STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE**
COUNTY OF MECKLENBURG	**SUPERIOR COURT DIVISION** **16CRS212564**
STATE OF NORTH CAROLINA **v.** [redacted], **Defendant.**	**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND/OR FOR DISCOVERY**

Imagine two individuals in Mecklenburg County who commit essentially identical crimes. Mr. Smith, a salesperson at a large department store, pockets cash belonging to the store totaling $1900. Ms. Jones, a courier for a delivery service, siphons off $1900 worth of goods and payments. Neither has any criminal record. Both are arrested and charged with felony larceny by employee, a Class H felony carrying the possibility of 6-17 months in prison.

Under the current policy of the Mecklenburg County District Attorney's Office, both individuals are automatically offered the opportunity to participate in a deferred prosecution program whereby the felony will ultimately be dismissed upon successful completion of a two-year probationary period. However, neither is allowed into the program unless and until the restitution owed is paid down to $1,000.

Mr. Smith is fortunate to come from a wealthy family and borrows money from a relative to make restitution payments to the department store. After making a $900 payment, he is admitted into the deferred prosecution program, successfully completes it, and is able to maintain a clean criminal record without being subject to incarceration.

Ms. Jones comes from a poor family and has no one who can help. After months of seeking continuances in an attempt to cobble together the $900, she eventually has no choice but to set the case on the trial calendar. The matter results in a conviction. Ms. Jones is sent to prison for four months with probation upon release. She now has a permanent felony conviction.

I. THE POLICY OF THE MECKLENBURG COUNTY DISTRICT ATTORNEY'S OFFICE, WHEREBY THOSE WHO CAN PAY RESTITUTION UP FRONT ARE GRANTED ENTRY INTO THE DEFERRED PROSECUTION PROGRAM AND THOSE WHO CANNOT ARE REFUSED ENTRY, DENIES EQUAL PROTECTION TO THE POOR AND CONSTITUTES SELECTIVE PROSECUTION.

The policy that results in these disparate outcomes, where inability to pay determines who is sent to prison, who is subject to probation, and who ends up with a permanent felony conviction, offends the principles enshrined in our State and Federal Constitutions. In particular, the policy applied to [redacted] constitutes unconstitutional selective prosecution in violation of equal protection under the law.

As the evidence has shown, [redacted] was charged with felony larceny[1] involving $1899 of restitution. He is now subject to the above policy. As much as he would like to be able to pay the $799 preventing him from entering a program that could stave off incarceration, probation, and a felony record, he is unable to do so. In the months since he was charged, he has lost his job as an audio/visual technician, come to sleep in the cars of his friends, and sent his son to live with his mother in Pennsylvania. He has diligently applied to dozens of jobs but has struggled to find employment. Though he worked for a short time at Captain D's restaurant as a cook, the bulk of this income went to child support obligations, and he was unable to put more than $100 toward restitution in the present case.

In *Griffin v. Illinois*, 351 U.S. 12 (1956), the United States Supreme Court directly addressed the question of whether poverty should determine outcomes in the criminal justice system. The issue was whether indigent persons could be denied a chance to appeal due to their inability to pay for the mandatory trial transcript. The petitioners contended that "refusal to afford full appellate review solely because of poverty was a denial of due process and equal protection." *Id.* at 15. The Court meditated:

> Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Charta: "To no one will we sell, to no one will we refuse, or delay, right or justice. . .
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> These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system -- all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court."

Id. at 16-17 (internal citations omitted).

[1] The State originally charged [redacted] by warrant with embezzlement but elected to charge him with felony larceny upon indictment. The State offered [redacted] deferred prosecution under both charges.

The Supreme Court ultimately agreed with the petitioners, holding that "[i]n criminal trials, a State can no more discriminate on account of poverty than on account of religion, race, or color." *Id.* at 17. The Court went on to explain, "[p]lainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial." *Id.* at 17-18.

