DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2013

JEAN CLAUDE NOEL,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D10-1765

[November 27, 2013]

EN BANC

GROSS, J.

Jean Claude Noel was convicted after a jury trial of conspiracy to racketeer and first degree grand theft, arising from an elaborate scheme to steal advance fees from victims who sought to obtain funding for their business projects. We affirm the conviction and write to consider a sentencing issue en banc. We recede from our opinion in the case of one of Noel's co-conspirators, *DeLuise v. State,* 72 So. 3d 248 (Fla. 4th DCA 2011). We hold that, consistent with the Fourteenth Amendment of the United States Constitution, when deciding what sentence to initially impose, a sentencing judge may consider the entire background of a defendant, including employment history, financial resources, and ability to make restitution. The Constitution does not preclude a judge from actively using the sentencing process to encourage payment of restitution to victims of crimes, nor does it prevent a judge from showing mercy by reducing the severity of a previously imposed legal sentence.

At Noel's sentencing hearing, the trial judge announced that he had read the pre-sentence investigation and letters from both victims and supporters of the defendant. The prosecutor advised the court of the sentences imposed on other co-conspirators by other judges; for example, a defendant who had received little of the proceeds of the scheme, but who provided up front restitution of $210,000 for the victims of the theft, received a sentence of 10 years probation.

The State established that Noel had received at least $108,795 of the stolen proceeds. The judge asked Noel if he was in a position "to make any up front restitution." Noel indicated that he had been incarcerated for three years, but said "there would be an amount that could be negotiated." The judge said that he was "not asking [Noel] for a negotiation," but wanted to know if he was in a position to pay a reasonable amount of "up front" "lump sum" restitution without having his family starve. Noel responded that a lump sum would be "somewhere between" $20,000 to $40,000 "plus other things."

Asserting that Noel was a sophisticated cog in the conspiracy, the prosecutor argued for a minimum sentence of 15 years. The maximum prison sentence for both first degree grand theft and conspiracy to racketeer is 30 years imprisonment. §§ 812.014(2), 895.03(4), 895.04(1), 775.082(3)(b), Fla. Stat. (2009). The defense attorney requested a sentence at the "low end of the guidelines," 3.8 years. The trial court noted nine other incidents where Noel was involved with bad checks, stolen property, or deceptive practices.

Before imposing the sentence, the judge voiced a hope that "it accomplishes something [for] these victims that have lost so much as a result of this whole incident." The judge sentenced Noel to 10 years in prison followed by 10 years of probation, with the provision that if Noel made restitution of $20,000 within 60 days, his prison sentence would be mitigated to 8 years. *See* Fla. R. Crim. P. 3.800(c). As a condition of probation, the court ordered Noel to pay $650,000 in restitution to the victims, with 15% of his net pay going towards restitution.

Noel contends that his equal protection rights were violated by that portion of the sentence which provided for mitigation if he paid restitution of $20,000 within 60 days. He relies primarily on *DeLuise v. State*, 72 So. 3d 248 (Fla. 4th DCA 2011), which holds that it is fundamental error for a trial judge to offer to mitigate a lawful sentence if a defendant comes up with some restitution for the victims of a crime within 60 days of the sentence.

DeLuise involved the same criminal scheme at issue in this case. The victims suffered substantial losses and the court ordered DeLuise to pay restitution of $1,167,500. *DeLuise*, 72 So. 3d at 250. After pronouncing six concurrent 15 year sentences and two concurrent 10.5 year sentences, the judge in *DeLuise* said that she would "consider a reduction in the prison sentence" if the defendant came forward with substantial restitution, on the order of $100,000 to $150,000, within sixty days. *Id.* at 253. We reversed the sentence, holding that the trial

court's "offer" was fundamental error and in violation of the Equal Protection Clause. *Id.* at 252-53. We wrote that the sentence violated "equal protection because it results in harsher punishment for an offender who does not have the means to pay." *Id.* at 253.

To reach its conclusion, *DeLuise* relied primarily upon *Tate v. Short*, 401 U.S. 395 (1971), and a 1999 Michigan decision[1] without acknowledging the later decided case of *Bearden v. Georgia*, 461 U.S. 660 (1983). *DeLuise* also did not mention a Florida statute and Rule of Criminal Procedure, which authorized the type of sentence the trial judge imposed. Correct application of the United States Supreme Court precedent and consideration of the importance placed on restitution to victims by Florida law compels the conclusion that the sentence in this case did not give rise to any constitutional violation, much less a fundamental one.

United States Supreme Court Case Law

Because DeLuise relied primarily on *Tate v. Short,* it is necessary to first examine *Tate* and the earlier case of *Williams v. Illinois*, 399 U.S. 235 (1970), upon which the Supreme Court relied in deciding *Tate*. Neither case involved a court's attempt to encourage restitution after imposing a lawful sentence of incarceration. The cases do not justify the extension of them in *DeLuise.*

In *Williams*, a defendant received the maximum sentence for "petty theft"–one year imprisonment, a $500 fine, and $5 in court costs. 399 U.S. at 236. Pursuant to statute, the judgment of conviction directed that if the defendant was "in default of the payment of the fine and court costs at the expiration of the one year sentence," he should remain in jail to "work off" the monetary obligations at the rate of $5 per day. *Id.* The effect of the sentence was to allow the defendant "to be confined for 101 days beyond the maximum period of confinement [one year] fixed" by state law. *Id.* at 236-37.

The Supreme Court reversed the sentence and held "that the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status"; "a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine." *Id.* at 243-44. The Court was careful to indicate that its decision in *Williams*

[1]*People v. Collins*, 607 N.W.2d 760 (Mich. App. 1999).

did not impinge on the broad discretion of a sentencing judge to impose a sentence *within* the maximum sentence:

> The mere fact that an indigent in a particular case may be imprisoned for a longer time than a non-indigent convicted of the same offense does not, of course, give rise to a violation of the Equal Protection Clause. Sentencing judges are vested with wide discretion in the exceedingly difficult task of determining the appropriate punishment in the countless variety of situations that appear. The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences. Thus it was that in *Williams v. New York*, 337 U.S. 241, 247[ ] (1949), we said: 'The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'

Id. at 243.

Given this reaffirmation of the broad discretion of a sentencing judge, *Williams* obviously would not preclude the sentence in this case, which was well within statutory limits. *Williams* required only that the statutory maximum incarceration for a substantive offense be the same for all defendants regardless of their economic status. It did not require identical punishment for each defendant regardless of circumstances.

Tate addressed the constitutionality of a fine for a non-criminal traffic offense that was converted into incarceration by a defendant's indigency. There, the defendant was fined $425 for traffic offenses which he was unable to pay because he was indigent. *Tate*, 401 U.S. at 396. He was committed to the "municipal prison farm" to "satisfy the fines at the rate of five dollars for each day," which required that he serve 85 days. *Id.* at 396-97. Relying on *Williams*, the Court held that "'the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.'" *Id.* at 398 (quoting *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970)).

Williams was a case where the defendant received a jail sentence *longer* than the law allowed because of his indigency. *Tate* was a case where the applicable statute called for only a fine, but the defendant served jail time because of his indigency. These cases have little

application to this case, where Noel was sentenced well within the statutory maximum for the criminal offenses.

Bearden v. Georgia

DeLuise failed to consider the impact of *Bearden v. Georgia*, 461 U.S. 660, 661 (1983), decided over a decade after *Williams* and *Tate*. *Bearden* is significant because it drew a bright constitutional line between a judge's initial sentencing decision, where a judge may properly take into consideration a defendant's inability to make restitution in fashioning a sentence, and a revocation of probation proceeding, where a judge may not revoke probation for failure to pay restitution unless the State can show that the failure to pay was willful.

Bearden confronted the issue of whether the "Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution." 461 U.S. at 661. The Court held that a judge may not revoke probation and sentence the defendant to prison unless the defendant "willfully refused to pay or failed to make sufficient bona fide efforts to legally acquire the resources to pay." *Id.* at 672.

Although this holding is not directly relevant here, the case is important for two reasons. First, the Court suggested that a due process analysis was superior to an equal protection approach for evaluating the impact of a defendant's indigency in the sentencing context. Second, the Court was careful to distinguish a revocation of probation from the initial sentencing decision, reaffirming the broad discretion of a judge to consider a defendant's financial resources when imposing the original sentence.

