SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. CHRISTI KOPP et al., Defendants-Appellants.	Case No. S257844 Court of Appeal No. D072464 San Diego County Case No. SCN327213

APPEAL FROM SAN DIEGO COUNTY SUPERIOR COURT
HONORABLE HARRY M. ELIAS, JUDGE

APPELLANT'S OPENING BRIEF ON THE MERITS

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QUESTIONS PRESENTED

(1) Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments? (2) If so, which party bears the burden of proof regarding the defendant's inability to pay?

INTRODUCTION

> "Imposing unpayable fines on indigent defendants is not only unfair, it serves no rational purpose, fails to further the legislative intent, and may be counterproductive. A fine on indigent people 'is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent . . . .' [Citations.]"

(*People v. Dueñas* (2018) 30 Cal.App.5th 1157, 1167.)

California's system of fines, fees, surcharges and penalty assessments that have profound consequences for virtually every criminal defendant in the state. At least 36 different statutes describe legal financial obligations ("LFOs") imposed for being convicted of a crime.[1] Penalty assessments in a typical felony case more than quadruple a base fine by adding assessments that total 310 percent of the base fine.[2] Some of these LFOs may be imposed as punishment in addition to a jail or prison sentence. (*People v. Sorenson* (2005) 125 Cal.App.4th 612, 617.) Other LFOs are fees for programs or criminal justice services, such as drug testing, alcohol screening, DNA testing, public defender services or probation supervision.

These LFOs are not insignificant – in fact, they are devastating for a defendant with no source of funds or a household that lacks the ability to pay for basic necessities. Only about a third of the code sections that set forth these fines require courts to determine that the defendant can pay before imposing the fine, while another third prohibit courts from considering ability to pay at all. Under Penal Code section 1202.4, every

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[1] This number does not include the statutes that impose fines only for infraction violations.

[2] See Pen. Code, §§ 1464, subd. (a)(1) [$10 for every $10 or part of $10]; 1465.7, subd. (a) [20 percent of base fine]; Gov. Code, §§ 70372, subd. (a)(1) [$5 for every $10 or part of $10], 76000, subd. (a)(1) [$7 for every $10 or part of $10], 76000.5, subd. (a)(1) [$2 for every $10 or part of $10], 76104.6, subd. (a)(1) [$1 for every $10 or part of $10] & 76104.7, subd. (a) [$4 for every $10 or part of $10]. A fine of $100 grows to $410 if penalty assessments are added.

defendant must pay a minimum restitution fine and victim restitution, regardless of his or her financial circumstances.

Courts have begun to recognize constitutional limits on the imposition of LFOs on the indigent. The Court of Appeal, Second Appellate District, Division Seven, held in *People v. Dueñas* (2018) 30 Cal.App.5th 1157, that federal and state constitutional guarantees of due process and equal protection require trial courts to determine whether criminal defendants are able to pay LFOs before courts may impose them. Shortly thereafter, the Legislature passed AB 927 – by significant margins in both houses – which would have required courts to find that defendants are able to pay fines and fees before imposing them. AB 927 set forth certain facts and circumstances, such as receipt of public benefits or representation by a public defender, that would have created a presumption the defendant was unable to pay and provided another list of facts and circumstances that were relevant to the defendant's ability to pay. The governor vetoed AB 927, stating that he agreed with its sentiment but disagreed that holding an ability-to-pay hearing in every case was the best way to address the problem of criminal defendants being overwhelmed with unpayable criminal debts.

Other legislative actions have recognized the ineffectual practice of imposing LFOs on people who cannot pay them. In 2015, the Legislature passed a one-time amnesty for traffic fines, http://www.courts.ca.gov/trafficamnesty.htm. The 18-month amnesty program was offered to provide individuals the

opportunity to resolve their delinquent court-ordered debt at a significant reduction and to request restoration of driving privileges. The program led California to reinstate more than 246,000 driver's licenses and collect $45,111,315 in fines and fees that would not have been collected otherwise. https://finesandfeesjusticecenter.org/articles/california-statewide-traffic-tickets-infractions-amnesty-program-2015-2017/. More and more counties have been discharging uncollectible LFO debt and eliminating imposition of LFOs in the first place.

Against this backdrop, this Court now confronts the state and federal constitutional questions of whether the courts must determine a defendant's ability to pay LFOs before they can be imposed. The answer is yes: the due process and equal protection clauses of the Fourteenth Amendment work together to prevent a court from imposing LFOs on defendants without considering their ability to pay. Similarly, the Eighth Amendment's excessive fines clause requires courts to consider defendants' ability to pay, as does California's own constitutional guarantee of equal protection. Consistent with these constitutional principles and with the operation of other statutes, the government should bear the burden of proving that a defendant can pay the proscribed fines, fees and assessments.

STATEMENT OF THE CASE

Mr. Hernandez was convicted of conspiring to commit murder, witness intimidation, assault, and selling or furnishing methamphetamine. He was sentenced to 84 years to life.

At his sentencing hearing, Mr. Hernandez asked that some of his monetary sanctions be reduced because he could not pay them, and he offered to present evidence of his inability to pay. He asked that the trial court only impose the mandatory minimum restitution fine of $200. The trial court rejected this request, and took no evidence on the issue, saying, "My general understanding is the determination of inability to pay occurs not necessarily on the date of sentencing but at a later date when the fine is or may be imposed. There is a possibility that the defendant may be able to earn funds while he is incarcerated, so I'm going to decline to make that finding at this time." [22 RT 2200.] The court did not elicit or consider specific evidence regarding Mr. Hernandez's ability to pay, either at the time of sentencing or in the future.

The court then imposed the following fines and fees: a $10,000 restitution fine; a court security fee under Penal Code section 1465.8 of $120; a critical needs fee under Government Code section 70373 of $90; a criminal justice administrative fee of $154; drug program fee under Health and Safety Code section 11372.5 of $615; and a lab analysis fee under Health and Safety Code section 11372.5 of $205. [22 RT 2200-2201.]