The reasoning in *Griffin* was applied again in *Douglas v. California*, 372 U.S. 353 (1963), in which the Supreme Court held that it violated equal protection for a state to deny counsel to indigent criminal defendants on appeal from a conviction. The Court declared that the "evil" of "discrimination against the indigent" was the same as that in *Griffin*: "For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'" *Douglas*, 372 U.S. at 355 (quoting *Griffin*, 351 U.S. at 19). The *Douglas* Court explained:

> [U]nder its present practice the type of an appeal a person is afforded in the District Court of Appeal hinges upon whether or not he can pay for the assistance of counsel. If he can the appellate court passes on the merits of his case only after having the full benefit of written briefs and oral argument by counsel. If he cannot the appellate court is forced to prejudge the merits before it can even determine whether counsel should be provided.

Id. at 355-56. The Court concluded that "an unconstitutional line ha[d] been drawn between rich and poor." *Id.* at 357.

Thus, the Supreme Court in *Griffin* and *Douglas* established that in the criminal context, drawing binary lines based on poverty—where one track is available to those with money, and a wholly different track is left to those without—cannot be countenanced under the Fifth and Fourteenth Amendments.

In the present case, [redacted] does not contend that the State is depriving him of his right to plead not guilty and put the State to its proof. The fundamental unfairness is that others do not have to do so—that others can merely pay and avoid trial, can merely pay and avoid incarceration, can merely pay and avoid a felony conviction. [redacted] receives a wholly separate and unequal justice.

The State's rejoinder may be that *Griffin* and *Douglas* involved procedural protections, the right to an appeal and the right to counsel on an appeal, whereas this case involves discretionary plea offers made by the State. However, the interest involved here is even more significant than the right to an appeal or to an appellate lawyer. What is at stake here is the alpha and omega of the case—the very resolution of the prosecution, not merely the tools to ensure fair appellate review. At stake is conviction or dismissal, prison or freedom, conditions of probation or the liberty to do as you please. The District Attorney's policy does not impact the result in subtle, difficult-to-measure ways as when the rich are able to afford superior counsel compared to the counsel afforded to the poor. The policy creates a stark, binary distinction, with light consequences offered to those who can pay and heavy

consequences for those who cannot. *See Bearden v. Georgia*, 461 U.S. 660, 665 (1983) (holding that the issue in an equal protection analysis is "whether the State has invidiously denied one class of defendants *a substantial benefit available to another class of defendants*") (emphasis added).

It makes no difference that the opportunity to participate in deferred prosecution is not a right but a privilege—an offer extended by the State. Even where the State has no obligation to offer a particular benefit, where the "State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution…." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). *See also Morrissey v. Brewer*, 408 U.S. 471, 481-84 (1972) (holding that though the State has great discretion in setting policies governing parole decisions, it must nonetheless make those decisions in accord with the Due Process Clause).

Our own State Constitution also has something to say about "'equality before the bar of justice.'" *Griffin*, 351 U.S. at 17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)). Article I, Section 19 of the North Carolina State Constitution provides, "No person shall be denied the equal protection of the laws." Our Appellate Courts have explicated this clause in selective prosecution cases. *See S.S. Kresge Co. v. Davis*, 277 N.C. 654 (1971) (comparing selective prosecution claims under Article I, Section 19 of the North Carolina State Constitution with the Fourteenth Amendment to the United States Constitution). "[T]he district attorney may not, during the exercise of his discretion, transcend the boundaries of the Fourteenth Amendment's guarantee of equal protection." *State v. Spicer*, 299 N.C. 309, 312 (1980). "To prevail on a selective prosecution challenge, a defendant must first make a prima facie showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not." *State v. Rogers*, 68 N.C. App. 358, 367 (1984) (quotation omitted). *Accord United States v. Armstrong*, 517 U.S. 456, 458 (1996) ("The claimant must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose.") (quotation omitted).

The evidence unequivocally establishes discriminatory effect since the State "declined to prosecute similarly situated suspects" who had the ability to pay restitution. *Armstrong*, 517 U.S. at 458. *See also State v. Pope*, 213 N.C. App. 413, 415 (2011) (requiring a defendant claiming selective prosecution to show he has "been singled out for prosecution while others similarly situated and committing the same acts have not") (quotation omitted). The record includes sixteen other defendants who were charged with crimes eligible for diversion under the State's policy and who owed over $1,000 of restitution. In this, they are identical to [redacted]. These other defendants were offered deferred prosecution conditioned, per policy, upon paying the balance of the restitution to $1,000. In this, they are identical to [redacted]. These other defendants paid the balance of their restitution down to $1,000 or less. In this, they differ from [redacted]. And these other defendants, differing in this one respect from [redacted], entered deferred prosecution. Moreover, the State's two offers of

deferred prosecution to [redacted] foreclose any argument that there is something different about him from these other defendants—something besides wealth.

