

- 7) Following negotiations with counsel, the State agreed that the Defendant could enroll in deferred prosecution if he paid \$799 prior to his arraignment.
- 8) The State did not agree to the Defendant's request to pay the entirety of the owed restitution through probation while on deferred prosecution; if not paid by arraignment, the State's plea offer reverted to the intermediate punishment described above.
- 9) The Defendant did not pay \$799 prior to his arraignment, and he entered a plea of not guilty on June 28, 2017.
- 10) The State formally revoked all plea offers at that time.

B. Policies & Practices

- 11) The State offers deferred prosecution for a range of felonies concerning violations of property rights but excludes residential break-ins and burglaries; embezzlement and felony larceny are charges for which the State routinely offers deferred prosecution.
- 12) For a defendant to receive an offer of deferred prosecution, he must have no prior convictions and not have previously been placed on probation.
- 13) Where a defendant is charged with a qualifying crime and has the requisite absence of criminal history, an offer of deferred prosecution is the default according to the representation of counsel for the State during argument.
- 14) Pursuant to statute and the policy of the State, the standard conditions of deferred prosecution are as follows: a defendant must sign a stipulation of guilt, perform 100 hours of community service, complete 24 months of supervised probation, pay any applicable restitution, pay court costs, and comply with the regular conditions of probation.
- 15) Upon successful completion of the above conditions, a defendant's charge is dismissed.
- 16) The State has a consistent, clearly established policy that a defendant who owes more than \$1,000 of restitution may not enroll in deferred prosecution unless or until the defendant has paid the balance of restitution down to \$1,000.
- 17) This policy appears in writing on the standard application form, was admitted to and endorsed by the elected District Attorney, and is represented by assistant district attorneys to defense counsel as an official office policy.
- 18) This policy has been effect during the entirety of the pendency of the Defendant's case.
- 19) Upon request of a defendant, the State may grant a continuance for a defendant to pay the restitution down to \$1,000; the length of the continuance is left in the discretion of the assigned assistant district attorney.
- 20) If a defendant is unwilling or unable to comply with the policy by the date determined by the State, the State either makes the defendant a misdemeanor plea offer or binds the case

over to Superior Court.

- 21) The State does not offer alternatives to payment of restitution over \$1,000 to those with an inability to pay.
- 22) This policy is not waived upon a showing of indigence; no cases were identified by either party in which the State waived the \$1,000 threshold due to a defendant's indigence, and the State has denied defense attorneys' requests for waiver due to indigence.
- 23) The Court reviewed the records from 20 cases in which the State offered the defendants deferred prosecution and the requested restitution was over \$1,000.
- 24) In these 20 cases, the defendants were charged with larceny by employee, felony larceny, embezzlement, and uttering.
- 25) Sixteen of these defendants enrolled in deferred prosecution; four pled guilty to a misdemeanor.
- 26) In one case, the defendant received a waiver of the pay down policy; the restitution owed was \$1,024.70, and the State agreed that the defendant could enroll in deferred prosecution despite the *de minimis* amount of restitution owed over the threshold.
- 27) No other cases involving a waiver of the policy were identified by either party.
- 28) For those who enrolled in deferred prosecution following payment of the restitution balance to \$1,000 or less, the original requested restitution ranged from \$1,225.87 to \$2,245.69.
- 29) For those who were offered deferred prosecution but disposed of their cases through a guilty plea to a misdemeanor, the original requested restitution ranged from \$1,250 to \$7,800.
- 30) The elected District Attorney, [REDACTED], has consistently endorsed a policy of paying restitution up front before qualifying for diversion programs, including deferred prosecution for property felonies.
- 31) He has represented in private and public forums that he believes payment up front is the best way to make his victims whole.
- 32) He further represented that he has some concern that restitution ordered to be paid through probation will not be collected given that judges have the authority to waive financial conditions of probation.
- 33) [REDACTED] has maintained his policy of up-front restitution despite acknowledging that it will disparately affect the indigent.
- 34) [REDACTED] chose \$1,000 as the threshold for participation in deferred prosecution because it was the line of demarcation between misdemeanor and felony larceny.

