Note

Too Poor to Vote: Felony Disenfranchisement in Florida Violates *Bearden*

By Nicolas Sawyer*

* J.D. candidate, University of Texas School of Law, expected to graduate 2021. I would like to thank the Texas Fair Defense Project for introducing me to the *Griffin*-to-*Bearden* case line when I interned there in 2019. Their work at the intersection of poverty and criminal law inspired this note. I would also like to thank Mimi Marziani for encouraging me to think creatively and intersectionally about voting rights.

Working-class Americans, who may struggle to raise money to provide for their families because of generational poverty and cultural oppression, lack the discretionary resources that sophisticated corporations and the rich have to influence government policy in their favor.[1] Working-class Americans' ability to vote is one of the few avenues for doing so. When this franchise is denied to them, democracy is threatened and, indeed, constitutional issues arise.

Florida's current felony disenfranchisement regime is unconstitutional because it disproportionately punishes poor people. There are two reasons why. First, withholding voting-rights restoration solely based on a person convicted of a felony's inability to pay is invidious discrimination that creates two discrete classes of citizens and increases punishment solely due to indigency in violation of equal protection. Second, withholding voting rights restoration for failure to pay monetary terms of a sentence is a violation of *Bearden v. Georgia*[2] and thus unconstitutional under the Fourteenth Amendment.[3] Typically, the standard for reviewing laws that burden voting rights is the Anderson-Burdick test.[4] However, the central thrust of this note is that a concurrent line of poverty-related precedent in criminal law might be applied to challenge felony disenfranchisement in Florida.

The structure of this note is as follows: First, the background

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[1] *See* Jamila Michener, *Race, Poverty, and the Redistribution of Voting Rights*, 8 POVERTY AND PUB. POL'Y. 106, 106 (2016) (finding that poverty and race are associated with political involvement); Alistair Macleod, *Democracy and Economic Inequality*, *in* PHIL. PERSP. ON DEMOCRACY IN THE 21ST CENTURY 175 (Ann E. Cudd & Sally J. Scholz eds., 2014) (arguing that corporate lobbying produces socio-economic inequality in democracy).

[2] 461 U.S. 660 (1983).

[3] *Id.* at 672–73.

[4] Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); Burdick v. Takushi, 504 U.S. 428, 434 (1992) ("[A]s the full Court agreed in *Anderson* . . . a more flexible standard applies. A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'").

history of the felony disenfranchisement regime in Florida is summarized. Second, the Fourteenth Amendment is applied to Florida's felony-disenfranchisement laws. And third, the remedy available for this violation under Bearden, a determination of indigency before deprivation, is proposed.

I. BACKGROUND

This section outlines the history of felony disenfranchisement in Florida, beginning with the ratification of Florida's constitution in 1838. Then, it charts subsequent changes to the felony-disenfranchisement regime up to 2018. The section ends by analyzing the recent preliminary injunction in a federal district court and its affirmance by the Eleventh Circuit.

A. The 1838 Florida Constitution and the Origins of Felony Disenfranchisement in Florida

Felony disenfranchisement in Florida began with the 1838 ratification of the state constitution.[5] There is little evidence on the constitutional intent of this felony-disenfranchisement statute. The only legislative history regarding the original passage of Florida's constitution in 1838 is the Journal of the Proceedings of Convention of Delegates to Form a Constitution.[6] Article VI, § 13 of the original 1838 constitution states "laws shall be made by the General Assembly, to exclude from office, and from suffrage, those who shall have been or may thereafter be convicted of bribery, perjury, forgery, or other high crime, or misdemeanor."[7] The Florida constitution required that voters be a resident of the county and have permanent housing: qualified voters "shall have resided, and had his habitation, domicil, home, and place of permanent abode in Florida, for two years next preceding the election at which he shall offer to vote; and who shall have at such time, and for six month immediately preceding said time, shall have had his habitation, domicil, home, and place of permanent abode in the county, in which he may offer to vote . . . ."[8] This suggests that poor or transient people who may have had difficulty establishing permanent residency in Florida were unable to vote. This is the beginning of Florida's discrimination against voters on

[5] FLA. CONST. of 1838, art. VI, § 13.

[6] *See Generally* JOURNAL OF THE PROCEEDINGS OF CONVENTION OF DELEGATES TO FORM A CONSTITUTION FOR THE PEOPLE OF FLORIDA, HELD AT ST. JOSEPH, DECEMBER, 1838 (1839). This clause did not receive specific attention. The Proceedings only shows what motions were made and how the various members voted on motions. *Id.*

[7] FLA. CONST. of 1838, art. VI, § 13.

[8] FLA. CONST. of 1838, art. VI, § 1.

the basis of their ability to pay.[9]

B. Changes to Florida's Felony Voting Rights, 1838–2018

From 1838 to today, the constitutional and statutory language surrounding what types of convictions trigger disenfranchisement has changed; such changes were made in 1868,[10] 1968,[11] 1974,[12] and 2007.[13] Lawsuits challenging Florida's felony-disenfranchisement regime were brought as the regime changed over time: in 2000, 2018, and in 2019.[14] The analysis in this note centers on Florida's current statutory regime—specifically, the interplay between the Florida constitution's Amendment 4 and Senate Bill 7066 (SB 7066), codified as Florida statute § 98.0751.[15]

C. Amendment 4, 2018

Amendment 4 provides an avenue for felony voting-rights restoration. During the November 6, 2018 election, Amendment 4, a 799,000-signature ballot initiative, passed with a 64.55% vote.[16]

This is the relevant text of Amendment 4:

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[9] By specifically indicating racial prerequisites on the exercise of the franchise, Florida legislators also, by extension, implicated economic classifications. *Id.* (enumerating voting rights only to "[e]very free white person . . . ." *Id.* In other words, if you were not white, you could not vote.

10 FLA. CONST. of 1868, art. XIV, § 2 (The first inclusion of the word "felony"; removed racial requirement to vote; enacted close to date Florida was admitted to the Union).

11 FLA. CONST. of 1968, art. VI, § 4 ("bribery, perjury, larceny, and infamous crimes" were taken out).

12 *See* FLA. CONST. of 1974 (legislature provided for suffrage restoration upon conclusion of sentence).

13 *See* FLA. CONST. of 2007 (restored suffrage to those recommended by the Parole Commission).