Our North Carolina Court of Appeals has ruled that when the State creates one track—dismissal—for those with money and one track—prosecution—for those without, the State has selectively prosecuted in violation of the law. In *In re Register*, 84 N.C. App. 336 (1987), seventeen juveniles allegedly broke into a residence. The juveniles who were prosecuted were "unwilling or unable to pay $1,000 compensation to [the victim] while other juveniles similarly situated were not prosecuted because they, or their parents, were able or willing to pay $ 1,000 to the complainant." *Id.* at 341. The Court concluded that the juveniles who had been prosecuted had received "unequal treatment. . . by design." *Id.* at 341, 345-46.

Though *Register* arose in the context of the juvenile justice system, the principles espoused therein apply with equal force to the adult criminal justice system. In fact, the *Register* Court cited directly to adult criminal cases in setting forth the moving party's burden in maintaining a claim of selective prosecution: the moving party "must show that in the exercise of that discretion there has been intentional or deliberate discrimination by design." *Id.* at 341 (citing *State v. Spicer*, 299 N.C. 309 (1980)).

Noting that "[a]ll of [Register's] contentions ha[d] merit," the *Register* Court unequivocally concluded that determining who is prosecuted based on who pays restitution and who does not violates equal protection and selective prosecution principles. *Id.* at 340. The Court's extensive analysis regarding equal protection and selective prosecution was essential to the ultimate holding, for it was the discrimination between those willing and able to pay and those unwilling or unable to pay that was the crux of the wrongful intervention by the prosecutor into the court counselor's intake procedures.

Crucially, in *Griffin*, *Douglas*, and *Register*, neither the United States Supreme Court nor our Court of Appeals peered into the heart of the government to determine whether the discrimination was motivated by animus toward the indigent. In all three cases, a clear demarcation existed between those able to afford a particular outcome or procedural safeguard and those unable to afford such an outcome or safeguard. As it was uncontested that the government had intentionally created this line of demarcation and the policy had clear discriminatory effect, these Courts held that a constitutional violation had occurred.

In another financial barrier case in the adult criminal system, the Supreme Court of North Dakota found an equal protection violation without a consideration of animus against the poor. *See State v. Ohnstad*, 92 N.W.2d 89 (N.D. 1986). The defendant Mr. Steve Ohnstad issued a check with insufficient funds and received a notice from the Cass County prosecutor that he "would consider" charging Mr. Ohnstad if he did not repay the victim within ten days. *Id.* at 389-90. The notice was statutorily optional but routinely issued by office policy. *Id.* at 390. Prior decisions had upheld the relevant version of the statute as constitutional on its face, but the

Supreme Court agreed with Mr. Ohnstad that the Cass County prosecutor had unconstitutionally enforced it:

> [T]he [notice of dishonor] practice coupled with the evidence showing that in Cass County 70 percent of those persons whose checks come to the attention of the State's Attorney for prosecution respond to the notices of dishonor and are not prosecuted; that over 95 percent of the persons charged with violations of NDCC § 6-08-16 are people who have received the notice but who have not paid the check; and that in most cases they would not have been prosecuted if they had paid the check, is indistinguishable from what we found offensive in [prior cases].

Id. at 391.

Such disproportionate prosecution of those who did not or could not pay restitution "effectively makes the crime one for failure to pay" and denies equal protection of the law. *Id.* at 392 (relying on *State v. Carpenter*, 301 N.W.2d 106, 109 (N.D. 1980) (applying intermediate review to classifications based on indigence and holding the statute at issue "constitutes class legislation because it imposes criminal prosecution burdens upon some persons, *i.e.*, indigents, which are not imposed upon others")). No evidence of animus toward the indigent was presented; the only mention of the prosecutor's intention was to note his "admission that in most cases [the defendants in Cass County] would not have been prosecuted if they had paid the check." *Ohnstad*, 92 N.W.2d. at 392.