On appeal, the Fourth Appellate District, Division One, reversed Mr. Hernandez's conviction for conspiracy to intimidate

a witness and vacated his sentence. The Court of Appeal also held that, under *People v. Dueñas,* the trial court should have allowed Mr. Hernandez to make a record regarding his inability to pay the non-punitive assessments and fees under Penal Code section 1465.8 and Government Code sections 29550.1 and 70373. (*People v. Kopp* (2019) 38 Cal.App.5th 47, 95.)[3] The Court of Appeal disagreed, however, with *Dueñas* on three critical points: First, it held that the defendant bore the burden of making a record on his ability to pay. (*Id.* at p. 96.) Second, it held that trial courts are not limited to assessing a defendant's ***present*** ability to pay but should consider a defendant's ability to earn wages in prison. (*Ibid.*) Third, the *Kopp* court held that defendants may only challenge punitive fines and fees, like the restitution fine, under the Eighth Amendment's excessive fines clause and that there is no due process requirement that courts hold an ability-to-pay hearing on punitive fines. (*Id.* at pp. 96-97.)

On November 13, 2019, this Court granted review on the questions of whether trial courts must hold ability-to-pay hearings before they impose fines, fees and assessments and, if they must, who bears the burden of proof.

ARGUMENT

In *People v. Dueñas, supra*, the Court of Appeal found that California laws permitting the imposition of fines, fees and assessments on criminal defendants who are unable to pay them

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[3] The Court of Appeal did not address the question of whether Mr. Hernandez could challenge his ability to pay the drug program and lab fees.

violates the Fourteenth Amendment. This Court should agree and should hold that courts must assess defendants' ability to pay before imposing LFOs.

I. The Fourteenth Amendment bars the imposition of unpayable fines and fees on indigent defendants.

The U.S. Supreme Court has examined court processes that treat indigent defendants differently from non-indigent defendants, and it has concluded that the Fourteenth Amendment protects criminal defendants from procedures that punish them or deny them access to justice because they are poor.

This line of cases began with *Griffin v. Illinois* (1956) 351 U.S. 12, in which the U.S. Supreme Court held that if states give criminal defendants the right to appeal, they must ensure that all defendants have access to transcripts, even if they cannot pay for them. Both due process and equal protection concerns informed the Court's analysis:

> In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system – all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court."

(*Griffin* at p. 17.)

The Court later built on *Griffin* to hold that states must

supply appellate counsel to indigent defendants when they give all defendants the right to first appeal. (*Douglas v. California* (1963) 372 U.S. 353.) And it held that states may not automatically imprison defendants who cannot pay their LFOs. (*Williams v. Illinois* (1970) 399 U.S. 235, 240-241; *Tate v. Short* (1971) 401 U.S. 395, 399.)

In *Bearden v. Georgia* (1983) 461 U.S. 660, 671, the Court faced the question of "whether, and under what circumstances, a defendant's indigent status may be considered in the decision to revoke probation" for failing to pay LFOs. (*Bearden, supra*, 461 U.S. at p. 666.) Because that question amounts to the same thing as "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 [a] fine" (*ibid.*), the Court applied a multifactor balancing test in which "[d]ue process and equal protection principles converge" (*id.* at p. 665), explaining 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 (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.

(*Bearden,* supra, 461 U.S. at p. 666 fn. 8.)

Bearden thus created a rubric for testing the constitutionality of court processes that threaten to disadvantage criminal defendants based solely because of their indigence. Under this rubric, which applies heightened scrutiny rather than rational basis review, courts may not impose additional punishment because of an indigent defendant's failure to pay an LFO unless no alternative could satisfy the state's interest in punishing the original offense. (*Bearden* at p. 672.)

The *Bearden-Griffin* analysis applies to "***all stages of the proceedings***." (*Griffin*, *supra*, at p. 18, emphasis added.) Other courts have relied on the *Bearden* and *Griffin* line of cases to hold that defendants may not be deprived of bail because of their indigency (*O'Donnell v. Harris County* (5th Cir. 2018) 892 F.3d 147, 162) and may not be subjected to a longer prison sentence solely because they cannot pay restitution. (*United States v. Plate* (11th Cir. 2016) 839 F.3d 950, 955-956.) The Eleventh Circuit recently held that Florida's scheme for allowing felons to apply for re-enfranchisement violated the equal protection clause because it required felons to pay off all their legal financial obligations before regaining the right to vote. (*Jones v. Governor of Fla.*

(11th Cir. 2020) 950 F.3d 795.) That court said,

> We think the *Griffin-Bearden* principle straightforwardly applies here too, where the State has chosen to continue to punish those felons who are genuinely unable to pay fees, fines, and restitution on account of their indigency, while re-enfranchising all other similarly situated felons who can afford to pay. This is so because continued disenfranchisement is indisputably punitive in nature, and because felons who are unable to pay are subject to continued punishment solely because of their inability to pay.

(*Jones v. Governor of Fla.* (11th Cir. 2020) 950 F.3d 795, 819.)

This Court[4] has similarly held that indigent defendants who have court-appointed counsel must be provided with court-appointed ancillary services because forcing them to obtain those services only through the public defender "would be to subject that relationship [between attorney and client] to an unwarranted and invidious discrimination arising merely from the poverty of the accused." (*Smith v. Superior Court of Los Angeles County* (1968) 68 Cal.2d 547, 562.)

Because the Fourteenth Amendment protects indigent defendants both from unequal treatment and from procedures

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[4] This Court is currently considering the intersection of poverty and bail in *In re Humphrey*, S247278. Both the District Attorney (representing the appellant) and the Attorney General (appearing as amicus) have agreed in *Humphrey* that courts have a constitutional duty to consider a defendant's ability to pay before setting a cash bail.

that refuse to examine or account for their unequal treatment, the Fourteenth Amendment requires that courts examine a criminal defendant's ability to pay LFOs before imposing them as part of a sentence.

A. Under *Bearden*, California's courts must consider a defendant's ability to pay before imposing LFOs.

Bearden sets forth the analysis that courts must undertake to determine an appropriate sentence in light of a defendant's financial resources. (*Bearden*, *supra*, 461 U.S. at p. 666, fn. 8.) *Bearden* requires a careful inquiry into "'the nature of the individual interest affected [by a sentencing decision], 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 that purpose.'" (*Bearden*, *supra*, at pp. 666-667, quoting *Williams*, *supra*, 399 U.S. at p. 260 (conc. opn. of Harlan, J.).)

