

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16CRS212564

STATE OF NORTH CAROLINA )  
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)  
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v. )  
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██████████████████████, )  
Defendant. )

MOTION TO DISMISS AND/OR FOR  
DISCOVERY

NOW COMES the Defendant, ██████████, by and through counsel, ██████████, and respectfully moves this Court to dismiss the above captioned charge pursuant to N.C.G.S. § 15A-954; the United States Constitution, Amendments V and XIV; and the Constitution of North Carolina, article I, Sections 19 and 23.

*I. Facts & Procedural History*

1. ██████████ was charged by warrant with one count of embezzlement in violation of N.C.G.S. § 14-90 on March 30, 2016.
2. At the first appearance on April 7, 2016, the Court determined that ██████████ was indigent and appointed the Public Defender to represent him. [Exhibit 1]
3. The State alleges that ██████████ stole electronic devices and components belonging to Scott Brown Media Group, Inc. between December 8, 2015 and March 30, 2016.
4. The value of the restitution sought by the State is \$1,799.
5. ██████████ has no prior criminal history.
6. The District Attorney's Office for N.C. Prosecutorial District 26 is divided into subject matter units.
7. One such unit is the Property Unit; assistant district attorneys in the Property Unit exclusively prosecute people charged with property-related felonies, including felony larceny and embezzlement.
8. It is the policy and practice of the Property Unit to offer deferred prosecution pursuant to N.C.G.S. § 15A-1341(a1) to eligible defendants charged with qualifying crimes so that eligible defendants may earn a dismissal of their charges through good behavior on probation.
9. Embezzlement and felony larceny are qualifying crimes according to the policy and practice of the Property Unit.

10. Pursuant to N.C.G.S. § 15A-1341(a1), the State must consent to a defendant's participation in deferred prosecution.
11. It is the policy and practice of the Property Unit that defendants who owe more than \$1,000 of restitution will not receive the State's consent to deferred prosecution unless or until they have paid the balance of restitution down to \$1,000.
12. The State made its first plea offer to [REDACTED] on July 12, 2016 while the case was pending in District Court.
13. This offer was for [REDACTED] to participate in deferred prosecution pursuant to N.C.G.S. § 15A-1341(a1), or, in the alternative, to waive his probable cause hearing and have the case bound over for Superior Court.
14. [REDACTED] is eligible for deferred prosecution under the terms of N.C.G.S. § 15A-1341(a1). Pursuant to the policy and practice of the Property Unit that participants in deferred prosecution owe no more than \$1,000 in restitution at the time of enrollment, the State refused to consent to [REDACTED] participation in deferred prosecution unless Mr. Bethea paid \$799 by November 22, 2016.
15. [REDACTED] was willing but unable to pay \$799 by November 22, 2016.
16. Due to [REDACTED] inability to pay \$799 by November 22, 2016, the State declared its intention to prosecute the matter in Superior Court. [Exhibit 2]<sup>1</sup>
17. As a result, [REDACTED] elected to waive his statutory right to a probable cause hearing.
18. The State indicted [REDACTED] on February 13, 2017 on one count of felony larceny in violation of N.C.G.S. § 14-72.
19. [REDACTED] received his discovery and his written plea offer on or about March 7, 2017.
20. The written plea offer was for [REDACTED] to plead guilty as charged to one count of felony larceny, to be sentenced to an intermediate punishment of 5-15 months, to be placed on supervised probation for 24 months, and to pay \$1,799 of restitution. [Exhibit 3]
21. Counsel for [REDACTED] requested via email on April 13, 2017 that the assigned ADA consent to [REDACTED] enrollment in deferred prosecution despite [REDACTED] inability to pay the \$1,799 balance down to \$1,000. [Exhibit 4]
22. Counsel for [REDACTED] requested in the alternative that the ADA allow [REDACTED] to plead guilty to a reduced charge.

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<sup>1</sup> The proxy dated July 28, 2016 was sent via email on November 21, 2016 and is in fact the proxy for the docket of November 22, 2016. A "proxy" is a written recommendation from the Property Unit for each case on the docket on a given day in District Court.