The analysis the North Dakota Supreme Court employed in *Ohnstad*, like the analysis of the North Carolina Court of Appeals in *Register*, was functionally equivalent to the analysis authorized by the United States Supreme Court in cases of "overt discrimination." Where a law or an enforcement policy so clearly distinguishes between two groups of similarly situated people on the basis of an "unjustifiable standard," *Oyler v. Boles*, 368 U.S. 448, 456 (1962), further evidence of discriminatory animus is not necessary. In *Wayte v. United States*, 470 U.S. 598 (1985), the Supreme Court applied the standards announced in *Oyler* to a claim of selective prosecution brought by draft protesters. While confirming the general rule that selective enforcement standards require a complainant to "show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose," *id.* at 608, the Court noted a key exception to that general rule: "A showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification," *id.* at 608 n.10 (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880)).

The overt discrimination analysis is appropriate for cases challenging financial barriers to rights or benefits in the criminal justice system. In cases like *Griffin*, *Douglas*, *Register*, and *Ohnstad*, there existed a policy whose operation defined a group of those who could pay (for a transcript or for an appellate lawyer or for restitution) on the one hand, and those who could not on the other. The design of the policies went further and conditioned access to a governmental benefit based on

membership in one of these two groups. These courts have forcefully declared that requiring money to qualify for leniency or meaningful appellate review contravenes equal justice under the law and constitutes unlawful discrimination, even without animus toward the poor.

One court has explicitly relied on the overt discrimination path approved in *Wayte* to grant relief in a selective prosecution case involving deferral of prosecution. The District of Columbia Court of Appeals considered the selective prosecution claims of three political demonstrators charged criminally with unlawful entry. *Fedorov v. United States*, 600 A.2d 370, 372 (D.C. 1991) (en banc). The appellants were first-time offenders but were not offered pretrial diversion because, they claimed, the prosecutor "had a policy of denying diversion to political demonstrators." *Id.* The appeal concerned whether the demonstrators had made out a *prima facie* case of selective prosecution and could therefore compel discovery. *Id.*[2]

Preliminarily, the Court held that "[t]he government's decision to deny an arrestee admission into a diversion program is a decision to prosecute and we treat it as a claim of selective prosecution." *Id.* at 377. After defining the appropriate comparison group for the similarly situated analysis, the Court continued to the discriminatory purpose prong. *Id.* at 380-81.

> A showing of discriminatory purpose, however, is not necessary when the selective prosecution claim "is based on an overtly discriminatory classification." *Wayte*, 470 U.S. at 608 n.10 (citing *Strauder v. West Virginia,* 100 U.S. 303, 25 L. Ed. 664 (1880)). Stated conversely, discriminatory purpose need only be shown when a facially neutral policy is alleged to have discriminatory impact. An "overtly discriminatory classification," therefore, is presumptively invalid. Unless the government shows that such apparent discrimination is not in fact taking place, the courts must engage in strict scrutiny to determine whether the government can prove that its policy of disparate treatment is necessary to promote a compelling or important governmental interest.

Id. at 381.

The demonstrators provided evidence of two statements, one from a prosecutor and one from a paralegal in the prosecutor's office who processed applications for diversion, revealing an office policy not to divert charges of unlawful entry for protest cases. *Id.* at 381-82. Direct statements of intent that "come close" to an admission of basing an outcome on a constitutionally protected category are "powerful evidence" of discrimination. *Id.* at 382 n.17 (citing *United States v. Real Estate Dev. Corp.*, 347

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[2] *Fedorov* was decided before *United States v. Armstrong*, 517 U.S. 456 (1996), clarified the evidentiary standard for obtaining discovery in support of a selective prosecution claim. The *Fedorov* Court surveyed the range of standards used by other courts and chose the most stringent rule: that the defendant must make a *prima facie* showing as to both portions of a selective prosecution claim. *Fedorov*, 600 A.2d at 377-79.

F.Supp. 776, 783 (N.D. Miss. 1972)). Moreover, the statements were consistent with the evidence:

> [N]ot one of the 275 political demonstrators arrested for unlawful entry had been admitted to the pretrial diversion program, in contrast with 27% of the non-demonstrating unlawful entrants who were granted diversion. On these facts, we agree that appellants have made a prima facie showing of a government policy that, by its own terms, more severely punishes those who exercise protected constitutional rights than those who do not.