[14] *See* Johnson v. Bush, 214 F. Supp. 2d 1333 (S.D. Fla. 2002) (denying a challenge to the felony disenfranchisement regime); Hand v. Scott, 888 F.3d 1206 (11th Cir. 2018) (finding Florida's scheme of voter felony re-enfranchisement violated the Equal Protection Clause and the First Amendment of the United States Constitution); Jones v. DeSantis, 410 F. Supp. 3d 1284 (N.D. Fla. 2019) (finding laws prohibiting those convicted of felonies from voting due to their inability to pay financial obligations violated the First Amendment and the Equal Protection Clause of the United States Constitution and granting order granting preliminary injunction).

[15] FLA. STAT. § 98.0751 (2019).

[16] ACLU OF FLORIDA STATEMENT ON HOUSE BILL RESTRICTING AMENDMENT 4, ACLU OF FL. (March 19, 2019), https://www.aclufl.org/en/press-releases/aclu-florida-statement-house-bill-restricting-amendment-4 [https://perma.cc/GB9G-UURW]; Steven Lemongello, *Floridians will vote this fall on restoring voting rights to former felons*, SUN SENTINEL (Jan. 23, 2018, 4:40 PM), https://www.sun-sentinel.com/news/florida/fl-reg-felon-voters-amendment-20180123-story.html [https://perma.cc/7CFU-KSZM]; Patricia Mazzei, *Floridians Gave Ex-Felons the Right to Vote. Lawmakers Just Put a Big Obstacle in Their Way*, NEW YORK TIMES (May 3, 2019), https://www.nytimes.com/2019/05/03/us/florida-felon-voting-amendment-4.html [https://perma.cc/L8D2-PRBU] (citing his "national acclaim").

> (a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability. Except as provided in subsection (b) of this section, any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation.
>
> (b) No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights.[17]

Critically, the statute does not define what it means to complete "all terms of a sentence."

D. Florida Senate Bill 7066, Codified as Florida Statute § 98.0751, 2019

SB 7066 sought to define what it means to complete "all terms of a sentence," and is the point of juncture for class discrimination. Section 98.0751 became effective on July 1, 2019.[18] The key provision of Section 98.0751 (SB 7066) codified, that is at issue in this note is the statute's definition of the "completion of all terms of sentence," which is required to restore one's right to vote.[19] According to the statute, "'[c]ompletion of all terms of a sentence' means any portion of a sentence that is contained in the four corners of the sentencing document," including "[f]ull payment of restitution ordered to a victim by the court as a part of the sentence" and "full payment of fines or fees ordered by the court as a part of the sentence or that are ordered by the court as a condition of any form of supervision, including, but not limited to, probation, community control, or parole."[20] Also of importance, § 98.0751(2)(a)(5)(e) describes specific means for satisfying these financial obligations, which include "actual payment in full," termination by the court with the restitution payee's approval, or the completion of community service hours.[21]

In a letter to Florida Secretary of State, Laurel Lee, Governor DeSantis wrote that SB 7066 "enumerates a uniform list of crimes that fall into the excluded categories and confirms that the amendment does not apply to a felon who has failed to complete all terms of his [sic]

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[17] FLA. CONST. art. VI, § 4.
[18] FLA. STAT. § 98.0751 (2019).
[19] *Id.*
[20] *Id.* § 98.0751(2)(a)(5).
[21] *Id.* § 98.0751(2)(a)(5)(e).

sentence."[22] This bill was heavily criticized for creating what resembled a poll tax in light of the fact that a disproportionate number of those convicted of felonies in Florida are African American and poor.[23] In her reporting on the issue, a New York Times journalist quoted a Floridian who had spent 15 years in prison for robbery and burglary: "Basically, they're telling you 'If you have money, you can vote. If you don't have money, you can't.'".[24] The Floridian was also concerned because "he [did] not know whether he owe[d] money to the court, but worrie[d] it could now prove a complication when he gets ready to cast a ballot."[25] During the bill's final debate, lawmakers highlighted the origins of disenfranchisement: "The final debate on the House floor on Friday lasted more than two hours, with black Democrats emphasizing that felons had been barred from voting in the first place in Florida as part of racist Jim Crow laws enacted during Reconstruction."[26]

E. Federal District Court Enjoins Senate Bill 7066 in *Jones v. DeSantis*, 2019

On October 18, 2019, Judge Robert L. Hinkle, a federal judge in the Northern District of Florida, issued a preliminary injunction against SB 7066 after advocates filed suit.[27] The lawsuit involved seventeen individuals and three organizations.[28] The named plaintiffs are entitled to vote based on Amendment 4 except for one reason: they have not paid the financial obligations imposed upon them when they were sentenced.[29] The precise question at issue was whether the State of Florida can deny restoration of a person convicted of a felony's right to vote based on their failure to pay an amount they are unable to pay.[30] Although it asserted that the Florida Supreme Court has the final word on whether "all terms of the sentence" includes fines, restitution, and fees, the district court assumed that they are included for the purpose of the lawsuit.[31] The court

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[22] Letter from Ron DeSantis, Fla. Gov., to Laurel Lee, Fla. Sec'y of State (June 28, 2019), https://www.flgov.com/wp-content/uploads/2019/06/6.282.pdf [https://perma.cc/V3JZ-8NY8].

[23] Dara Kam, *Florida Senate OKs strict Amendment 4 felon voting rights measure*, ORLANDO SENTINEL (May 3, 2019), https://www.orlandosentinel.com/politics/os-ne-florida-senate-felon-voting-20190503-story.html [https://perma.cc/UCF5-X4L2].

[24] Mazzei, *supra* note 17 (internal quotation omitted).

[25] *Id.*

[26] *Id.*

[27] *DeSantis*, 410 F. Supp. 3d at 1289; *see also* P.R. Lockhart, *A controversial Florida law stops some former felons from voting. A judge just blocked part of it.*, VOX (Oct. 19, 2019, 2:53 PM), https://www.vox.com/policy-and-politics/2019/7/2/20677955/amendment-4-florida-felon-voting-rights-injunction-lawsuits-fines-fees [https://perma.cc/4M5E-YEL7].

