SAYS THAT THOSE FIRST
TWO -- THERE WAS TESTIMONY FROM
PROBATION OFFICER ONE, HE TOLD
HIM TO PAY.

THERE WAS EVIDENCE FROM NUMBER
TWO THAT HE WAS IN ARREARS AND
THAT'S WHAT CASE YOU RELY ON
THAT THAT'S SUFFICIENT TO SHOW
WILLFULNESS?

>> WE CITED NO CASE.

>> RIGHT.

SO YOU'RE NOT AWARE OF ONE.

>> I'M NOT AWARE OF ONE, BUT I
THINK THAT'S THE ONLY WAY THE
STATUTE CAN REASONABLY BE READ.

>> WHY WOULD WE NOT READ IN THAT
THERE MUST BE SOME EVIDENCE UPON
WHICH A COURT CAN FIND
WILLFULNESS BECAUSE I THINK
BEARDEN SAYS YOU HAVE TO MAKE A
DETERMINATION OF WILLFULNESS.

>> -- INABILITY TO PAY.

WILLFUL FAILURE.

>> WHATEVER YOU WANT TO CALL IT.

>> ACTUALLY BEARDEN AND WE QUOTED IN STEPHENS, TALKED ABOUT ABILITY TO PAY.

AND THIS DECISION IN STEPHENS CAME OUT IN 1994 AT LEAST TEN YEARS AFTER THE STATUTE WENT INTO EFFECT, AND, YOU KNOW, RIGHT AROUND THE TIME OF BEARDEN IT SAID WE AGREE AND FOR FAILURE TO MAKE RESTITUTION THERE MUST BE A DETERMINATION THAT THE PERSON HAS HAD THE ABILITY TO PAY BUT HAS WILLFULLY REFUSED TO DO SO.

SO ABILITY TO PAY IS PART AND PARCEL WITH WHAT THE FINDINGS HAVE TO BE.

>> RIGHT.

AND IT'S THE DEFENDANT'S BURDEN, THE PROBATIONER'S BURDEN TO GET THAT EVIDENCE TO THE COURT.

AND THE REASON IT IS IS BECAUSE THE DEFENDANT IS, AND I TAKE ISSUE WITH COUNSEL'S STATEMENT THAT THE PARTIES ARE EQUALLY ABLE TO SHOW CONDITIONS OF THE PROBATIONER'S FINANCIAL CONDITION.

IN ALL CASES ALL WE HAVE TO GO ON IS WHAT THE PERSON TELLS US. THEY HAVE TO MAKE REPORTS, THEY HAVE TO SHOW JOB SEARCHES, THEY REPORT IN.

BUT WE CAN'T SHOW ALL OF THEIR ABILITIES TO GET MONEY IN BEARDEN.

THEY EVEN SPOKE OF BORROWING MONEY FROM FAMILY MEMBERS.

>> SO IF YOU HAD A SITUATION AGAIN WHERE NOBODY, NEITHER SIDE PRESENTS EVIDENCE IN ABILITY, WHAT WOULD HAPPEN IN THAT CASE IN THE THIRD DISTRICT?

>> IN THE THIRD DISTRICT BECAUSE THE PETITIONER DID NOT GO FORWARD WITH ITS BURDEN OF PRODUCTION AND BURDEN OF PROOF, THEN WILLFULNESS WOULD BE PRESUMED, AND THE REVOCATION COULD BE, COULD BE SUPPORTED.

>> SO THE STATE IN THE THIRD DISTRICT COULD COME IN AND SIMPLY SAY HE DID NOT PAY HIS MONETARY MONEY, AMOUNTS --

>> AND HE KNEW --

>> -- AND THE VIOLATION IS BASED ON THAT AND THAT ALONE?

>> THAT'S WHAT HAPPENED HERE.

>> WELL, IT JUST SEEMS TO ME THAT BEARDEN -- LET ME QUOTE TO YOU FROM BEARDEN.

AND IT SAYS, "THAT IN REVOCATION PROCEEDINGS FOR FAILURE TO PAY A FINE OR RESTITUTION A SENTENCING COURT MUST INQUIRE INTO THE REASONS FOR THE FAILURE TO PAY."