Id. at 382. Because of the government's policy that, "on its face, impermissibly discriminates against charged offenders based on their exercise of protected First Amendment rights," the Court concluded that the demonstrators had established a *prima facie* case of selective prosecution. *Id.*

The deferred prosecution policy applied to [redacted] likewise overtly discriminates against those without money and obviates the need to show animus. The District Attorney has a clearly defined and consistently applied policy to offer the benefit of deferred prosecution only to those with the ability to pay restitution swiftly. "To no one will we sell . . . justice," *Griffin*, 351 U.S. at 16, yet deferred prosecution is for sale.

As discussed above, the United States and North Carolina Constitutions protect the poor from disparate treatment in the criminal justice system. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *In re Register*, 84 N.C. App. 336 (1987). Combined with the evidence that, consistently with this purposeful policy, inability to pay $799 was the "determinative factor" for the State's consent to [redacted] application for deferred prosecution, selective prosecution is shown.

II. AN INQUIRY INTO THE FOUR FACTORS SET FORTH IN *BEARDEN* DEMONSTRATES THAT THE MECKLENBURG COUNTY DISTRICT ATTORNEY'S POLICY VIOLATES DUE PROCESS.

In *Bearden v. Georgia*, 461 U.S. 660 (1983), the United States Supreme Court considered whether it violated Fourteenth Amendment Due Process principles for a court to revoke probation and incarcerate an individual unable to pay fines and restitution. Mr. Bearden had been sentenced to probation and ordered to pay a $500 fine and $250 in restitution. *Bearden*, 461 U.S. at 662. Having only a ninth-grade education and being illiterate, Mr. Bearden was unsuccessful in his repeated efforts to find employment, and with no income nor assets during the relevant period, he borrowed $200 from his parents to make payment. *Id.* at 662-63. Nonetheless, he was soon forced to notify the probation office that he would be late on his next payment. *Id.* at 663. A probation violation report was issued, and Mr. Bearden's probation was revoked after an evidentiary hearing. *Id.*

On review, the United States Supreme Court noted that Due Process and Equal Protection principles "converge in the Court's analysis" in cases involving the

fair treatment of indigents in the criminal justice system. *Id.* at 665. Elaborating on the appropriate framework for the analysis, the Court reasoned:

> The parties, following the framework of *Williams* [*v. Illinois*, 399 U.S. 235 (1970),] and *Tate* [*v. Short*, 401 U.S. 395 (1971)], have argued the question primarily in terms of equal protection, and debate vigorously whether strict scrutiny or rational basis is the appropriate standard of review. There is no doubt that the State has treated the petitioner differently from a person who did not fail to pay the imposed fine and therefore did not violate probation. To determine whether this differential treatment violates the Equal Protection Clause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine. Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather *requires a careful inquiry into such factors as "[1)] the nature of the individual interest affected, [2)] the extent to which it is affected, [3)] the rationality of the connection between legislative means and purpose, [and] [4)] the existence of alternative means for effectuating the purpose. . . ."*

Id. at 665-67 (quoting *Williams*, 399 U.S. at 260 (Harlan, J., concurring)) (emphasis added).

Interestingly, the State in *Bearden* stressed the importance of ensuring that restitution be paid to the victims of crime, just as the State emphasizes in the case at hand. *See id.* at 670. The Supreme Court, however, rejected the proposition that the goal of obtaining restitution justifies incarcerating those truly unable to pay:

> A rule that imprisonment may befall the probationer who fails to make sufficient bona fide efforts to pay restitution may indeed spur probationers to try hard to pay, thereby increasing the number of probationers who make restitution. Such a goal is fully served, however, by revoking probation *only for persons who have not made sufficient bona fide efforts to pay.*

Id. at 670-71 (emphasis added).

Ultimately, the *Bearden* Court concluded, "if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." *Id.* at 668-69.

The Federal Due Process Clause converges with the North Carolina Law of the Land Clause. *See State v. Balance*, 229 N.C. 764, 769 (1949) ("The term 'law of the

land' is synonymous with 'due process of law,' a phrase appearing in the Federal Constitution and the organic law of many states.). Therefore, an application of the four factors set forth in *Bearden* to the present case demonstrates that the District Attorney's policy is fundamentally unfair, and thus violates the state and federal guarantees of due process.