[28] *DeSantis*, 410 F. Supp. 3d at 1289.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 1292. The Florida Supreme Court has since held that all terms of the sentence do indeed include fine, restitution, and fees. *Advisory Opinion to the Governor Re: Implementation of Amendment 4, the Voting Restoration Amendment.*, No. SC19-1341 (Fla. Jan. 16, 2020),

issued the preliminary injection, finding a likely Fourteenth Amendment violation, after applying *Johnson v. Governor of State of Florida*[32] and a standard of review slightly higher than rational basis under *M.L.B. v. S.L.J.*[33]

F. The Eleventh Circuit Affirms Jones v. DeSantis, 2020

On February 19, 2020, in a *per curiam* opinion, the Eleventh Circuit affirmed the *Jones v. DeSantis* preliminary injunction in *Jones v. Governor of Florida*.[34] The court applied heightened scrutiny to the plaintiff's equal protection claim rather than rational basis in finding that the plaintiffs were likely to succeed on the merits among the other elements of the preliminary injunction review.[35] The preliminary injunction required the State to allow the named plaintiffs to register and vote if they are able to show that they are genuinely unable to pay their legal financial obligations.[36] The district court had yet to hold on the class certification. The subclass for the Equal Protection Clause claim was defined as "[a]ll persons otherwise eligible to vote in Florida who are denied the right to vote solely because they are genuinely unable to pay their outstanding LFOs [legal financial obligations]."[37] At this point in time, neither the Eleventh Circuit or the District Court in Florida have required any specific procedure for complying with the preliminary injunction.[38] The district court declined to rule on the First Amendment, Due Process Clause, and Twenty-Fourth Amendment claims, and the Eleventh Circuit only ruled on the Equal Protection Clause claim.[39]

In applying the *Griffin*-to-*Bearden* and *Harper* case lines, the Eleventh Circuit held that the interpretation of Amendment 4 to include LFOs failed heightened scrutiny for this wealth-based discrimination claim because the discrimination involved either or both the right to access to franchise and access to criminal judicial processes.[40] The Eleventh Circuit cited *M.L.B.* in finding that Florida's re-enfranchisement scheme punished a class of people convicted of felonies based only on their wealth and that the punishment the plaintiffs suffer implicates access to

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https://www.floridasupremecourt.org/content/download/567884/6414200/file/sc19-1341.pdf [https://perma.cc/L247-D94C].

[32] Johnson v. Governor of State of Florida, 405 F.3d 1214 (11th Cir. 2005) (en banc).

[33] 519 U.S. 102 (1996).

[34] 950 F.3d 795, 800 (11th Cir. 2020).

[35] *Id.* at 809.

[36] *Id.* at 810.

[37] *Id.* at 804-5.

[38] *Id.* at 805.

[39] *Id.*

[40] *Id.* at 817.

the franchise.[41] Another finding of the Eleventh Circuit was that *Bredesen*, *Harvey v. Brewer*, and *Madison* were distinguishable or not binding on this decision when those courts applied a rational basis review to requiring payment of LFOs before re-enfranchisement.[42] In addition, the Eleventh Circuit held that people convicted of felonies still retained re-enfranchisement interests protected by the Equal Protection Clause even though those convicted of felonies could constitutionally lose their franchise under *Richardson v. Ramirez*.[43] In combining the *Bearden* and *Harper* case lines, the court found "the state's ability to *deprive* someone of a profoundly important interest does not change the nature of the right, nor whether it is deserving of heightened scrutiny when access to is made to depend on wealth."[44]

And finally, the Eleventh Circuit suggests that the remedy the district court provides must be pre-deprivation. The court discussed the adequacy of the current Florida disenfranchisement scheme in fixing the Equal Protection Clause violation when the court applies the *Bearden* standard of heightened scrutiny, which requires considering the existence of "alternative means for effectuating the purpose" of Amendment 4.[45] In doing so, the court noted that three methods of fixing the violation[46] were inadequate because the remedies for a person's continued disenfranchisement were *discretionary*.[47] The reason that the discretionary and slow-paced nature of these remedies made them inadequate is that they were not a "suitable alternative" to "felons who are able to pay [that] enjoy near-immediate, *automatic* re-enfranchisement as of right."[48] It should follow then that the only adequate alternative for automatic re-enfranchisement upon payment for someone who can pay would be automatic consideration of ability to pay before continued disenfranchisement so that the restoration of the ability to vote for both wealthy and indigent is equally as automatic. The court further considered the practicality of this administrative burden when it rejected the State's argument that their interest in not having to administer the system weighed in the State's favor: "[I]t is Florida's voters who have chosen to automatically re-enfranchise the States' felons and that decision has necessarily created an administrative burden on the state," and in fact, "it is not as though this is the first time the State will be making individualized

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[41] *Id.* at 817-25.

[42] *Id.* at 821.

[43] *Id.* at 801-2 (citing Richardson v. Ramirez, 418 U.S. 24, 56 (1974)).

[44] *Id.* at 823.

[45] *Id.* at 825-28.

[46] *Id.* at 826 ("The defendants argue, however, that felons have three alternative avenues to regain their access to the ballot: (1) by terminating their LFOs '[u]pon the payee's approval,' as SB 7066 allows; (2) the completion of community service hours if so converted by a court; and (3) a discretionary grant of clemency by the Executive Clemency Board." (internal citation omitted)).

47 *Id.* at 826 ("All three avenues suffer from a common and basic infirmity—they are entirely discretionary in nature.").

48 *Id.* at 826.

determinations about a criminal defendant's financial situation on a large scale."[49] The remainder of this note details the exact historical backdrop of the *Griffin*-to-*Bearden* case line underpinning this combined Equal Protection Clause and Due Process Clause argument, and why this case line requires a pre-deprivation remedy.

II. ARGUMENTS

Requiring that all monetary terms of a sentence be paid before restoring a person convicted of a felony's right to vote, without an inquiry into their ability to pay and without offering adequate alternatives to full payment, is a violation of the Fourteenth Amendment. A state may remove the right to vote from all citizens, but if it chooses to re-enfranchise them, it must do so in line with equal-protection principles.[50]

It is a general rule that equal-protection claims based on indigency are subject only to rational-basis review, with two exceptions: claims related to voting and claims related to criminal or quasi-criminal processes.[51] Although the first prong clearly applies here,[52] it is the second-prong that will be discussed. The argument proceeds as follows.[53] First, the voter-disenfranchisement scheme in Florida is penal in nature. Because of this, Florida improperly creates two classes of people convicted of felonies in its punishment system: one group of people wealthy enough to afford all monetary terms of their felony sentences and remove the burden of disenfranchisement; and a second group of people that is poor and cannot afford to pay all the monetary terms of their felony sentences and remain burdened by disenfranchisement. In other words, this form of discrimination increases punishment for poor people convicted of felonies solely because of the size of their wallets. This violates the law of equal protection. Second, under this scheme, Florida improperly creates continued felony disenfranchisement solely based on inability to pay, which is unconstitutional when applying the *Bearden* balancing test for burdens on defendants. And third, the statutory authorization to supply community service as an alternative to monetary punishment is not an

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49 *Id.* at 830.