23. The ADA responded that he would consent to deferred prosecution for [REDACTED] if he paid \$799 by June 2017. The case was accordingly set for arraignment on June 28, 2017.
24. After [REDACTED] was charged in this matter, he lost his employment and his housing.
25. As a result, he had to send his son, for whom he was the primary custodian, to reside with his mother in Pennsylvania.
26. From March 30, 2016 to November 2016, [REDACTED] was unemployed.
27. In November 2016, M [REDACTED] secured a position with Captain D's.
28. His year-to-date earnings as of December 5, 2016 were \$474.88. [Exhibit 5]
29. [REDACTED] worked for Captain D's until approximately March 2017; as of his paycheck of February 27, 2017, he earned \$1,749.07 in 2017. [Exhibit 6]
30. From March 30, 2016 to April 1, 2017, [REDACTED] was homeless.
31. In April, he rented a room in a house.
32. In May, having lost his employment, he moved in with a family member.
33. [REDACTED] has been diligently searching for employment throughout the pendency of this case.
34. [REDACTED] is responsible for three minor children; he owes court-ordered child support of \$574.61 per month as of February 27, 2017 as to one of them.
35. He has not had sufficient income to pay the restitution in advance of beginning deferred prosecution.
36. Counsel for [REDACTED] advised the ADA via email on June 16, 2017 that [REDACTED] was willing but unable to pay the \$799 and again requested that [REDACTED] be allowed to enroll in deferred prosecution despite not having paid the balance of the restitution down to \$1,000. [Exhibit 7]
37. The ADA did not respond.
38. On June 28, 2017, [REDACTED] appeared for his arraignment.
39. At that time, the ADA indicated that the only plea offer available to [REDACTED] was the original offer to plead guilty to felony larceny and receive an intermediate sentence.
40. [REDACTED] pled not guilty.

## II. Selective Prosecution/Equal Protection

### A.

1. A prosecutor may not exercise his otherwise broad discretion if it is “based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (quoting *Oyler v. Boyles*, 368 U.S. 448, 456 (1962)).
2. “It is appropriate to judge selective prosecution claims according to ordinary equal protection standards. Under our prior cases, these standards require petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose.” *Wayte v. United States*, 470 U.S. 598, 608 (1985).
3. Classifications based on indigence constitute “invidious discrimination,” *Williams v. Ill.*, 399 U.S. 235, 242 (1970), and require “a careful inquiry,” *Bearden v. Ga.*, 461 U.S. 660, 666 (1983). *See also O’Donnell v. Harris Cty.*, 2016 U.S. Dist. LEXIS 174628, \*37-40 (S.D. Tex. Dec. 16, 2016) (rejecting rational basis review to a challenge to bail systems under the Equal Protection clause).
4. When the ability to pay restitution becomes the “determinative factor” in a prosecutor’s recommendation for a case, a claim of selective prosecution is established. *In re Register*, 84 N.C. App. 336, 346 (1987).
5. In *Register*, seventeen juveniles allegedly broke into and damaged a residence, and the North Carolina Court of Appeals heard the cases of six of the juveniles who were prosecuted following their unwillingness or inability to pay \$1,000 of restitution in exchange for a dismissal of their charges:

The record before us discloses that each of these respondents received unequal treatment among individuals who were alleged to have committed the same or similar offenses by design. The record affirmatively discloses that each respondent was prosecuted because he or she, or his or her parents, was 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.

6. The Court arrested the judgments in all six of the cases because the juveniles established a claim of selective prosecution:

From the record before us, it appears that seventeen juveniles were involved in the vandalism of [the victim’s] home. Petitions were filed against at least eight of the juveniles allegedly involved. These eight juveniles were tried together. Six of these cases are on appeal herein. Apparently, two respondents did not appeal. The record discloses that at

least six of the seventeen juveniles had "paid out" at the time of the hearing. One other juvenile had agreed to pay and at the time of the hearing had not paid, but that juvenile was not put on trial. Thus, it appears that a total of seven juveniles had their cases dismissed or petitions were not filed against them simply because they were willing and able to pay \$ 1,000 each to [the victim] pursuant to the agreement described in her testimony. **From the above, it is clear to us that the juveniles in these cases were prosecuted simply because they were unwilling or unable to pay \$ 1,000 each for damage done to [the victim's] home.** Some of the seventeen juveniles involved in the destruction of [the victim's] home were willing and able to pay their proportionate share of the damages and were not prosecuted. The record before us affirmatively discloses that eight juveniles, including the six in these cases, were selected for prosecution by design based on their, or their parents', unwillingness or inability to pay \$ 1,000 each to [the victim]. Surely, the purposes of the legislature in adopting our juvenile code are not served by making the willingness or ability of a juvenile to pay compensation the determinative factor in the decision of whether to file a complaint as a juvenile petition. **This, in our opinion, is selective prosecution.**

