

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-6633  
DANNY R. BEARDEN, Petitioner  
TITLE v.  
GEORGIA  
PLACE Washington, D. C.  
DATE January 11, 1983  
PAGES 1 - 40

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IN THE SUPREME COURT OF THE UNITED STATES

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DANNY R. BEARDEN,

Petitioner

v.

GEORGIA

No. 81-6633

7 - - - - -x  
8 Washington, D.C.  
9 Tuesday, January 11, 1983

10                   The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 2:14 o'clock p.m.

13 APPEARANCES:

14 JAMES H. LOHR, ESQ., Chattanooga, Tennessee; appointed  
15 by this Court, pro hac vice.

16 GEORGE M. WEAVER, ESQ., Assistant Attorney General of  
17 Georgia, Atlanta, Georgia.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Bearden against Georgia.

Mr. Lohr, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES H. LOHR, ESQ.,  
APPOINTED BY THIS COURT, PRO HAC VICE

MR. LOHR: Mr. Chief Justice, and may it please the Court, this case involves the revocation of an indigent's probation for his failure to pay a fine and restitution which was imposed as a condition of his probation.

Mr. Bearden has received a three-year probated sentence. The condition was that he pay \$750 as fine and restitution. Two hundred dollars had to be paid almost immediately. This was paid by his parents. Within the next four months, he had to come up with and pay the balance, which is \$550.

Approximately one month after this sentence was imposed, he was laid off. He became unemployed. From that period until the time of the revocation hearing, he did not gain employment, although the record shows that he tried to gain employment. He was without funds. He was without property. I think he was what we might call functionally indigent.



1           The trial court held the revocation hearing  
2 and revoked it on two grounds, as I understand what the  
3 trial court did. It revoked it on his failure to pay  
4 the fine and restitution. Secondly, it revoked it on  
5 his failure to report to his probation officer  
6 regularly. That, of course, was not a ground stated in  
7 the petition to revoke.

8           In fact, I don't believe there was any  
9 evidence to support that finding, and the Georgia Court  
10 of Appeals held that even if the trial court did rely  
11 upon the failure to revoke the probation -- or revoke  
12 the probation for his failure to report, that the  
13 revocation rested upon an alternate independent ground  
14 which was sufficient, and that was that he failed to pay  
15 his fine and restitution, which was a condition of his  
16 probation.

17           The Georgia Supreme Court denied a petition to  
18 review this discretionary appeal, and there are two  
19 other important factors I should mention in this case.  
20 First of all, the petitioner was serving his probation  
21 under what we call the Georgia First Offenders Act.  
22 Under that Act, when a person is convicted or enters a  
23 plea of guilty, the court suspends further proceedings  
24 and places him on probation.

25           If he successfully completes his term of

1 probation, he is discharged without an adjudication of  
2 guilt, no criminal record, no criminal purpose. On the  
3 other hand, if his probation is revoked, the trial court  
4 then at the revocation hearing enter an adjudication of  
5 guilt and sentence the defendant to any sentence that it  
6 could have originally imposed. In this case, it would  
7 have been 20 years for the burglary and ten years for  
8 the theft by receiving.

9           The only condition is that he must be given  
10 credit for the time that he was on probation.

11           Now, in this case, when the trial court  
12 originally revoked his probation, it sentenced him to  
13 five years to serve. It was a three-year term of  
14 probation. It sentenced him to five years to serve. On  
15 a motion on behalf of the defendant, this was reduced to  
16 the remaining balance of his probation, in line with the  
17 Georgia case of Stevens versus State.

18           QUESTION: Mr. Lohr, do you think that a  
19 sentencing judge can at an original sentencing  
20 proceeding consider the fact that the defendant is  
21 indigent and couldn't pay a fine, and therefore decide  
22 to sentence the person to jail? Would that be valid?

23           MR. LOHR: In lieu of a fine?

24           QUESTION: The sentencing judge, who has  
25 options available to him at sentencing, the possibility

1 of a jail term, the possibility of a fine, the  
2 possibility of probation on condition that a fine is  
3 paid, can the sentencing judge decide that because the  
4 person in fact is unemployed and indigent, and therefore  
5 unlikely that he could pay a fine, and would be a poor  
6 risk on probation, should be sentenced to jail? Is that  
7 all right?

8 MR. LOHR: I think, if I might answer that  
9 question, if a high level of scrutiny is to be applied  
10 to this type of state action, I don't think it is okay.  
11 If a low level is, then I think it is. If I might  
12 explain, as I understand your hypothetical, the person  
13 could have been placed on probation except for the fact  
14 that he couldn't pay the fine. That indicates to me  
15 that there is no additional threat to society. There is  
16 nothing being achieved by protecting society simply  
17 because he was poor.

18 As far as rehabilitation goes, I don't think  
19 the state is achieving anything by putting him in jail  
20 for rehabilitation under these circumstances.

21 Now, there is the element of deterrence, let's  
22 say, to other individuals. For example, other indigents  
23 may see this indigent -- in their mind he may be getting  
24 off scot free. In other words, he is not -- doesn't  
25 have to pay a fine because he is too poor, and he

1 doesn't have to go to jail. There are other ways that  
2 the state can enforce or achieve the policy of  
3 deterrence other than the payment of a fine or jail.  
4 Those aren't the only two options.