The Court recognized that the equal protection approach of *Williams* and *Tate* was "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." *Id.* at 666 (footnote omitted). The Court wrote that

> [a] due process approach has the advantage in this context of directly confronting the intertwined question of the role that a defendant's financial background can play in determining an appropriate sentence. When the court is initially considering what sentence to impose, a defendant's level of financial resources is a point on a spectrum rather than a classification. Since indigency in this context is a

> relative term rather than a classification, fitting "the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished," *North Carolina v. Pearce*, 395 U.S. 711, 723, 89 S.Ct. 2072, 2079, 23 L.Ed.2d 656 (1969). The more appropriate question is whether consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process.

Id. at 666 n.8. A due process approach that considers whether a "sentence is so arbitrary or unfair as to be a denial of due process" better takes into account the competing policies that come into play in sentencing than an equal protection analysis.

Next, the Court explicitly distinguished the probation revocation decision from the *initial* decision to sentence, where a "sentencing court can consider a defendant's employment history and financial resources" as "a necessary part of evaluating the entire background of the defendant in order to tailor an appropriate sentence for the defendant and crime." *Id.* at 671. The Court explained:

> The State, of course, has a fundamental interest in appropriately punishing persons--rich and poor--who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment. *Thus, when determining initially whether the State's penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources.*

Id. at 669-70 (emphasis added).

After *Bearden*, Florida trial courts have generally taken a defendant's ability to make restitution into consideration in the sentencing equation, given that restitution is a part of a state's "penological interest." This means that at the initial sentencing hearing, a judge may properly elect a prison sentence instead of probation if it appears that a defendant is unlikely to make restitution if placed on probation. Also, a judge may use the sentencing process as an incentive to encourage the payment of restitution to victims of crime.

Florida's Penological Interest in Restitution

Examination of Florida Statutes demonstrates that restitution to victims is a central "penological interest" of Florida criminal law. *DeLuise* did not address the importance of the place of restitution in Florida criminal law.

A judge has broad discretion over restitution because its purpose is not only to compensate the victim. As the Supreme Court observed in *State v. Hawthorne*, the

> purpose of restitution is not only to compensate the victim, but also to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system. The trial court is best able to determine how imposing restitution may best serve those goals in each case.

573 So. 2d 330, 333 (Fla. 1991) (quoting *Spivey v. State*, 531 So. 2d 965, 967 (Fla. 1988)); *see also J.K. v. State*, 695 So. 2d 868, 869 (Fla. 4th DCA 1997).

Section 775.089(6)(a), Florida Statutes (2010), provides that "in determining whether to order restitution and the amount of such restitution," a sentencing judge "shall consider the amount of the loss sustained by any victim as a result of the offense." Under the current statute, the victim's loss is the sole consideration for restitution; a "defendant's financial resources or ability to pay does not have to be established when the trial court assesses and imposes restitution." *Del Valle v. State*, 80 So. 3d 999, 1006 (Fla. 2011). Unless a court "finds clear and compelling reasons" not to order restitution, a court must order a defendant to make restitution for "[d]amage or loss caused directly or indirectly by the defendant's offense" and for "[d]amage or loss related to the defendant's criminal episode." § 775.089(1), Fla. Stat. (2010). Where ordered, restitution is a mandatory condition of probation or parole. § 775.089(4), Fla. Stat. (2010). The current statute is a change from the pre-1995 version, under which the "trial court was affirmatively required to consider the defendant's financial resources when imposing restitution." *Del Valle,* 80 So. 3d at 1006; *see* § 775.089(6), Fla. Stat. (1993).[2]

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[2]The public policy favoring restitution is also apparent in the White Collar Crime Victim Protection Act, section 775.0844, Florida Statutes (2010). Section 775.0844(8) provides that a person convicted of an "aggravated white collar crime" must "pay restitution to each victim of the crime, regardless of whether

The Florida Legislature permits judges to use the sentencing process to obtain restitution for crime victims. In 1974, the legislature passed a statute that explicitly allows a judge to mitigate a sentence where a defendant makes restitution. Ch. 74-125, Laws of Florida. For crimes "involving property," section 921.185, Florida Statutes (2010), provides that a sentencing court has the discretion to "*consider any degree of restitution a mitigation of the severity of an otherwise appropriate sentence*." (Emphasis added).

Similarly, restitution is a mitigating circumstance justifying a downward departure from the lowest permissible sentence under the Criminal Punishment Code where the "need for payment of restitution to the victim outweighs the need for a prison sentence." § 921.0026(2)(e), Fla. Stat. (2010). We have written that "[i]f the harm suffered by the victim as a result of the [offense i]s greater than normally expected, and restitution could mitigate that increased harm, then a downward departure sentence may be justified." *State v. Prasad*, 889 So. 2d 204, 205 (Fla. 4th DCA 2004) (citing *Demoss v. State*, 843 So. 2d 309 (Fla. 1st DCA 2003)).

Finally, Florida Rule of Criminal Procedure 3.800(c) provides the procedural vehicle for a judge to encourage restitution by mitigating a sentence after sentencing. In pertinent part, the rule provides:

> A court may reduce or modify . . . a legal sentence imposed by it . . . within 60 days after the imposition . . . .

The judges' offers to mitigate the sentences in *DeLuise* and in this case were both authorized under rule 3.800(c) and section 921.185. *DeLuise* did not take into consideration the statute and rule of procedure that authorized precisely what the trial judge did in that case.

The primary difference between this opinion and *DeLuise* is that *DeLuise* used an equal protection analysis while we employ the due process approach favored by the Supreme Court in *Bearden.* The dissents appear to have abandoned the equal protection analysis. Although the principles of equal protection and due process may

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the victim is named in the information or indictment." Restitution is required to be made a condition of "any probation granted" to a defendant and probation continues "for up to 10 years or until full restitution is made to the victim, whichever occurs earlier." § 775.0844(8)(a), Fla. Stat. (2010). Of course, under the dissents' analyses, this statutory provision violates due process because it provides for a harsher sentence for those who cannot afford to pay restitution.

sometimes converge on the same result, the applicable analyses are not congruent. The problem with an equal protection approach is that it views the sentencing issue with tunnel vision, focusing only upon the sometimes disparate treatment between rich and poor and ignoring all other factors that come to play in the sentencing process. A due process analysis looks at the entirety of the sentencing process and balances all of the interests—the state, the defendant, the victim of a crime, and society at large—and asks whether a sentence was so "arbitrary or unfair" that the Constitution cannot allow it.

The dissents' analyses, which comport largely with equal protection, would have a negative practical impact on restitution in the criminal justice system. Prior to sentencing, judges would likely be removed from participating in any discussion about restitution because any sentence imposed where a defendant failed to make restitution would be open to the attack that it was harsher because of the defendant's poverty. Restitution would become subject to a "don't ask, don't tell" jurisprudence of unwritten policies, where prosecutors negotiate behind the scenes for restitution without involving the court except by a "wink and a nod" at the sentencing hearing where unwritten policies are "understood." Judges would be precluded from actively using statutes such as section 921.185 to encourage restitution; the prosecution and defense would have to broach the subject by way of Rule 3.800(c). An important public policy of the state would be frustrated; statutes like sections 921.185 and 921.0026(2)(e) would be constitutionally neutered, not because they are unfair to a defendant who wants to make restitution to obtain a lesser sentence, but because they may not offer the same assistance to a defendant who cannot.

In its most virulent form, the dissents' analyses would require a sentence of probation in this case because a co-defendant who made substantial restitution secured a sentence of probation.[3] This analysis ignores the United States Supreme Court's pronouncements in *Williams v. New York* and *Williams v. Illinois*:

> The mere fact that an indigent in a particular case may be imprisoned for a longer time than a non-indigent convicted

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[3]Certainly the dissents' belief that fundamental error exists would open the door in postconviction relief for resentencing in any case where a judge took into consideration any failure to make restitution in setting a sentence. Although the dissents do not discuss the issue, the dissents' treat the legal issue as fundamental error because there was no due process objection to the sentence in the circuit court.