1. The Nature of the Interest Affected

The importance of the interests affected in this case cannot be overstated. First and foremost, [redacted] fundamental interest in liberty is directly impacted by this policy. Although not imminently facing imprisonment as was the defendant in *Bearden,* it will not be long before [redacted] will be exposed to a prison term after a plea or possible conviction following trial. If [redacted] were granted the same opportunity to participate in deferred prosecution that others able to pay were granted, he would entirely avoid such a dire prospect.

The State may point out that those who participate in deferred prosecution are placed on supervised probation and are thus subject to a restraint on liberty, as well. However, those who are granted access to the deferred prosecution program can rest assured that they will not be sent to prison as long as they do not violate the terms of the program. This is a luxury that [redacted] is unable to afford. [redacted] alleged culpability is no different from similarly situated individuals, yet he faces the unique threat of a prison sentence as a direct and proximate result of the District Attorney's policy of granting deferrals only to those who can "pay to play".

Other crucial interests must be noted, as well. Those that are granted access to deferred prosecution can violate the terms of their supervision and still have the opportunity to plea bargain or proceed to trial. If convicted of the charge or a lesser offense, they will potentially be placed on probation yet again. [redacted], on the other hand, even if he receives probation rather than prison, will be subject to incarceration upon the first violation of probation. Though this differential treatment is more subtle, there is no question that those who enter the deferred prosecution program not only receive a more favorable form of justice up front, but frequently receive more chances down the line.

Finally, there is the interest in avoiding the heavy stamp of the label, "felon." It is common knowledge that a felony conviction carries myriad negative consequences beyond those directly imposed by the criminal justice system. These consequences range from limited employment options, reduced eligibility for housing and school loans, licensing penalties, and more. *See generally United States v. Nesbeth*, 188 F. Supp. 3d 179 (E.D.N.Y. 2016) (summarizing the "collateral consequences of a felony conviction [that] form a new civil death"). *See also James v. Strange*, 407 U.S. 128, 139 (1972) ("A criminal conviction usually limits employment opportunities."); Collateral Consequences Assessment Tool, UNC School of Government, at https://ccat.sog.unc.edu/.

Though the District Attorney's goal of seeking restitution is undoubtedly appropriate, this goal must be weighed against [redacted] interest in a fair chance

to maintain his liberty and avoid a felony conviction. The balancing must take into account society's interest in an equal justice system in which one's ration of liberty is not a function of one's ability to pay, a system in which the label "felon" is not affixed in a fundamentally unfair fashion. As the *Bearden* and *Register* Courts concluded, these latter concerns carry more weight than collection of restitution under our State and Federal Constitutions.

2. The Extent to which the Interest is Affected

As to the interests discussed above, the effect is profound. The District Attorney's policy does not subtly militate toward a harsher sentence. It is binary in nature. Either you receive the chance to inoculate yourself from a prison sentence or you do not. Either you receive the chance to keep your record clean or you do not. In the District Attorney's own words, deferred prosecution is the "default" offer to those facing certain felony charges who have no prior record. Yet the immutable requirement that restitution be paid up front neatly divides those who would otherwise be eligible into those who can pay and receive the benefit, and those who cannot pay and do not receive the benefit.

3. The Rationality of the Connection between Means and Purpose

As noted in both *Bearden* and *Register*, it is appropriate and just for the District Attorney's Office to seek to make alleged victims whole through the payment of restitution. At first blush, it appears rational to incentivize up-front payment toward the total amount owed so as to increase the chances that the total restitution will ultimately be paid. However, closer inspection reveals that both the timing and the dollar amount of the demanded restitution are not rationally connected to the State's purpose of collecting restitution.

It is not rational to require the individual to make payment during the very time that the individual is least likely to be able to do so. As exemplified by [redacted] testimony, the moment that one is charged with a felony is among the most devastating moments in an individual's life. One is usually arrested and forced to post a significant secured bond or make payment to a bondsperson to obtain one's liberty. Loss of one's job is common. Subsequently, the pending felony charge makes it very difficult to obtain employment going forward. The spiral of negative consequences renders the pendency of the charge one of the most difficult periods for a defendant to make restitution.