5           So, if we look at strict scrutiny, so to  
6 speak, it is not necessary to put him in jail. There  
7 are other less intrusive ways to accomplish that  
8 deterrence. If we are looking at just a rational basis,  
9 then I think the judge can do it, so long as the fine is  
10 -- or the jail term is in some way commensurate with the  
11 fine.

12           Now, the second point I just want to mention,  
13 that I am sure you are aware of, that the fact that his  
14 probation was revoked because he was too poor to pay the  
15 fine resulted in the adjudication of guilt which has  
16 several other consequences, among which he loses his  
17 right to vote, he loses his right to hold public office,  
18 and certain other rights that citizens who are not  
19 convicted of a felony of moral turpitude hold.

20           First of all, I would like to consider the  
21 cases of Williams versus Illinois and Tate versus  
22 Short. This Court in the case of Williams versus  
23 Illinois held that it was unconstitutional to  
24 incarcerate the defendant beyond the limits of  
25 incarceration which by statute apparently the state



1 determined as necessary to achieve the penalogical  
2 interests of the state.

3 Now, in this present case, apparently the  
4 trial judge made a determination that this individual  
5 did not need to go to jail in order to satisfy the  
6 penalogical interests of the state. It wasn't a  
7 legislative determination. It was apparently done by  
8 the trial judge.

9 QUESTION: The trial judge, I take it, thought  
10 that what you referred to as perhaps inartfully, at  
11 least in my opinion, less intrusive methods might be  
12 used to achieve society's goal without having to send  
13 him to jail at that stage.

14 MR. LOHR: That's correct. The probation and  
15 the other -- and the conditions that were imposed upon  
16 his probation would satisfy the penalogical interests of  
17 the state.

18 QUESTION: What were the conditions that were  
19 imposed?

20 MR. LOHR: They were the standard -- in  
21 addition to the fine and restitution, they were the  
22 standard conditions, not to associate with --

23 QUESTION: Yes, but fine and restitution were  
24 the two non-boilerplate conditions.

25 MR. LOHR: That's correct. Those were the

1 only two non-boilerplate conditions.

2 QUESTION: Did the defendant ever ask to have  
3 that term of condition modified -- term of probation  
4 modified or extended or reduced or --

5 MR. LOHR: No, he never made that request.

6 QUESTION: He had that right, I suppose, under  
7 state law.

8 MR. LOHR: Yes, the trial judge retains the  
9 jurisdiction over probation cases beyond that term of  
10 court for the term of probation, and I think at any time  
11 the trial court could upon a reasonable showing modify  
12 the conditions of probation.

13 QUESTION: Do you know if -- do you know if  
14 the obligation, the condition about restitution and  
15 paying a fine, did they survive the revocation of  
16 probation?

17 MR. LOHR: I have not --

18 QUESTION: Or do you know?

19 MR. LOHR: I have not been able to find any  
20 cases right on point on this --

21 QUESTION: Well, I know, but in this  
22 particular case, if he went to jail, was he free from  
23 the conditions of paying the fine?

24 MR. LOHR: I don't believe he is. I believe  
25 he is going to be obligated to pay the fine and

1 restitution until, even after the jail term, you know,  
2 until he pays it. It probably will never be collected,  
3 in fact.

4 QUESTION: At the time restitution was  
5 requested of him, did he make any showing or statement  
6 to the judge that he was indigent and therefore couldn't  
7 make restitution?

8 MR. LOHR: At -- We are at a disadvantage  
9 here. Apparently there was no transcript taken at the  
10 time the plea was entered and he was placed on  
11 probation. We have searched for it, and we can't find  
12 it. I was not present at that time.

13 QUESTION: So we have to presume that  
14 everything that was done to support the  
15 constitutionality of the order below was done, since we  
16 don't know?

17 MR. LOHR: Well, the only thing we have in the  
18 record is that in his testimony on his probation  
19 revocation hearing, he did testify that he agreed to pay  
20 the fine at the time the condition of probation was  
21 entered, and I am assuming that he agreed to it. He had  
22 a job at that time, and felt like he could pay it.

23 QUESTION: Well, what did he steal, or what  
24 was the theft?

25 MR. LOHR: The burglary, and I think the theft

1 by receipt, were one and the -- arose out of the same  
2 incident, but it was breaking into a mobile home and  
3 apparently taking some items out of the mobile home.

4 QUESTION: Was there any finding of the value  
5 of the items?

6 MR. LOHR: Again, I really don't know. There  
7 is no record of what happened back when he was placed on  
8 probation. So I don't know what --

9 QUESTION: Any indication of what he did with  
10 those items? I mean, at one point I presume he could  
11 have made restitution if he had simply still had the  
12 property by just giving the property back.

13 MR. LOHR: All I can -- All I can represent to  
14 this Court is what the District Attorney has led me to  
15 believe in talking to him, the one that was apparently  
16 there at the time.

17 QUESTION: Your argument really then is quite  
18 abstract, isn't it, and quite apart from the particulars  
19 of this case, where your client was convicted of theft,  
20 presumably at one time had the ability to make  
21 restitution, accepted a sentence imposing restitution,  
22 and now simply wants to shed the whole thing.

23 MR. LOHR: Well, we are assuming some things  
24 here, and I don't know that in fact he had the ability  
25 to make restitution out of the goods that were stolen.



1           QUESTION: Well, but if you don't know, if the  
2 record is silent, isn't there a presumption in a case  
3 such as this that the findings are in support of  
4 constitutionality?