C. The Defendant's Ability to Pay

- 35) As a result of his arrest, the Defendant lost his job; without income, he became homeless.
- 36) He has not had stable housing since his arrest.
- 37) During the pendency of this case, the Defendant occasionally slept in friend's cars or in friend's houses.
- 38) He stayed briefly with a sister in Salisbury, but that home had too many prior residents for him to be able to remain.
- 39) Despite diligent efforts to find employment, both in his field of audio/visual technology and in unskilled, minimum-wage occupations, the Defendant has only had two periods of employment since March 2016.
- 40) He worked from approximately November 2016 until February 2017 at Captain D's at an hourly rate of \$7.25 per hour.
- 41) During this period, the Defendant made his only payment towards the restitution: he paid \$100 via a money order issued on December 6, 2016.
- 42) He next found employment at Value Village beginning in August 2017 at an hourly rate of \$8.25 per hour.
- 43) The Defendant has three children.
- 44) The Defendant's oldest son resides in South Carolina with his mother; the Defendant pays court-ordered child support for that son.
- 45) As of June 30, 2017, around the date of his arraignment, the Defendant was in arrearage in the amount of \$2,229.85 as to that child support.
- 46) At the time of his arrest, the Defendant was the primary custodian of his second-oldest son; he received no financial support from the child's mother, however.
- 47) Due to his homelessness, the Defendant sent that son to Pennsylvania to live with his mother in April 2016.
- 48) The Defendant's third child was born this year and resides with his mother; the Defendant pays court-ordered child support for this child as evidenced by the withholdings on his Value Village paystub.
- 49) For the above reasons, the Defendant has not had the ability to pay the requested amount of restitution to qualify under the State's policy for deferred prosecution.

II. Conclusions of Law

Based on the above Findings of Fact, the Court makes the following **CONCLUSIONS OF LAW**.

A. Equal Protection & Selective Prosecution

- 1) A prosecutor may not exercise his otherwise broad discretion if the exercise 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. Boles*, 368 U.S. 448, 456 (1962)).
- 2) “In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.” *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).
- 3) “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).

i. Discovery

- 4) Where a defendant has made a request for discovery in support of his selective prosecution claim, he must present “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) (internal quotation omitted).
- 5) First, the Defendant has made “a credible showing of different treatment of similarly situated persons.” *Id.* at 470.
- 6) In particular, the Defendant has shown that there are other defendants charged with the same or similar charges as that with which he is charged; that there are other defendants who owe comparable amounts of restitution as that which the Defendant owes; that the State has offered these defendants deferred prosecution, as it has offered the Defendant; that these defendants were able to pay their restitution balance down to \$1,000 in accordance with the State’s policy; and that these defendants accordingly enrolled in deferred prosecution.
- 7) The Defendant, in contrast, was not able to pay the balance of his restitution down to \$1,000 and, as a result, his offer of deferred prosecution was revoked.
- 8) Whereas the State allowed other defendants the opportunity to participate in deferred prosecution and earn a dismissal of their charges, the State denied the Defendant this same opportunity because of his inability to pay \$799. *Accord In re Register*, 84 N.C. App. 336, 345-46 (1987).
- 9) Second, the Defendant has made a credible showing that his prosecution was motivated by discriminatory intent as ability to pay \$799 of restitution up front was the “determinative

factor” in whether he would receive the benefit of the State’s consent to deferred prosecution. *Id.* at 346.