The first two *Bearden* factors – the nature of the individual interest and the extent to which it is affected – weigh heavily in favor of finding a Fourteenth Amendment violation when a statutory scheme refuses to consider a defendant's ability to pay LFOs at sentencing. Unpayable fines implicate both economic and liberty interests. For people with very little means, a government debt may result in a lifetime of "cascading consequences" including loss of shelter, transportation, and food and clothing. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1163). Prisoners, who have little access to income to begin with, must pay their debts before they can buy basic needs like food and soap, or call their loved

ones. Probationers with outstanding debts lose the opportunity to end their probation. Defendants who cannot pay their LFOs, through no fault of their own, face significant long-term consequences.

> "[T]he growing use of … fees and similar forms of criminal justice debt creates a significant barrier for individuals seeking to rebuild their lives after a criminal conviction. Criminal justice debt and associated collection practices can damage credit, interfere with a defendant's commitments, such as child support obligations, restrict employment opportunities and otherwise impede reentry and rehabilitation. 'What at first glance appears to be easy money for the state can carry significant hidden costs – both human and financial – for individuals, for the government, and for the community at large. … [¶] … Debt-related mandatory court appearances and probation and parole conditions leave debtors vulnerable for violations that result in a new form of debtor's prison. … Aggressive collection tactics can disrupt employment, make it difficult to meet other obligations such as child support, and lead to financial insecurity – all of which can lead to recidivism.' [Citations.]"

(*People v. Neal* (2018) 29 Cal.App.5th 820, 827.) The liberty and economic interests at stake in imposing fines and fees on those unable to pay them could not be more fundamental.

These potential consequences[5] must be weighed against the rationality of the connection between legislative means and purpose, and the existence of alternative means for effectuating that purpose. (*Bearden*, *supra*, at pp. 666-667.) As to the legislative purpose, most statutes imposing LFOs on criminal defendants were enacted to help fund court operations rather than to punish defendants. (E.g., *Dueñas*, *supra,* 30 Cal.App.5th at pp. 1168-1169.) Yet reports have found that a large percentage of debt resulting from unpaid LFOs is uncollectible. "The inability of many defendants 'to satisfy court-ordered debt is reflected in the large amount of outstanding debt and the courts' inability to collect it' – total delinquencies stood at $10.581 billion as of fiscal year-end 2019, of which $1.32 billion has been written off as uncollectible since 2012." (*People v. Cowan* (2020) 47 Cal.App.5th 32, 70. *See also* Commission on the Future of California's Court System, Judicial Branch of California, Report to the Chief Justice (2017) Recommendation 2.3: Refine the Adjudication and Settlement of Fines, Fees, and Assessments, p. 75; Judicial Council of California, Report on the Statewide Collection of

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[5] The state has argued in some cases that because defendants are contesting their monetary sanctions on direct appeal, rather than during a revocation proceeding at which they face concrete adverse consequences for failing to pay their sanctions, the defendants fail to state a due process claim. Defendants, however, "need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections." (*People v. Castellano* (2019) 33 Cal.App.5th 485, 490; *People v. Taylor* (2019) 43 Cal.App.5th 390, 403.)

Delinquent Court-Ordered Debt for 2018–2019 (Dec. 2019).)

As Justice Streeter pointed out in his *Cowan* concurrence, this system makes no sense: "It is irrational to impose a funding burden on litigants who are unable to pay, for collection from them, by definition, is futile." (*Cowan* at p. 59.) Indeed, the California State Auditor expressed concern in 2018 that uncoordinated and repeated increases in LFOs, combined with defendants' inability to pay, have reduced the availability of state and county funds that are supposed to come from LFOs and have levied inordinate financial pressures on citizens. (https://www.bsa.ca.gov/pdfs/reports/2017-126.pdf at p. 15.) Thus there is no rational connection between the legislative means of assessing LFOs on indigent defendants and the legislation's ostensible purpose of raising funds for the courts.

Even the statutes that aim to punish defendants through fines can have no rational connection to their alleged purpose when those fines are imposed without considering ability to pay. A defendant who is indigent does not decide not to pay; he does not pay because he cannot pay, despite any efforts he might make. Since an indigent defendant's failure to pay fines provides no information about his responsiveness to punishment, unpayable LFOs necessarily fail to deter criminal activity or rehabilitate offenders.

And the imposition of unpayable LFOs cannot satisfy an retributory purpose because the retribution would fall unequally on indigent and non-indigent defendants who were otherwise similarly situated. "[U]nder any plausible theory of retribution,

punishment must at least bear some sense of proportionality to the culpability of the conduct punished to be rational." (*Jones v. Governor of Fla.* (11th Cir. 2020) 950 F.3d 795, 812.)

> Retribution, which has as its core logic the crude proportionality of "an eye for an eye," has been regarded as a constitutionally valid basis for punishment only when the punishment is consistent with an individualized consideration of the defendant's culpability, and when the administration of criminal justice works to channel society's instinct for retribution.

(*Tison v. Arizona* (1987) 481 U.S. 137, 180-81 (Brennan, J., dissenting) (quotations and citations omitted).) In *Jones v. Florida*, the Eleventh Circuit relied on these principles in part to find that the goal of retribution could not justify refusing to reenfranchise convicted felons until they paid off their LFOs and entered a preliminary injunction barring implementation of the law requiring the payments. (*Jones*, 950 F.3d at p. 812.)

The final question, then, is whether there are alternative means for funding the courts and punishing defendants. As for funding, most court funding comes from sources other than unpayable fines. General revenues from taxes, user fees assessed on those who can pay them, and other sources are available. According to California's 2019-2020 State Budget (http://www.ebudget.ca.gov/2019-20/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf), "The trial courts are funded with a combination of General Fund, county maintenance-of-effort

requirements, fines, fees, and other charges. Other levels of the Judicial Branch receive most of their funding from the General Fund. The Budget includes total funding of $4.2 billion ($2.2 billion General Fund and $2 billion other funds) in 2019-20 for the Judicial Branch. . . .” The General Fund receives its money from personal income tax, sales and use taxes, corporate tax and other taxes. (https://lao.ca.gov/Publications/Report/4083.)

As for the state’s interest in adequately punishing defendants, *Bearden* itself said that imposing unpayable LFOs does nothing to further legitimate penological goals for three reasons. First, imposing unpayable LFOs cannot spur poor defendants to pay their fair share of court costs because the orders “will not make [money to pay LFOs] suddenly forthcoming.” Instead, the imposition of unpayable LFOs may give defendants an incentive to commit more crimes to avoid violating a term of their sentence. (*Bearden* at pp. 670-671.) Second, imposition of unpayable LFOs does nothing to further the defendant’s rehabilitation. (*Ibid.*) Trying and failing to obtain the funds to pay an LFO is likely to impede a defendant’s reintegration into society or rehabilitative efforts in prison. Third, the state has alternative means of imposing punishment and deterring crime, such as smaller LFOs calculated commensurate with a defendant’s ability to pay, as well as mental health services, education, and job training support. (*Id.* at pp. 671-672.)