*Id.* at 345-46 (emphasis added).

7. Under the policy and practice of the Property Unit, the State consents to deferred prosecution for defendants charged with embezzlement or felony larceny who owe comparable amounts of restitution to that in the present case simply because such defendants have the ability to pay the restitution down to \$1,000 while the matter is pending.
8. [REDACTED] inability to pay \$799 while the matter was pending was the "determinative factor" in whether the State would consent to his enrollment in deferred prosecution.
9. Therefore, as applied to [REDACTED], the Property Unit's policy and practice concerning the \$1,000 threshold for participation in deferred prosecution constitutes selective prosecution in violation of his right to equal protection. *See* the United States Constitution, Amendments V and XIV; and the Constitution of North Carolina, article I, Sections 19 and 23.
10. The remedy for a claim of selective prosecution is dismissal. *See In re Register*, 84 N.C. App. 336 (1987); *State v. Howard*, 78 N.C. App. 262, 266 (1985) (noting that when a defendant establishes a selective enforcement claim, "he is entitled to dismissal"); N.C.G.S. § 15A-954(a)(4).

*B.*

11. In the alternative, a defendant has a right to seek discovery in support of a selective prosecution claim when he establishes "some evidence tending to show the existence of the

essential elements of the defense, discriminatory effect and discriminatory intent.” *United States v. Armstrong*, 517 U.S. 456, 468 (1996).

12. Furthermore, trial courts in North Carolina have inherent authority “to compel discovery in certain instances in the interest of justice.” *State v. Warren*, 347 N.C. 309, 325 (1997).
13. ██████ tenders the following as “some evidence” of discriminatory intent:
  - a. Discriminatory intent lies where a prosecutor’s decision was “deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” *Oyler v. Boles*, 368 U.S. 448, 456 (1962).
  - b. The plea offers extended in writing to ██████ demonstrate an intent to determine the outcome of ██████ criminal case based on his ability to pay \$799.
14. ██████ tenders the following as “some evidence” of discriminatory effect:
  - a. The “required threshold” for obtaining discovery in furtherance of a claim of selective prosecution is “a credible showing of different treatment of similarly situated persons.” *Armstrong*, 517 U.S. at 470.
  - b. Counsel for ██████ has searched the records in cases prosecuted by the Property Unit from March 30, 2016 to the present where the Office of the Public Defender was assigned counsel.
  - c. That search revealed 11 cases in which the amount of restitution could be verified, an offer of deferred prosecution was made while the cases were pending in District Court<sup>2</sup>, the requested restitution was over \$1,000, and the cases have been resolved:
    - i. 17 CR 200735 (\$2,951 restitution)
    - ii. 16 CR 221515 (\$1,500 restitution)
    - iii. 16 CR 234651 (\$1,024.70 restitution)
    - iv. 16 CR 221591(\$1,229.03 restitution)
    - v. 16 CR 224307 (\$1,314.07 restitution)
    - vi. 16 CR 203989 (\$7,800 restitution)
    - vii. 16 CR 233508-09 (\$1,586 restitution)
    - viii. 16 CR 242769-72 (\$1,569.41 restitution)
    - ix. 17 CR 205657 (\$1,552.58 restitution)
    - x. 16 CR 237763 (\$1,284.04 restitution)
    - xi. 17 CR 201522-24 (\$1,250 restitution)

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<sup>2</sup> Counsel can only assert information pertaining to cases in which the State extended an offer of deferred prosecution in District Court because counsel has access to the State’s written recommendations for cases pending in District Court but not in Superior Court. The offers extended in Superior Court is included in the discovery requested in this Motion.