50 *See* Richardson v. Ramirez, 418 U.S. 24 (1974) (subjecting a felony enfranchisement law to equal-protection analysis); *see also Johnson*, 405 F.3d at 1216 n.1 ("A felon who has completed his sentence may apply for clemency to have his civil rights restored. The plaintiffs also allege that Florida's voting rights restoration scheme violates constitutional and statutory prohibitions against poll taxes. Access to the franchise cannot be made to depend on an individual's financial resources." (internal citations omitted)).

51 *M.L.B.*, 519 U.S. at 123.

52 *See DeSantis*, 410 F. Supp. 3d at 1302 (indicating that the exception for claims related to voting is "squarely applicable here . . . .").

53 For further development of this argument, as it applies to the voting regimes of forty-eight states and the District of Columbia, see Beth Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 101 (2019).

adequate alternative under *Bearden*.

A. Florida's Felony Disenfranchisement Scheme Is Penal In Nature

Florida's felony disenfranchisement scheme is penal in nature.[54] A law that is penal in nature and discriminates based on indigency is suspect to a standard of review higher than rational basis under *M.L.B.* and *Bearden*.[55] The test for determining whether a law is penal is set forth in *Trop v. Dulles*[56]:

> In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.[57]

The federal district court in *Jones v. DeSantis*, in granting the preliminary injunction, considered the application of the reasoning in *Trop* to the statutory scheme at hand: is it penal in nature?[58] The court discussed whether the law was penal in the context of the second exception to rational-basis review under *M.L.B.* regarding indigency-related equal-protection claims:

> [W]hen the purpose of disenfranchisement is to punish, this second exception applies. If, after adoption of Amendment 4,

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[54] *Jones*, 950 F.3d at 819 ("Disenfranchisement is punishment.").
[55] *See id.* at 817-28.
[56] 356 U.S. 86 (1958).
[57] *Id.* at 96-97.
[58] *See DeSantis*, 410 F. Supp. 3d at 1302.

> the purported justification for requiring payment of financial obligations is only to ensure that felons *pay their "debt to society"*—that is, that they are fully punished—this second *M.L.B.* exception is fully applicable.[59]

Because "[t]he controlling nature of such statutes normally depends on the evident purpose of the legislature,"[60] I turn to the legislative history of SB 7066 to determine if the purpose of Amendment 4 and SB 7066 is to ensure those convicted of felonies "pay their debt to society."[61] Such a purpose indicates a scheme is penal in nature. An analysis of the history shows that it is penal in nature.

When asked about the nuances of waiving monetary terms of a sentence in order to restore one's right to vote, the chair of the Florida House of Representatives Judiciary Committee and sponsor of SB 7066 repeatedly affirmed that the purpose of the various mechanisms for receiving waiver was to provide as many means as possible for people to efficiently be able *to pay their debt to society*.[62] When asked whether restitution converted to a lien constitutes completion of a sentence, Representative James Grant stated that it would, in order to provide "as many pathways as possible for people to efficiently be able to pay their debt to society."[63] He went on to further say that waiver of fees that people cannot afford is desirable to ensure someone convicted of a felony "has in fact paid their debt to society."[64] This shows that the legislative architects of this statutory scheme intended for it to be penal in nature, and thus the *M.L.B.* second prong and *Bearden* apply.

In addition, SB 7066 is penal in nature because it defines the terms of the sentence as "any portion of a sentence that is contained in *the four corners of the sentencing document*,"[65] including restitution, fines, and fees. Also, pursuant to SB 7066, in its text, and as discussed on the floor of Florida House of Representatives, expressly grants jurisdiction to the *originating criminal court* to adjust terms of a sentence for the purpose of restoring felony voting rights.[66] These two considerations taken together show that the Florida legislature intended this disenfranchisement scheme, and any relief available to indigent people convicted of felonies, to remain under the purview of the originating criminal court, and

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[59] *Id.* at 1302 (emphasis added).
[60] *Trop*, 356 U.S. at 96.
[61] *DeSantis*, 410 F. Supp. 3d at 1302.
[62] Online Video Archive: House – 60th Day of Regular Session (Florida House of Representatives May 3, 2019, 11:00 AM) [hereinafter Online Video Archive: House – 60th Day of Regular Session], https://www.flsenate.gov/media/VideoPlayer?EventID=2443575804_2019051002&Redirect=true [https://perma.cc/Z5KS-68L3].
[63] *Id.*
[64] *Id.*
[65] FLA. STAT. § 98.0751(1)(a) (2019) (emphasis added).
[66] Online Video Archive: House – 60th Day of Regular Session, *supra* note 63.

therefore remain subject to such court's considerations of their criminal involvement and sanctions. In all practical matters, this makes the originating criminal court judge the gatekeeper as to whether an indigent person convicted of a felony will be able to waive or receive other relief for their outstanding fees, and thus restore their right to vote. This design by the architects of the statutory scheme shows that it was meant to be penal in nature.

Finally, no text in SB 7066—nor any discussion of SB 7066 on the House of Representatives floor the day of its passage—articulated non-penal purposes of the statutory regime. For these reasons, the Florida disenfranchisement scheme under Amendment 4 and SB 7066 is penal in nature. Thus, the statutory scheme is subject to a standard of review for a due-process claim that is higher than rational basis under *M.L.B.* and the combined due process and equal-protection balancing test under *Bearden*. Each of these are applied in turn.

B. Disenfranchising Those Convicted of Felonies Based Solely on Their Inability to Pay Is Invidious Discrimination Because Doing So Creates Two Discrete Classes of Citizens and Increases the Punishment of One Class Solely Due to its Members' Indigency. This Violates Equal-Protection Law.

Disenfranchising people convicted of felonies based solely on their inability to pay is invidious discrimination that creates two discrete clases of citizens and increases punishment solely due to indigency in violation of equal protection. States cannot issue higher punishment to people solely due to their inability to pay.[67] Where the increased punishment serves no compelling government interest, it is invidious discrimination.[68]

In *Williams v. Illinois*, the Court held that an indigent defendant may not be confined beyond the maximum term specified by statute because of their failure to satisfy the monetary provisions of the sentence through no fault of their own.[69] The appellant in this case was convicted of petty theft and received one-year imprisonment and a $500 fine plus five dollars in court costs.[70] The judgement specified that he should

[67] Williams v. Illinois, 399 U.S. 235, 241-42 (1970). ("[O]nce the state has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.").

[68] *Id.* at 242.

[69] *Id.* at 236.