It is frequently the case that those who commit property offenses steal because they are behind on their bills, facing eviction, or otherwise in dire financial straits. Unless they have other means of support or alternative sources of income, they will commonly be unable to make prompt payment of restitution. *See Bearden*, 461 U.S. at 670-71 (Punishing "someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming. Indeed, such a policy may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay"). As discussed below, there are numerous ways to further the District Attorney's goal of obtaining restitution in a more rational and just fashion.

In addition, the $1,000 threshold at issue lacks a rational basis. The State did offer a reason for the $1,000 threshold for participation in deferred prosecution: that this number is the line between felony and misdemeanor larceny. But a reason is not a rational reason, as the State offered no justification for creating this particular financial barrier for participation. Participants in deferred prosecution do not plead guilty to any crimes; rather, the original charge remains pending for the duration of the probation (24 months by policy of the State). Felonies do not become misdemeanors, and this legislative distinction is wholly irrelevant in the context of deferred prosecution.[3]

Although the State's arguments focus on its purpose in collecting restitution, its policy reveals a second purpose pursued by the program that must be considered in this analysis. Both the Legislature, through the enactment of N.C.G.S. § 1341(a1), and the District Attorney, through the creation of a policy employing that statute, demonstrably value rehabilitation and a path to a clean record for first-time offenders. *See also James v. Strange*, 407 U.S. 128, 139 (1972) (balancing a state's interest in recouping attorney fees from indigent defendants against its interest in ensuring that "a defendant, upon satisfaction of the criminal penalties imposed, be afforded a reasonable opportunity of employment, rehabilitation and return to useful citizenship").[4] The pay-down policy bears no rational relationship to this interest and, in fact, thwarts it: The District Attorney seeks a conviction only against those first-time offenders most economically vulnerable and thus most in need of the opportunity to earn a clean record.

Finally, the State's arguments reveal that the policy is irrationally and unconstitutionally punitive. The State expressed a concern about judicial waivers of restitution for defendants on deferred prosecution, discussed further below. But the possibility of a judicial waiver of restitution ordered to be paid through probation does not deter the State from making misdemeanor offers to first-time offenders originally charged with felony property crimes. Nor does the State balk at the possibility of judicial waivers of restitution in amounts less than $1,000 while those defendants, not barred by the pay-down policy, are on deferred prosecution.

It is only the combination of deferral with the risk of the loss of some—not even all—of the restitution that the State cannot countenance. But where the State believes a particular outcome to be the appropriate sanction for a crime, it may not

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[3] It is not the case that the state has chosen a number that represents an amount of damage or harm that, in their view, renders a person unfit for or undeserving of deferred prosecution. The number is arbitrary. This case does not present the question whether a policy based on a demarcation of that kind violates the constitution. The amount of restitution at issue here is comparable to the amount of restitution owed by others who entered deferred prosecution, and the amount of restitution here did not prevent the State from offering [redacted] deferred prosecution.

[4] The legislature has *expanded* the opportunities for first-time offenders "to demonstrate [their] good conduct" by passing N.C.G.S. § 15A-1341(a4), "conditional discharge," effective December 1, 2014. Currently, the District Attorney's Office does not consent to conditional discharge for those defendants prosecuted by the Property Team.

seek a more severe punishment based on a defendant's inability to pay. *See Griffin v. Illinois*, 351 U.S. 12, 17-18 (1956) ("Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial."); *Bearden*, 461 U.S. at 667-68 ("In other words, if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.")

4. The Existence of Alternative Means for Effectuating the Purpose

Even if one were to accept the idea that mandatory, partial, up-front restitution is rationally related to the goal of ultimately obtaining full restitution, the existence of multiple, easy-to-implement alternatives militates strongly against the constitutionality of the District Attorney's policy.

The most obvious alternative, which would require virtually no effort on the District Attorney's part, would be to allow those who have demonstrated a bona fide inability to pay restitution up front to be admitted into the deferred prosecution program, with payment of the entire amount of restitution made a condition of supervision.

In its arguments to this Court, the District Attorney has not challenged [redacted] contention that he has made legitimate efforts but has been unable to make the requisite payment. The State acknowledges that its policy renders people in [redacted] circumstances unable to enjoy the benefits of deferred prosecution, but simply rests on the importance of its aim of obtaining restitution as justification for the disparate treatment. However, if the District Attorney were to admit [redacted] into the deferred prosecution program and allow him time to make payments in installments, it would likely *further* the District Attorney's goal of obtaining total restitution.