- d. The charges in this set of cases included larceny by employee, embezzlement, uttering a forged instrument, and felony larceny.
  - e. Of those eleven cases, the \$1,000 “pay down” policy was waived in one; the restitution in that case totaled \$1,024.70. (16 CR 234651)
  - f. Of those eleven cases, three defendants accepted an alternative offer to plead guilty to a misdemeanor. (17 CR 201522-24, 17 CR 200735, 16 CR 203989)
  - g. Of those eleven cases, seven defendants entered into deferred prosecution after paying the balance of their restitution down to \$1,000. (16 CR 237763, 17 CR 205657, 16 CR 242769-72, 16 CR 233508-09, 16 CR 224307, 16 CR 221591, 16 CR 221515)
  - h. These seven defendants are similarly situated to [REDACTED] because they were statutorily eligible for deferred prosecution, were charged with the same or similar offenses as the offense charged in the present case, and they owed comparable amounts of restitution.
  - i. These seven defendants were given the opportunity to avoid having a felony conviction on their criminal record, as well as the opportunity to avoid the incarceratory or probationary punishment associated with such a felony conviction.
  - j. Whereas the State allowed these seven defendants the opportunity to participate in deferred prosecution, the State denied [REDACTED] this same opportunity because of his inability to pay \$799. *Accord In re Register*, 84 N.C. App at 345-46 (comparing seven juveniles who paid restitution and received a dismissal to eight juveniles who did not pay restitution and were selected for further prosecution).
  - k. In the alternative, where evidence of discriminatory intent is strong as in [REDACTED] case, evidence of discriminatory effect is not necessary. *See United States v. Al Jibori*, 90 F.3d 22 (2d Cir. 1996) (applying the *Armstrong* standard and remanding for further inquiry into evidence of selective prosecution in a case with no evidence of discriminatory effect but with an admission of discriminatory intent.); *Armstrong*, 517 U.S. at 469 n.3 (reserving “the question whether a defendant must satisfy the similarly situated requirement in a case involving direct admissions by [prosecutors] of discriminatory purpose.”) (quotations omitted).
15. [REDACTED] specifically moves the Court to order the State to provide him with the following discovery:
- a. A written statement of the policy and practice of the Property Unit concerning offers of deferred prosecution;
  - b. All documents and/or correspondence (including emails and internal memorandum regarding phone calls or verbal conversations) from the District

Attorney's Office concerning any policies establishing criteria for offers of deferred prosecution for cases prosecuted by the Property Unit;

- c. Captions and case numbers of all cases prosecuted by the Property Unit from March 30, 2016 to the present in which an offer of deferred prosecution was extended, the amount of restitution requested for all such cases, the amount of restitution paid prior to the disposition of all such cases, whether or not the defendant was appointed counsel in all such cases, and the disposition of all such cases.

### *III. Due Process*

1. In claims regarding the "treatment of indigents in our criminal justice system," the Supreme Court has held that "[d]ue process and equal protection principles converge in the Court's analysis." *Bearden v. Ga.*, 461 U.S. 660, 665 (1983).
2. In a due process analysis, the question is "whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine." *Id.* at 666.
3. Substantive due process is a protection that "prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty." *State v. Thompson*, 349 N.C. 483, 491 (1998) (quotations omitted).
4. "Procedural due process protection ensures that when government action depriving a person of life, liberty, or property survives substantive due process review, that action is implemented in a fair manner." *Id.* (quotations omitted).
5. ██████████ rights to substantive and procedural due process have been violated. *See* the United States Constitution, Amendments V and XIV; and the Constitution of North Carolina, article I, Sections 19 and 23.
6. A violation of a person's right to due process requires dismissal. *See Thompson*, 349 N.C. at 503; N.C.G.S. § 15A-954(a)(4).

### *IV. Conclusion*

**WHEREFORE**, defendant through counsel, hereby moves the Court

1. To set this matter for a hearing, and/or
2. To issue an order dismissing the charge of felony larceny with prejudice, and/or
3. To issue an order granting the discovery requests made in Part II.B.15 of this Motion, and/or
4. For such other and further relief as this Court deems just and proper.