5           QUESTION: Doesn't the record show that as a  
6 matter of fact the only way he paid the original \$200  
7 was to pay it from his mother?

8           MR. LOHR: That's true.

9           QUESTION: And that he didn't even have it?

10          MR. LOHR: At the time --

11          QUESTION: Doesn't the record show that?

12          MR. LOHR: Yes, it does. He either borrowed  
13 it or his mother gave it to him to pay. That's correct.

14          QUESTION: The record shows that.

15          MR. LOHR: That's correct. And he had a job  
16 at the time, and about a month later became laid off.

17          QUESTION: Doesn't the record also show the  
18 amount of the restitution, the \$200 on one charge and  
19 \$50 on the other?

20          MR. LOHR: That was the restitution. That's  
21 correct.

22          QUESTION: So isn't it fair to assume that's  
23 the amount he had to restore? I mean, that must be the  
24 value of what he stole?

25          MR. LOHR: It would seem reasonable to assume

1 that, yes.

2 QUESTION: It is also true, isn't it, that  
3 your client signed the order of probation in which in  
4 effect he agreed that in violation of the terms of  
5 probation the court may enter an adjudication of guilt  
6 and proceed as provided by law?

7 MR. LOHR: Yes, he signed that. That's  
8 correct.

9 QUESTION: Both counsel and petitioner signed  
10 it.

11 MR. LOHR: Yes, both counsel that represented  
12 him at that time. That's correct.

13 In the case of Tate against Short, again, this  
14 Court, in citing from a concurring opinion in Morris  
15 versus Schoonfield, stated that it doesn't matter if the  
16 fine is accompanied by a jail term or not, and again, in  
17 this case, it was not -- it was not accompanied by a  
18 jail term, but only by a probationary period of time.  
19 If a jail term of an indigent extends beyond -- excuse  
20 me. Or whether or not the jail term extends beyond the  
21 statutory maximum. And of course it didn't in this  
22 case. It still held there that it is in violation of  
23 the equal protection clause in order just to convert a  
24 jail term -- or, excuse me, a fine into a jail term.

25 And it appears that that is what we -- what

1 happened here, and it wasn't any attempt by the trial  
2 court to substitute a jail term equivalent to the \$550  
3 he owed.

4 QUESTION: Is there some table from which the  
5 trial court could have found an equivalent term?

6 MR. LOHR: That poses a real difficult problem  
7 with that -- with that approach, simply because how do  
8 you know how much one day is worth?

9 QUESTION: Well, I thought you were arguing  
10 that -- the intimation seemed to be that the trial judge  
11 should have made the effort. I agree with you. I think  
12 it would be quite difficult. Then why do you argue that  
13 he should have made the effort?

14 MR. LOHR: The only reason I guess I made that  
15 point is, it has been suggested -- I believe it was in  
16 Justice White's opinion in Wood against Georgia that  
17 there should be some -- when a person's probation is  
18 revoked for his failure to pay a fine, that there should  
19 be some relationship between the amount of jail time and  
20 the amount of the fine, and I guess the reason for that  
21 is is that apparently the state needs some -- needs to  
22 satisfy its interest in deterrence, satisfy its interest  
23 in retribution.

24 QUESTION: Well, do you think the suggestion  
25 is that perhaps the judge should consider the nature of

1 the offense, and decide considering the offense and the  
2 nature of the defendant what punishment is appropriate,  
3 whether it is jail, or a fine, or in either case how  
4 much or how long it should be?

5 MR. LOHR: Well, I think the Judge has wide  
6 discretion at the time of sentencing, at the time he  
7 places a person on probation or puts him in jail or  
8 imposes a fine. I think he has wide discretion. I  
9 think he needs to maintain that.

10 QUESTION: Do you think that a judge who is  
11 considering whether to continue someone on probation  
12 should reasonably consider whether the person has a job,  
13 and if not, the extent to which he is a risk to society,  
14 being a convicted felon and not having employment? Is  
15 that appropriate?

16 MR. LOHR: I don't think it's appropriate to  
17 consider that a person who does not have a job becomes a  
18 greater risk to society than a person under the exact  
19 same circumstances that does have a job, or a person  
20 that is poor is a greater risk to society than an  
21 individual who is rich under the exact same  
22 circumstances. So, if we are looking at the trial  
23 judge's ability just to look at whether or not the  
24 person is rich or poor, I don't think they should  
25 consider that in making that initial determination.



1           QUESTION: Do you think -- historically in the  
2 books there were a lot of provisions that prescribed the  
3 punishment for a certain criminal act, 30 days or \$30.  
4 Now, here is a legislative judgment. Suppose a  
5 legislature said, if you steal something that is worth  
6 \$200, you either pay a \$100 fine or go to jail for five  
7 days. Those are equivalent. And we just think that if  
8 you can't pay the \$100, you have got to do something, so  
9 we are going to send you to jail for five days.

10           MR. LOHR: Again, I am going to have to answer  
11 that, if you apply the strict scrutiny approach, I think  
12 there are other ways that the state can accomplish its  
13 interests.

14           QUESTION: Well, that is just shorthand for  
15 saying that you think that the statute is bad.

16           MR. LOHR: That's correct. That's correct.  
17 But you see, there would be other ways then that the  
18 state could accomplish its same deterrent interest.

