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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Appellant,

-against-

No. 139

BRIAN HAKES,

Respondent.

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285 Wall Street  
Kingston, New York  
November 15, 2018

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this  
2 morning's calendar is appeal number 139, the People of the  
3 State of New York v. Brian Hakes.

4 Counsel?

5 MR. FARRELL: Good morning. May it please the  
6 court, Jim Farrell, Sullivan County District Attorney for  
7 the People in this case. The People submit - - -

8 CHIEF JUDGE DIFIORE: Mr. Farrell, may I  
9 interrupt a moment? Would you like any rebuttal time, sir?

10 MR. FARRELL: Oh, I would. Yes, please, three  
11 minutes?

12 CHIEF JUDGE DIFIORE: You may, sir.

13 MR. FARRELL: Thank you, Judge. The People  
14 submit that the Appellate Division Third Department's  
15 holding in this case that no criminal defendant, including  
16 those of substantial means, as well as those who  
17 specifically consent - - -

18 CHIEF JUDGE DIFIORE: Mr. Farrell - - -

19 JUDGE RIVERA: Where does that - - -

20 CHIEF JUDGE DIFIORE: Mr. Farrell - - - excuse  
21 me. Mr. Farrell, are you arguing that there are two  
22 different and separate conditions of probation that were  
23 imposed on Mr. Hakes - - - a condition to wear the SCRAM  
24 bracelet and the condition to pay for the SCRAM bracelet?

25 MR. FARRELL: We are, yes.



1 CHIEF JUDGE DIFIORE: Okay. And are - - - is  
2 there a funding stream available?

3 MR. FARRELL: There is not.

4 CHIEF JUDGE DIFIORE: No funding.

5 MR. FARRELL: And in this particular case, the  
6 judge determined that the defendant had the ability to pay.

7 JUDGE FAHEY: Well, isn't - - - isn't the - - - I  
8 thought there was a funding stream available but that the  
9 County chose not to seek that funding stream; is that  
10 correct?

11 MR. FARRELL: No. I don't know that there is a  
12 funding stream available - - -

13 JUDGE FAHEY: Okay. Go ahead.

14 MR. FARRELL: - - - that the County had access  
15 to.

16 JUDGE RIVERA: So - - - so explain how there are  
17 two conditions.

18 MR. FARRELL: Well, the conditions - - -

19 JUDGE RIVERA: What does the first one fall  
20 under? What does the other one fall under?

21 MR. FARRELL: Well, we believe that the first  
22 condition falls under 65.10[4]. Now, remember, that  
23 subdivision of the law was passed when the legislature took  
24 issue with this court's decision in McNair. In McNair, the  
25 court ruled that it was illegal for a court to impose an



1 electronic monitoring condition. And the - - -

2 JUDGE RIVERA: Well, the point was whether or not  
3 you could impose something that wasn't rehabilitative when  
4 the focus was for public safety. I don't think there's a  
5 question about that. So what does the other condition fall  
6 under?

7 MR. FARRELL: The other condition falls under  
8 65.10[5] which was - - -

9 JUDGE RIVERA: Okay.

10 MR. FARRELL: - - - passed at the exact same time  
11 that [4] was - - - was passed.

12 JUDGE RIVERA: So - - - so where under either or  
13 both of these provisions is there any kind of statutory  
14 text that allows for the imposition of - - - of the payment  
15 requirement?

16 MR. FARRELL: Well, if we look to the actual  
17 language of 65.10[5], we find that the court can require  
18 the defendant to comply with any reasonable condition that  
19 the court determines necessary. And then there's two  
20 parts: One, to ameliorate the conduct which gave rise to  
21 the offense or to prevent incarceration of the defendant.  
22 And that statute vests broad discretion in the court.

23 JUDGE RIVERA: Okay. But how does pay - - -  
24 payment fit under either of these foundational bases for  
25 charging a fee?



1 MR. FARRELL: Because it would be a reasonable  
2 condition related to ameliorating the conduct - - -

3 JUDGE FAHEY: Well, let's talk about - - -

4 MR. FARRELL: - - - and to prevent him being - -  
5 -

6 JUDGE FAHEY: Slow down. Slow down.

7 MR. FARRELL: - - - incarcerated.

8 JUDGE FAHEY: Let's talk about the reasonableness  
9 of it. It's 300 dollars a week - - - 308 dollars a month;  
10 is that right?

11 MR. FARRELL: Well, it depends on - - - there's a  
12 sliding scale - - -

13 JUDGE FAHEY: It's eleven dollars a day. It's -  
14 - - so it works out to 308 dollars a month. And this  
15 defendant was given six months' jail time and four-and-a-  
16 half years' probation, right?

17 MR. FARRELL: That's correct. That was his  
18 initial sentence.

19 JUDGE FAHEY: So my math may be wrong, but that's  
20 10,800 dollars in fees.

21 MR. FARRELL: Well, that's - - - the judge did  
22 not order it to hold - - - to hold the SCRAM bracelet for  
23 the entire term of probation.