In sum, imposing LFOs without regard to defendants’ ability to pay constitutes a fundamentally unfair and futile

attempt to fund the courts on the backs of poor people, as well as an ineffective system for punishing defendants. When the state has alternative options for funding its courts and adequately punishing defendants, the system of placing this burden on poor criminal defendants violates the Fourteenth Amendment, as the *Dueñas* court held.

B. This Court should reject any suggestion that it cannot review unpayable fines and fees under the Fourteenth Amendment.

Contrary to the Court of Appeal's holding below, *Kopp* at pp. 96-97, *Bearden*'s hybrid due process - equal protection analysis, as adopted by *Dueñas, supra*, at pp. 1166-1169, is the appropriate constitutional vehicle for examining the questions presented here.

Other cases that have sided with *Kopp* on this point[6] have claimed that *Griffin* only applies to court rules that limit access to courts or judicial processes, and *Bearden* only applies to punishing defendants who have not paid a previously imposed LFO. But the *Griffin-Bearden* emphasis on equal justice cannot be interpreted that narrowly. Equal justice is not limited to access to counsel or transcripts – it is access to proceedings that guarantee fairness across defendants at all stages of the proceedings (*Griffin, supra*, at p. 18), which necessarily includes

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[6] E.g., *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1039-1040 (conc. opn. of Benke, J.); *People v. Hicks* (2019) 40 Cal.App.5th 320; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067-1072.

sentencing and any proceedings related to the fulfillment of a sentence's terms. Processes that exposes indigent defendants to consequences that more affluent defendants can avoid violate this guarantee.

Removing the prospect of incarceration for nonpayment does not fix the due process problem. "[T]he United States Supreme Court has rejected the argument that the principles of *Griffin* and its progeny are restricted to instances in which a defendant is subject to imprisonment." (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1167-1168, citing *Mayer v. Chicago* (1971) 404 U.S. 189, 196-197.) Therefore, a due process analysis is not limited to situations where a defendant faces imprisonment because of an inability to pay an assessment or fine. (*Dueñas*, at p. 1168; *People v. Belloso* (2019) 42 Cal.App.5th 647, 656-658.) The imposition of additional consequences on an indigent defendants is still invidious discrimination based on poverty, whether or not those consequences involve incarceration.

Indeed, when a defendant challenges his ability to pay LFOs, "the defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections. [Citation.]" (*Castellano*, *supra*, at p. 490, citing *Dueñas*, at pp. 1168-1169.)

Any suggestion that *Graham v. Connor* (1989) 490 U.S. 386, 395, prohibits analysis of LFOs under the Fourteenth Amendment is also incorrect. As the Supreme Court explained in *United States v. Lanier* (1997) 520 U.S. 259, "*Graham* simply

requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of *substantive due process*." (*Id*. at p. 272, fn. 7, emphasis added.) *Dueñas* and its progeny, including the instant case, are not about substantive due process – they address the *procedural* due process that attaches at sentencing hearings when courts consider imposing LFOs on indigent defendants. *Graham* is inapposite because it subverted substantive due claims in favor of claims brought under specific constitutional provisions – its holding did not apply to procedural due process claims, which in any event arise under specific constitutional provisions: the Fifth and Fourteenth Amendments.

Furthermore, the language in *Graham* does not compel this Court to abandon a Fourteenth Amendment analysis because a *Dueñas* claim is not an Eighth Amendment excessive fines claim, which would require an analysis not only of the defendant's ability to pay but also whether the fine was proportionate to the defendant's conduct. A *Dueñas* claim argues that courts always violate due process and equal protection when they impose fines on people who cannot pay them because doing so increases a person's punishment solely because of his indigency.

Mr. Hernandez is not sidestepping an Eighth Amendment analysis; he is explicitly asserting a due process/equal protection claim that is based on the Fourteenth Amendment and not on the Eighth Amendment.

No case says the Eighth Amendment is the only means for challenging an LFO as unconstitutional. And even if one did, the *Dueñas* court addressed this challenge head-on and dismissed it: "The due process and excessive fines analyses are sufficiently similar that the California Supreme Court has observed that '[i]t makes no difference whether we examine the issue as an excessive fine or a violation of due process. [Citations].'" (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1171, fn. 8.)

II. Under the Fourteenth Amendment's Equal Protection Clause, the state has no rational basis for imposing unpayable fines on indigent defendants.

Although *Bearden's* hybrid due process / equal protection analysis compels this Court to require ability-to-pay hearings before LFOs are imposed, a straight equal protection analysis also demonstrates that imposition of unpayable LFOs violates the constitution.

The Fourteenth Amendment to the United States Constitution guarantees all persons the equal protection of the laws. A state violates equal protection when it adopts a classification that affects two or more similarly situated groups in an unequal manner. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836.) When two groups are similarly situated, courts must determine whether there the government has a justifiable reason for making a distinction between them. If the classification is based on race or gender or affects a fundamental right, strict scrutiny applies and the government must have a compelling government interest justifying the classification and show that

the distinctions drawn are necessary to further that purpose. (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the classification affects less significant interests, the government must still demonstrate the distinction is rationally related to a legitimate government interest. (*People v. Turnage* (2012) 55 Cal.4th 62, 74.)

Here, California's imposition of both penal and non-penal fines and fees punishes indigent criminal defendants more harshly than it punishes non-indigent defendants, who otherwise are similarly situated at sentencing. California's system of using criminal fines and fees to fund its courts also treats criminal litigants differently than civil litigants, upon whom user fees are only assessed if they are able to pay. California has no compelling state interest nor any rational basis for creating these distinctions. As such, a sentencing process that fails to consider ability to pay before imposing monetary sanctions on criminal defendants violates equal protection.

A. Refusing to consider ability to pay improperly treats indigent and non-indigent defendants differently.

When the state fails to consider defendants' ability to pay or prevents the courts from accounting for defendants' ability to pay in imposing sentences, *see* Penal Code section 1202.4, it makes an unreasonable and unjustifiable distinction between similarly situated indigent and non-indigent defendants.