AND THEN IT GOES ON TO SAY, "IF THE PROBATIONER WILLFULLY REFUSED OR FAILED TO MAKE

SUFFICIENT BONA FIDE EFFORTS TO ACQUIRE THE RESOURCES, THE COURT MAY THEN REVOKE AND SENTENCE THE DEFENDANT TO IMPRISONMENT."

SO IT SEEMS TO ME IT'S SAYING IT MUST INQUIRE, HAVE SOME BASIS TO MAKE AN AFFIRMATIVE FINDING OF WILLFULNESS.

I DON'T THINK IT'S JUST AN ABILITY, IT'S A QUESTION OF WILLFULNESS IS WHAT BEARDEN HAS ADDRESSED.

>> BEARDEN, AS JUSTICE CANADY POINTED OUT, INVOLVED A VERY DIFFERENT SCENARIO.

>> RIGHT.

BUT ARE YOU SUGGESTING THAT PRINCIPLE OF LAW HAS NO APPLICATION HERE?

>> NOT NO --

>> OKAY.

>> I'M SUGGESTING IT'S INADEQUATE TO FLORIDA STATUTE. FLORIDA STATUTE, WE MAINTAIN, IS COMPLETELY CONSISTENT WITH BEARDEN.

COMPLETELY CONSISTENT WITH --

>> HOW IS IT CONSISTENT WHEN IT SAYS THAT A SENTENCING COURT MUST INQUIRE INTO THE REASONS FOR THE FAILURE TO PAY?

>> WELL, I THINK THAT DOESN'T SAY NECESSARILY THAT THE SENTENCING COURT HAS TO MAKE AN INDEPENDENT SEARCHING INQUIRY INTO IT.

THERE HAS TO BE EVIDENCE
SOMEWHERE IN THE RECORD, AND IF
THERE ISN'T ANY EVIDENCE
ANYWHERE IN THE RECORD UNDER
FLORIDA'S STATUTE AND SIMILAR
STATUTES HAVE BEEN ALL OVER THE
COUNTRY AND HAVE BEEN -- NONE
HAVE BEEN STRUCK DOWN AS FAR AS
I KNOW -- UNDER FLORIDA STATUTE
THAT BURDEN PROPERLY RESTS WITH
THE PROBATIONER.

>> RIGHT.

THE U.S. SUPREME COURT HAS NOT
FOLLOWED UP AFTER BEARDEN WITH
ANY OF THESE STATUTES, RIGHT?
AS FAR AS YOU KNOW?

>> NOT THAT I'M AWARE OF.

THERE MAY HAVE BEEN ONE THAT
HAPPENED IN THE LAST TWO WEEKS.

>> YOU MENTIONED EARLIER THAT
THE DEFENDANT IS IN THE BEST
POSITION TO PRESENT EVIDENCE ON
JOB SEARCHES --

[INAUDIBLE]

WELL, IN PROBATION HEARINGS,
REVOCATION HEARINGS THE
DEFENDANT CAN USE HIS FIFTH
AMENDMENT RIGHT TO DEFER IN
CIVIL MATTERS.

>> RIGHT.

>> WHY CAN'T THE STATE CALL THE
DEFENDANT AND ASK WHAT EFFORTS
HAVE YOU MADE TO FIND A JOB,
WHAT EFFORTS HAVE YOU MADE TO
BORROW MONEY, WHAT EFFORTS HAVE
YOU MADE TO SELL YOUR CAR?

AND STILL MAINTAIN BURDEN OF
PROOF AS IT DOES IN EVERY OTHER
INSTANCE?

>> BECAUSE ALL -- YOU WOULD BE
AT THE MERCY OF WHATEVER IT WAS
THE PROBATIONER WANTED TO TELL
YOU.

>> BUT YOU WOULD BE AT THAT
MERCY IF HE HAD THE BURDEN.

>> HE HAS THE BURDEN OF SHOWING
BY CLEAR AND CONVINCING
EVIDENCE.

I THINK THE REASON THAT STANDARD
WAS PUT IN WAS TO PREVENT THE
INSTANCE WHERE THE, IF THE
STANDARD WERE PREPONDERANCE, THE
PROBATIONER COULD TAKE THE STAND
AND SAY, I DON'T HAVE AN ABILITY
TO PAY.

AND THE STATE WOULD REALLY BE
ALMOST UNABLE TO --

>> OH, COME ON.