[70] *Id.*

remain in jail beyond the year if he was in default of the payment of the fee and court costs at a rate of five dollars per day.[71] The effect was that he would remain in jail for 101 days beyond the one-year maximum length of the sentence solely because he could not afford the fee.[72] A concurring opinion by Justice Harlan denied the equal-protection rationale of the majority in favor of a due-process analysis.[73]

Additionally, in *Tate v. Short*,[74] the Court held, in light of *Williams v. Illinois* and the Equal Protection Clause, that a defendant cannot be punished with incarceration for failure to pay a fine or court costs related to a fine-only offense because doing so exceeds the statutory ceiling for fine-only offenses.[75] The petitioner in *Tate* case had fines of $425 for nine convictions out of a Houston court for traffic offenses and was unable to pay because he was indigent.[76] He would have had to spend 85 days incarcerated to pay off the fines at a rate of five dollars per day.[77] The Court reasoned that incarceration in this situation did not "further any penal objective of the state."[78] Instead, incarceration was imposed for the purpose of increasing the state's revenue "but obviously [did] not serve that purpose."[79] In fact, incarceration had the opposite effect because it burdened the state with the cost of feeding and housing the defendant for the period of his imprisonment.[80]

The holdings in *Williams* and *Tate* control in Florida, proving an equal-protection violation for three reasons. First, like the defendants in *Williams* and *Tate*, Floridians convicted of felonies are continuously punished with disenfranchisement for the sole reason that they cannot afford fines, restitution, or fees. The equal-protection violation is identical. The same government interests at play in *Williams* and *Tate* are at play here: the government's penal interest in making defendants pay fines and fees as a condition of their sentence, or to provide the government revenue. While the liberty interest at stake in *Williams* and *Tate* was incarceration, which is not at stake in this case, the ability to vote is arguably more important than freedom from incarceration,[81] and is heavily burdened as a result of this discrimination.

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[71] *Id.*
[72] *Id.* at 236–37.
[73] *Id.* at 259 (Harlan, J., concurring).
[74] Tate v. Short, 401 U.S. 395 (1971).
[75] *Id.* at 397.
[76] *Id.* at 396.
[77] *Id.* at 397.
[78] *Id.* at 399.
[79] *Id.*
[80] *Id.*
[81] *See* Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

Second, requiring indigent people convicted of felonies to pay that which they cannot pay before refranchising them serves no compelling interest. Denying franchise to someone who has no means to pay fines, restitution, and fees does not make the money forthcoming. Not being able to vote doesn't make you more money. Not being able to vote doesn't make you more likely to get a job. Not being able to vote is not rationally related to raising funds for the government. In fact, denying civic engagement to indigent people convicted of felonies discourages civic and entrepreneurial involvement, frustrates the government's same interests, and threatens democracy.[82]

Third, Florida's statutory scheme is unconstitutional because it increases punishment beyond its own statutory determination of what punishment is appropriate only against the indigent. In *Williams*, the Court reasoned that "once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency."[83] By analogy, once a court has determined that a suspension of the right to vote until all terms of the sentence have been completed as a punishment for a felony, Florida, in its implementation, may not make an end run around the intent and plain language of Amendment 4 by effectively denying the restoration of voting rights to most people convicted of felonies. Doing so extends punishment beyond its statutory authority.[84]

C. Felony Disenfranchisement for Failure To Pay the Monetary Terms of a Sentence Is a Violation of Bearden and Is Thus Unconstitutional Under the Fourteenth Amendment

Felony disenfranchisement for failure to pay the monetary terms of a sentence is a violation of *Bearden* and is thus unconstitutional under the

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[82] Kevin Lanning, *Democracy, Voting, and Disenfranchisement in the United States: A Social Psychological Perspective*, 64 JOURNAL OF SOCIAL ISSUES 431, 445 (2008) ("This relationship between socioeconomic status and political participation is a recipe for continuing inequalities, for when poor citizens do not vote, their interests are less likely to be reflected in progressive economic policies. Yet withdrawal from the political sphere has consequences for the person as well as for the broader society. If the act of voting fosters a sense of inclusion and the expression of values, then, in not voting, one is deprived of these benefits. If, as an act of civic engagement, voting leads to an increase in interpersonal trust, then, in not voting, one is likely to remain at the margins, skeptical of the intentions of those who lead." (internal citations omitted)).

[83] *Williams*, 399 U.S. at 241-42.

[84] *See DeSantis*, 410 F. Supp. 3d at 1296 ("The record does not show the percentage of otherwise-eligible felons who have unpaid fines and restitution, but the record shows that roughly 80% of otherwise-eligible felons have unpaid fines, restitution, or other financial obligations imposed at the time of sentencing.").

Fourteenth Amendment.[85] In *Bearden v. Georgia*, the Court held that the Fourteenth Amendment prohibits a state from revoking an indigent defendant's probation for failure to pay a fine and restitution without determining that the defendant had made sufficient *bona fide* efforts to pay and that adequate alternative forms of punishment did not exist.[86] In *Bearden*, the petitioner pled guilty to burglary and theft.[87] The trial court did not enter a judgment of guilt but deferred proceedings and sentenced petitioner to three years of probation.[88] Petitioner was required to pay a $500 fine and $350 restitution as a condition of probation.[89] Petitioner was required to pay $100 that day, $100 the next day, and the remaining $550 within four months.[90] Petitioner borrowed money to pay the first $200 but, after losing his job, told the probation office that he would be unable to make the payments on time.[91] His probation was revoked and he was required to serve the sentence in prison.[92]

The Court held that this practice was unconstitutional, stating that due process and equal-protection principles converge in the Court's analysis in these cases.[93] The analysis that this Court adopts in *Bearden* is taken from the due process-like analysis in Justice Harlan's concurrence in *Williams*:

> Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as "the nature of the individual interest 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. . . ."[94]

Further, the Court mentions in a footnote that due-process concerns were more applicable to problems of indigence:

> 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

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[85] Bearden v. Georgia, 461 U.S. 660, 661 (1983).
[86] *Id.* at 661–62.
[87] *Id.* at 662.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.* at 663.
[93] *Id.* at 665.
[94] *Id.* at 666–67 (quoting Williams, 399 U.S. at 260 (Harlan, J., concurring)).