19           QUESTION: Well, the legislature didn't think  
20 so.

21           MR. LOHR: It seems to me that if a person is  
22 unable to pay -- Now, for a person that could pay, it  
23 may be a legitimate choice, but for a person that is  
24 unable to pay, he really has no choice at all. It is  
25 just, go to jail, for him. It seems to me that there

1 should be some other type of provision made, that the  
2 state could, with some sort of a work release program,  
3 have him do public service work. There are all sorts of  
4 options open to the state.

5           And just because it is not paid immediately  
6 does not mean that it may not be paid down the road.  
7 So, for a person who is indigent, I don't believe that  
8 that is a valid option.

9           QUESTION: But wouldn't that depend a good  
10 deal on the crime committed? You have an individual  
11 that plead guilty to burglary. I can think of all sorts  
12 of crimes that would not suggest that the individual  
13 would be a very good risk. So if you have no alternative  
14 but to him on work relief or doing public service, would  
15 that not be a bit dangerous for the public generally?

16           MR. LOHR: Well, I think the determination of  
17 whether or not a person is a risk to society, is going  
18 to pose a threat to the other individuals around him,  
19 needs to be made independently of whether or not this  
20 person is rich or poor.

21           QUESTION: Right. Right.

22           MR. LOHR: Now, I agree that in a case of  
23 burglary, it would seem -- if you compared it to a  
24 traffic violation --

25           QUESTION: Surely.

1           MR. LOHR: -- there is a greater probability  
2 that the court is going to find that he needs to be  
3 incarcerated to protect society, but apparently that is  
4 not the situation in this case.

5           QUESTION: Have you considered that one of the  
6 consequences, if you prevail, is that judges in the  
7 courts dealing with these -- matters of this kind are  
8 going to have a tendency, or at least they are going to  
9 be encouraged to simply impose -- have several  
10 alternatives: impose a fine, saying, if you pay this  
11 fine in cash or post a bond within 48 hours, then the  
12 sentence will be suspended; otherwise, imprisonment --  
13 that that may be the tendency, or the judges will, as a  
14 second alternative, simply forget about restitution and  
15 all, which is beginning to be rather illusory, and  
16 simply convict and send all these people to prison?

17          MR. LOHR: I have considered that. For an  
18 indigent, it really doesn't make a lot of difference.  
19 He can't pay the fine, and if it is a condition of being  
20 free, he is not free. By definition, he can't pay it,  
21 so he is going to go to jail, regardless of what the  
22 judges do.

23          QUESTION: Well, he may be able to get  
24 somebody to put up a bond, if they can't lend him the  
25 money, to put up a bond to see that it is paid. Here

1 there was no security for the balance of this fine, was  
2 there?

3 MR. LOHR: No, there was no security.

4 QUESTION: There was just a promise to pay.

5 MR. LOHR: Right. It would have an effect, I  
6 think, possibly on the trial court's decisions on close  
7 cases. For example, in this case, where a person is  
8 employed and it looks like he might become unemployed,  
9 the court may say, well, I am not going to fool with a  
10 fine. Let me just impose a jail term. That may be the  
11 result. I should --

12 QUESTION: Well, didn't one of us say exactly  
13 that in Tate against Short, in the concurring opinion?

14 MR. LOHR: I believe so, and I believe,  
15 Justice Blackmun, you did not entirely disapprove of  
16 that.

17 QUESTION: As a matter of fact, it has been  
18 said in probably half a dozen cases, at least, that this  
19 trend will probably lead to that kind of a result.

20 MR. LOHR: It may very well do that. Just  
21 because -- if it is in fact in violation of the  
22 Constitution. I don't think that we necessarily can  
23 look at the results to determine whether or not it is in  
24 violation of the Constitution.

25 QUESTION: Mr. Lohr, do you think that the



1 judge in revoking probation can consider whether the  
2 defendant has made a bona fide effort to be employed,  
3 and therefore earn the money to pay the fine, in  
4 determining whether to revoke probation?

5 MR. LOHR: I think that if a person wilfully  
6 fails to pay the fine, or squanders his resources --

7 QUESTION: That is not my question to you.

8 MR. LOHR: Whether or not he made a bona fide  
9 effort?

10 QUESTION: Right, to be employed, and to get  
11 out there and hustle and earn the money to pay the fine,  
12 and the judge feels maybe that wasn't done. Is that  
13 grounds for revocation of the probation?

14 MR. LOHR: I don't believe it is. I don't  
15 believe it is. If the condition of probation that an  
16 indigent --

17 QUESTION: So somebody can just sit around and  
18 not make a bona fide effort to get a job and pay the  
19 fine that has been ordered, that he has agreed to pay  
20 when the probation was originally imposed. Is that  
21 right?

22 MR. LOHR: I think that is where my argument  
23 would lead me, yes.

24 QUESTION: He can sit around and not only not  
25 pay the fine, but not make restitution of the value of

1 the property that he has stolen.

2 QUESTION: Mr. Lohr, in this case --

3 QUESTION: Would you please answer my question?

4 QUESTION: I am helping him.

5 (General laughter.)

6 QUESTION: Go ahead, answer the question,  
7 counsel.

8 MR. LOHR: I -- Could you repeat that, please?

9 QUESTION: He can sit around and not only not  
10 pay the fine, but not make restitution of the value of  
11 the property that he has stolen.