> of the same offense does not, of course, give rise to a violation of the Equal Protection Clause. . . . Thus it was that in *Williams v. New York*, 337 U.S. [at 247,] we said: 'The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'

399 U.S. at 243.

Judge Taylor's dissent miscasts Florida jurisprudence as broadly supporting the assertion that disparate sentencing for indigent defendants who are unable to pay up front restitution constitutes per se reversible error, regardless of the penological interests at issue. In the Florida cases cited in her dissent, infirmity arose because the employed sentencing scheme subjected indigent defendants to *increased* punishment for no reason other than his or her indigency. In each case, the sentencing court found extended incarceration unnecessary to satisfy the state's penal objective, yet conditioned lesser sentencing upon the indigent defendant's ability to pay up front restitution; thus, the restitution obligation functioned much like the fine in *Tate*, subjecting the indigent defendant to "debtors' prison" for non-willful nonpayment. *See V.H. v. State*, 498 So. 2d 1011, 1011 (Fla. 2d DCA 1986) (reversing where the trial court's decision to commit the indigent defendant to juvenile detention, rather than impose community control, depended entirely upon the defendant's inability to pay $48 in restitution); *P.B. v. State*, 533 So. 2d 883, 884 (Fla. 3d DCA 1988) (finding an equal protection violation where the juvenile defendant, due to his indigency, could not accept the State's offer to *nolle prosse* his case upon payment of restitution, as done for his co-defendant, subjecting him to trial, adjudication, and commitment); *Smith v. State*, 933 So. 2d 723, 725 (Fla. 2d DCA 2006) (disapproving a plea agreement which conditioned the defendant's 18 month incarceration sentence upon his mother's payment of restitution, since the "nonpayment of restitution was used as a basis for an *increase* in the sentence") (emphasis added).

By contrast, in imposing sentence against DeLuise and Noel, the trial courts' election of incarceration, along with their choices of years, derived not from the ability to pay restitution, but from each defendant's prior record and the enormity of the scheme in which both participated. That the courts, upon reaching an appropriate sentence, provided each defendant the opportunity to *reduce* his sentence through the payment of restitution cannot, as the dissents insinuate, be said to equate to punishment. Rather, such exhibition of leniency serves to balance the penological interests of the victim and the state, within the confines of

section 921.185, by facilitating the controlled exchange of betterments between the defendant and victim, a result neither condemned by *Williams*, *Tate*, and *Bearden* nor Florida case law. To destroy such incentive, as the dissents desire, would be to punish the victim.

The dissents seek to create an entirely new constitutional principle by relocating the *Bearden* analysis from violation of probation proceedings to the first sentencing hearing. While we recognize, in accordance with Judge Ciklin's dissent, that trial judges possess differing, and sometimes more effective, means of incentivizing early restitution payment, the existence of a "better" alternative cannot, by itself, elevate "good practice" to constitutional principle. There is no basis, either in *Bearden* itself or in subsequent jurisprudence, to extend *Bearden*'s post-sentencing requirements to a defendant's initial sentencing, particularly where doing so would open up a whole new area of criminal appeal rife with unclear, yet reversible, judicial impediment. Such a system would leave trial judges with more questions than answers. Could, for example, a sentencing judge inquire into a defendant's ability to make restitution before imposing a maximum sentence? Or, better yet, could a judge reject a plea to probation on the grounds that it does not involve restitution? Neither is certain. Applying the "constitutional principle" espoused in Judge Ciklin's dissent would establish a precarious legal tightrope, wherein sentencing judges, out of caution, will likely remain mute only to place the onus on prosecutors, via a "wink and a nod," to negotiate pre- and post-sentencing restitution payments. Nothing within *Bearden* compels such an unworkable result, nor should it.

Conclusion

In deciding *DeLuise*, we did not hold that the sentence imposed was in any way inappropriate given the magnitude of the defendant's crime. The sentence was well within the statutory maximum. The trial judge did not say that she imposed a greater sentence because the defendant did not pay restitution. The opinion did not mention section 921.185 and rule 3.800(c), which authorize precisely what the judge did—an offer to use restitution to mitigate the severity of an otherwise appropriate sentence. It did not address the importance of restitution as part of Florida's sentencing scheme. There is no reason to stretch *Tate* to apply to a defendant who received a sentence of incarceration within the statutory maximum.

A judge should always have the ability to impose a more lenient sentence than the statutory maximum, for whatever reason. There is no constitutional limit on a judge's ability to show mercy by imposing a

shorter sentence, where a judge is trying to do justice for the victim of a crime. The question is whether a judge's active use of the sentencing process to encourage restitution to crime victims "is so arbitrary or unfair as to be a denial of due process." *Bearden*, 461 U.S. at 666 n.8. We hold that it is not.

The sentence imposed in this case was entirely proper. The judge considered the enormity of the crime and Noel's criminal record in arriving at a sentence well within the maximum allowed by statute. The judge asked Noel if he was in a position to "make any up front restitution" and the judge took Noel at his word. The sentence furthered the recognized goals of sentencing—protection of society, deterring Noel from future crimes, and providing retribution for a serious crime. Consistent with *Bearden,* section 921.085, and rule 3.800(c), the judge gave Noel the opportunity to mitigate "the severity of an otherwise appropriate sentence" by paying restitution to the victims in an amount he indicated he could afford. Under the Constitution, a victim's interest in restitution has a place in sentencing along with the state and the defendant. In weighing those competing interests, a judge's use of an incentive to encourage the payment of restitution is not so arbitrary or unfair as to be a denial of due process. The judge decided at the outset that a 10 year prison sentence, and not probation, was appropriate; the trial court was not bound by the same factors that came to play in *Bearden*, which involved a violation of probation in a case where the sentencing judge initially determined against incarceration. The constitution does not preclude leniency if restitution is paid by, or on behalf of, a defendant.

We therefore affirm the sentence in this case and recede from *DeLuise* to the extent that it is inconsistent with this opinion. We note that the fifth district has aligned itself with *DeLuise* in *Nezi v. State*, 119 So. 3d 517 (Fla. 5th DCA 2013), and we certify conflict with that opinion.

Affirmed.

DAMOORGIAN, C.J., WARNER, STEVENSON, MAY, GERBER and FORST, JJ., concur.

TAYLOR, J., dissents with opinion, in which CIKLIN, LEVINE and KLINGENSMITH, JJ., concur.

CIKLIN, J., dissents with opinion, in which TAYLOR, LEVINE, CONNER, and KLINGENSMITH, JJ., concur.

TAYLOR, J., dissenting.

I respectfully dissent. By conditioning the length of the defendant's sentence on the defendant's payment of restitution, without regard to his ability to pay restitution, the trial judge violated the defendant's right to due process. In this case, as in *DeLuise*, the trial judge imposed a harsher sentence on the defendant solely because he was unable to pay restitution to the victims at the time of sentencing. The majority relies on section 921.185, Florida Statutes, as authority for a judge to consider payment of restitution as a mitigating factor in sentencing the defendant. However, the statute does not permit a judge to impose a sentence of incarceration and then condition a reduction of that sentence on payment of restitution, without considering the defendant's ability to pay restitution or reasonable efforts to acquire the resources to do so. While the rationale in the case law has moved from an equal protection emphasis to a due process approach, it is well-established that the Federal Constitution prohibits imposing a longer term of imprisonment based solely on a defendant's poverty.

The United States Supreme Court "has long been sensitive to the treatment of indigents in our criminal justice system," *Bearden v. Georgia*, 461 U.S. 660, 664 (1983), and over the years since *Griffin v. Illinois*, 351 U.S. 12 (1956), has "reaffirm[ed] allegiance to the basic command that justice be applied equally to all persons." *Williams v. Illinois*, 399 U.S. 235, 241 (1970). In *Griffin*, the Supreme Court held that under the Due Process and Equal Protection Clauses, indigent defendants "must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U.S. at 19. The Court declared that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.*

In a line of cases after *Griffin*, the Court established that sentences which amounted to imprisonment solely because of indigency violated the Fourteenth Amendment's Equal Protection Clause. In *Williams v. Illinois*, the Supreme Court invalidated a state law that allowed an indigent to be imprisoned beyond the statutory maximum so that he might "work off" a fine imposed as part of his sentence. The Court held that the Equal Protection Clause requires that "the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." 399 U.S. at 244. On the same day, the Court decided *Morris v. Schoonfield*, 399 U.S. 508 (1971). In that case, the petitioner, like Williams, was subjected to imprisonment solely because of his indigency. The Court remanded the

case for reconsideration in light of *Williams v. Illinois*. In a concurring opinion, Justice White stated:

> [T]he same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.

Id. at 509.

In *Tate v. Short*, 461 U.S. 395 (1971), decided the next term, the Court applied *Williams* in holding that it is a denial of equal protection to limit punishment to payment of a fine for those who are able to pay it, but to convert the fine to imprisonment for those who are unable to pay.