24 JUDGE FAHEY: Okay. But - - -

25 MR. FARRELL: His - - -



1 JUDGE FAHEY: - - - if it did go for the entire  
2 term it'd be 10,800 dollars.

3 MR. FARRELL: At the highest level that you cite,  
4 but as - - - as was indicated in the hearing, the defendant  
5 had the opportunity, although he chose to reject the  
6 opportunity, to apply for financial assistance. He chose  
7 to not - - - not - - -

8 JUDGE FEINMAN: Which would have brought it down  
9 to four dollars a day.

10 MR. FARRELL: Which would have brought it down to  
11 four dollars a day which would have been half the amount  
12 that he was spending on cigarettes.

13 JUDGE RIVERA: Although he says he can't pay  
14 anything. Well, but put aside the cigarettes for a moment.  
15 He says he can't pay anything. Let's get back to the  
16 statute since you say this is the statutory basis for - - -

17 MR. FARRELL: Correct.

18 JUDGE RIVERA: - - - the fee. I'm - - - I'm not  
19 really certain I understand the argument about how this  
20 ameliorates the conduct. Obviously, the - - - the bracelet  
21 is closer to this, but how does requiring someone who is  
22 indigent paying the fee ameliorate the conduct?

23 MR. FARRELL: Judge, respectfully, we do not  
24 contest the preliminary determination that a failure to pay  
25 is willful must be made before a person may be sanctioned



1 upon a violation of probation. So - - -

2 JUDGE STEIN: So are we talking about two  
3 different things?

4 MR. FARRELL: We are.

5 JUDGE STEIN: We're talking about when the - - -  
6 when the condition is initially imposed on the one hand and  
7 the failure to comply with it later on on the other hand?

8 MR. FARRELL: Correct. Again, I'm not - - - I'm  
9 not suggesting to this court - - - because Bearden is very,  
10 very clear. The Supreme Court case in Bearden is very,  
11 very clear. We - - - we can't imprison somebody if they  
12 fail to pay because they can't.

13 JUDGE STEIN: Well, can we order the - - - the  
14 bracelet and the - - - in the first place order the  
15 bracelet and the payment if the defendant is indigent?

16 MR. FARRELL: I don't believe that we - - - we  
17 could order the defendant if he was indigent at the time.  
18 But your - - - your question - - -

19 JUDGE FAHEY: So - - - so - - -

20 MR. FARRELL: - - - raises an important point.

21 JUDGE FAHEY: Should there be an indigency  
22 hearing before it's imposed? Before that penalty's  
23 imposed?

24 MR. FARRELL: Well, I don't think the court  
25 needed it in this case because in this case the defendant



1 was represented by private counsel, in fact, two private  
2 counsels - - -

3 JUDGE FAHEY: Right.

4 MR. FARRELL: - - - that he had hired.

5 JUDGE FAHEY: I understand that.

6 MR. FARRELL: He wasn't indigent at the time of -  
7 - -

8 JUDGE FAHEY: Just slow down, slow down. I  
9 understand that. But I thought later on that he went - - -  
10 he was represented by Legal Aid counsel?

11 MR. FARRELL: He was at the time of the violation  
12 of probation, but the time of the imposition - - -

13 JUDGE FAHEY: All right. And that was - - - let  
14 me just - - - let me just follow up then. So then is that  
15 the time when he said he couldn't pay?

16 MR. FARRELL: That's the time that he said he - -  
17 - he wouldn't pay.

18 JUDGE FAHEY: So when he was represented - - -  
19 when he was represented by Legal Aid was also the time that  
20 he said that he couldn't pay. So people's financial  
21 circumstances change. Should they be punished for that?

22 MR. FARRELL: No. We don't think that they  
23 should.

24 JUDGE FAHEY: Don't you think this leads to that  
25 result?





1 MR. FARRELL: I do not. I think that - - -

2 JUDGE FAHEY: Tell me why.

3 MR. FARRELL: I think that you can - - - you can  
4 have a court that makes a determination, and again, that  
5 determination was made in this case. In fact, the  
6 Appellate Division didn't even address it. They said it  
7 wasn't preserved because - - -

8 JUDGE FAHEY: So - - -

9 MR. FARRELL: - - - because the judge made a  
10 specific finding, I am not sentencing you because you're  
11 indigent.

12 JUDGE FAHEY: No. You know the - - - you know  
13 the record I'm sure better than we do, but - - -

14 MR. FARRELL: I do.

15 JUDGE FAHEY: He admits that freely.

16 MR. FARRELL: You've got to give me that.

17 JUDGE FAHEY: Yeah, yeah.

18 JUDGE RIVERA: You were answering - - - answering  
19 the first part not the second.

20 JUDGE FAHEY: I got to give you that. No  
21 question. No question. So when - - - I'm assuming when he  
22 was assigned Legal Aid that he went through some kind of  
23 indigency - - - indigency review.