1. Indigent defendants and non-indigent defendants are similarly situated at sentencing.

For purposes of imposing a sentence, an indigent defendant is no different from a non-indigent defendant who has committed

the same crime. Indeed, the case law uniformly states that courts violate equal protection if they punish defendants more harshly based solely on their wealth or indigency. (*Bearden, supra,* 461 U.S. at p. 661-662; *United States v. Plate, supra,* 839 F.3d at pp. 955-956.) In *Williams v. Illinois*, *supra*, the U.S. Supreme Court implicitly found that indigent and non-indigent defendants were similarly situated at sentencing when it held that "[b]y making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment." (*Id.* at p. 242.)

For purposes of imposing sentence, indigent defendants and non-indigent defendants are similarly situated.

2. By subjecting indigent defendants to fines and fees that they cannot pay, California law punishes them more harshly than it punishes those defendants who can pay fines and fees.

In *People v. Dueñas*, 30 Cal.App.5th at pp. 1166-1167, the Court of Appeal held that the imposition of unpayable fines and fees subjected Ms. Dueñas to additional punishment beyond that imposed on other defendants who could pay the fines and fees. In fact, regardless of the sentence imposed, a defendant's inability to immediately pay off all his monetary sanctions exposes him to additional penalties not imposed on the wealthy. For defendants sentenced to probation or sentenced to determinate terms of

imprisonment followed by parole, the inability to pay monetary sanctions during their terms of noncustodial supervision "can lead to loss of employment or shelter, compounding interest, yet more legal action, and an ever-expanding financial burden – a cycle as predictable and counterproductive as it is intractable." (*Rivera v. Orange County Probation Dept.* (9th Cir. 2016) 832 F.3d 1103, 1112 fn. 7.)

In addition, indigent defendants sentenced to either probation or prison pay higher monetary sanctions than defendants who can pay their fines immediately because California law imposes mandatory collection fees on LFOs that are not paid all at once. (E.g., Pen. Code, § 2085.5, subd. (e).) As an example, a non-indigent defendant who can pay $1,000 at the time of sentencing will pay only that amount. An indigent defendant will not have the resources to do so, and if that defendant is in prison, he will only be able to earn $56 a month in prison wages – the maximum amount authorized by the state. From his prison earnings, the California Department of Corrections and Rehabilitation (CDCR) can deduct $28 a month from his trust account as payment for the fine, plus $2.80 in collection fees each month.[7] (*People v. Taylor* (2019) 43 Cal.App.5th 390, 402.) At this rate, the indigent inmate will pay off his fine over 36 months, adding $100.80 in administrative fees to the $1,000 fine. For an inmate earning the meager wages

[7] *Taylor* claims that the administrative fee is 5 percent, but both section 2085.5 and Cal. Code Regs., tit. 15, § 3097, refer to a fee of 10 percent.

offered in California prisons, this is at least an extra two months of work – more if he needs to spend some of his earnings on food, phone calls or co-pays for medical treatment.[8] The state may also charge seven percent interest on delinquent court-ordered debts. (Rev. & Tax. Code, §§ 19280, subds. (a) & (f), 19521.)

The state imposes similar collection fees on misdemeanants, which then fall unequally on indigent and non-indigent defendants. (Pen. Code, §§ 1463.007(b), 1463.010.) Defendants who cannot pay their LFOs are subject to a $300 late penalty. (Pen. Code, § 1214.1.) If court-ordered debt, including LFOs, remains delinquent after 90 days, the debt may be transferred to the Franchise Tax Board, a state agency, which in addition to charging interest, may garnish wages, intercept tax refunds, or levy against assets to enforce court-ordered debt. (Rev. & Tax. Code, § 19280(a), (c).)

Indigent defendants who are required to pay a restitution fine as a condition of probation are also treated differently from non-indigent defendants because they are denied access to mandatory expungement petitions solely due to their indigence. (Pen. Code, § 1203.4; see, e.g., *People v. Guillen* (2013) 218 Cal.App.4th 975, 992.) And individuals with any form of outstanding court debt may be denied discretionary expungement if a court finds that their unpaid debt means that granting their petition would not be in the "interests of justice." (Pen. Code, §

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[8] "Inmates shall be charged and inmates shall pay a fee of five dollars ($5.00) for each inmate-initiated health care visit." (Cal. Code Regs., tit. 15, §3354.2(c).)

1203.4; *Guillen*, *supra*, at pp. 994-95.)

Scholars have documented other ways in which fines and fees impose additional penalties on those defendants unable to pay them. For example, one paper notes:

> [L]egal debt . . . can interfere with obtaining credit and making child support payments. Criminal justice debt can also prompt additional warrants, liens, wage garnishment and tax rebate interception. In addition, it can lead to a civil judgment, which is available to credit agencies because this information is made public. With poorer credit scores, individuals with legal debt also risk being denied employment, and they may be unable to secure credit cards, mortgages, leases or loans. Thus, employment, housing and transportation are all jeopardized.

(Martin, Karin D., Sandra Susan Smith, and Wendy Still. *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*. New Thinking in Community Corrections Bulletin. Washington, D.C.: U.S. Department of Justice, National Institute of Justice (2017) at p. 9, footnotes omitted.)

In sum, unpayable monetary sanctions punish indigent defendants more harshly than non-indigent defendants, both through the attempted collection of those debts and through the many collateral consequences that attach to the failure to quickly pay those debts.

3. The disparate treatment of indigent and non-indigent criminal defendants cannot withstand rational basis review.

Since the U.S. Supreme Court has held that indigence is not a suspect classification for purpose of a straight equal protection challenge,[9] this Court should review a Fourteenth Amendment challenge to the disparate treatment of indigent and non-indigent criminal defendants under rational basis review. (See *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 882.) Rational basis review determines whether there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. (*People v. Turnage* (2012) 55 Cal.4th 62, 74.)

The *Dueñas* court held that "[i]mposing unpayable fines on indigent defendants is not only unfair, it serves no rational purpose, fails to further the legislative intent, and may be counterproductive." (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1167.) This Court should agree and find that the state has no rational basis for imposing unpaying fines and fees.