In *Bearden v. Georgia*, 461 U.S. 660 (1983), the Court addressed "whether a court can revoke probation for failure to pay a fine and restitution when there is no evidence that the petitioner was at fault in his failure to pay or that alternate means of punishment were inadequate." *Id.* at 666 n.7. As the Court acknowledged, the holdings in both *Williams* and *Tate* were "vital to a proper resolution" of this issue. *Id.* at 667. The Court explained, "The rule of *Williams* and *Tate*, then, is that the State cannot 'impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.'" *Id.* (quoting *Tate*, 401 U.S. at 398).

Noting that the case was one where "[d]ue process and equal protection principles converge," *id.* at 665, the Court described the resolution of this issue as involving "a delicate balance between the acceptability . . . of considering all relevant factors when determining an appropriate sentence for an individual and *the impermissibility of imprisoning a defendant solely because of his lack of financial resources*." *Id.* at 661 (emphasis added). Although the Court had emphasized equal protection in earlier case law, the Court in *Bearden* signaled a preference for the due process approach. *Id.* at 666 n.8. However, "as a practical matter," the two clauses "largely converge." *Smith v. Robbins*, 528 U.S. 259, 276 (2000). The question of whether differential treatment violates

equal protection is "substantially similar" to asking the due process question of whether the State's treatment of an indigent defendant is fundamentally unfair or arbitrary. *Bearden*, 461 U.S. at 666.

The *Bearden* Court concluded that "the trial court erred in automatically revoking probation because petitioner could not pay his fine, without determining that petitioner had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist." *Id.* at 661-62. The Court acknowledged that if a probationer sentenced to pay restitution "has willfully refused to pay . . . when he has the means to pay," he may be imprisoned. *Id.* at 668. But, the Court held, "it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available" where the defendant "could not pay despite sufficient bona fide efforts to acquire the resources to do so[.]" *Id.* at 668-69, 672. The *Bearden* Court concluded that the problem in that case was that the State was seeking "to use as the *sole* justification for imprisonment the poverty of a probationer[.]" *Id.* at 671.

Similarly, in this case the trial judge imposed a harsher sentence on the defendant solely because he was unable to pay restitution to the victims within sixty days after he was sentenced. Unlike in *DeLuise*, however, in this case the trial judge did initially inquire into the defendant's ability to pay restitution before offering to reduce his sentence in exchange for payment of restitution. The trial judge asked Noel if he was in a position to pay any up front restitution without having his family starve. Noel responded that there was an amount he could "negotiate." Defense counsel told the court that by "negotiate", Noel meant negotiations with his family members to raise money. Noel said that a lump sum would be "somewhere between" $20,000 to $40,000. The trial court then announced his sentence: "It's going to be ten years Florida State Prison followed by ten years probation. If he makes restitution of twenty-thousand dollars within sixty days, his sentence will be mitigated – the jail portion will be mitigated to eight years."

Noel did not raise the money for restitution and consequently received the longer ten-year sentence. Because the trial court did not revisit Noel's ability to pay restitution or consider any bona fide efforts he made to pay restitution before sentencing him to the longer prison term, this case suffers from the same constitutional defect we found in *DeLuise*. Put simply, Noel received a longer prison term because of his financial inability to meet the restitution obligation.

The majority downplays the significance of *Bearden*'s holding that the Constitution prohibits imposition of a longer prison term based on the defendant's poverty and, instead, focuses on *Bearden*'s allowance for limited consideration of the defendant's financial background in sentencing a defendant. To be sure, *Bearden* states that "the sentencing court can consider the entire background of the defendant, including his employment history and financial resources" in setting an appropriate sentence. *Id.* at 670. However, *Bearden* explains that the "appropriate question is whether consideration of a defendant's financial background in *setting or resetting* a sentence is so arbitrary or unfair as to be a denial of due process." *Id.* at 666 n.8 (emphasis added). Thus, even if, as the majority concludes, *Bearden* "drew a bright constitutional line between a judge's initial sentencing decision . . . and a revocation of probation proceeding," *Bearden* reaffirmed the well-established principle that imprisonment for a lack of financial resources is unconstitutional at any sentencing point in time.

Our decision in *DeLuise* is not inconsistent with *Bearden*. In *DeLuise*, we did not suggest that the trial court lacked authority to "consider the entire background of the defendant, including his employment history and financial resources" in its initial sentencing decision. *Id.* at 670. On the contrary, the sentencing error in *DeLuise*, as in this case, resulted from the absence of any showing that the trial court considered the defendant's *lack of* financial resources and inability to make a substantial restitution payment to avoid a longer term of imprisonment. Allowing the defendant's indigency to serve as a basis for the harsher sentence was "so arbitrary or unfair as to be a denial of due process." *Bearden*, 461 U.S. at 666 n.8.

Theoretically, had the sentencing judge examined the defendant's financial resources and determined that he had the financial means to pay restitution but was willfully refusing to pay it, the trial court may have been well within its discretion to impose a harsher sentence. *Bearden* suggests that a harsher penalty may be appropriate in setting the initial sentence where the defendant has the requisite resources but willfully refuses to come forward with a restitution payment. *See id.* at 668 (the state may use imprisonment as an appropriate penalty if the defendant has willfully refused to pay the restitution when he has the means to pay). But, as mentioned before, the record did not show that any hearing was held regarding the defendant's ability to pay restitution within the allotted time.

Following the *Tate-Morris-Williams* trilogy and *Bearden*, other courts have vacated sentences which were to be reduced or suspended upon

payment of restitution, irrespective of the defendant's ability to pay restitution. In *People v. Collins*, 607 N.W.2d 760 (1999), the Michigan Court of Appeals held that requiring a defendant convicted of embezzlement and larceny to pay $31,505.50 in restitution as a condition for suspending a portion of his jail term violated his equal protection rights as well as the state's restitution statute. There, the defendant, who said that he was unable to make the restitution payments, sought relief from the jail/restitution sentence, arguing that the sentence violated his right to equal protection. The defendant argued "that the trial court's sentencing order, which rewarded restitution payments with a suspension of jail time, violated these principles." *Id.* at 765. The appellate court agreed and rejected the prosecution's response that "the trial court did not impose a jail sentence because defendant failed to pay restitution, but rather allowed for suspension of a jail sentence if defendant met the restitution obligation." *Id.* The court stated:

> We agree with defendant that this is a distinction without a difference. The sentencing order that allowed defendant reduced jail time if he paid restitution is not materially different from a sentence order that would require defendant to serve additional jail time if he did not pay restitution. Regardless of how the trial court phrases its order, the result is a shorter term for defendant if he can and does pay, a longer term if he cannot and does not pay – a result clearly prohibited by the Equal Protection Clause and the statute.

Id.

In *Reddick v. State*, 608 A.2d 1246 (Md. App. Ct. 1992), the Maryland Court of Appeals held that due process and equal protection were violated by a sentencing court's offer to suspend five years of an indigent defendant's thirty-year sentence if he paid restitution for funeral and medical expenses to the victim's mother. The court agreed with the defendant's argument that it is "unconstitutional to incarcerate an indigent defendant for a term longer than that imposed on a similarly situated nonindigent defendant who would be able to make the requisite monetary payment." *Id.* at 1248. Writing for the court, Chief Judge Murphy stated:

> In an opinion in which "[d]ue process and equal protection principles converge," *Bearden v. Georgia* (citations omitted), the United States Supreme Court made clear that, having determined that a fine or restitution is an appropriate

> sentence, a court cannot then imprison a defendant solely because of his inability to pay it. The thirty-year sentence that Judge Hammerman imposed subjects Reddick, an indigent, to five years' imprisonment beyond that which a nonindigent defendant would be required to serve. Since imprisonment for a lack of financial resources is illegal, Reddick is entitled to the sentence that a defendant with the financial wherewithal to make the payment would have received under the same circumstances.

Id. Accordingly, the Maryland court modified the defendant's sentence by striking out the illegal portion and imposing a twenty-five year sentence.

Similarly, the Supreme Court of Montana in *State v. Farrell*, 676 P.2d 168 (Mont. 1984), vacated a sentence that violated the defendant's due process rights by subjecting the defendant to the maximum ten-year sentence simply because of the trial court's belief that he would not be able to make restitution within ten years. Noting the lack of findings regarding the defendant's financial resources and his ability to make restitution and reimburse defense costs, the court expressed its concern that indigency may have been the criterion for imposing the sentence. *Id.* at 176-77.