ALL THE JUDGE HAS TO DO IS MAKE
A CREDIBILITY DETERMINATION
ABOUT THE DEFENDANT, YOU KNOW --

>> WELL, THERE WOULDN'T BE IN
THAT CASE, AND I HATE TO CUT YOU
OFF, BUT --

>> YOU DO?

[LAUGHTER]

>> WELL, I HATE IT.

[LAUGHTER]

>> YOU DID.

YOU DON'T LOOK LIKE YOU HATE IT.

[LAUGHTER]

>> TOTALLY MITIGATED.

NOW I'VE LOST MY TRAIN OF
THOUGHT.

>> WHAT I WAS SAYING IS THAT THE
JUDGE HAS THE ABILITY HIMSELF OR
HERSELF TO MAKE CREDIBILITY
DETERMINATIONS.

AND WHAT STRIKES ME, AND I
APPRECIATE THAT SOMETHING'S BEEN
GOING ON FOR A LONG TIME IN THE
THIRD DISTRICT AND IN THE FOURTH
AND THE SECOND AND THE FIFTH A
COMPLETELY DIFFERENT THING HAS
BEEN GOING ON.

THE STATE SEEMS TO HAVE BEEN
OKAY WITH HOW IT'S GOING IN
THESE OTHER DISTRICTS.

>> I DON'T KNOW ABOUT THAT.

>> WELL, BUT THERE'S VERY STRONG
STATEMENTS IN BLACKWELDER AND IN
SHEPARD WHERE THEY'RE JUST GOING
THIS IS HOW IT'S GOING TO BE
HERE.

AND MY CONCERN ABOUT THIS TODAY
IS THAT WHAT WE'RE, WHERE THIS
ISSUE IS COMING UP FROM A
STATUTE FROM 1984 WHERE WE NOW
HAVE UNPRECEDENTED JOB LOSSES,
YOU KNOW, ECONOMIC DOWNTURN.
AND THE STATE IS SORT OF SAYING
EVEN THE IDEA THAT THEY WANT TO
COME IN AND VIOLATE PEOPLE FOR
NONPAYMENT AND PUT THEM IN
PRISON, MAYBE A 10-YEAR
SENTENCE, THERE IS SOMETHING NOW
THAT IS EVEN GREATER CONCERN.
SO, OBVIOUSLY, IF A DEFENDANT

COMES IN AND SAYS, LISTEN, I'VE BEEN LOOKING EVERY DAY FOR A JOB, AND I CAN'T FIND IT, STATE CAN CROSS-EXAMINE AND SAY, WELL, WHERE HAVE YOU LOOKED AND WHAT HAVE YOU DONE AND WHAT KIND OF, YOU KNOW, AREN'T YOU A CONSTRUCTION WORKER?

AND THEN MAKE A FINDING THAT THAT TESTIMONY WASN'T CREDIBLE.

I DON'T -- I GUESS I'M HAVING TROUBLE UNDERSTANDING, THEY DON'T HAVE TO ACCEPT WHAT THE DEFENDANT SAYS.

BUT THE CLEAR AND CONVINCING EVIDENCE PUTS THE DEFENDANT AT HAVING TO SHOW SOMETHING GREATER THAN THE STATE HAS TO SHOW TO PROVE A VIOLATION.

>> YES, FOR THE REASON I SAID THAT THERE'S -- YOU HAVE TO HAVE SOMETHING MORE THAN, I MEAN, COMPETENT, SUBSTANTIAL EVIDENCE WOULD BE THE DEFENDANT TAKING THE STAND AND SAYING, YEAH, I'VE LOOKED ALL OVER, I CAN'T FIND A JOB.

>> AND CAN'T THE TRIAL COURT JUST SIMPLY SAY THAT I DON'T FIND THAT TESTIMONY CREDIBLE?

>> BUT WHERE WILL THE EVIDENCE BE OF AN INABILITY TO PAY IN THAT SITUATION?

>> THE STATE HAS ESTABLISHED -- YOU'RE ASKING ME HOW THE STATE DOES IT?

>> NO, NO.

I'M SAYING THAT THERE WOULDN'T BE A WAY FOR THE STATE TO -- IN OTHER WORDS, THAT WOULD BE UNREBUTTED EVIDENCE.