24 MR. FARRELL: Nah, that's not usually done.

25 JUDGE FAHEY: Really?



1 MR. FARRELL: Yeah, really.

2 JUDGE FAHEY: You don't fill out a questionnaire?

3 You don't - - -

4 JUDGE FEINMAN: It varies by location, doesn't  
5 it?

6 MR. FARRELL: It's not done where I come from.

7 JUDGE FEINMAN: Yeah.

8 JUDGE FAHEY: No?

9 MR. FARRELL: No. You just say you can't afford  
10 it.

11 JUDGE FAHEY: Well, how do you make the  
12 determination?

13 MR. FARRELL: You just say you can't afford it  
14 and you get free - - - free Legal Aid.

15 JUDGE FAHEY: I see.

16 JUDGE RIVERA: Okay. Well, let me if I may - - -

17 MR. FARRELL: It's very rare that someone's  
18 required to fill out an affidavit. And in this case, he  
19 was offered the opportunity to fill out a financial form.  
20 He said no. And, Judge, I think that that underscores - -  
21 - I don't think you can discern it necessarily from the  
22 record, I think you can if you look real close, of the - -  
23 - and it was in the PSI, that the defendant's actions are  
24 demonstratively - - - demonstrative of a blatant disregard  
25 of authority.



1 JUDGE RIVERA: Well - - -

2 MR. FARRELL: And you see that throughout this  
3 case. He didn't want to do it so he didn't.

4 JUDGE STEIN: Well, did the County Court - - -

5 JUDGE FEINMAN: I just - - -

6 JUDGE STEIN: - - - make a finding of a willful  
7 violation?

8 MR. FARRELL: He did. He did. And he made a  
9 finding that he was not indigent as well. That's very,  
10 very important.

11 JUDGE FEINMAN: Well, so that's what I want to be  
12 clear about.

13 MR. FARRELL: Correct.

14 JUDGE FEINMAN: Let's say we were to agree with  
15 you that you can impose such a condition and that you can  
16 impose, you know, that you wear the bracelet and that you  
17 can impose a condition that you pay for it. That answers,  
18 you know, those questions. But in terms of the actual  
19 applications of this defendant, do we need to remit to the  
20 Appellate Division to determine whether there's factual  
21 support in the record for the County Court's determination  
22 - - -

23 MR. FARRELL: I don't know that you can.

24 JUDGE FEINMAN: - - - regarding indigency?

25 MR. FARRELL: I don't know that you can. It's an



1 interesting question because the Appellate Division - - -

2 JUDGE FEINMAN: That's why I'm asking it.

3 MR. FARRELL: Well, I don't - - - I don't know  
4 the answer, I've got to be honest. Because this court only  
5 reviews questions of law.

6 JUDGE FEINMAN: Right.

7 MR. FARRELL: Not questions of fact. That  
8 factual issue was determined against the defendant by  
9 County Court, and the Appellate Division said it wasn't  
10 preserved and they - - - they weren't going to look at it.  
11 And in fact, they looked at this issue that we're dealing  
12 with right now without briefing by the parties. Neither of  
13 us had the opportunity. It raised it sua sponte basically  
14 in their decision saying, no, no, you can't - - - you can't  
15 impose this condition even on somebody who can afford to  
16 pay.

17 So that begs the next question. If someone can  
18 afford to pay but says I'm not going to - - - and now we go  
19 down the - - - the road because how about for counseling?  
20 How about for mental - - - mental health counseling? How  
21 about drug and alcohol - - - no, I'm not going to get  
22 Medicaid. I'm not going to do it because I - - - because  
23 you know what? I'm going to saddle the taxpayer with that  
24 burden. They can pay for it. I'm not going to get  
25 qualified. Where does that lead? Where does that lead us?



1           This is not a situation, I want to make very  
2 clear, where the - - - where the district attorney's office  
3 has sought to incarcerate someone who was poor. No. Quite  
4 the opposite. We sought to incarcerate him when he had  
5 means. We asked for one to three at the original  
6 sentencing. And then when he willfully disregarded his  
7 obligation, which 65.10 allows the court to impose, he was  
8 sentenced by the court. So I don't really know the answer  
9 to the question, Judge, because factually they decided not  
10 preserved.

11           CHIEF JUDGE DIFIORE: Thank you, Mr. Farrell.

12           MR. FARRELL: Thank you.

13           CHIEF JUDGE DIFIORE: Counsel.

14           MS. FRIEDMAN: Good morning, Your Honors.

15           CHIEF JUDGE DIFIORE: Good morning.

16           MS. FRIEDMAN: May it please the court, excuse  
17 me, Kathryn Friedman representing respondent, Brian Hakes.  
18 Your Honor, in the absence of explicit statutory authority,  
19 it is my contention that we have to look at 65.10[5] and  
20 the reasonable - - - the reasonableness standard in that  
21 section of the statute when looking at the - - - at this  
22 case.

23           JUDGE FEINMAN: Well, so why isn't the - - - the  
24 payment incidental to, you know, what is otherwise probably  
25 I think clearly an okay condition to wear the bracelet?