12 MR. LOHR: Well, it seems to -- yes, I think  
13 so. Restitution I don't think carries any greater state  
14 interest than does the payment of the fine, and of  
15 course that is not the facts that we have in this case,  
16 but on the other hand, you just -- it seems to me that  
17 if we leave the trial courts with the discretion to  
18 determine whether or not a person has made a bona fide  
19 effort in order to obtain employment and to obtain  
20 funds, that that is just -- it is just opening the  
21 door.

22 I just don't see how a trial court is going to  
23 make that determination.

24 QUESTION: Well, there is a little of that  
25 element in this case, isn't there, where the trial judge

1 on revoking probation commented that jobs were available  
2 for anyone who would come to the courthouse any day  
3 during the week, and that this defendant didn't do that,  
4 and some indication here that that is what this judge  
5 thought that happened?

6 MR. LOHR: Yes, Judge Loggins did mention  
7 that.

8 QUESTION: Right.

9 MR. LOHR: And he also mentioned that he  
10 recognized that there were times when people cannot find  
11 a job, even though they try.

12 QUESTION: Right.

13 QUESTION: Assuming I may ask a question, does  
14 the record show specifically the places he went to  
15 looking for work, and name the places, and that he also  
16 went to the state labor department? Does the record  
17 show that?

18 MR. LOHR: That's correct. That's in his  
19 testimony. There is no doubt --

20 QUESTION: Did you forget it?

21 MR. LOHR: No, I didn't forget that.

22 QUESTION: Thank you.

23 (General laughter.)

24 QUESTION: Counsel, wouldn't your client be  
25 better off if Georgia law permitted him to make a

1 showing of a bona fide effort to raise funds as a  
2 defense to the probation? As I understand it now, even  
3 with the bona fide effort, even if the facts were 1,000  
4 percent favorable, a total impossibility, he can still  
5 be sentenced to jail for, what is it, five years in this  
6 case, because he couldn't raise \$500.

7 MR. LOHR: That's correct, and in fact, if  
8 there was a record showing that the provisions in  
9 Stevens versus State had been complied with,  
10 technically, he could have been sentenced, I suppose,  
11 for 20 years with ten years concurrent.

12 QUESTION: In this sentence, if I remember the  
13 record correctly, it was imposed not by the original  
14 sentencing judge, but by the judge at the time of the  
15 revocation. The original sentencing judge only  
16 sentenced him to one year, I think.

17 MR. LOHR: The original sentencing judge was  
18 three years' probation on one count and one year on the  
19 other.

20 QUESTION: I see.

21 MR. LOHR: That's correct.

22 QUESTION: But the five years was at the time  
23 of the revocation.

24 MR. LOHR: By a different judge, and at the  
25 probation revocation hearing there was no attempt to

1 determine at that time whether or not his status with  
2 respect to his threat to society, with respect to the  
3 possibility of rehabilitation, with respect to these  
4 other state interests, these weren't even --

5 QUESTION: What was the ultimate sentence to  
6 jail? First five years. Then he lowered it to three  
7 with the credit. So what was the time he was going to  
8 spend in jail?

9 MR. LOHR: He would have had to serve  
10 approximately two and a half years in jail, but the  
11 Department of Corrections would have given him credit  
12 for good days, and so forth.

13 QUESTION: Yes.

14 QUESTION: Mr. Lohr, do you have any criticism  
15 of the Georgia statute, or merely of the way it was  
16 applied in this case?

17 MR. LOHR: Merely of the way it was applied.

18 QUESTION: The statute is very generous on its  
19 face, isn't it?

20 MR. LOHR: I believe it is. Yes, Your Honor.

21 If I may, I would like to reserve my remaining  
22 time.

23 CHIEF JUSTICE BURGER: Mr. Weaver?

24 ORAL ARGUMENT OF GEORGE M. WEAVER, ESQ.,

25 MR. WEAVER: Mr. Chief Justice, may it please



1 the Court, in this case, the petitioner raises an equal  
2 protection challenge to the revocation of his  
3 probation. At stake is the broad sentencing discretion  
4 that this Court has often recognized to be vested in  
5 trial courts.

6 I would like to say at the outset that the  
7 equal protection issue here is not the typical equal  
8 protection question this Court faces. Most equal  
9 protection issues involve broad, sweeping legislative  
10 action that is at least to some degree over-inclusive.  
11 Here we have a single sentencing decision by a single  
12 trial court, highly individualized, a revocation of  
13 probation which was an act of discretion by a trial  
14 court.

15 That is one reason why the respondent submits  
16 that the Court should employ the reasonable basis test  
17 of equal protection review. Another is that the  
18 conditions this Court has specified in the past to the  
19 application of higher scrutiny are simply not met in  
20 this case. Strict scrutiny, we feel, would be  
21 inappropriate because there is no suspect criterion that  
22 is the basis for the state action here. Moreover, no  
23 fundamental right is burdened for equal protection  
24 purposes.

25 A person on probation has no right,

1 fundamental or otherwise, to probation. Moreover, his  
2 fundamental rights may even be limited by his  
3 probationary status.

4 As to intermediate review, this Court has  
5 reserved that level for the review of state  
6 classifications which are based on what some have called  
7 semi-suspect criteria, usually immutable  
8 characteristics, as gender or illegitimacy, but in this  
9 case there is no such characteristic that is the basis  
10 for the state action.