The Fifth Circuit's opinion in *Barnett v. Hopper*, 548 F.2d 550 (5th Cir. 1977), *vacated as moot*, 439 U.S. 1041 (1978), is also instructive, even though it was a pre-*Bearden* case that was later vacated as moot. The defendant and a co-defendant, who were charged with armed robbery, entered into a plea agreement with the prosecutor wherein in exchange for their guilty pleas, the prosecutor would recommend that the court impose a ten-year probation sentence conditioned on the payment of a $2,000 fine and court costs by each defendant. The co-defendant paid his fine and received probation. However, the defendant could not raise the funds and was thus sentenced to ten years in prison. In a habeas corpus proceeding, the defendant sought relief from the sentence which he contended was unconstitutionally based on his inability to pay. The Fifth Circuit reversed the district court's order denying habeas relief.

The Fifth Circuit acknowledged that the facts in *Hopper* were distinguishable from the facts in *Williams* and *Tate,* but noted that "[t]his court has not interpreted the *Williams-Morris-Tate* line of cases to be limited to their precise facts." 548 F.2d at 553. "When a defendant is imprisoned for financial inability to pay a fine immediately, he is treated more severely than a person capable of paying a fine immediately. The

sole distinction is one of wealth, and therefore the procedure is invalid." *Id.* (citing *Frazier v. Jordan*, 457 F.2d 726 (5th Cir. 1972)). The court went on to explain that "[t]o imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws." *Id.* at 554.

Florida courts have also applied the basic principles enunciated in *Williams* and *Tate* in invalidating increased sentences that resulted solely from indigency. The Second District cited *Tate* in holding that an indigent juvenile who failed to pay restitution could not be committed where the sentencing judge had offered to place the juvenile on community control if she paid the restitution. *See V.H. v. State*, 498 So. 2d 1011, 1011 (Fla. 2d DCA 1986) ("A person cannot be imprisoned solely because of his indigency. . . . The sentence imposed here was equivalent to the alternate sentence of imprisonment based on financial ability to pay which was condemned in *Tate*."). In other words, in *V.H.*, the Second District found it unconstitutional for a trial judge to make a more lenient sentence *expressly conditional* on the defendant's payment of restitution even though the defendant had no ability to pay restitution.

Similarly, in *Smith v. State*, 933 So. 2d 723, 725 (Fla. 2d DCA 2006), the Second District described a plea agreement, which was conditioned upon the payment of restitution by a relative of the indigent defendant, as "morally repugnant." The court questioned "the wisdom of plea agreements that permit longer prison terms for poor people whose relatives have failed to raise the money needed to buy their freedom." *Id.*

In *P.B. v. State*, 533 So. 2d 883, 884 (Fla. 3d DCA 1988), the Third District—citing *Tate*, *Bearden*, and *V.H.*—held that it was a violation of equal protection to order the commitment of a juvenile defendant where his co-defendant's charges were dropped under a plea deal that the defendant could not take advantage of due to his inability to pay restitution.[4]

The majority reads *Bearden* as supporting the sentences imposed in this case and in *DeLuise*. But as demonstrated above, post-*Bearden* case

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[4]However, we later distinguished *P.B.* in *Malone v. State*, 973 So. 2d 1220 (Fla. 4th DCA 2008), where we held that the State's withdrawal of a plea offer that was contingent on restitution did not render the defendant's subsequent sentence unconstitutional, even though the defendant was unable to pay restitution and a different defendant in an unrelated case had been given probation after making restitution to the same victim.

law largely reaffirms the *Williams* and *Tate* holdings that forbid imposing a longer term of imprisonment due to a defendant's inability to pay restitution.

For example, in *United States v. Burgum*, 633 F.3d 810 (9th Cir. 2011), the Ninth Circuit reversed the defendant's sentence because the trial judge impermissibly considered the defendant's inability to pay restitution as an "aggravating factor" in sentencing. The holding of *Burgum* is that the sentencing judge's treatment of the defendant's inability to pay restitution as an aggravating factor in sentencing was plain error. *Id.* at 816. The *Burgum* opinion explained that "it is well established that the Constitution forbids imposing a longer term of imprisonment based on a defendant's inability to pay restitution." *Id.* at 814. The court further explained that "the Constitution prohibits imposition of a longer prison term based on the defendant's poverty, although it does not forbid all consideration of the defendant's financial resources." *Id.* at 815. As the Ninth Circuit explained: *"Bearden*'s allowance for limited consideration of the defendant's financial background *does not undermine the core constitutional prohibition against imposition of a longer prison term as a substitute for a monetary penalty*."[5] *Id.* (emphasis added). The Ninth Circuit's concern in *Burgum* "was that treating defendants who could not pay restitution as more culpable than those who could would result in discrimination against poor and indigent defendants." *United States v. Rangel*, 697 F.3d 795, 804 (9th Cir. 2012).

Without question, the State of Florida has a strong penological interest in obtaining restitution for the victims of crime. To that end, trial courts are required by our restitution statute, section 775.089, Florida Statutes, to order the defendant to make restitution to the victim for damage or loss caused by or related to the defendant's criminal conduct. Courts must order restitution "unless it finds clear and compelling reasons not to order such restitution." § 775.089(1)(a), Fla. Stat. Further, the court must make the payment of restitution a condition of probation in accordance with section 948.03, Florida

[5]The *Burgum* opinion, however, does state that a sentencing court may properly "consider the defendant's ability to pay restitution in deciding to impose a more lenient sentence." *Id.* at 815. There, the court gave the example that a sentencing judge may "impose a reduced sentence to further the legitimate sentencing goal of providing restitution by allowing the defendant to work." *Id.* Nonetheless, the Ninth Circuit did not indicate how it would rule in a situation where the trial judge expressly conditioned a reduction in a prison sentence on an indigent defendant's payment of restitution, as occurred here and in *DeLuise*.

Statutes. *Id.* Restitution orders are therefore routinely issued as a condition of a probationary term that follows a prison term.

In addition, as noted by the majority, section 921.185, Florida Statutes, authorizes a trial court, in its discretion, to consider a defendant's payment of restitution a mitigating factor in imposing a sentence. However, in fashioning an appropriate sentence under this statute, the trial court must exercise its discretion in a manner that comports with constitutional standards. The statute does not expressly permit a trial court to structure a prison sentence such that the prison term is reduced if the defendant pays restitution – without regard to the defendant's ability to pay.

Without an assessment of the defendant's financial resources and ability to pay, the offer to mitigate the sentence under Florida Rule of Criminal Procedure 3.800(c), in exchange for payment of restitution within sixty days, results in an unconstitutional application of section 921.185, Florida Statutes. This type of conditionally mitigated sentence, which offers the defendant an opportunity to "buy" a shorter sentence, blurs the line between rewarding restitution and impermissibly imposing a longer sentence based solely on a defendant's inability to pay. A defendant who cannot and does not come forward with restitution will have to serve additional time in prison solely because of his poverty. For this reason, appropriate findings of fact regarding the defendant's ability to pay restitution are necessary safeguards to avoid a due process violation.

On its face, section 932.285, Florida Statutes, appears constitutional. It extends "to all defendants an apparently equal opportunity for limiting confinement" by satisfying a restitution obligation. *Williams v. Illinois*, 399 U.S. 235, 242 (1970). But this is an "illusory choice for [the defendant] or any indigent who, by definition, is without funds." *Id.* Since only a defendant with access to funds can avoid the lengthier sentence, a conditionally mitigated sentence like the one here creates different consequences for two categories of defendants: those who have the financial resources to pay restitution and those who do not. The indigent defendant is therefore placed in the position of a present-day Tantalus,[6] with the conditional mitigation of his sentence dangling forever out of reach.

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[6]"In Greek mythology a Phrygian king, Tantalus, was condemned for his crimes to stand thirsty and hungry, chin deep in water with fruit-laden branches hanging above his head. When he bent over to drink, the water receded, when he reached up for fruit, the branch would fly upward." *Young Men & Women's*

The majority sanctions a sentencing order that reduces prison time in exchange for restitution as a means of furthering the state's interest in ensuring that victims of property crimes are compensated for their losses. Ideally, the lure of a lesser penalty will motivate more defendants to come up with the restitution. However, this goal is fully achieved only by imposing the longer sentence on someone who actually has the requisite resources but is not forthcoming with restitution. The imposition of a longer sentence for someone who through no fault of his own is unable to pay restitution will not suddenly make him able to produce a payment. As Justice O'Connor suggested in *Bearden* in the context of probation revocations, such a policy could have the "perverse effect of inducing the [defendant] to use illegal means to acquire funds to pay" to avoid a longer sentence. 461 U.S. at 671.