> classification, fitting "the problem of his case into an equal protection framework is a task too Procrustean to be rationally accomplished." 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.[95]

The Court responded to at least two important arguments by the State in favor of revoking probation for the inability to pay restitution or a fine that are particularly relevant to voter disenfranchisement.[96] First, the Court declines the argument that imprisonment is meant to encourage the repayment of restitution in compensating the victim by countering that no amount of imprisonment will encourage the payment of restitution from someone who cannot pay due to no fault of their own.[97] Second, the Court rejects the argument that revoking probation and incarcerating someone fulfills a punitive and deterrent function. Instead, the Court argues, there are alternative means of punishing and deterring crime that are less onerous, such as the use of fines tailored to the defendant's means or the requirement of community service.[98] As a result, the Court held that a sentencing court must inquire into the reasons for the failure to pay a fine or restitution in revocation proceedings before revoking probation.[99]

The Court in *Bearden* reasoned that if a "probationer has willfully refused to pay the fine or restitution when he has the means to pay," then the State is justified in using imprisonment to enforce collection.[100] In addition, the Court reasoned that the "probationer's failure to make sufficient *bona fide* efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime," which justifies "revoking probation and using imprisonment as an appropriate penalty for the offense."[101] At first blush, one might be tempted to dismiss *Bearden* and the *Griffin* case line as inapplicable to the Floridians convicted of felonies because incarceration is not at issue, but this is not a proper reading of *Griffin* and its progeny.[102]

In fact, federal courts have begun to apply *Bearden* to unequal

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[95] *Id.* at 666 n.8 (internal citations omitted).
[96] *Id.* at 670–72.
[97] *Id.* at 670.
[98] *Id.* at 671–72.
[99] *Id.* at 672.
[100] *Id.* at 668.
[101] *Id.* (emphasis added).
[102] *See* M.L.B. v. S.L.J., 519 U.S. 102, 103 (1996) ("*Griffin*'s principle has not been confined to cases in which imprisonment is at stake, but extends to appeals from convictions of petty offenses, involving conduct 'quasi criminal' in nature."); Robinson v. Purkey, No. 3:17-cv-01263, 2018 WL 5023330, at *55 (M.D. Tenn. Oct. 16, 2018) (explaining why this narrow reading of *Griffin* and *Bearden* in the context of voter disenfranchisement, was improper).

punishment outside of the context of incarceration in circumstances similar to voting: the revocation of driver's licenses.[103] Four other district courts have considered whether revoking driver's licenses solely due to inability to pay criminal justice debt is a violation of *Bearden*. Three of these courts have determined that it is.[104] One court has determined that it is not.[105]

In *Thomas v. Haslam*, the court found that it was a "violation of criminal defendants' due process and equal protection rights by the 'mandatory revocation of people's driver's licenses because they are too poor to pay Court Debt without any inquiry into their ability to pay.'"[106] The court applied a rational basis review with the addition of a more "searching inquiry" because the distinction based on indigency threatens to exacerbate indigency.[107] The court decided that the suspension of driver's licenses not only did not serve the government's interest in compelling payment of court debt, but actually made it more difficult for people to pay off court debt, and thus failed the searching rational basis review.[108] In addition, the court held that a pre-revocation hearing to determine indigency *prior to suspension* of their license was required by the Constitution. It reasoned the following:

> Affording a debtor the opportunity to establish his indigence prior to revocation, therefore, is likely necessary to avoid a large number of erroneous deprivations. Because section 40–24–105(b) revocations are not safety-related, moreover, the government has relatively little interest in avoiding the slight delay necessary for such a process. See *Dixon*, 431 U.S. at 114–15, 97 S.Ct. 1723 (emphasizing importance of safety rationale in holding that post-deprivation hearings are sufficient). Indeed, a purely post-deprivation indigence process might create a greater administrative burden, because it would require TDSHS to quickly reverse many revocations shortly after they were imposed—whereas a pre-deprivation determination would allow TDSHS to avoid performing unwarranted revocations altogether.[109]

The other two cases were similar in their reasoning in finding a due-process violation.[110] The one case that found no violation of a driver's

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[103] *See, e.g.*, *Robinson*, No. 3:17-cv-01263, 2018 WL 5023330, at *55.

[104] *See, e.g.*, Robinson v. Purkey, No. 3:17-cv-01263, 2018 WL 5023330 (M.D. Tenn. Oct. 16, 2018); Stinnie v. Holcomb, 355 F. Supp. 3d 514 (W.D. Virg. 2018); Thomas v. Haslam, 329 F. Supp. 3d 475 (M.D. Tenn. 2018).

[105] Johnson v. Jessup, 381 F. Supp. 3d 619 (M.D. N.C. 2019).

[106] *Thomas*, 329 F. Supp. 3d, at 480.

[107] *Id.* at 482.

[108] *Id.* at 491.

[109] *Id.*, at 495.

[110] *Robinson*, No. 3:17-cv-01263, 2018 WL 5023330, at *56–58 (applying a "somewhat elevated version of rational basis review" under *Johnson*, *Griffin*, and *Bearden* in finding the driver's license

license suspension regime in North Carolina, *Johnson v. Jessup*, is distinguishable because it improperly applied a normal rational basis review instead of *Bearden* or *M.L.B.*[111] The court in *Jessup* interpreted *Bearden* as only requiring searching review when the interest involved was fundamental, which it found driver's licenses were not.[112] Because voting and criminal sanctions required elevated rational basis, *Jessup* is distinguishable.

These driver's licenses cases and *Bearden* apply to Florida's statutes. *Bearden* requires that courts balance "the nature of the individual interest 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."[113] The driver's license cases are strikingly similar to the Florida disenfranchisement scheme for four reasons. First, the cases are similar because they do not involve incarceration, which shows that the Constitution extends *Bearden*'s procedural due-process inquiry to non-carceral or fundamental interests of the indigent. Second, the deprivations of rights are automatic in these cases and administered by state agencies, which pushes towards a finding of overbroadness and arbitrariness where applicable. Third, they involve vitally important interests of defendants that are deprived purely due to their inability to pay. The court in *Thomas*,[114] went through great pains in fact-finding to determine the severe impact on the ability to live without the ability to drive.[115] Similarly, the Supreme Court has a long history of affirming the vital liberty interest involved in the right to vote.[116]

And fourth, neither of the purposes proposed by the states for license suspension or continued felony disenfranchisement are rationally related to recovering payments. As the cases illustrate, it is impossible to recover money through the pains of not being able to drive or not having your voice heard through your vote. This is because there is no money to give, regardless of the pain. Indeed, suspending driver's licenses and revoking the ability to vote may make it harder to pay court debt back. For these reasons, applying the reasoning of these driver's license cases,

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revocation regime unconstitutional, and also finding that it would not pass rational basis review either); *Stinnie*, 355 F. Supp.3d at 529–30 (finding that an affirmative pre-deprivation hearing is required for driver's license revocation based on the factors in Mathews v. Eldridge, 424 U.S. 319 (1976)).