11 Another reason why the respondent --

12 QUESTION: Well, I suppose the defendant who  
13 is on probation has some kind of a liberty interest in  
14 remaining out of jail, does he not?

15 MR. WEAVER: Yes, Your Honor, I think he has a  
16 conditional liberty interest, and that liberty can only  
17 be taken away if the requirements of the due process  
18 clause are met. This Court established what those are  
19 for probation revocation in the case of Gagnon versus  
20 Scarpelli. In this case, the requirements of the due  
21 process clause were clearly met. There has been no  
22 contention, as I understand it, from the petitioner.

23 QUESTION: Well, can he have his probation  
24 revoked solely because of circumstances beyond his  
25 control? For example, he is told as a condition of

1 probation not to leave the state, and he is kidnapped,  
2 and is taken forcibly across the border. Can probation  
3 be revoked for that reason?

4 MR. WEAVER: I would say no, in that  
5 situation.

6 QUESTION: Well, all right. He loses his job,  
7 and it is no fault of his own. He was hired as a  
8 replacement strike worker --

9 (General laughter.)

10 QUESTION: -- as a permanent employee and then  
11 fired. Now, can he be -- can probation be revoked  
12 because of that?

13 MR. WEAVER: Well, Your Honor, in your  
14 hypothetical, I would say the revocation in those  
15 circumstances would be arbitrary, and therefore would  
16 violate the equal protection clause.

17 QUESTION: All right. What saves it here,  
18 where he says, I lost my job, and I have been trying to  
19 get work, and I can't, so I can't pay the fine.

20 MR. WEAVER: Justice O'Connor, I think the  
21 trial court could rationally have concluded that the  
22 petitioner's loss of his job and his failure to pay the  
23 fine, his inability to pay the fine from the record  
24 increased or made him a less acceptable probation risk.  
25 It seems to me that that follows from the ability of a

1 trial court to consider financial resources and  
2 employment situation in the original sentencing  
3 decision.

4 QUESTION: Do you mean that a person who is  
5 poor is a bigger risk than a person who has money?

6 MR. WEAVER: No, sir. I am saying that a  
7 person --

8 QUESTION: I thought you just said that.

9 MR. WEAVER: Well, I think a trial court could  
10 reasonably use --

11 QUESTION: A trial court could say that?

12 MR. WEAVER: A trial court could reasonably  
13 use a person's financial resources and their employment  
14 history as an index to their likely probation success.

15 QUESTION: No, to the likelihood that they  
16 would commit a crime, is what you were talking about.

17 MR. WEAVER: Likelihood that they would commit  
18 a crime and probation success.

19 QUESTION: So a poor person is more likely to  
20 commit a crime than a person with money? And you are  
21 speaking as a state Attorney General?

22 MR. WEAVER: Your Honor, I am saying it is  
23 reasonable to use -- Let me put it this way. When a  
24 trial court is faced with sentencing a defendant, in  
25 this case deciding whether to put a defendant on

1 probation or not, the trial court must make a  
2 prediction. Under Georgia law, he must decide under the  
3 statute whether it is likely that the defendant will  
4 again engage in a course of criminal conduct. Now, what  
5 is to help him make that prediction?

6 I am saying that the financial resources  
7 available to the defendant and his employment history  
8 are two indices. They are imperfect, Your Honor. I  
9 admit that. But they can rationally, reasonably be used  
10 to predict the future behavior of the defendant. That  
11 is the whole reason why they are considered in the first  
12 place.

13 Now, that is the primary position of the  
14 respondent, that financial resources and employment  
15 background are a reasonable indication of likely  
16 probation success of a defendant. Let me illustrate my  
17 argument by making a comparison to two other cases  
18 decided by this Court.

19 In Vance versus Bradley and Massachusetts  
20 Board of Retirement versus Mergia, the Court considered  
21 mandatory retirement schemes. The Court held that the  
22 mandatory retirement schemes were reasonable and  
23 therefore not unconstitutional. This Court said that,  
24 even though there were employees under both of those  
25 schemes who could still perform the tasks.



1           In other words, it was reasonable for the  
2 Congress in one case and the Massachusetts legislature  
3 in the other to use age as an index to the physical  
4 capabilities of workers, even though there are  
5 exceptions.

6           Similarly, in the case before the Court, the  
7 respondent submits that it is reasonable for a trial  
8 court to use financial condition and employment history  
9 as an index to the likely probation success of the  
10 defendant. That is the whole purpose for considering  
11 those elements, not only on revocation, but also in the  
12 original sentencing decision.

13           The respondent also contends to the Court  
14 that --

15           QUESTION: Mr. Attorney General, would that be  
16 permissible as a matter of constitutional law if, say,  
17 his probation period lasted for three years, and he paid  
18 the \$550 within the deadline, he used his last dime to  
19 pay the \$550, and periodically his condition is  
20 reviewed, and the judge finds out he is totally broke,  
21 he has no money at all, he is indigent. Could he then  
22 say, well, I think I am going to revoke your probation  
23 because I don't think you are a good risk any more?

24           MR. WEAVER: No, sir. There would have to be  
25 the violation of a condition of probation. And I think

1 the violation should have some --

2 QUESTION: What if one of the conditions is  
3 that he must appear to the judge periodically to be a  
4 good probation risk? Say the state statute permitted a  
5 re-examination from time to time of the condition of the  
6 probationer. Would that be constitutional?