1 MS. FRIEDMAN: Well, why isn't the payment  
2 incidental to - - -

3 JUDGE FEINMAN: Yeah.

4 MS. FRIEDMAN: So part and parcel of - - -

5 JUDGE FEINMAN: Uh-huh.

6 MR. FARRELL: - - - part and parcel of that  
7 condition? I - - - I think, Your Honors, I don't think  
8 that there is any precedent for that particular view that  
9 if you're under a term of - - - if you're under a term of  
10 probation you necessarily have to pay for it regardless of  
11 your means.

12 JUDGE GARCIA: But he never made a means  
13 application at the time this condition was imposed, right?

14 MS. FRIEDMAN: He - - - he didn't make a means  
15 application, Your Honor. You're right. But throughout - -  
16 -

17 JUDGE GARCIA: So really to find for you we'd  
18 have to say you can never do this because there's nothing  
19 in the record to say they imposed this condition and he  
20 couldn't pay, right?

21 MS. FRIEDMAN: Oh - - - oh, I think there's - - -  
22 there's ample evidence in the record, Your Honor, that he  
23 couldn't pay. And he - - -

24 JUDGE GARCIA: Later there's evidence that he  
25 couldn't pay because he didn't pay. But at the time it was



1 imposed your client doesn't raise I'm going to have  
2 difficulty paying this, he doesn't ask for a hearing. He  
3 accepts that in lieu of a one-to-three-year prison term.

4 MS. FRIEDMAN: I think, Your Honor, my client  
5 made clear at the probation violation hearing that he felt  
6 that he was forced to accept this condition of probation.

7 JUDGE GARCIA: But that's at the violation  
8 hearing.

9 JUDGE FEINMAN: But that's - - - yeah, and that's  
10 retroactive saying I - - - you know, I shouldn't have done  
11 this.

12 MS. FRIEDMAN: I do think that - - - I do think  
13 that the testimony at the probation violation hearing made  
14 clear that my client, despite the findings of County Court  
15 that he was indigent, his - - -

16 JUDGE STEIN: But what should have happened at  
17 the - - - when the condition was initially imposed if he  
18 said I'm really not comfortable with this, I don't think I  
19 can afford it? What - - - what should the court have done  
20 at that point?

21 MS. FRIEDMAN: I - - - I think there should have  
22 been a hearing. I think that he - - - that - - -

23 JUDGE STEIN: And what if the court found you're  
24 right, you can't afford it? Then - - - then what?

25 MS. FRIEDMAN: It - - - well, then there - - -



1 well - - -

2 JUDGE STEIN: Then does he have to be sentenced  
3 to incarceration or does the - - -

4 MS. FRIEDMAN: No, not at all. I mean I think -  
5 - - I think under Bearden v. Georgia it's pretty clear that  
6 the court would have had to take into account other  
7 alternatives to incarceration because in the - - - in the  
8 words of Bearden it would have been fundamentally unfair.

9 JUDGE STEIN: Okay. But that - - - that's not  
10 what happened here because he didn't raise it at the time.  
11 He raises it at the - - - at the violation stage.

12 MS. FRIEDMAN: The - - -

13 JUDGE STEIN: So is it the same inquiry then,  
14 look at alternatives, other alternatives?

15 MS. FRIEDMAN: I absolutely think so, Your Honor.  
16 Yes.

17 JUDGE STEIN: So - - - so is that the error here?

18 MS. FRIEDMAN: I think that's certainly one of  
19 the errors that - - - that the court did not delve into  
20 that issue or I guess - - - and again, in the word of  
21 Bearden provide an adequate inquiry.

22 JUDGE RIVERA: So, counsel, I just want to be  
23 clear on what your argument is. I get this part of the  
24 argument. Are - - - did you start out with your argument  
25 being that you couldn't - - - the judge couldn't impose the





1 fee anyway? Is that where you start? Or is your position  
2 you can impose the fee on someone who can carry the fee but  
3 not on someone who can't?

4 MS. FRIEDMAN: That's my argument, Your Honor.

5 JUDGE RIVERA: The second, not the first?

6 MS. FRIEDMAN: That's correct, Your Honor.

7 JUDGE RIVERA: Okay. So where's - - - I'll ask  
8 you the same question I asked your adversary. Where is the  
9 statutory authority to impose the costs?

10 MS. FRIEDMAN: So that - - - that I think is the  
11 rub in this case.

12 JUDGE RIVERA: Okay. So - - -

13 MS. FRIEDMAN: That in the absence of explicit  
14 statutory authority we are left with 65.10[5]. That's what  
15 we - - - or I should say you have - - - have to deal with.  
16 And I think that the Appellate Division, although the  
17 Appellate Division didn't explicitly, obviously, state  
18 that, the fact that they relied on People v. - - - People  
19 v. - - -

20 JUDGE RIVERA: I'm a - - - I'm a little unclear.  
21 Is your position that it's reasonable under [5] - - -

22 MS. FRIEDMAN: Yes.

23 JUDGE RIVERA: - - - if the person can afford it  
24 but it's unreasonable if they can't? Or is your position  
25 it's not reasonable to impose a fee regardless of means?