[111] *See Jessup*, 381 F.Supp.3d at 631. ("In sum, contrary to Plaintiffs' contention, the fundamental fairness doctrine does not apply to the indigency claim here, where no fundamental right or interest is at stake. This leaves the court to apply rational basis analysis, and section 20-24.1 easily evinces the 'constitutionally minimal level of rationality' required.").

[112] *Id.*

[113] *Bearden*, 461 U.S. at 666-67 (internal quotation omitted).

[114] *Thomas*, 329 F. Supp. 3d 475.

[115] *Id.* at 481-92.

[116] *See, e.g., Reynolds*, 377 U.S. at 555 ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

the Florida voting regime would fail the test in *Bearden*.

Johnson v. Bredesen,[117] one federal appeals court distinguished *Bearden* when it applied rational basis to a voter franchise regime to a claim just as I have outlined here.[118] The fundamental reason why is that it incorrectly reads the standard of review set by *Bearden*. The federal appeals court erred in two ways. As a result, it was incorrectly decided or is otherwise inapplicable to the Florida disenfranchisement regime. First, *Bredesen* incorrectly applied rational basis instead of heightened scrutiny.[119]

Second, the court improperly determined, based on a Sixth Circuit holding, that because the people convicted of felonies had already lost their right to vote, "the right of felons to vote is not fundamental."[120] This reasoning ignores the findings of other federal appeals circuits that a state is still subject to equal-protection limitations in its voting-rights-restoration regime, even after the right has been suspended.[121] A state may remove the right to vote from some citizens, but if it chooses to refranchise them, it must do so in line with equal protection.[122] The crucial logical failure that the court in *Bredesen* made was conflating the right to vote (which, concededly, has been properly suspended at the outset), with their separate and independent right to equal treatment under voter-restoration-franchise laws.

D. The Statutory Authorization to Supply Community Service or Waiver as an Alternative to Monetary Punishment Is Not an Adequate Alternative Under *Bearden*

The statutory authorization to supply community service or waiver as an alternative to monetary punishment is not adequate for indigent defendants to satisfy the monetary terms of their sentence so as to save the statutory regime from being stricken under *Bearden*. The final step in the *Bearden* analysis is to weigh "the existence of alternative means for effectuating the purpose."[123] This means that even if an indigent person's punishment is increased due to their indigency alone, that punishment is not an equal-protection violation if that indigent person may avoid

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[117] Johnson v. Bredesen, 624 F.3d 742 (6th Cir. 2010).
[118] *See id.* at 745.
[119] *Id.*
[120] *See id.* at 746 (citing Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986)).
[121] *See Johnson*, 405 F.3d at 1216 n.1; Shepherd v. Trevino, 575 F.2d 1110, 1114–15 (5th Cir. 1978); Harvey v. Brewer, 605 F.3d 1067, 1079 (9th Cir. 2010); Owens v. Barnes, 711 F.2d 25, 26–27 (3rd Cir. 1983).
[122] *See Richardson*, 418 U.S. 24; *Johnson*, 405 F.3d at 1222.
[123] *Bearden*, 461 U.S. at 667.

that increased punishment by completing alternatives to the monetary term. The argument is that, since indigent people convicted of felonies have a means of getting their court debt waived or performing community service as an alternative, the statutory regime does not constitute an unconstitutional deprivation on their rights.[124] This argument is flawed because it relies on a mischaracterization of Florida's statutory provision of community service.

Giving credit where credit is due, the most compelling analysis of Florida's failure to provide adequate alternatives can be found in *DeSantis*.[125] The court gives three reasons.[126] First, this relief does not apply to those with out-of-state felonies, and so this relief would not allow those with out-of-state felonies to discharge the monetary terms of their sentences.[127] This leaves them out in the cold. Second, the practical usage of community service as a form of relief is illusory: community service is usually credited at low hourly wages, meaning that it would take far too long for indigent people convicted of felonies to satisfy payment, leaving them disenfranchised in the meantime.[128] And third, even separate from seeking community service, the disparate treatment of indigent defendants is the fundamental problem that goes unsolved because "[a]ccess to the franchise cannot be made to depend on an individual's financial resources."[129] For these reasons, the availability of community service or waiver does not save the statutory regime from constitutional violation under *Bearden*.

III. REMEDY: *BEARDEN* REQUIRES A PRE-DEPRIVATION INQUIRY INTO THE ABILITY TO PAY

One might wonder why a plaintiff would take the *Bearden* route in challenging Florida's voter-disenfranchisement regime instead of the *Anderson-Burdick* route. One reason is that, although the tests appear similar, their remedies are different. Under *Bearden* and procedural due process, there is an affirmative duty to determine whether someone can

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[124] This factor in the application of heightened scrutiny under *Bearden* shows that, if adequate alternatives existed to avoid discriminatory treatment of criminal legal debt, the regime may pass heightened scrutiny. "Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as 'the nature of the individual interest 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* . . .." Bearden v. Georgia, 461 U.S. 660, 666-67 (1983) (emphasis added) (citing *Williams v. Illinois*, 399 U.S., at 260, 90 S. Ct., at 2031 (Harlan, J., concurring)).

[125] *See DeSantis*, 410 F. Supp. 3d 1284.

[126] *Id.* at 1304.

[127] *Id.*

[128] *Id.* at 1305.

[129] *Id.* at 1300 (citing *Johnson*, 405 F.3d at 1216 n.1).

afford the monetary terms of a sentence *before* denying their voting-rights restoration if their inability to pay the monetary terms is the but-for cause of the restoration denial.[130] On the other hand, under *Anderson-Burdick*, specifically its application in *Crawford v. Marion County Election Board*, it is likely that this is not required, and that it is permissible to shift the burden of asserting indigency onto the voters instead of the administrative state.[131]

In *Crawford*, the Court found, in light of the state's asserted interests, it was permissible to require voters overcome the burden of receiving a state I.D.[132] This requirement of process is similar, if not more burdensome than requiring an otherwise-qualified person convicted of a felony to first affirmatively assert indigency through some kind of affidavit in order to trigger an inquiry by the court into their ability to pay. Under *Bearden*, the state is required to provide an affirmative, *pre*-deprivation finding of indigency before continuing disenfranchisement.