IF YOU HOLD THE DEFENDANT TO A HIGHER STANDARD RATHER THAN JUST SAYING, YEAH, I'VE BEEN LOOKING EVERYWHERE --

>> ONE WOULD ASSUME THAT THE PROSECUTOR IN A CASE IS GOING TO CROSS-EXAMINE THE DEFENDANT AND ASK HIM WHERE DID YOU LOOK FOR A JOB.

>> WELL --

>> I MEAN, HOW MANY PLACES HAVE YOU GONE?

I MEAN, THAT'S WHAT A JUDGE CAN DERIVE THE EVIDENCE FROM.

>> BUT THAT'S, THAT'S -- AND YOU HIT ON A THING, JUSTICE PARIENTE, ABOUT THE ABILITY/INABILITY KIND OF DICHOTOMY HERE THAT, YOU KNOW, ONE THING IS KIND OF LIKE PROVING THE ABSENCE OF A NEGATIVE.

IT DOES GET CONCEPTUALLY BAD BUT, JUSTICE LABARGA, IN ANSWER TO YOUR QUESTION, ONE THING CROSS-EXAMINATION ISN'T ALWAYS AS SUCCESSFUL AS WE HOPE IT WOULD BE.

>> WELL, YOU'VE GOT TO HIRE BETTER GUYS.

>> WELL, THAT'S A DECISION LIKE

THE DECISION NOT TO APPEAL --

>> I DON'T UNDERSTAND REALLY,
QUITE FRANKLY, IF A DEFENDANT
GETS ON THE STAND, SAYS I HAVE
BEEN UNABLE TO FIND A JOB, I
HAVE LOOKED FOR FOUR MONTHS, I
WENT TO XYZ PLACE, I WENT TO
THIS PLACE -- IT SOUNDS TO ME
LIKE YOU WERE SAYING THAT THAT
IS NOT ENOUGH.

WHAT MORE ARE YOU SAYING THAT
THE DEFENDANT SHOULD HAVE TO DO?

>> WELL, SHOW SOME BANK RECORDS,
SHOW SOME ACTUAL RECORDS OF, I
MEAN, HEARSAY'S ADMISSIBLE, FROM
PLACES WHERE HE MADE JOB
SEARCHES.

IF HE'S GOT MEDICAL BILLS AND
THERE'S A MEDICAL REASON AND HIS
PROBATION OFFICER VIOLATES HIM
ANYWAY --

>> WELL, THE QUESTION OF WHAT
HAS TO BE SHOWN BY THE DEFENDANT
IS REALLY NOT AT ISSUE IN THIS
CASE.

>> I DISAGREE, BUT --

>> HOW IS IT AT ISSUE?

>> BECAUSE THE STATUTE PUTS THE
BURDEN ON THE DEFENDANT --

>> OKAY.

THE QUESTION IS WHETHER, AS I
UNDERSTOOD IT, WAS WHETHER THAT
STATUTE IS CONSTITUTIONAL OR
NOT.

>> CORRECT.

>> AND IN THIS CASE THE

DEFENDANT SHOWED NOTHING.

>> CORRECT.

>> SO THE QUESTION OF WHETHER THE SHOWING, THE SPECIFICS OF WHAT THE DEFENDANT WOULD HAVE TO SHOW JUST HASN'T REALLY COME UP HERE SINCE HE SHOWED NOTHING. THE QUESTION IS WHETHER HAVING SHOWN NOTHING HE LOSES.

>> WELL, YES.

>> SO ALL THIS OTHER STUFF IS JUST SPECULATING ABOUT SOME CASE THAT'S NOT BEFORE US, ISN'T THAT RIGHT?

>> THAT WE ARE SPEAKING IN --
MORE KINDLY SPEAKING IN --

>> WELL, SPECULATING ABOUT SOME CASE THAT'S NOT BEFORE US. IF YOU WANT TO DO THAT, YOU'RE ENTITLED TO DO IT, BUT I DON'T UNDERSTAND WHY YOU THINK THAT'S RELATED TO THE CASE THAT YOU'RE HERE TO ARGUE.

>> WELL, I WAS ANSWERING THE QUESTIONS THAT WERE PUT TO ME BY THE COURT, JUSTICE.

>> WELL, DID THE JUDGE FIND WILLFULNESS?