Both this Court and the federal courts have recognized that enacting a fee statute against a defendant who cannot afford to pay, with the sole purpose of raising revenue, is ineffective and irrational. (See, e.g., *Tate*, *supra*, 401 U.S. at 22 p. 399 [invalidating a fee statute designed "to augment the State's

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[9] As Mr. Hernandez explained *supra*, this Court should still apply heightened scrutiny as part of a Fourteenth Amendment analysis under *Bearden*.

revenues" because the statute "obviously does not serve that purpose; the defendant cannot pay because he is indigent"]; *In re Antazo* (1970) 3 Cal.3d 100, 114 [noting that the Court "fail[ed] to see how either the threat or the actuality of imprisonment can force a man who is without funds, to pay a fine"].) *Rivera* further demonstrates that the court fees scheme here is not only irrational but also "counterproductive," since imposing the court fees without consideration of ability to pay has "damaging effects on the community," operates "as a regressive tax," places a "tax upon distress," and "undermines the credibility of government and the perceived integrity of the legal process." (*Rivera*, *supra*, 832 F.3d at p. 1112.)

To the extent that the restitution fine and some other fees and fines have been designed to punish defendants, rather than raise revenue for the courts, they also fail rational basis review because there is no permissible reason for sentencing indigent defendants more harshly than non-indigent defendants. This is true not only for probationers who face revocations and other sanctions for failure to pay, but for defendants sentenced to prison who have no control over whether they can earn the money they need to pay their LFOs, extending both the cost of paying off the LFOs and the economic anxiety for them and their families.

Contrary to the holdings in several Court of Appeal opinions that inmates sentenced to prison will have an opportunity to make upward of $12 to $56 a month while serving their sentence, see, e.g., *People v. Jones* (2019) 36 Cal.App.5th 1028, 1035-1036, inmates have little or no control over whether

they can earn money while incarcerated. Under Penal Code section 2700, the CDCR is supposed to require every able-bodied prisoner to work. The regulations implementing section 2700, however, give the CDCR quite a bit of discretion in deciding who works, when they work and how they work, including whether they get paid to work. Under 15 CCR § 3040, every able-bodied inmate is obligated to work as assigned by staff, but "[a]ssignment may be up to a full day of work, education, other programs, or a combination of work, education, or other programs." (15 CCR §3040, subd. (a).)

Further, under 15 CCR § 3040(e), "Inmates assigned to clerical duties and office work positions, requiring an extensive amount of staff/inmate interaction, such as clerks and teachers' aides, shall be rotated at regular intervals to other positions within the institution even though that may result in lower pay, ***or no pay at all***, to the inmate being rotated out of the position." (Emphasis added.)

Under subdivision (j) of section 3040, the availability of paid inmate jobs is contingent on institutional budgets. Under subdivision (k), being paid to work is considered a privilege depending on available funding, job performance, seniority and conduct. Under subdivision (l), inmates are not paid for participating in education or substance abuse treatment.

Thus, of the approximately 130,000 inmates in California, some 7,000 qualify for work through the California Prison Industry Authority (CalPIA), earning wages of between $.30 and $.95 an hour. (§ 2801; CDCR, Operations Manual (2017) §

51120.10; CalPIA, Fast Facts, http://www.calpia.ca.gov/About_PIA/AboutPIA.aspx (as of June 13, 2017); CDCR, Spring 2017 Population Report.)

While there is never any rational reason for sentencing indigent defendants more harshly than non-indigent defendants, any purported justification for doing so dissolves in the face of the fact that prisoners have little or no control over whether they can earn money to pay their sanctions during their term of incarceration.

The state has no rational basis for treating indigent and non-indigent defendants differently in imposing LFOs.

B. Refusing to consider indigent criminal defendants' ability to pay improperly treats criminal defendants and civil litigants differently in violation of the constitution.

Beyond the unfair disparities in how indigent and wealthy criminal defendants are treated, the imposition of unpayable court fees on criminal defendants treats them differently than similarly situated civil litigants. This classification has no rational basis and violates equal protection.

1. Indigent criminal defendants and indigent civil litigants are similarly situated for purposes of paying user fees.

As Justice Streeter explained in his concurrence in *People v. Cowan*, *supra*, 47 Cal.App.5th at p. 55, "Under the user fee scheme the *Dueñas* court outlines, which broadly applies to civil and criminal litigants, all litigants subject to these fees are

similarly situated." California codes subject both criminal defendants and civil litigants to fees designed to help fund court operations. For instance, Penal Code section 1465.8 was enacted in 2003 to increase a number of court-related fees, including small claims court filing fees, civil litigation filing fees, civil motions fees, and appellate filing fees; it also imposed new court fees, such as a fee for complex litigation, probate filing fees, and a fee for certain court reporter services. (Assem. Republican Bill Analysis of Assem. Bill No. 1759 (2003–2004 Reg. Sess.).) The statute's purpose was "[t]o ensure and maintain adequate funding for court security" (Stats. 2003, ch. 159, § 25, p. 1676); in 2011 the Legislature amended the statute to specify that the purpose was "[t]o assist in funding court operations" (Stats. 2011, ch. 40, § 6).

Similarly, Government Code section 70373 was enacted in 2008 to raise funds for court facilities by increasing existing fees or imposing new fees in trust and estate proceedings; for the violation of license, registration and mechanical requirements of the Vehicle Code; for certain parking offenses; and for persons attending traffic violator school. (Legis. Counsel's Dig., Sen. Bill No. 1407 (2007–2008 Reg. Sess.) 5 Stats.
2008, Summary Dig., ch. 311, p. 124.) Government Code section 70373 provides that its purpose is "[t]o ensure and maintain adequate funding for court facilities." (Gov. Code, § 70373, subd. (a)(1).)

These statutes as well as many others show that the courts impose fees designed to cover the cost of court operations on both criminal defendants and civil litigants. Any unpaid fees, whether

assessed on criminal or civil litigants, become civil judgments subject to collection procedures. (E.g., Pen. Code, § 1214.)

In *James v. Strange* (1972) 407 U.S. 128, 138-139, the U.S. Supreme Court found that a criminal defendant whose unpaid public defender fees had been converted to a civil judgment was similarly situated to other civil judgment debtors. Based on this similarity, the high Court struck down a law that gave civil judgment debtors substantial exemptions from collection of their debt but explicitly denied those exemptions to indigent criminal defendants.[10] For purposes of collecting the cost of court operations from litigants, criminal defendants and civil litigants are similarly situated.