1 MS. FRIEDMAN: The first, Your Honor. It's if -  
2 - - if a defendant can pay - - -

3 JUDGE RIVERA: Then it should be charged. Okay.

4 MS. FRIEDMAN: - - - then it's - - - correct,  
5 it's reasonable.

6 JUDGE RIVERA: Okay. So then how does that fit  
7 the rest of the conditions of [5]?

8 MS. FRIEDMAN: I'm sorry?

9 JUDGE RIVERA: "To ameliorate the conduct which  
10 gave rise to the offense or to prevent incarceration of the  
11 defendant"? I know your adversary's position is that it  
12 fits the former. Is that also your position?

13 MS. FRIEDMAN: I - - - I'm sorry. You'll have to  
14 repeat the question.

15 JUDGE RIVERA: Okay. I'm sorry. Is the mic not  
16 - - - I'm sorry. I'm sorry if you're not hearing me on the  
17 mic. I'm asking since you think Section [5] does authorize  
18 the fee for those who have the means to pay then what  
19 section that has these other requirements does the fee  
20 satisfy or fall under, right? It says as necessary or  
21 appropriate "to ameliorate the conduct which gave rise to  
22 the offense or to prevent the incarceration of the  
23 defendant." Which one do you say the fee fits?

24 MS. FRIEDMAN: Prevent the incarceration of the  
25 defendant.



1 JUDGE RIVERA: So I'm - - - I'm not sure I'm  
2 understanding that argument. Can you explain that a little  
3 bit more to me?

4 MS. FRIEDMAN: I mean I apologize, Your Honor.

5 JUDGE RIVERA: One can impose the fee to avoid  
6 incarceration of the defendant?

7 MS. FRIEDMAN: One can impose - - -

8 JUDGE RIVERA: Or the court can, I'm sorry.

9 MS. FRIEDMAN: Yeah. A court can impose a fee  
10 for an electronic monitoring device to avoid incarceration  
11 of a defendant.

12 JUDGE RIVERA: Well - - - well, the electronic  
13 device avoids incarceration.

14 MS. FRIEDMAN: Oh, I see what you're saying.

15 JUDGE RIVERA: How does the fee avoid the  
16 incarceration?

17 MS. FRIEDMAN: I see what you're saying.

18 JUDGE RIVERA: Because it's a separate condition.  
19 Your adversary takes the position that Section [4] covers  
20 the device.

21 MS. FRIEDMAN: Yeah.

22 JUDGE RIVERA: But [5] covers the fee. So how  
23 does the fee satisfy these requirements of the provision?

24 MS. FRIEDMAN: That's a great point, Your Honor.  
25 That's a great point.



1 JUDGE RIVERA: Yeah, well - - -

2 MS. FRIEDMAN: I mean again in the absence of  
3 explicit statutory language this is what we have to deal  
4 with. We have to - - - we have to deal with [5].

5 JUDGE FAHEY: So - - - so does it then come down  
6 to the catch-all provision?

7 MS. FRIEDMAN: I believe so, Your Honor. Until  
8 the legislature passes an explicit statute, I think that  
9 this is what we have.

10 JUDGE FAHEY: Well - - -

11 JUDGE STEIN: So would this also be the same for  
12 other types of rehabilitative programs like substance abuse  
13 programs and - - -

14 JUDGE FEINMAN: Mental health.

15 JUDGE STEIN: - - - mental health and - - -

16 MS. FRIEDMAN: I think - - - I think that there  
17 are other provisions in the statute as the New York - - -

18 JUDGE FAHEY: Well, let me just follow-up on  
19 Judge Stein's question because that's a good point. When  
20 you're talking about an electronic monitoring bracelet, is  
21 that a deterrence device or is it a device for  
22 rehabilitation? The way I understand the cases, cost for  
23 rehabilitation can - - - or say psychiatric costs, medical  
24 costs, characteristically come out of the defendant. Cost  
25 for deterrence, put somebody in jail, a deterrent, those



1 costs do not come out of the defendant. So where does this  
2 fall on the divide?

3 MS. FRIEDMAN: So - - - so it is a cost for  
4 rehabilitation but particularly with regard - - -

5 JUDGE FAHEY: Is it a cost for rehabilitation or  
6 a cost for deterrence? I guess I don't - - - it seems to  
7 me it's a monitoring device so it's similar to - - - so to  
8 make sure that you - - - where you are and the police know  
9 where you are all the time. It's like being locked up  
10 electronically.

11 MS. FRIEDMAN: I would suggest it is a cost for  
12 deterrence because we're dealing with a condition of  
13 probation. And in - - - and - - -

14 JUDGE RIVERA: But it's tied to public safety; is  
15 it not?

16 MS. FRIEDMAN: I'm sorry?

17 JUDGE RIVERA: It's tied to public safety; is it  
18 not?

19 MS. FRIEDMAN: Yes.

20 JUDGE FAHEY: Just like an ignition - - - the  
21 device you breathe into, what do they call it, the ignition  
22 device?