7 MR. WEAVER: If he violated a condition of  
8 probation, and the trial court --

9 QUESTION: Well, one of the conditions is, he  
10 satisfy the judge that he is still not a risk to society  
11 and that he is just generally still a good risk, and you  
12 leave that to the wide discretion of the sentencing  
13 judge, who always has very wide discretion in these  
14 matters. Why couldn't you let the judge just re-examine  
15 it every six months, and he just decides, well, I am not  
16 sure about you any more, you don't have any money.

17 MR. WEAVER: Your Honor, if that is a valid  
18 condition of probation, I would agree with you.

19 QUESTION: Well, that is my question. Is it a  
20 valid condition?

21 MR. WEAVER: I'm not sure that it is. I think  
22 that conditions should be sufficiently specific so that  
23 it can be understood, and it has some connection with  
24 the probation worthiness, to put it in the best way I  
25 can.

1           QUESTION: Well, but I think your argument is  
2 that indigency is related to probation worthiness. I  
3 think that's what your argument comes down to.

4           MR. WEAVER: I am saying that a person's  
5 financial resources --

6           QUESTION: Are related to his probation  
7 worthiness.

8           MR. WEAVER: Yes, sir.

9           QUESTION: If that is true, I would not see  
10 any constitutional objection to a statute such as I  
11 hypothesize.

12          MR. WEAVER: If that kind of condition would  
13 be legitimate, then I think probation probably could be  
14 revoked.

15          QUESTION: I think that is what the issue in  
16 the case is.

17          MR. WEAVER: Yes, sir. Now --

18          QUESTION: Suppose the original case comes up,  
19 and the judge says, there are two people involved here.  
20 One has \$500, and a job that pays \$10,000 a year, and  
21 the other one is broke, so I find one guilty and I  
22 release the other one. He couldn't do that, could he?  
23 Could he?

24          MR. WEAVER: I'm not sure, Your Honor. I  
25 think a trial court can consider the financial condition

1 of the defendant in sentencing him, but if there is that  
2 kind of wide disparity, I think you might even have an  
3 Eighth Amendment problem, a cruel and unusual punishment  
4 situation, where you have that kind of  
5 disproportionality between sentences for people who have  
6 committed the same crime.

7           QUESTION: Wouldn't some of the consideration  
8 you are talking about depend on the crime with which the  
9 person was charged? I mean, a trial judge could  
10 reasonably suppose, I suppose, that a person who was  
11 indigent would be more likely to commit petty theft than  
12 someone who had \$100,000 in the bank, but I suppose he  
13 could also suppose that the one with the \$100,000 in the  
14 bank might be more likely to kite a large check than the  
15 person who was indigent. Both of them are crimes.

16           MR. WEAVER: Yes, sir. I think a trial court  
17 could reasonably come to those conclusions.

18           Now, let me make it clear. I am not saying  
19 that the conclusion that this defendant was a greater  
20 probation risk is the only conclusion the trial court  
21 could have come to, but under the rationality standard,  
22 it is not required that there be no reasons to the  
23 contrary.

24           The key words that this Court has used to  
25 describe state actions which fail to comply with the

1 rationality standard are "arbitrary" and "irrational."  
2 And the respondent submits that in this --

3 QUESTION: Is that a due process kind of a  
4 concern rather than equal protection? Are we concerned  
5 with fundamental fairness here in talking about  
6 arbitrariness of the decision?

7 MR. WEAVER: Well, the due process clause is  
8 broad enough, I think, to include this issue, but as I  
9 understand the prior decisions of the Court, the equal  
10 protection clause has been used to decide whether state  
11 action is arbitrary or irrational. In the line of  
12 cases --

13 QUESTION: It is not altogether clear, is it?

14 MR. WEAVER: Your Honor?

15 QUESTION: It is not altogether clear what the  
16 basis of some of these prior decisions --

17 MR. WEAVER: No, sir. No, Your Honor.

18 (General laughter.)

19 MR. WEAVER: In the case of -- Pardon me.

20 (General laughter.)

21 MR. WEAVER: In the case of Ross versus  
22 Moffitt, this Court summarized some previous decisions  
23 of the Court that dealt with state actions which had  
24 erected insurmountable barriers to indigents seeking a  
25 review of their criminal convictions, and in Ross versus



1 Moffitt, which Justice Rehnquist wrote, the Court said  
2 that although those prior cases could be fit -- they  
3 could be fitted under either the due process or the  
4 equal protection clause, that the Court considered them  
5 to be best explained under the equal protection clause.

6 Now, I would like to address myself to this  
7 issue. My opponent has mentioned Williams versus  
8 Illinois and Tate versus Short. In those cases, this  
9 Court decided that the additional punishment imposed  
10 upon indigents solely because of their indigency served  
11 no legitimate state interest.

12 QUESTION: And therefore violated what?

13 MR. WEAVER: Well, the equal protection  
14 clause, I would say. The Court pointed out that when  
15 the two defendants in those cases were sentenced, there  
16 was a declaration by the state that the state's penal  
17 interests did not require the additional punishment  
18 later imposed upon the indigents.

19 Now, in the case before the Court, I submit  
20 that there is no -- even assuming that analysis, there  
21 is no declaration by the state that the state's penal  
22 interest is satisfied here without imprisonment. You  
23 have to remember, this is a probation case. Tate versus  
24 Short and Williams versus Illinois were not probation  
25 cases. This defendant, this petitioner was put on

1 probation, which is a conditional release, and he has to  
2 comply with certain conditions of probation. So, it is  
3 a tentative release.