- 10) Where a defendant is “selected for prosecution by design based on [his] unwillingness or inability to pay” restitution, a claim of selective prosecution is established. *Id.* at 345-46.
- 11) Here, the State designed a policy that made the swift collection of restitution its “overriding concern.” *Id.* at 349.
- 12) The State’s deferred prosecution policy is “based on an overtly discriminatory classification” that “discriminate[s] on its face” between those with the ability to pay restitution up front and those without that ability. *Wayte*, 470 U.S. at 608 n. 10.
- 13) Since the Defendant has made a satisfactory showing of both elements, the Court concludes that he is entitled to the requested discovery, which is as follows:
 - 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.

ii. Dismissal

- 14) A defendant who has claimed selective prosecution is “entitled to dismissal” if he “establish[es] discrimination by a clear preponderance of proof.” *State v. Howard*, 78 N.C. App. 262, 266 (1985). *See also* N.C.G.S. § 15A-954(a)(4).
- 15) First, the Defendant has shown that there are other defendants charged with the same or similar charges as that with which he is charged; that there are other defendants who owe comparable amounts of restitution as that which the Defendant owes; that the State has offered these defendants deferred prosecution, as it has offered the Defendant; that these defendants were able to pay their restitution balance down to \$1,000 in accordance with the State’s policy; and that these defendants accordingly enrolled in deferred prosecution.
- 16) The Defendant, in contrast, was not able to pay the balance of his restitution down to \$1,000 and, as a result, his offer of deferred prosecution was revoked.
- 17) Whereas the State allowed other defendants the opportunity to participate in deferred prosecution and earn a dismissal of their charges, the State denied the Defendant this same

opportunity because of his inability to pay \$799. *Accord In re Register*, 84 N.C. App. 336, 345-46 (1987).

- 18) Second, the Defendant has shown that his prosecution was motivated by discriminatory intent as ability to pay \$799 of restitution up front was the “determinative factor” in whether he would receive the benefit of the State’s consent to deferred prosecution. *Id.* at 346.
- 19) Where a defendant is “selected for prosecution by design based on [his] unwillingness or inability to pay” restitution, a claim of selective prosecution is established. *Id.* at 345-46.
- 20) Here, the State designed a policy that made the swift collection of restitution its “overriding concern.” *Id.* at 349.
- 21) The State’s deferred prosecution policy is “based on an overtly discriminatory classification” that “discriminate[s] on its face” between those with the ability to pay restitution up front and those without that ability. *Wayte*, 470 U.S. at 608 n. 10.
- 22) For these reasons, the Court concludes that the Defendant has established that he was selectively prosecuted and is entitled to dismissal.

B. Due Process

- 23) 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. Georgia*, 461 U.S. 660, 665 (1983).
- 24) A due process claim “cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as ‘the nature of the individual interests affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, and the existence of alternative means for effectuating the purpose.’” *Id.* at 666-67 (quoting *Williams v. Illinois*, 399 U.S. 235, 260 (1970)).
- 25) The State demonstrated that deferred prosecution was, in the State’s view, the “appropriate and adequate penalty” for the Defendant’s crime when it twice offered him deferred prosecution, which would allow him the opportunity to earn a dismissal of the charge and to maintain his clean record. *Bearden*, 461 U.S. at 667.
- 26) The State’s legitimate interest in securing restitution for its victim could easily be satisfied through payment of restitution through probation, and the State has offered no rational reason why the Defendant must pay \$799 up front before beginning deferred prosecution.
- 27) Nevertheless, because the Defendant could not pay \$799 up front despite his best efforts to secure employment, the State’s final plea offer required the Defendant to accept a felony conviction.
- 28) That there exists a chasm between the punishment for the same offense where the

Defendant had \$799 to put towards restitution and where he did not is “fundamentally unfair or arbitrary.” *Id.* at 666.

29) This due process violation requires dismissal. *See State v. Thompson*, 349 N.C. 483, 503 (1998); N.C.G.S. § 15A-954(a)(4).

III. Conclusion

For the foregoing reasons, the Court hereby **ORDERS**

- That the State produce the requested discovery to the Defendant no later than 60 days from the issuance of this Order.
- That the above-captioned case be dismissed with prejudice.

This the ____ day of September, 2017.

The Honorable [REDACTED]
District Court Judge Presiding