23 JUDGE WILSON: Interlock device.

24 JUDGE FAHEY: Yeah, the ignition - - - Judge  
25 Wilson's got it right, the ignition interlock device.



1 MS. FRIEDMAN: That's correct, Your Honor. And  
2 in - - - I think it's Vehicle and Traffic Law 1185 - - - I  
3 can't recall the sub - - - the subsection. They - - - that  
4 specifically allows for the circumstance where an  
5 individual cannot pay. And if an - - - if an individual  
6 cannot pay, then arrangements are made with the provider of  
7 the electronic device or the interlock ignition device. So  
8 - - - so I think the rub here is that the - - - there is no  
9 statutory language - - -

10 JUDGE FAHEY: Well, there's that and there's a  
11 question of does it matter when the individual says they  
12 cannot pay? For instance, I get arrested for drunk  
13 driving. I have a job. I'm able to pay for things. Later  
14 on, six months in, I do my six months, and now I'm on  
15 probation, and I lose my job as a result of my jail time.  
16 My financial circumstances have changed. Is a hearing  
17 required at that point, or is a hearing required at the  
18 point that the sentence is imposed and that that's the only  
19 chance you get at a hearing?

20 MS. FRIEDMAN: I think - - - I think, you know,  
21 in that - - - in the way you phrased the question it would  
22 - - - it would depend.

23 JUDGE FAHEY: Well, I phrased it that way because  
24 this defendant seems to fall - - - at least the sentencing  
25 structure seems to fall that way. So - - -



1 MS. FRIEDMAN: Yeah. I mean I think that an  
2 indigency hearing could have been held.

3 JUDGE STEIN: Well, could the defendant also have  
4 asked for a modification of the terms and conditions of his  
5 probation?

6 MS. FRIEDMAN: And - - - and asked for a  
7 reduction in - - - or not being have - - - not having to  
8 pay? Is it - - -

9 JUDGE GARCIA: Or not having the monitor.

10 MS. FRIEDMAN: Not - - - not having the monitor?

11 JUDGE STEIN: Having some other - - -

12 MS. FRIEDMAN: I suppose that probably could have  
13 been requested, but again in - - - in the context of this  
14 case that wasn't requested. And - - -

15 JUDGE RIVERA: Can I - - - can I ask, I may have  
16 misunderstood the record. Is there some point that either  
17 probation or someone else had informed the court that they  
18 felt that it was no longer necessary for him to wear this  
19 device?

20 MS. FRIEDMAN: Absolutely. He had provided - - -

21 JUDGE RIVERA: Okay. At what point did that  
22 happen and who was that?

23 MS. FRIEDMAN: At the probation violation hearing  
24 I believe. It was pretty clear that he was abiding by all  
25 the terms of the probation, and - - - and he was being

1 successful.

2 JUDGE FEINMAN: And I - - -

3 JUDGE RIVERA: So that was - - - I'm sorry.

4 JUDGE FEINMAN: Before you sit down, I want to  
5 ask you the one question that I asked your adversary which  
6 is if we were to hold that you can impose this condition  
7 and - - - and you can require him to pay for it then what?  
8 Do we just affirm the conviction? Do we remit it to the  
9 Appellate Division to - - - to look at what actually  
10 happened and determine whether it was an abuse of  
11 discretion? Do we just send it back to the County Court?  
12 Do we send it to the Appellate - - - you know - - -

13 MS. FRIEDMAN: I - - - well - - -

14 JUDGE FEINMAN: You know, it's a legal question  
15 of - - -

16 MS. FRIEDMAN: Yeah, yeah, yeah.

17 JUDGE FEINMAN: - - - whether it can be imposed  
18 is answered not in favor of your client then what?

19 MS. FRIEDMAN: Yeah. Well, I would - - - I would  
20 suggest that the court - - - well, the court could send it  
21 back to either County Court or the Appellate Division to  
22 make findings of fact. I would - - - you would have to  
23 bring in - - -

24 JUDGE FEINMAN: So you don't think that the  
25 County Court already determined that he wasn't indigent and





1 that this was a willful violation?

2 MS. FRIEDMAN: I - - - I absolutely agree that  
3 County Court did not conduct a sufficient inquiry that  
4 would meet the standards of Bearden v. Jordan. I  
5 absolutely think that it failed to meet the Bearden  
6 standard. And so County Court could conduct a - - - or has  
7 to conduct a sufficient inquiry and make findings of fact.  
8 I think maybe the - - - the Appellate Division, you could  
9 send it back to the Appellate Division and have them  
10 determine whether or not - - - you know, make their own  
11 findings of fact. Obviously, you are a court of law, and  
12 you can't do that.

13 JUDGE FEINMAN: And - - - and what about your  
14 adversary's point that they already said that it was  
15 unpreserved?

16 MS. FRIEDMAN: Well, the court - - - I would say,  
17 with all due respect, erred in - - - in the regard.  
18 Because I think if you look at the record the Bearden claim  
19 was raised consistently at the - - - at the arraignment, at  
20 the parole violation hearing, raised by assigned counsel at  
21 the Appellate Division, and I raised it in my brief as  
22 well. The Bearden standard is I think what really rubs  
23 people the wrong way with regard to what County Court did.  
24 The County Court forced someone - - - if that stands, it  
25 forces someone to choose between food and shelter and



1 paying 4,000 dollars a year for an electronic monitoring  
2 bracelet.