The majority also cites section 775.089(6), Florida Statutes, as authority for the trial court's ability to factor up-front restitution payment into the formula for deciding the length of a defendant's prison term, without regard to the defendant's financial resources and ability to pay. However, section 775.089(6) applies when the trial court orders restitution as a condition of probation or parole – not as a yardstick for the length of a prison term. Section 775.089(6) relieves a trial court from having to determine a defendant's ability to pay when imposing probationary restitution. Restitution to the victim can be made a mandatory condition of probation or parole, regardless of a defendant's ability to pay at the time of sentencing. § 775.089(4), Fla. Stat. (2010). Only later, during revocation of probation proceedings, must a court consider the defendant's ability to pay before imposing punishment. And even if the court finds at that point that the probationer has exhausted all good faith efforts to pay restitution and is not willfully refusing to pay, the debt is not necessarily extinguished. Section 775.089(5), Florida Statutes, authorizes the state or the victim to enforce an order of restitution in the same manner as a civil judgment.

Contrary to the majority's suggestion, my analysis is completely consistent with the due process approach favored by the Supreme Court in *Bearden*. Nor would my approach have a negative impact on restitution in the criminal justice system. As Judge Ciklin has thoroughly explained in his dissent, there are multiple ways a trial judge may encourage restitution without violating a defendant's constitutional rights.

Hebrew Ass'n. v. Borough Council of Borough of Monroeville, 429 Pa. 283, 286, 240 A.2d 469, 471 (1968).

In its parade of horribles, the majority also suggests that the analysis in this dissent "would require a sentence of probation in this case because a co-defendant who made substantial restitution secured a sentence of probation." However, this is simply a mischaracterization of my position. My view is that the Constitution prohibits a judge from conditioning a lower sentence on the payment of restitution without considering the defendant's ability to pay restitution. Nothing in that analysis would require a sentence of probation in this case. In fact, in *DeLuise*, this court expressly rejected the defendant's argument that, as a result of the trial court's improper offer, he was entitled to a minimum guidelines sentence on remand. *See DeLuise*, 72 So. 3d at 254 n.3.

Finally, the majority suggests that Florida jurisprudence does not support my analysis. Nonetheless, the majority agrees that in each of the Florida cases cited in this dissent, infirmity arose because the employed sentencing scheme subjected an indigent defendant to increased punishment for no reason other than his or her indigency. It therefore appears that the main point of contention between the majority and the dissenters is that the majority believes a mitigation of a sentence made expressly conditional on the payment of restitution "cannot . . . be said to equate to punishment." But as Judge Ciklin's dissent eloquently explains, there is no constitutional distinction between a sentence that calls for additional incarceration if the defendant does not pay restitution and a sentence that conditionally reduces the defendant's sentence if he pays restitution. Indeed, if the majority's position were taken to its logical conclusion, it would be difficult to reconcile the majority opinion with a case like *V.H.* After all, the trial judge in *V.H.* did exactly what the majority condones – namely, using "an incentive to encourage the payment of restitution."

In sum, I agree that *Bearden* allows a sentencing judge to consider the defendant's entire background, including employment history, financial resources, and ability to make restitution, in determining the initial sentence. But I strongly disagree that *Bearden* permits a court to craft a sentence which would impose a longer term of imprisonment on a defendant solely because he is unable to pay restitution at the time of sentencing. Where, as in this case, the defendant is unable to pay restitution and receive the benefit of the bargain of a lower prison term, the sentence is *automatically* harsher than it would otherwise be. The defendant's financial status thus becomes the *sole* factor which determines whether he receives the longer sentence – a consequence that is constitutionally indefensible. *Cf. United States v. Parks*, 89 F.3d 570, 572 (9th Cir. 1996) ("Parks may be receiving an additional eight months

on this sentence due to poverty. Such a result is surely anathema to the Constitution.").

For these reasons, I respectfully dissent from the majority's decision to affirm the sentence in this case, as well as from the majority's decision to recede from *DeLuise*. Even if *DeLuise* should have analyzed the issue under a due process framework rather than an equal protection framework, this would have made little difference as a practical matter, because the two clauses largely converge. The ultimate result in *DeLuise* was correct. *DeLuise* properly relied on Supreme Court precedent holding that sentences based solely on a defendant's inability to pay fines or restitution are fundamentally unfair and violate the defendant's rights under the Fourteenth Amendment. For, as the Ninth Circuit said in *Burgum*, "class and wealth distinctions . . . have no place in criminal sentencing." 633 F.3d at 816. A sentencing court's reliance on a defendant's inability to pay "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 814 (citing *United States v. Olano*, 507 U.S. 725, 736 (1993)).

CIKLIN, LEVINE and KLINGENSMITH, JJ., concur.

CIKLIN, J., dissenting.

I believe fundamental due process rights are compromised when a defendant, without being afforded a hearing to consider willfulness, is automatically sentenced to a longer term of incarceration based on a failure to pay money. The sentencing structures of *DeLuise v. State*, 72 So. 3d 248 (Fla. 4th DCA 2011) and the instant case violated the defendants' constitutional due process rights. I therefore must respectfully dissent.

By receding from *DeLuise*, the majority retroactively condones a plainly unconstitutional practice which this court correctly found to constitute fundamental error less than two years ago. The majority's unceremonious burial of this court's decision in *DeLuise* runs the risk of sending an unintended message to those who rely on our decisional authority. To expressly recede from *DeLuise* may very well result in an avalanche of questionable sentencing schemes which have the potential to run afoul of due process considerations.

I am deeply concerned that the majority's decision to not only recede from *DeLuise* but to then enthusiastically embrace the restitution scheme used by Noel's sentencing judge may lead judges, prosecutors, and crime victims down a clearly unpermitted path fraught with false

expectations and constitutional obstacles.

The majority correctly frames this issue under a due process analysis rather than equal protection. "Due process and equal protection principles converge" in the analysis of cases where a defendant may have been improperly sentenced due to the defendant's poverty. *Bearden v. Georgia*, 461 U.S. 660, 665 (1983). As the United States Supreme Court stated, the Court "generally analyze[s] the fairness of relations between the criminal defendant and the State under the Due Process Clause, while [the Court] approach[es] the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause." *Id.* In the same opinion, the Court suggested that "[a] due process approach has the advantage in this context of directly confronting the intertwined question of the role that a defendant's financial background can play in determining an appropriate sentence." *Id.* at 666 n.8.

Under a due process analysis, the issue is "whether [the sentencing court's] consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process." *Id.*

The crucial inquiry in deciding whether a defendant has been unfairly sentenced due to his poverty is the willfulness of the defendant's failure to pay. *See id.* at 667–68 (distinguishing willful and non-willful payment of fines or restitution during probation as basis for incarceration) (citations omitted); *United States v. Parks*, 89 F.3d 570, 572 (9th Cir. 1996) ("[I]f the defendant was making a reasonable, good faith attempt to pay the fine or restitution, it would be fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." (citation and quotation marks omitted)).

The trial court must assess the defendant's ability to pay <u>at the point</u> when the defendant has failed to make the required restitution payment and incarceration is just a jail cell door click away. *See United States v. Ryan*, 874 F.2d 1052, 1054 (5th Cir. 1989) ("[B]efore a defendant can be incarcerated for failure to comply with a restitution order there must be a factual determination that the defendant has not made a reasonable bona fide effort to pay or, if he has made such effort, that an alternative punishment will not satisfy the penalogical [sic] interests of the government." (citing *Bearden*, 461 U.S. at 668–69)); *Vincent v. State*, 699 So. 2d 806, 807 (Fla. 1st DCA 1997) ("While the trial court made a finding of fact on the record that Vincent had the ability to pay, this

finding appears to have been based not on the evidence introduced during the revocation hearing, but on the previous determination of ability to pay that the trial court had made when it modified Vincent's probation. This automatic fact-finding resulted in imprisonment without a determination of Vincent's ability to pay in violation of his right to due process and equal protection of the law as well as the prohibition against imprisonment for failure to pay a debt."[7] (citations omitted)); *State v. Fowlie*, 636 A.2d 1037, 1039 (N.H. 1994) (reversing a sentencing order where the trial court "based its decision to impose the sentence on a presumption of ability to pay restitution at the time of the original sentence, rather than on the defendant's actual ability to pay at any time during the existence of the order to pay"). Thus, as Judge Taylor's dissent accurately notes, the discussion between the court and Noel regarding the amount he was able to pay was insufficient, on its own, because the court must assess willfulness at the point the defendant fails to make the restitution payment thus triggering an automatic additional period of incarceration. The failure to provide a hearing to a defendant who faces automatic imprisonment based on a stale order to pay violates unshakable constitutional principles.