Although this Court has said that criminal defendants and civil litigants are not similarly situated for purposes of deciding whether certain classes of evidence are admissible at trials, see *People v. Guzman* (2019) 8 Cal.5th 673, 683, under equal protection analyses courts examine whether two groups are similarly situated for purposes of the specific law in question. In *Guzman,* this Court rejected the defendant's argument that

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[10] The exemptions from which indigent defendants were excluded included restrictions on the amount of disposable earnings subject to garnishment, protection of the debtor from wage garnishment at times of severe personal or family sickness, and exemption from attachment and execution on a debtor's personal clothing, books, and tools of trade. For the head of a family, the exemptions afforded other judgment debtors become more extensive, and cover furnishings, food, fuel, clothing, means of transportation, pension funds, and even a family burial plot or crypt. (*James* at p. 135.)

Proposition 8 violated equal protection if it abrogated Penal Code 632 (barring surreptitious recording of phone calls) in criminal cases but not in civil cases. It found that Proposition 8's goal of curtailing the exclusion of relevant evidence in criminal cases – due to the public stake in criminal proceedings – justified the disparate treatment. Here, however, there is no public policy justification for treating indigent litigants differently in criminal and civil proceedings, nor do any of the LFO statutes evidence such an intent. For purposes of deciding whether poor people should be required to pay fees to support court operations, criminal defendants and civil litigants are similarly situated.

2. Indigent criminal defendants and civil litigants are treated differently for purposes of court user fees.

A number of laws protect indigent civil litigants from unpayable fines and fees. Civil litigants can apply for a fee waiver, Government Code sections 68630 through 68641, and are presumed to be indigent for all purposes if they receive food stamps, welfare assistance, Supplemental Security Income, Medi-Cal or other benefits or meet certain income guidelines. (Gov. Code, § 68632.) By contrast, indigent criminal defendants are subject to far fewer protections from unpayable fines and fees. Some criminal fines and fees preclude a court from considering a defendant's ability to pay at all,[11] and most current criminal

[11] Some statutes explicitly preclude consideration of ability to pay, such as Penal Code sections 1001.90 and 1202.4. Others effectively preclude consideration of ability to pay by virtue of the

LFOs do not include a presumption of inability to pay for any reason.[12]

In addition, the California debt collection scheme strips criminal debtors of certain protections given to other civil judgment debtors. For example, subsection (e) of Penal Code section 1214 excludes criminal debtors from the limitations period available to other civil judgment debtors. (See, e.g., Code Civ. Proc., § 683.020(a)-(c) [limiting enforcement of civil judgment to 10 years].) Stripping civil judgment protections prolongs criminal debt for those who are most in need of "reasonable opportunity of employment, rehabilitation and return to useful citizenship," the exact action found impermissible by the U.S. Supreme Court in *James v. Strange, supra,* 407 U.S. at p. 139. In *James,* the defendant argued that he was unfairly denied access to exemptions granted to other civil judgment debtors solely because he was an indigent criminal defendant. The high Court agreed.

Similarly, by offering civil litigants protections from unpayable debt that are unavailable to indigent criminal litigants, California law treats these two classes of litigants unequally.

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fact that they are mandatory and include no exception for defendants unable to pay. (E.g., Gov. Code, §§ 29550 and 70373, Pen. Code, § 1465.8.)

[12] Penal Code section 987.8, subdivision (g)(2), presumes that a defendant sentenced to state prison or to county jail for more than 364 days does not have a future ability to pay costs of court-appointed counsel.

3. The distinctions between indigent civil litigants and indigent criminal litigants cannot survive rational basis review.

The state has no rational basis for treating civil and criminal defendants differently for purposes determining who pays the costs of funding court operations. Granting fee waivers and offering presumptions of indigence to civil litigants certainly makes sense – these policies allow civil litigants to access the courts while keeping the state from wasting time or resources pursuing uncollectible debts, and keeping litigants from suffering the consequences of protracted collection efforts. By contrast, criminal defendants – who may have far less ability to pay their debts, both because of their incarceration and because the fact of their convictions diminishes their employment opportunities – have limited access to fee waivers and virtually no presumptions of inability to pay.

No legitimate government policy warrants these distinctions. Access to the courts is just as important for civil litigants as for criminal defendants. In fact, it is even more important to criminal defendants, many of whom face potential incarceration. The disparate treatment of civil and non-civil litigants provides an independent basis for finding that equal protection requires ability-to-pay findings at sentencing.

III. Courts must determine whether defendants can pay monetary sanctions to ensure they do not impose excessive fines in violation of the Eighth Amendment.

This Court should also rely on the Eighth Amendment to hold that courts must assess a criminal defendant's ability to pay before imposing or executing LFOs. The Eighth Amendment to the U.S. Constitution prohibits the imposition of excessive fines and "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" (*Timbs v. Indiana* (2019) ___ U.S. ___, 139 S.Ct. 682, 687, 203 L.Ed.3d 11.) The Fourteenth Amendment requires that this prohibition be applied to the states. (*Ibid.*)

The California Constitution contains similar protections. Article I, section 17, prohibits cruel or unusual punishment and excessive fines; article I, section 7, prohibits the taking of property without due process of law. (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 727–728.)

The prohibition on excessive fines applies to both criminal penalties, like fines, and civil penalties, like forfeitures. (*Timbs* at p. 686.) Even LFOs that are only partially punitive may be challenged under the excessive fines clause. (*Austin v. United States* (1993) 509 U.S. 602, 610, 621.) Both the restitution fine, which is unmistakably punitive, and the court operations assessments can be challenged under the excessive fines clause because they attach only upon entry of a criminal conviction.

(*People v. Cota* (2020) 45 Cal.App.5th 786, 799 [Dato, J., dissenting]; *People v. Cowan, supra,* 47 Cal.App.5th at p. 45.)

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality . . . ." (*United States v. Bajakajian* (1998) 524 U.S. 321, 334.) That inquiry requires a court to determine whether the severity of a punishment is grossly disproportionate to the seriousness of the offense for which it is imposed. (*Id.* at p. 336-337.) In *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., supra,* 37 Cal.4th 707, this Court relied on *Bajakajian* to set forth four considerations for determining Excessive Fines proportionality: (1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay. (*Lockyer* at p. 728.) Although *Bajakajian* did not actually address ability to pay as part of its proportionality test, this Court read *Bajakajian* in conjunction *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1322, to include consideration of ability to pay as part of the Excessive Fines analysis. (*Lockyer* at p. 728.) *Lockyer*'s inclusion of ability to pay in the Eighth Amendment proportionality test is consistent with both U.S. Supreme Court and California Excessive Fines principles.