3 CHIEF JUDGE DIFIORE: Thank you, Ms. Friedman.  
4 Counsel?

5 MR. FARRELL: Judge Fahey, to - - -

6 JUDGE RIVERA: So - - - so, counsel, can I just  
7 ask is it the People's position that the bracelet should be  
8 treated in terms of the statutory authorization and - - -  
9 and this question about paying by means if you have the  
10 means like the IID, the like interlock ignition device - -  
11 -

12 MR. FARRELL: We suggest - - - we - - -

13 JUDGE RIVERA: - - - that's how it should be  
14 treated?

15 MR. FARRELL: We did suggest that in our brief to  
16 the court. We believe - - - again, we do not believe that  
17 if a person is truly indigent - - -

18 JUDGE RIVERA: Okay.

19 MR. FARRELL: - - - that they should be  
20 incarcerated for failure to pay. But we - - -

21 JUDGE RIVERA: Because the - - - did IID sections  
22 that provide for this safety net, if you will, talk about  
23 indigency? What's the standard for that?

24 MR. FARRELL: They do talk about - - -

25 JUDGE RIVERA: But what is the standard?



1 MR. FARRELL: I believe it's - - -

2 JUDGE RIVERA: It's not indigency?

3 MR. FARRELL: I don't know that the word  
4 indigency is used but certainly ability - - -

5 JUDGE RIVERA: Does it - - - it's short of - - -

6 MR. FARRELL: - - - ability to pay.

7 JUDGE RIVERA: - - - indigency, right?

8 MR. FARRELL: Ability to pay. And there's a - -  
9 - there's a - - -

10 JUDGE RIVERA: And the burden on the individual  
11 and the family - - -

12 MR. FARRELL: Correct.

13 JUDGE RIVERA: - - - does that sound familiar?

14 MR. FARRELL: Financial affidavit, things of that  
15 nature.

16 JUDGE RIVERA: Yeah. So - - - so if the - - - if  
17 the legislature has that language and we can point to it  
18 and it doesn't have that language for the bracelet, why are  
19 we able as a court to now read the statute as containing  
20 language that's not found anywhere in these provisions?

21 MR. FARRELL: Because I believe that that statute  
22 - - - and when it was passed, remember when it was passed.  
23 That statute vests broad authority in the court to fashion  
24 reasonable conditions. I don't think it's unreasonable - -  
25 - and I don't think this court can find that it's



1 unreasonable - - -

2 JUDGE RIVERA: Right, but how does it - - -

3 MR. FARRELL: - - - to have somebody pay for a  
4 device which they can afford to pay for and for - - -

5 JUDGE RIVERA: You're right, and the legislature  
6 might very well agree with you. But my question is is it  
7 appropriate to ameliorate the conduct which is where you  
8 say it fits - - -

9 MR. FARRELL: Yes, and that - - - that's - - -

10 JUDGE RIVERA: - - - tell me how the fee  
11 ameliorates the conduct.

12 MR. FARRELL: And - - - and that was back to my -  
13 - - my point with Judge Fahey - - - and I want to address  
14 what - - - what he raised with my adversary, whether the  
15 SCRAM bracelet is rehabilitative or is a deterrent.

16 JUDGE FAHEY: Deterrence, yeah.

17 MR. FARRELL: I think - - - I think it's both  
18 because when you're wearing that SCRAM bracelet you know  
19 that your alcohol is going to be tested every thirty  
20 minutes, and that helps you, in part, not consume alcohol  
21 which is good for your rehabilitation because when you  
22 consume alcohol, obviously, it - - - it turns you in a  
23 different direction. So I think it's both.

24 JUDGE WILSON: The legislature imposes a - - -

25 MR. FARRELL: I think it's both.



1 JUDGE WILSON: - - - bunch of different types of  
2 fees, right? There's a crime victim's assistance fee,  
3 there's a probation fee. There's a DNA registry fee.  
4 Those are specified by the legislature. This is not. And  
5 my understanding, correct me if I'm wrong, is that if you -  
6 - - if you're a defendant and you are assessed one of those  
7 fees and you fail to pay it, your probation is revoked on  
8 account of that; is that right?

9 MR. FARRELL: Well, it could be if it's a willful  
10 violation. That's our position. Our position is if - - -  
11 if you've given the SCRAM bracelet and then you willfully  
12 don't pay for it reasonably - - -

13 JUDGE WILSON: And - - - and if you willfully -  
14 - -

15 MR. FARRELL: - - - then the judge can  
16 incarcerate.

17 JUDGE WILSON: And if you willfully don't pay the  
18 DNA fee your probation is revoked?

19 MR. FARRELL: Well, yeah, sure. You could - - -  
20 you could be violated for not paying the court fees as  
21 well.

22 JUDGE WILSON: Because - - -

23 MR. FARRELL: Again, but there's a means - - -  
24 there's a means test. Does the person have the means? In  
25 this case, he had the means. And I think back to your



1 point, Judge Feinman, with respect to what can you do I  
2 think the facts have been decided here.