The majority attempts to draw a distinction between (1) a sentencing order that requires the defendant to pay restitution or else be imprisoned, which, I assume, the majority would consider unconstitutional, and (2) a sentencing order that imprisons a defendant but then, within minutes after the imposition of an *initial* sentence, announces to the defendant that he or she may pay restitution in exchange for a reduced sentence (or automatic continued incarceration in the event of non-payment without any further hearing or opportunity to be heard), which the majority considers constitutionally sound. The majority goes to great lengths to suggest that the trial courts here were involved in an "exhibition of leniency" and only the reduction of an initial sentence was being offered—not more prison time for non-payment. Slip Op. at 10. Pay restitution, so goes the act of mercy, and your prison sentence shall automatically be *reduced*. Fail to pay—regardless of financial ability or willfulness issues surrounding the non-payment—and incarcerated you shall remain. This is a distinction without any discernible due process difference. *See People v. Collins*, 607 N.W.2d 760, 765 (Mich. Ct. App. 1999) ("The sentencing order that allowed defendant reduced jail time if he paid restitution is not materially different from a sentence order that would require defendant to serve

[7]Although I believe a due process analysis is the proper method to address these cases, I note that the *Vincent* court chose to also consider equal protection ramifications.

additional jail time if he did not pay restitution."). The trial court's sleight of hand in this regard, as sanctioned by the majority, is as transparent as it is unconstitutional. And the fact that the offer of a reduced prison term came at the *initial* sentencing is inconsequential under a due process analysis and just as patently unconstitutional.

The majority correctly notes that the trial judge in the *DeLuise* case "did not say that she imposed a greater sentence because the defendant did not pay restitution." Slip Op. at 11. Although the trial court did not specifically say it was imposing a greater sentence because DeLuise could not pay the restitution, the record reveals that this is exactly what the *DeLuise* trial court did. This a judge may not do because—quite simply—it is constitutionally repugnant.

Thus, although the sentencing courts in *DeLuise* and *Noel* could have legally ordered the same sentences they initially imposed, it was still unconstitutional for the sentencing courts to render a sentencing plan that automatically imposed a lengthier (or extended) prison term based on the defendant's failure to pay restitution without first addressing whether such failure to make restitution was willful.[8]

The Constitution requires that, in this type of situation, a non-paying defendant be given a chance to explain the non-payment in open court and anything less is antithetical to basic fairness which is deeply rooted in the American justice system.[9]

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[8]As structured by the trial courts in *DeLuise* and *Noel*, both sentences automatically became more harsh without ever giving either defendant the opportunity to explain why they were unable to pay the restitution.

[9]In *Scull v. State*, 569 So. 2d 1251 (Fla. 1990), the Florida Supreme Court outlined the concept of due process:

> The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. *Tibbetts v. Olson*, 91 Fla. 824, 108 So. 679 (1926). Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. *State ex rel. Munch v. Davis*, 143 Fla. 236, 244, 196 So. 491, 494 (1940). In this respect the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. *See* art. I, § 9, Fla. Const.

Id. at 1252.

The majority cites to numerous Florida statutory provisions related to restitution and specifically to a statute that directs a sentencing court to focus on the loss of the victim—and not the defendant's ability to pay—in initially fashioning an appropriate restitution amount. *See* § 775.089(6)(a), Fla. Stat. (2010); *Del Valle v. State*, 80 So. 3d 999, 1006 (Fla. 2011). I take the risk of stating the obvious by pointing out that a state restitution statute can never be applied in a way that violates the United States Constitution.[10] Regardless of whether the trial court's actions were authorized under Florida's statutes and rules, the relevant issue of this and all similar appeals is and must always be whether the sentencing schemes violated constitutional precepts.[11]

The enormity of the crimes perpetrated by Noel and DeLuise are alarming. Both defendants preyed on innocent people, many of whom had life fortunes cast to the wind by the premeditated fraud committed by these two convicted criminals. It is understandable human instinct to demand justice by imprisoning both until the victims and their families are reimbursed. But the guarantees associated with the rule of law must always prevail, and public clamor and the passions of the moment can never be a permissible judicial guidepost.

While I have no difficulty whatsoever with judicial attempts to recover as much restitution money as possible from the pockets of convicted swindlers,[12] the safeguards built into our system of justice must be vigilantly preserved. Failing to consider a person's ability to pay before automatic imprisonment because of non-payment is not only unconstitutional but most assuredly will give false hope to victims. While it might make trial judges feel good to know that they have stood up for victims' rights by incarcerating the perpetrator of an economic

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[10]The majority's discussion of Florida's penological interest in restitution, restitution schemes, and the applicable statutes and rules is entirely correct and one in which I concur. Nonetheless, all such "penological interests" are inherently tempered by constitutional protections.

[11]The majority astutely suggests that a sentencing "judge should always have the ability to impose a more lenient sentence than the statutory maximum, for whatever reason." Slip Op. at 11. However, as noted by the majority, a sentencing judge's restitution plan must always be juxtaposed against the fundamental constitutional principle which prohibits a sentencing process which "'is so arbitrary or unfair as to be a denial of due process.'" Slip Op. at 6 (quoting *Bearden*, 461 U.S. at 666 n.8).

[12]Just as in *DeLuise*, "[I] commend the trial court for making an effort to recover some portion of the substantial losses suffered by the victims." *DeLuise*, 72 So. 3d at 253.

crime in "debtors' prison[13]," a primary goal of the sentencing mix should be the actual transfer of money from the defendant to the victim and not a hollow court document. It is not in the best interest of our system of justice to order a defendant to make the victim financially whole when, in actuality, such an order will result in nothing more than further disappointment on the part of the victim.

Putting this situation into the context of a probation matter perhaps best illustrates why the majority opinion is an unconstitutional contortion. Consider the following hypothetical. Assume a defendant and the state enter into a plea agreement with a sentence of probation and as one of the special conditions of that probation the defendant is required to pay $20,000 in restitution within sixty days of the sentence. Under the hypothetical plea agreement, the defendant and the state agree to a suspended prison sentence of two years, to be imposed automatically if the defendant violates any condition of probation. *See Roman v. State*, 73 So. 3d 796, 796–97 (Fla. 4th DCA 2011) (stating Florida Supreme Court recognizes suspended sentencing structure in which court sentences a defendant to probation but may sentence defendant to original prison term if the defendant violates the terms of probation) (citing *Poore v. State*, 531 So. 2d 161 (Fla. 1988)). Further assume the court inquires of the defendant as to whether the defendant has the ability to pay the $20,000, and the defendant unequivocally states that he can pay the restitution within sixty days. After determining the plea was knowingly and voluntarily given and that a factual basis exists for the guilty plea, the court sentences the defendant pursuant to the terms of the agreement.

Under this hypothetical, if the defendant failed to make the $20,000 payment within sixty days, the defendant would be in an almost identical position to that of Noel in the instant case. In both situations, the defendant would face an automatic two-year prison term for failure to make the restitution payment.