DID THE JUDGE FIND A WILLFUL ABILITY TO PAY?

>> IMPLICITLY ONLY.

I MEAN, I CAN'T ARGUE WITH THE RECORD --

>> WELL, IT'S NOT EVEN IMPLICITLY, THERE'S NOTHING.

>> THE VIOLATION HAS TO BE

WILLFUL, BUT THAT'S THE BEST
I'VE GOT ON THAT.

>> BUT IN ANSWER TO JUSTICE
CANADY, AND I HAVEN'T READ EVERY
CASE ON THESE OTHER COURTS, BUT
I DON'T THINK ANYONE'S
DISAGREEING THERE'S A CLEAR
CONFLICT.

>> OH, YES.

THERE'S THREE DIFFERENT
APPROACHES.

THE THIRD DCA SAYS IT'S THE
DEFENDANT'S BURDEN AND THE JUDGE
DOESN'T HAVE TO MAKE A FINDING
IF THE DEFENDANT DOESN'T GO
FORWARD WITH THIS BURDEN.

>> FROM 1990.

>> YEAH.

BEFORE STEPHENS.

BUT THEY RELIED ON GUARDADO.

IN ANY EVENT, THE CASE THAT'S
CITED IN THIS CASE.

THE SECOND, FOURTH AND FIFTH SAY
IT'S STATE'S BURDEN, THE SECOND
SAYS IT'S THE DEFENDANT'S
BURDEN, BUT THE COURT MUST FIND
ON THE RECORD THAT THERE WAS A
WILLFUL REFUSAL --

>> SO WHAT'S WRONG WITH THE
FIRST DISTRICT APPROACH IN
TRYING TO FOLLOW BEARDEN WHICH
IN MY READING VERY CLEARLY SAYS
YOU MUST INQUIRE AND HAVE A
FINDING OF WILLFULNESS WITH WHAT
THE STATUTE'S SAYING?

AND I STILL HAVEN'T HEARD THE

CASE THAT SAYS THE SHIFTING OF THE BURDEN RENDERS IT TOTALLY UNCONSTITUTIONAL.

SO IF WE TALK ABOUT THAT THE BURDEN IS THERE BUT THERE MUST STILL BE THIS WILLFULNESS WHICH SEEMS TO BE WHAT THE FIRST DISTRICT IS SAYING, WHAT PROBLEMS DOES THE STATE HAVE WITH THAT?

>> WELL, THE PROBLEM WE HAVE IS I DON'T THINK THAT'S WHAT THE STATUTE DID.

>> WELL, BEARDEN REQUIRES IT.

>> WE BELIEVE THAT THE STATUTE IS CONSISTENT WITH BEARDEN.

>> WHAT ABOUT THE OTHER, WHAT ABOUT 948.032 WHICH IS A PART OF THE SAME STATUTORY SCHEME, AND IT ACTUALLY TALKS ABOUT WILLFULNESS?

948.032 ACTUALLY TALKS ABOUT WHEN YOU'RE VIOLATING A PROBATION IT SAYS THAT THE WILLFULNESS OF A DEFENDANT'S FAILURE TO PAY.

>> UH-HUH.

>> IF YOU READ 948.032 WITH THE OTHERS, WITH THE OTHER STATUTE 065, IT SEEMS TO ME THAT THIS STATE STILL HAS TO SHOW THERE WAS A WILLFUL VIOLATION, THAT HIS FAILURE TO PAY WAS WILLFUL.

>> AND OUR POSITION HERE IS THAT THAT WAS SHOWN BY THE FACT THAT HE KNEW OF THE CONDITION

INFERENTIALLY SHOWN BY THE FACT
THAT HE WASN'T COMPLETELY IN
ARREARS.

IN OTHER WORDS, HE HAD MADE SOME
PAYMENTS.

AND THAT HE DID NOT PAY
DESPITE --

>> YOU ARE, YOU ARE ADMITTING
WHAT I ASKED, THAT THE MERE FACT
THE STATE COMES IN AND MERELY
SHOWS THAT HE DID NOT PAY, THAT
THAT IS ENOUGH TO SAY IT WAS A
WILLFUL VIOLATION OF PROBATION?

>> ASSUMING HE KNEW THE
CONDITION.

