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**Supreme Court**  
No. 2009-SC-589

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**COMMONWEALTH OF KENTUCKY**

**APPELLANT**

**V**

On Discretionary Review  
Court of Appeals No. 2008-CA-1093  
Appeal from the Graves Circuit Court  
Honorable Timothy C. Stark, Judge  
Indictment No. 06-CR-00212

**MARK JOHNSON**

**APPELLEE**

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**Reply Brief for Commonwealth**

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**Submitted by:**

**JACK CONWAY**

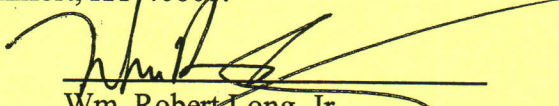
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**CERTIFICATE OF SERVICE**

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Reply Brief for Commonwealth has been mailed this 21st day of July, 2010 to Samuel Givens Jr., Office of the Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9229; Hon. Timothy C. Stark, Judge, Graves Circuit Court, Courthouse Box 5, 100 East Broadway, Mayfield, KY 42066; sent electronically to Hon. David Hargrove, Commonwealth's Attorney, 205 North 6<sup>th</sup> Street, Mayfield, KY 42066; and sent via messenger mail to Hon. Gene Lewter, counsel for respondent, 100 Fair Oaks Lane, Suite 301, Frankfort, KY 40601.

  
Wm. Robert Long, Jr.  
Assistant Attorney General

## **INTRODUCTION**

This brief is intended to reply to those matters presented in the Appellee's Brief. Specifically, this brief addresses the appellee's misinterpretation of Gamble v. Commonwealth, 293 S.W.3d 406 (Ky.App. 2009).

**STATEMENT OF POINTS AND AUTHORITIES**

**INTRODUCTION** ..... i

**STATEMENT OF POINTS AND AUTHORITIES** ..... ii

**ARGUMENT** ..... 1

**THE APPELLEE MISINTERPRETS GAMBLE V. COMMONWEALTH AND HIS PROBATION REVOCATION IS IMPLICITLY VALID** ..... 1

Gamble v. Commonwealth,  
293 S.W.3d 406 at 411-412 (Ky. App., 2009) ..... 1

Bearden v. Georgia,  
461 US 660 (1983) ..... 1

State v. Nordahl,  
680 N.W.2d 247 (N.D. 2004) ..... 1

Dickey v. State,  
570 S.E.2d 634 (Ga. App., 2002) ..... 1

Commonwealth v. Payne,  
602 N.E.2d 594 (Mass. App. Ct., 1992) ..... 1

Patton v. State,  
458 N.E.2d 657 (Ind. Ct. App., 1984) ..... 2

State v. Caballero,  
464 So.2d 939 (La. App. 1985) ..... 2

KRS 532.350 ..... 2

Hensley v. Commonwealth,  
217 S.W.3d 885, 887 (Ky. App. 2007) ..... 2

**CONCLUSION** ..... 3

## ARGUMENT

### THE APPELLEE MISINTERPRETS GAMBLE V. COMMONWEALTH AND HIS PROBATION REVOCATION IS VALID.

The appellee significantly misinterprets Gamble v. Commonwealth, 293 S.W.3d 406 (Ky. App. 2009). His probation revocation is valid because the appellee explicitly bargained for child support payments in order to avoid significant jail time, and default on such payments must result in a revocation of his probation.

In Gamble a unanimous Court of Appeals opined that where a defendant is not involuntarily sentenced by the court to pay a fine as a condition of their probation or conditional discharge and negotiates child support payments to avoid significant jail time, the requirements of Bearden v. Georgia, 461 U.S. 660 (1983), do not apply, and their revocation is valid. Gamble v. Commonwealth, 293 S.W.3d 406 at 411-412 (Ky. App. 2009).

Other courts have also held that where a defendant bargains for restitution payments to avoid jail time and fails to make said payments, the revocation of their probation is implicitly valid. State v. Nordahl, 680 N.W.2d 247 (N.D. 2004) (explaining that allowing a defendant to avoid restitution through subsequent claims of indigence after entering into a plea agreement would result in a windfall to the defendant); Dickey v. State, 570 S.E.2d 634 (Ga. App., 2002) (holding that Bearden was inapplicable where defendant negotiated for a probated sentence provided that he pay restitution and subsequently defaulted); Commonwealth v. Payne, 602 N.E.2d 594 (Mass. App. Ct., 1992) (holding that the plea bargain itself was tantamount to the representation by the defendant that he would pay restitution, otherwise there would have been no bargain and sentencing would have taken its normal course); Patton v. State, 458 N.E.2d 657

(Ind. Ct. App., 1984) (affirming defendant's probation revocation where he claimed indigence after defaulting on restitution payments that were pursuant to a plea agreement and probated sentence).

As pointed out by the Louisiana Appellate Court in State v. Caballero, 464 So.2d 939 (La. App. 1985):

To hold otherwise would permit defendants, either in good or bad faith, to bargain for payment of a fine in exchange for a suspended sentence, renege, and then avoid incarceration or any other punishment for the offense committed. “Cabellero, 464 So.2d at 943 (quoted in Dickey, 570 S.E.2d at 637 (Ga. App. 2002)).

While the appellee is correct in his assertion that Gamble also stands for the proposition that money owed for past due child support payments constitutes “restitution” within the meaning of KRS 532.350 and, as such, the requirements of Bearden, supra, must be met prior to the revocation of a defendant's probation or conditional discharge, Bearden is distinguishable when an appellee bargains for conditional discharge pursuant to regular child support payments in order to avoid significant jail time. “Courts have recognized that accepted plea bargains are binding contracts between the government and defendants...[and] a defendant who materially fails to preform the agreement, however is not entitled to enforce performance by the Commonwealth.” Hensley v. Commonwealth, 217 S.W.3d 885, 887 (Ky. App. 2007). While the child support payments here do constitute restitution, Bearden is inapplicable and the appellee's probation revocation is implicitly valid.

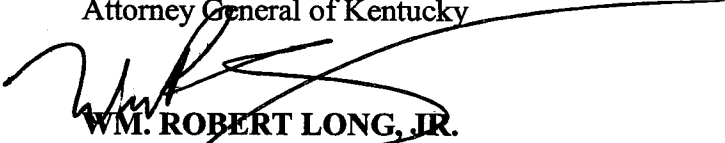
## **CONCLUSION**

As demonstrated above, appellee's reliance on Gamble v. Commonwealth is misplaced as it does not support invalidating the trial court's revocation of his probation. Pursuant to Gamble, the trial court was required to revoke his probation because the appellee specifically bargained for child support payments in order to avoid jail time.

WHEREFORE, for the foregoing reasons, the Commonwealth respectfully requests that the Court of Appeals' Opinion Vacating and Remanding be reversed and that the Graves Circuit Court's May 14, 2008, order revoking the appellee's conditional discharge be reinstated.

Respectfully submitted,

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