4           Moreover, in this case, the petitioner was put  
5 under the First Offenders Act of Georgia. The Georgia  
6 Supreme Court has said in a case called State versus  
7 Wiley, which is at 233 Georgia 316, that the purposes of  
8 first offender's probation are not the same as ordinary  
9 probation. The Court has said that unlike other  
10 probated sentences, the defendant is not merely serving  
11 his sentence outside the confines of prison, but is  
12 serving a period on probation to determine whether or  
13 not the prisoner may be rehabilitated.

14           So, first offender's probation in Georgia is  
15 even more tentative than ordinary probation. So I  
16 submit we don't have a declaration here as in Tate and  
17 Williams that the state's penal interest was satisfied  
18 without imprisonment.

19           Now, I would like to also point out to the  
20 Court that the revocation in this case can rationally be  
21 argued to help maintain public confidence in the  
22 criminal justice system. Surely, public confidence  
23 would seriously be eroded if a person like the  
24 petitioner could not only escape imprisonment, but even  
25 escape a conviction without having kept the conditions

1 of his sentence. And this concern is especially great  
2 here, because the petitioner was sentenced under the  
3 First Offenders Act of Georgia. Not only will he escape  
4 imprisonment, but also a conviction.

5           Respondent submits that to maintain public  
6 respect for the administration of justice, this  
7 revocation, this state action here can rationally be  
8 seen as furthering that interest.

9           In summary, Your Honor, what we have here is a  
10 trial court faced with a difficult sentencing decision.  
11 The trial court was faced with a defendant who had plead  
12 guilty to burglary and theft by receiving charges. He  
13 has no prior felony convictions. He says that he can  
14 pay a small fine and restitution, and he appears to be  
15 employed.

16           Based on those premises, the trial court  
17 places him on probation, gives him a very lenient  
18 sentence, and even gives him the benefit of the First  
19 Offenders Act. Eight months later, the petitioner comes  
20 back in for revocation of his probation. He has failed  
21 to keep the conditions. He has not paid his fine and  
22 restitution, and is now unemployed.

23           Now, a lot of questions could be asked about  
24 the trial court's decision to revoke probation. It  
25 could be asked whether it is wise, enlightened,

1 progressive, humane, but those are not the issues. The  
2 issue is, was the decision arbitrary, was it  
3 irrational?

4           The respondent submits that whatever might be  
5 said about the decision of the trial court, it was  
6 clearly rational. Therefore, it meets the dictates of  
7 the equal protection clause of the Fourteenth Amendment,  
8 and the judgment of the Georgia Court of Appeals should  
9 be affirmed.

10           Thank you.

11           CHIEF JUSTICE BURGER: Do you have anything  
12 further, Mr. Lohr?

13           REBUTTAL ARGUMENT OF JAMES H. LOHR, ESQ.,  
14           APPOINTED BY THIS COURT, PRO HAC VICE

15           MR. LOHR: Mr. Chief Justice, I have just a  
16 couple of points. First of all, as I understand the  
17 state's position, it is that the petitioner's loss of  
18 his job and his inability to pay his fine and  
19 restitution placed him in the position of being easily  
20 led to commit another crime. I disagree with that. I  
21 believe it is a false assumption, the one that was  
22 disapproved of in Griffin versus Illinois.

23           And the state seems to be riding a different  
24 horse. It is not saying that the failure to pay the  
25 fine and the restitution was -- caused him to be a

1 greater threat to society. It was his indigency. In  
2 other words, the real reason for the revocation of his  
3 probation was his indigency.

4           With regard to public confidence, it is hard  
5 to pin down, but it seems to me that people are not  
6 going to have much faith in a criminal justice system  
7 that puts an individual in jail because he is poor and  
8 under the same circumstances when a rich person is going  
9 to be able to go free. In Rodriguez, this Court  
10 reviewed Griffin, Douglas, Williams, and Tate, and in  
11 Justice Powell's opinion it was stated that where a  
12 person because of lack of wealth was completely unable  
13 to pay for a benefit, and as a result there was an  
14 absolute deprivation of that benefit, that the Court has  
15 struck down those types of state actions, and I submit  
16 that in this case, because of his lack of wealth, he was  
17 unable to pay for the benefits which flow from being on  
18 first offender's probation, and that he was completely  
19 deprived of those benefits.

20           For these reasons, I would respectfully submit  
21 that this Court should reverse the Georgia Court of  
22 Appeals.

23           CHIEF JUSTICE BURGER: Thank you, gentlemen.  
24 The case is submitted.

25           (Whereupon, at 2:58 o'clock p.m., the case in



1 the above-entitled matter was submitted.)

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CERTIFICATION

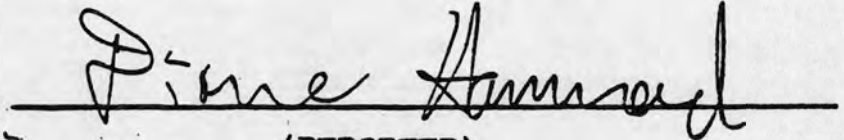
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DANNY R. BEARDEN, Petitioner v. GEORGIA #81-6633

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and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "P. H. Hammond", is written over a horizontal line.

(REPORTER)