WHICH HE CLEARLY DID, HE SIGNED,
HE SIGNED THE AGREEMENT AND THE
PROBATION OFFICER TESTIFIED TO
THAT, THAT HE HAD READ IT TO
HIM.

I MEAN, THAT'S WHAT HAPPENED
HERE, AND THAT'S WHAT WE'RE
DEFENDING.

>> IT'S, I HAVE A -- IT'S NOT
RELATED TO THIS, THE ADULT
STATUTE, BUT HAVE YOU LOOKED AT
THE JUVENILE STATUTE?

>> NO, MA'AM.

>> ALL RIGHT.

BECAUSE WE HAVE A CASE THAT'S
PENDING HERE THAT INVOLVED THE
JUVENILE STATUTE AND WHETHER THE
SETTING OF PROBATION NEEDS TO BE
CONDITIONED ON THE JUVENILE
ACTUALLY FINDING EMPLOYMENT.
THEN LOOKING AT THE JUVENILE

STATUTE, THE JUVENILE STATUTE DOESN'T HAVE ANYTHING AT ALL ABOUT BURDEN, SO YOU'RE NOT PREPARED TO --

>> NOT PREPARED TO DO THAT.

BUT THINGS ARE DIFFERENT FOR JUVENILES.

>> BUT ARE THINGS -- DO YOU KNOW FROM ON THE GROUND THAT BECAUSE THIS WHOLE LAW IN THE FOURTH DISTRICT, SECOND HAS BEEN THERE, IS IT IN THOSE DISTRICTS THE STATE'S NOT RUSHING TO TRY TO SHOW PROBATION VIOLATIONS IF SOMEONE HAS THE ABILITY TO PAY, BUT THEY'RE RUSHING IN THE THIRD?

I'M JUST STILL, I KNOW, YOU KNOW, WE'RE NOT, WE'RE HERE TO INTERPRET A STATUTE, WE'RE HERE TO INTERPRET BEARDEN, BUT I AM CONCERNED ABOUT -- WELL, PROBATION OFFICER SEES THEY HAVEN'T PAID, NOW WE'RE GOING TO GO INTO COURT AND GET THE REVOCATION, AND WE KNOW THAT MEANS NOT JUST BOOT CAMP, BUT IN MANY CASES IT COULD BE, YOU KNOW, THEIR ORIGINAL SENTENCE OF 10, 15, 20 YEARS WHICH IS COSTING THE STATE 20,000, 40,000 A YEAR TO HOUSE THESE PEOPLE.

I REALIZE YOU'RE HERE TO TALK ABOUT THE LAW, BUT ISN'T THERE SOME SANITY ON WHAT WE'RE GOING TO WANT TO HAVE ON THE GROUND?

>> I DO NOT DISAGREE WE WANT A SANE SYSTEM.

[LAUGHTER]

OPPOSING COUNSEL HAS AN ADVANTAGE OVER ME IN THAT THEY WORK WITH THE ASSISTANT PUBLIC DEFENDERS MUCH MORE CLOSELY THAN WE WORK WITH PROSECUTORS.

WE'RE A STATEWIDE OFFICE.

I HAVE HEARD NOTHING ANECDOTALLY.

I'VE ONLY BEEN BACK WITH THE AGENCY SINCE APRIL.

MAYBE THERE WAS A HUGE BROUHAHA IN THE THREE YEARS THAT I WAS GONE, BUT I DON'T KNOW ABOUT THAT.

>> LET ME ASK YOU THIS, THE QUESTION WAS ASKED WHAT IS YOUR OPINION ON THE PORTION OF WHAT THE STATUTE IS --

[INAUDIBLE]

>> WE BELIEVE IT'S SUBSTANTIVE. WE BELIEVE IT IS SUBSTANTIVE AND WITHIN THE LEGISLATURE'S PREROGATIVE.

>> THAT'S WHAT I MEAN.

AS FAR AS BURDEN OF PROOF IN EVERY OTHER INSTANCE --

>> WELL, I MEAN, IT'S AN AFFIRMATIVE DEFENSE, AND THERE ARE AT LEAST THREE AFFIRMATIVE DEFENSES IN THE CRIMINAL STATUTES THAT WE CITED IN OUR BRIEF, AND THERE MAY BE MORE IN OTHER STATUTES IN OTHER SECTIONS

THAT CRIMINALIZE CERTAIN
BEHAVIOR.