Respectfully submitted, this the 25th day of July, 2017.



\_\_\_\_\_  
Attorney for [REDACTED]

**CERTIFICATE OF SERVICE**

I hereby certify that I have served the foregoing Motion and Affidavit on the Assistant District Attorney, Twenty-Sixth Judicial District, by hand delivery, on this the 25th day of July, 2017.

\_\_\_\_\_  
Attorney for [REDACTED]

STATE OF NORTH CAROLINA  
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IN THE GENERAL COURT OF JUSTICE  
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 v. )  
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 [REDACTED],  
 )  
 Defendant. )

**AFFIDAVIT IN SUPPORT  
OF MOTION TO DISMISS AND /OR  
DISCOVERY**

THE AFFIANT, an attorney licensed to practice law in North Carolina, having been first duly sworn now deposes and says, based on information and belief that:

1. I am the attorney of record for [REDACTED], the defendant.
2. The District Attorney's Office for N.C. Prosecutorial District 26 is divided into subject matter units.
3. One such unit is the Property Unit; assistant district attorneys in the Property Unit exclusively prosecute people charged with property-related felonies, including felony larceny.
4. It is the policy and practice of the Property Unit is to offer deferred prosecution pursuant to N.C.G.S. § 15A-1341(a1) to eligible defendants charged with qualifying crimes.
5. Embezzlement and felony larceny are qualifying crimes according to the policies and practices of the Property Unit.
6. It is the policy and practice of the Property Unit that defendants who owe more than \$1,000 of restitution may not enroll in deferred prosecution unless or until they have paid the balance of restitution down to \$1,000. [Exhibit 8]
7. I have been practicing in Mecklenburg County since 2012 and have been exclusively representing indigent defendants prosecuted by the Property Unit since August 2016.
8. Based on my experience, the ADAs in the Property Unit have consistently expressed and enforced a policy and practice of requiring otherwise qualified defendants to pay the balance of restitution down to \$1,000 before enrolling in deferred prosecution.
9. After [REDACTED] was charged in this matter, he lost his employment and his housing.
10. As a result, he had to send his son, for whom he was the primary custodian, to reside with his mother in Pennsylvania.
11. From March 30, 2016 to November 2016, [REDACTED] was unemployed.

12. In November 2016, [REDACTED] secured a position with Captain D's.
13. His year-to-date earnings as of December 5, 2016 were \$474.88. [Exhibit 5]
14. [REDACTED] worked for Captain D's until March 2017; as of his paycheck of February 27, 2017, he earned \$1,749.07 in 2017. [Exhibit 6]
15. From March 30, 2016 to April 1, 2017, [REDACTED] was homeless.
16. In April, he rented a room in a house.
17. In May, having lost his employment, he moved in with a family member.
18. [REDACTED] has been diligently searching for employment throughout the pendency of this case.
19. [REDACTED] is responsible for three minor children; he owes court-ordered child support of \$574.61 per month as of February 27, 2017 as to one of them.
20. He has not had sufficient income to pay the restitution in advance of beginning deferred prosecution.

The above facts are based upon information and belief from court records, consultations with [REDACTED], discovery provided by the State, and counsel's communications with representatives of the District Attorney's Office.

Respectfully submitted, this the 25th day of July, 2017.

\_\_\_\_\_  
Attorney for [REDACTED]

Sworn to and subscribed before me

this the \_\_\_\_ day of \_\_\_\_\_, 2017.

\_\_\_\_\_  
Notary Public

My Commission expires: \_\_\_\_\_

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STATE OF NORTH CAROLINA )  
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v. )  
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)  
[REDACTED], )  
Defendant. )

ORDER

The above-captioned case came before the Court for a Pretrial Readiness Conference on July 25, 2017 in courtroom 5350. At that time, the Defendant filed a Motion to Dismiss and/or for Discovery.

The Court hereby **ORDERS** the State to respond in writing to the Defendant's request for discovery no later than August 22, 2017 stating whether the State has complied, in whole or in part, with the Defendant's request for discovery or, in the alternative, with the grounds for the State's objection to the request.

This the 25<sup>th</sup> day of July, 2017.

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The Honorable [REDACTED]  
District Court Judge Presiding