3 JUDGE FEINMAN: Well, the question is what's the  
4 next step is basically.

5 MR. FARRELL: What I'd like you to do? I'd like  
6 you to reverse the Appellate Division's decision that  
7 basically says this cannot be imposed in any case. Even my  
8 adversary concedes that it can be imposed where someone has  
9 the means to pay for it. I don't think that we should have  
10 a situation where the taxpayers are saddled with these  
11 costs when people who drive their cars drunk, crash into  
12 brick walls like this gentleman did - - - and it was his  
13 third offense, not his first, not his second.

14 JUDGE FEINMAN: Yeah, yeah.

15 MR. FARRELL: Right. That the taxpayers not be  
16 saddled with that and that people of means be able to - - -  
17 to meet their obligations. And you know what - - -

18 JUDGE RIVERA: So that sounds fair - - -

19 MR. FARRELL: - - - that's part of  
20 rehabilitation.

21 JUDGE RIVERA: It's a good - - - that sounds - -  
22 - excuse me. It sounds fair, but again, you said the fee  
23 comes under provision [5]. I'm - - - I'm trying to get you  
24 to explain to me how the fee ameliorates the conduct. I  
25 understand your argument about the bracelet. It makes



1 total sense to me. But you said the bracelet falls under  
2 [4]. There's no requirement under [4] about ameliorating  
3 the conduct. How does the fee ameliorate the conduct?

4 MR. FARRELL: The fee ameliorates the conduct  
5 because ameliorate means make better. Well, when you meet  
6 your financial obligations you make everything better,  
7 including for the taxpayers for the state of New York.

8 JUDGE RIVERA: So is your position then that the  
9 fee is inter - - - is connected to the bracelet, you can't  
10 de-couple them? Even though you were saying [4] gives you  
11 the authority for the bracelet and [5] gives you the  
12 authority for the fee, but, really, they're a package deal?  
13 Even though you were de-coupling them you're really arguing  
14 that the authority - - -

15 MR. FARRELL: They were passed together.

16 JUDGE RIVERA: - - - is based that way?

17 MR. FARRELL: And I mean obviously we didn't have  
18 that statute before we have electronic monitoring come out  
19 of McNair.

20 JUDGE RIVERA: Does it sound a little - - -

21 MR. FARRELL: Didn't have it.

22 JUDGE RIVERA: But does it sound a little unusual  
23 to have [4] but the authority for the requirement, the  
24 device, and then [5] just be sort of the catch-all and  
25 that's where you would now talk about cost and so forth?



1 MR. FARRELL: I don't want to be funny, but are  
2 you asking me if the legislature is passing unusual laws?

3 JUDGE RIVERA: No. I'm - - - I'm asking - - -

4 MR. FARRELL: Sometimes they do.

5 JUDGE RIVERA: No. I know you're not trying to  
6 be funny, but I'm asking you about the structure of the  
7 statute and a very serious matter about someone being  
8 returned to jail because they're not paying this fee. And  
9 I'm just trying to get clear the People's position about  
10 the authorization for the fee.

11 MR. FARRELL: I think the - - - I think the  
12 legislature granted the court - - -

13 JUDGE RIVERA: Okay.

14 MR. FARRELL: - - - broad authority to impose  
15 reasonable conditions. That's what it says. It's passed  
16 in conjunction with, yes, you can order someone to wear a  
17 bracelet, a SCRAM bracelet, and now we've got this catch-  
18 all that basically says anything that's reasonable. And  
19 they're passed together, so I think yes.

20 JUDGE RIVERA: Okay.

21 JUDGE FEINMAN: So - - - so - - - yeah, I see  
22 your red light's on, but I don't think you quite finished  
23 what you were going to say to me. If we get past the first  
24 question that the - - - that the County Court can impose  
25 these conditions what should happen here?





1 MR. FARRELL: Well, I think that you should  
2 reverse the Appellate Division's decision and find that  
3 where a person has the ability to pay the person can be  
4 made to pay. Where they're not, obviously, we don't  
5 disagree. We think Bearden controls.

6 JUDGE FEINMAN: All right. And - - -

7 MR. FARRELL: And they cannot be made to pay.

8 JUDGE FEINMAN: And then bind that to this  
9 particular set of facts?

10 MR. FARRELL: Yes.

11 JUDGE FEINMAN: Remit a firm - - -

12 MR. FARRELL: Reverse.

13 JUDGE FEINMAN: Reverse.

14 MR. FARRELL: Reverse, because the facts again -  
15 - - I don't know that the court can get involved in the  
16 facts. The facts are determined the judge said no.

17 CHIEF JUDGE DIFIORE: Thank you, Mr. Farrell.

18 MR. FARRELL: You willfully did not pay.

19 JUDGE FEINMAN: Okay.

20 MR. FARRELL: Thank you.

21 (Court is adjourned)

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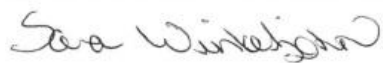
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Brian Hakes, No. 139 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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