>> BUT IS IT -- GO AHEAD.

>> BUT MY QUESTION IS, I HATE
TO --

[INAUDIBLE]

BUT IF WILLFULNESS IS AN ELEMENT
ESTABLISHED IN STEPHENS --

[INAUDIBLE]

>> BECAUSE WILLFULNESS IS NOT
NECESSARILY SHOWN IN THE MANNER
THAT THE OTHER SIDE WOULD WANT
IT TO BE SHOWN.

IN OTHER WORDS, AS I EXPLAINED
TO JUSTICE QUINCE AND PERHAPS TO
JUSTICE PARIENTE AS WELL, THE
STATE'S BURDEN OF WILLFULNESS IS
SHOWN WHEN THE, BY SHOWING THAT
THE PERSON KNEW OF THE
OBLIGATION, HAD OSTENSIBLY HAD
AN ABILITY TO PAY AT ONE TIME --

>> SO NOW YOU ADDED IN ABILITY
TO PAY.

WHEN YOU ANSWERED ME, YOU SAID
YOU SIMPLY SHOW THAT HE KNEW OF
IT, AND HE DIDN'T PAY IT.

>> AND THAT SHOWS THAT -- NO, I
HAD MENTIONED THAT IN THIS
SPECIFIC CASE HE HAD MADE
PAYMENTS.

WHETHER THAT SHOULD BE A PART OF
IT OR NOT I THINK SHOULD BE LEFT
FOR ANOTHER DAY, AND I'M WELL
INTO MY, OVER TIME.

>> COULD I ASK JUST ONE
QUESTION?

AS A PRACTICAL MATTER ON THE
GROUND AS THIS WHOLE PROBATION
THING IS SET UP, IS IT JUST A
STANDARD FORM, ROTE PROCESS THAT
THE PROBATION OFFICERS HAVE ALL
FINANCIAL EMPLOYMENT ON SOME
KIND OF FORM THAT'S USED AND
USED IN THE COURT SYSTEM?

>> I DON'T KNOW --

>> OKAY, WELL --

>> I SUSPECT IT VARIES FROM
JURISDICTION TO JURISDICTION.

WE ASK THAT YOU AFFIRM THE THIRD
DCA, DISAPPROVE --

[INAUDIBLE]

THANK YOU SO MUCH.

>> THANK YOU.

REBUTTAL?

>> YES.

I KNOW I'M OUT OF TIME, SO I'LL
MAKE IT --

>> ONE MINUTE.

>> YES.

UNDER BEARDEN AND STEPHENS, THE
VIOLATION OF PROBATION COMES
WHEN YOU HAVE AN ABILITY TO PAY,
AND YOU FAIL TO PAY.

AND THAT'S WHAT MAKES THE
DIFFERENCE.

THERE IS NO VIOLATION IF THERE'S
A MERE FAILURE TO PAY.

AS JUSTICE LABARGA WAS BRINGING
UP IN AFFIRMATIVE DEFENSE.

YOU KNOW, GENERALLY AN
AFFIRMATIVE DEFENSE SAYS, WELL,
I DID IT, BUT IT EXCUSES THE

CONDUCT.

HERE WE HAVE THERE IS NO
VIOLATION ONLY BASED UPON A MERE
FAILURE TO PAY.

BEARDEN AND STEPHENS LOOKED AT
SUBSTANTIVE DUE PROCESS AND
FOUND, IN FACT, THIS IS THE ONLY
SUBSTANTIVE DUE PROCESS THAT'S
RECOGNIZED IN REVOCATION
PROCEEDINGS, THAT YOU MUST PROVE
A WILLFUL FAILURE TO PAY.

YET HERE THE LEGISLATURE IS
TAKING AWAY THESE PROTECTIONS
WHERE THESE PROTECTIONS ARE MOST
NEEDED IN THE CASES OF INDIGENTS
WHO MAY BE IN PRISON FOR FAILURE
TO PAY.

WE RESPECTFULLY REQUEST THIS
COURT REVERSE THE THIRD DISTRICT
COURT OF APPEAL'S DECISION.

THANK YOU.

>> THANK YOU FOR YOUR ARGUMENT.