This affirmative finding is required for three reasons. First, the clear language of *Bearden*'s central holding shows that this affirmative duty exists under basic procedural due-process rights under the Fourteenth Amendment as birthed in *Griffin*: "We conclude 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."[133] The conclusion that the court erred because it "automatically revok[ed] . . . without determining" the defendant's status shows that the automatic administrative deprivation paired with a lack of individualized determination were the crux of the violation.[134] In other words, had there been a non-automatic deprivation or an actual determination prior to deprivation, then there may not be a violation. Based on this plain reading of *Bearden*, a state cannot automatically deprive a person convicted of a felony of their constitutional right to equal treatment under law. Rather, an affirmative, non-automatic process or individualized determination must be made instead of revoking the right to vote and shifting the burden onto the defendant.

Second, like those who get their licenses revoked for their inability to pay court debt, indigent people convicted of felonies are overwhelmingly unlikely to receive their rights back for the sole irrational reason that they are poor. Because four out of five people convicted of felonies will complete their sentences with criminal justice debt that they likely

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[130] *Bearden*, 461 U.S. at 668.
[131] *Id.*; *See also* Crawford v. Marion Cty. Election Brd., 553 U.S. 181 (2008).
[132] *Crawford*, 553 U.S. at 188–89.
[133] *Bearden*, 461 U.S. at 661–62 (emphasis added).
[134] *See id.*

cannot afford, providing a pre-deprivation hearing "is likely necessary to avoid a large number of erroneous deprivations."[135] This is a practical concern that rallies in favor of protection under *Bearden*. Third, because the desire to suspend driver's licenses and deny suffrage arises out of the desire to hold defendants accountable for their criminal convictions and recover payment, there is no emergency state interest that would justify a post-deprivation hearing instead of a pre-deprivation hearing, similar to driver's license revocation. As in the driver's license context, in the voting rights context, there is no emergency state or police interest in ensuring someone cannot vote at the outset. There is no public safety emergency interest in ensuring someone cannot vote after they have completed all of the terms of their sentence except to pay debt they cannot afford. As a result, a pre-deprivation remedy is not justified by an emergency state interest. For this reason, the remedy required under *Bearden* is an affirmative inquiry into individuals' ability to pay and a consideration of alternatives prior to purging from the rolls people convicted of felonies who have completed the terms of their sentences except for monetary terms due to their indigency.

IV. CONCLUSION

The working-class battle for the franchise in Florida is a chapter illustrative of the longer narrative of class, race, and democracy in American history. Based on 2016 estimates, 1,686,318 Floridians, many whom are African-American, are not able to vote due to felony convictions.[136] *Griffin* remains a constitutional foothold for civil rights litigators seeking to advocate for those who are criminally involved, mostly people of color, when the typical race-related constitutional avenues have significantly dried. The fact that remedies in the *Griffin*-to-*Bearden* line are pre-deprivation is a crucial aspect of this line of cases, practically and philosophically. These cases put the onus on the State to affirmatively act to inquire into the ability to pay prior to deprivation in order to avoid disparate treatment. As a result, the Equal Protection Clause carries with it a sharp, equalizing potential that specifically leverages the resources of the State to help extinguish the gap in the criminal legal experience between the wealthy and the poor. Who carries this labor is essential. The question of whether the State or individuals should bear the cost of the products of criminalized behavior cuts to the heart of political debates around work, class, money, race, and government.

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[135] *DeSantis*, 410 F. Supp. 3d at 1296 ("The record does not show the percentage of otherwise-eligible felons who have unpaid fines and restitution, but the record shows that roughly 80% of otherwise-eligible felons have unpaid fines, restitution, or other financial obligations imposed at the time of sentencing.").

[136] THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT 15 (2016), https://felonvoting.procon.org/wp-content/uploads/sites/48/sentencing-project-felony-disenfranchisement-2016.pdf [https://perma.cc/WU26-J5Y7].

Bearden's requirement that the State proactively inquire into ability to pay before continuing to disenfranchise someone is important because it acknowledges that requirements to pay off a debt in order to vote works an invisible, yet sinister deprivation of liberty on working class people that the State must remedy. By requiring the State to affirmatively act, this requirement brings to voice the fact that not everyone in a capitalist society can conform to seemingly administrative matters as completing payment of a debt. Although precedent is largely silent as to the reasons for these historical circumstances in the first place, the Eleventh Circuit's opinion in *Jones v. Governor of Florida* supports that there is a system at play producing the circumstances of a society whereby poverty is possible and whereby poverty is criminalized. To find more answers to the looming societal backdrop of this case, it might be helpful to go elsewhere.

In speaking about the disparity between the criminalization of property theft crimes and the legality of mass scale economic theft of the working class, Michel Foucault argued in 1977 that

> the economy of illegalities was restructured with the development of capitalist society. The illegality of property was separated from the illegality of rights. This distinction represents a class opposition because, on the one hand, the illegality that was to be most accessible to the lower classes was that of property – the violent transfer of ownership – and because, on the other, the bourgeoisie was to reserve to itself the illegality of rights: the possibility of getting round its own regulations and its own laws, of ensuring for itself an immense sector of economic circulation by a skillful manipulation of gaps in the law – gaps that were foreseen by its silences, or opened up by de facto tolerance.[137]

Florida's disenfranchisement regime is an effective form of ensuring an immense sector of economic circulation for the bourgeoisie by leaving nearly 1.7 million Floridians who are predominantly poor and people of color out of democratic participation in how the economy, society, and communities ought to be structured. While Foucault would not have predicted or known that the United States Constitution would generally be interpreted to require only rational basis review of wealth-based discrimination claims, this legal fact is the kind of "gap" that governments and bourgeoisie influences have used to advance policies hostile to working class interests.

Most importantly, Foucault was correct in pointing out how these

[137] MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 87 (1977).

workings were foreseen by its "silences." These silences include capitalist beliefs in society at large that predetermined the laws governing crime and voting. This belief is paradoxical: One can pay a fine as punishment to the bureaucratic regime serving bourgeoisie interests, while simultaneously, one cannot pay to provide for one's own family. In some sense, this belief running through American society is a silent prioritization of the cult of allegiance to upper class interests over allegiance to one's own community. This allegiance not only makes it permissible to silently make beliefs like this law, but makes these laws appear inevitable.

The hope of the Griffin-to-Bearden case line is that this belief is no longer silent, and no longer permissible under our federal Constitution. By requiring that the remedy to Florida's disenfranchisement regime be pre-deprivation, the courts hearing the arguments are taking a step towards elevating class consciousness in electoral and criminal law, areas of law central to the organization of class structures. The future of Florida's leaders and working-class people depend on it.