I venture to speculate that each of my colleagues in the majority would agree that, under the facts of the hypothetical, the defendant would have the constitutionally guaranteed right to be heard regarding the willfulness of non-payment before the court could lawfully impose the

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[13]While I do not wish to dwell on a "debtors' prison" analogy, I note that the majority's language, "a judge's use of an incentive [i.e. two years of imprisonment] to encourage the payment of restitution," Slip Op. at 12, certainly harkens back to the practice.

two-year sentence.[14] Indeed, going back at least eighteen years, this court itself has held numerous times that a failure to determine a defendant's ability to pay before being incarcerated for non-payment of a court-imposed financial obligation is reversible error. *Hoey v. State*, 965 So. 2d 360, 361 (Fla. 4th DCA 2007) ("The State must prove defendant has the present ability to pay restitution before probation can be revoked for a failure to pay." (citations omitted and emphasis removed)); *Dirico v. State*, 728 So. 2d 763, 765 (Fla. 4th DCA 1999) (citing *Stephens v. State*, 630 So. 2d 1090 (Fla. 1994)); *Thompson v. State*, 710 So. 2d 80, 81–82 (Fla. 4th DCA 1998); *Johnson v. State*, 698 So. 2d 909, 909 (Fla. 4th DCA 1997) ("This court has previously held that in order to revoke probation for failure to pay supervision costs there must . . . be a sufficient demonstration of probationer's ability to pay *and a specific finding by the court regarding that ability to pay*." (citation, quotation marks, and alterations omitted)); *Antoine v. State*, 684 So. 2d 266, 267 (Fla. 4th DCA 1996) ("[I]t was also error for the court to revoke community control without first making a finding that appellant has the ability to pay." (citation omitted)); *Allen v. State*, 662 So. 2d 380, 381 (Fla. 4th DCA 1995) ("We thus conclude that appellant's probation could not be violated for his failure to pay costs and fees without a finding that he had the financial ability to pay.").

Interestingly, well-established case law further holds that in the probation hypothetical, a defendant could never agree upfront to waive his right to later contest ability to pay in the event of an alleged violation of probation for non-payment of a financial obligation. An agreement to waive the defendant's right to be heard at a future hearing is illegal. *Holland v. State*, 882 So. 2d 510, 511 (Fla. 4th DCA 2004) (citing *Stephens*, 630 So. 2d at 1091).

This begs the question: How could the *Noel* trial judge be permitted to do what he did without ordering probation but had he ordered probation, would clearly have been prohibited from doing? The unmistakable answer is he couldn't. The trial judge fundamentally erred and the majority attempts to sanction a procedure which subverts the very essence of the Due Process Clause.[15]

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[14]This was similar to the fact pattern of *Bearden*, in which the U.S. Supreme Court held that "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay." 461 U.S. at 672.

[15]"Due process . . . is a flexible concept that varies with the particular situation." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). "The root requirement of the Due Process Clause is that an individual be given an opportunity for a

My opinion would be incomplete if it failed to recognize that trial courts already have complete authority and power to encourage and incentivize defendants to make restitution, *without violating the Constitution*. Trial judges who seek to assist victims in recovering restitution are not without viable options and indeed in most situations Florida law requires that restitution be ordered. *See* § 775.089(1)(a), Fla. Stat. (2010) ("In addition to any punishment, the court shall order the defendant to make restitution to the victim for . . . [d]amage or loss caused directly or indirectly by the defendant's offense; and . . . [d]amage or loss related to the defendant's criminal episode, unless it finds clear and compelling reasons not to order such restitution."). A sentencing judge may employ one or more of the following eight techniques:

1. The sentencing judge can place the defendant on probation and require payment of restitution as a condition of that probation. To promote prompt payment, the court can order automatic termination of probation upon full payment, without the need for a further hearing.

2. The sentencing judge can reset sentencing upon the suggestion that the defendant seeks additional time within which to return to court with a restitution payment in hand. As the federal cases interpreting *Bearden and the majority* suggest, it is proper for the court to then consider the payment of restitution in imposing a more lenient sentence. *See, e.g.*, *United States v. Anekwu*, 695 F.3d 967, 989 (9th Cir. 2012). *The consideration of a defendant's actual payment of restitution at the initial sentencing is not the equivalent of setting a condition that will*

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hearing *before* he is deprived of any significant protected interest . . . ." *Id.* (citations, quotation marks, and alteration omitted). "[T]he phrase [due process] expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty." *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24 (1981). "Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Id.* at 24–25. "The substantive due process protected by the Fourteenth Amendment reaches those fundamental rights which are, objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Zurla v. City of Daytona Beach*, 876 So. 2d 34, 35 (Fla. 5th DCA 2004) (citation and quotation marks omitted). The due process clause, and the corresponding due process clause of the Florida Constitution "are intended to operate not only to forbid, but by judicial proceedings to prevent, any and all arbitrary and oppressive governmental activities that adversely affect the life, liberty and property rights of any person." *Heller v. Abess*, 184 So. 122, 123 (Fla. 1938).

automatically impose a greater sentence if the defendant fails to make a certain amount of restitution.

3. The sentencing judge can, after a full in-court financial inquiry of the defendant's ability to pay, sentence the defendant to incarceration with an agreement to mitigate the period of incarceration (within the sixty-day time period set by the rule) upon payment of a set restitution amount. However, due process considerations require that in the event full payment is not made, and the defendant therefore faces an "automatic non-mitigation," he or she is entitled to a hearing and must be brought back before the sentencing judge to examine the reasons for non-payment and the accompanying issue of willfulness.

4. As the majority discusses, Florida Rule of Criminal Procedure 3.800(c) allows a sentencing judge to reduce or modify a sentence within sixty days after the imposition of the sentence. After the sentencing judge imposes sentence, the defendant, the state, or the court may, within the sixty-day mitigation period contemplated by the rule, seek mitigation because funds have become available to the defendant after sentencing.

5. In those jurisdictions which have operational collections courts, the sentencing judge can refer the defendant debtor to the appropriate program. *See, e.g., Castrillon v. State*, 821 So. 2d 360, 361–62 (Fla. 5th DCA 2002) (describing administrative order relating to a "Collections Program" and the underlying statute authorizing collections courts) (citing § 938.30, Fla. Stat. (2000)).

6. The sentencing judge can recommend to the Florida Department of Corrections that an imprisoned defendant be placed in the Florida Community Work Release Program or PRIDE (Prison Rehabilitative and Diversified Enterprises) operated through the DOC. *See Victim Services*, FLA. DEP'T OF CORR., http://www.dc.state.fl.us/oth/victasst/ (last visited Oct. 18, 2013).

7. The sentencing judge may require that a restitution order be enforced in the same manner as a civil judgment, bearing interest until satisfied. *See* § 775.089(5), Fla. Stat. (2010). When properly recorded, the judgment may become a lien on real estate owned by the defendant and all debt collection devices such as garnishment are authorized. *Id.* Pursuant to Florida law, the defendant is liable for all costs and attorneys' fees incurred by the victim with respect to the enforcement of restitution judgments. *Id.*

8. The sentencing judge is empowered to enter a separate income deduction order directing a defendant's employer to regularly deduct from the defendant's income the amount specified in the order. *See* § 775.089(12)(a), Fla. Stat. (2010).

Finally, I must voice my concern about the signals which the majority opinion potentially sends and the questionable procedure it apparently condones. Under the majority's decision, nothing would prevent a trial court from *initially* imposing the maximum sentence in every economic crimes case followed immediately by an offer from the bench to reduce the sentence to the minimum, or indeed below the minimum through a downward departure, if the defendant makes restitution.[16] For example, in this case, the state requested a sentence of fifteen years and the defense requested a sentence of 3.8 years. Under the majority's reasoning, the trial court could have lawfully imposed a maximum sentence of thirty years with the possibility of mitigation and a downward departure to no jail or prison time had Noel made restitution in an amount unilaterally established by the trial court. Or, conversely, the trial court could have automatically kept Noel behind bars for thirty years upon non-payment regardless of whether there was a scintilla of willfulness associated with the non-payment and without ever permitting the defendant to be heard on the issue of non-payment. This hypothetical example clearly illustrates why the trial court's sentencing plan, as approved and tolerated by the majority, is a denial of fundamental due process.

I agree with the very recent result reached in *Nezi v. State*, 119 So. 3d 517 (Fla. 5th DCA 2013). I believe *DeLuise* and *Nezi* were decided correctly, although the analysis should focus on due process rather than equal protection. In this case, I would reverse the sentence and remand for the purpose of affording Mr. Noel his constitutional right to a hearing regarding his failure to pay the $20,000 restitution payment. At that point, the trial judge can appropriately sentence Mr. Noel.

TAYLOR, LEVINE, CONNER and KLINGENSMITH, JJ., concur.

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[16]As the majority states, section 921.0026(2)(e), Florida Statutes (2010), allows the trial court to consider restitution as a mitigating circumstance justifying a downward departure from the lowest permissible sentence under the Criminal Punishment Code. Slip Op. at 8.

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Carlos A. Rodriguez, Judge; L.T. Case No. 07-9128 CF10A.

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Not final until disposition of timely filed motion for rehearing.