As [redacted] testimony demonstrates, he has obtained employment at Value Village in August of this year and could very well succeed in paying the total amount of restitution if given adequate time. *See Bearden*, 461 U.S. at 672 ("[the] State is not powerless to enforce judgments against those financially unable to pay. . . . For example, the sentencing court could extend the time for making payments"). What's more, [redacted] uncontradicted testimony was that potential employers balked as much at the pending felony as the pending court dates. With those employers, the prospect of an employee missing work for an unknown number of court dates for a case with an uncertain outcome results in a denial of that person's job application. Once a person begins deferred prosecution, the court dates end and the outcome becomes more certain; at the very least, the risk of imminent incarceration dissipates.

The State has expressed a concern that a judge might later waive the payment of restitution and leave the alleged victim only partially compensated. This concern is easily addressed. There is a simple statutory safeguard for collection of restitution over periods longer than are allowed for probation. The deferred prosecution

agreement could include a provision requiring the defendant to consent to the conversion of any unpaid restitution into a civil judgment. Our statutes expressly provide for such a mechanism. *See* N.C. Gen. Stat. §§ 15A-1340.38(a) and 15A-1340.34(b). Indigent defendants regularly have their tax refunds garnished as a result of such civil liens. Notably, an indigent defendant who successfully completes deferred prosecution is more likely to obtain positive employment with no felony on his record than with a felony record, and thus, offering a defendant entry into the program despite an inability to make payment up front also *furthers* the ultimate goal of making the victim whole. In addition, nothing about a deferred prosecution agreement prevents an alleged victim from bringing a civil action to obtain a judgment against the defendant for the proper amount of restitution.

For those truly unable to pay restitution even after having been given extended time to do so, the State would not have to be satisfied with only a civil judgment against the defendant. The State could also require the defendant to "perform some form of labor or public service in lieu of," or in addition to, paying restitution. *See Bearden*, 461 U.S. at 672. The current deferred prosecution program includes community service already, and increased hours could be assigned to those unable to pay restitution for them to "earn" the dismissal despite incomplete restitution.

In very similar contexts, our Legislature has indicated an intent not to squeeze blood from a stone by requiring those who are unable to pay restitution to pay it. For example, as to those on post-release supervision, N.C. Gen. Stat. § 15A-1368.4 expressly provides for community service to be imposed as a substitute for restitution where a supervisee is unable to pay restitution:

> The Commission may also impose a condition of community service on a supervisee who was a Class F through I felon and who has failed to fully satisfy any order for restitution, reparation, or costs imposed against the supervisee as part of the supervisee's sentence; however, the Commission shall not impose such a condition of community service if the Commission determines, upon inquiry, that the supervisee has the financial resources to satisfy the order.

Thus, while our Legislature has clearly expressed its interest in making victims whole through the passage of the Crime Victims' Rights Act and related provisions, § 15A-1368.4 demonstrates that the Legislature found it appropriate to forego payment of restitution where such payment is truly infeasible.

N.C.G.S. § 15A-1340.36(a) demonstrates a similar intent, *requiring* the sentencing court to "take into consideration the resources of the defendant," as well as the defendant's ability to earn and obligation to support dependents, when imposing restitution. The statute further provides that the court may order "partial restitution when it appears that the damage or loss caused by the offense is greater than that which the defendant is able to pay."

In conclusion, an application of the four *Bearden* factors to the case at hand shows that the District Attorney's policy fails to pass muster under the Due Process Clause.

III. CONCLUSION

An analysis of the District Attorney's deferred prosecution policy under either the Equal Protection Clause or the Due Process/Law of the Land Clause produces the same result: The pay-down policy unconstitutionally discriminates against those like [redacted] who otherwise qualify for deferred prosecution but who cannot pay restitution up front. [redacted], by law, should have been afforded the same opportunities as those with greater financial means. Because he was not, his case must be dismissed.

Respectfully submitted, this the 16th day of October, 2017.

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[redacted]
Assistant Public Defender
Attorney for [redacted]

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion and Affidavit on [redacted], Assistant District Attorney, Twenty-Sixth Judicial District, by inter-office courier, on this the 16th day of October, 2017.

_____
[redacted]
Assistant Public Defender
Attorney for [redacted]