Although the U.S. Supreme Court has not addressed ability to pay head-on in its Excessive Fines jurisprudence, the Court has noted that the clause's historical antecedents mandated such consideration. The Excessive Fines Clause can be traced back to Magna Carta, which required that economic sanctions "be

proportioned to the wrong" and "not be so large as to deprive [an offender] of his livelihood." (*Timbs,* supra, 139 S.Ct. at pp. 687-688, citing *Browning-Ferris Industries v. Kelco Disposal, Inc.* (1989) 492 U.S. 257, 271. See also *S. Union Co. v. United States* (2012) 567 U.S. 343, 370, Breyer, J., dissenting [Magna Carta prevented court from imposing fine that would deprive offender of means of livelihood]; *Browning-Ferris Industries, supra*, 492 U.S. at p. 287, O'Connor, J., dissenting [after Magna Carta, the precursors of civil fines were reduced in accordance with a party's ability to pay].) Eighth Amendment scholars agree. (See Beth A. Colgan, *Reviving the Excessive Fines Clause* (2014) 102 Cal. L. Rev. 277, 330-335 [concluding "the idea of saving defendants from persistent impoverishment was a guiding principle reaching back to the days of the Magna Carta and the English Bill of Rights, and enduring through the ratification of the Eighth Amendment"]; Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause* (2013) 40 Hastings Const. L.Q. 833, 854-72.)

The historical concern that the state not deprive a person of their livelihood, even when imposing legitimate and deserved punishment, supports the notion that a sentencing court must consider a defendant's ability to pay any LFO it might impose.

Bajakajian's excessiveness analysis implicitly requires consideration of a defendant's financial situation. *Bajakajian* adopted its Excessive Fines test from the Cruel and Unusual Punishment precedents, *Bajakajian* at p. 336, which focus on whether two defendants who are equally culpable receive the

same punishment; whether the punishment adequately reflects the seriousness of the crime; and whether the punishment for a given offense is disproportionate to the penalties for similar offenses. (See, e.g., *Solem v. Helm* (1983) 463 U.S. 277, 292.) A defendant's ability to pay informs at least two of these inquiries.

As explained in more detail in section II.A, *supra*, when a court imposes the same LFO on an indigent defendant and a non-indigent defendant, the indigent defendant is punished more harshly. The defendant with the unpayable LFO suffers different collateral consequences, such as repeated court appearances to justify non-payment, reduced resources to feed, clothe and house his family, and possible job disruption, and very likely ends up serving his sentence for a longer period of time, simply due to his inability to pay off the LFO immediately. The punishment for two similar offenses becomes unequal, in violation of Eighth Amendment proportionality principles, solely because the defendant who committed one offense is indigent and the defendant who committed the other offense is not. Only by taking into account ability to pay, and adjusting LFOs accordingly, or by eliminating LFOs as a sentence for all defendants, can a sentencing judge ensure that people who commit the same crime receive the same punishment.

Congress recognized the importance of considering ability to pay in achieving proportional sentences when it directed courts to consider defendants' income, earning capacity, financial resources, and financial burdens before imposing fines. (18 U.S.C. § 3572(a); United States Sentencing Guidelines §5E1.2.)

Both of those statutes were enacted as part of Congress' 1984 overhaul of federal sentencing law, focused on creating proportionality and equality in sentencing. (18 U.S.C. §3553(a)(6).)

California law is in accord. Even before this Court decided *Lockyer*, California courts found ability to pay relevant to an Eighth Amendment excessive fines challenge. (*Sainez, supra*, 77 Cal. App.4th at p. 1322; *People ex rel. State Air Resources Bd. v. Wilmshurst* (1999) 68 Cal.App.4th 1332, 1350 [characterizing ability to pay as a "critical factor"].) Those cases relied on federal case law describing ability to pay as central to the proportionality analysis, including *United States v. Lippert* (8th Cir. 1998) 148 F.3d 974, 978, and *United States v. Hines* (8th Cir. 1996) 88 F.3d 661, 664, which noted that compliance with the federal Sentencing Guidelines generally insulates fines from Eighth Amendment violations.

Under state and federal precedents, then, sentencing courts must consider a defendant's ability to pay LFOs before imposing or executing them, to avoid violating the Eighth Amendment's Excessive Fines clause.

IV. The state constitution requires the courts to consider ability to pay before imposing monetary sanctions.

Equal protection guarantees under article I, section 7, and article IV, section 16, of the California Constitution require that the courts of this state consider a criminal defendant's ability to pay before imposing fines and fees. Because wealth is a suspect classification under California law, the guarantees of equal

protection are even stronger under state law than under federal law.

California Constitution article I, section 7 provides: "(a) A person may not be … denied equal protection of the laws …."[13] This provision means persons similarly situated with respect to the legitimate purpose of a given law must receive like treatment. (*In re Eric J.* (1979) 25 Cal.3d 522, 531.)

"The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. This initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." (*People v. Valencia* (2017) 3 Cal.5th 347, 376, internal citations and quotations omitted.)

At the second step of the equal protection analysis, this Court determines whether the state has a sufficient justification for the unequal treatment. (*People v. Flint* (2018) 22 Cal.App.5th 983, 990.) This step requires the court to determine which level of scrutiny it will apply. (*People v. Boulerice* (1992) 5 Cal.App.4th 463, 472.) In a typical equal protection case, the classification need only bear a rational relationship to a conceivable legitimate state purpose. (*Fullerton Joint Union High School Dist. v. State*

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[13] This Court has characterized article IV, section 16(a), as encompassing this state's equal protection provisions. (See, e.g., *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 571.) That section states, "All laws of a general nature have uniform operation."

Bd. of Education (1982) 32 Cal.3d 779, 798-799.) In cases involving suspect classifications or touching on fundamental interests, however, this Court applies strict scrutiny. (*Ibid.*) Strict scrutiny requires the state to bear the burden of establishing not only that it has a compelling interest that justifies the law but also that the distinctions drawn by the law are necessary to further its purpose. (*Ibid.*)

California's equal protection provisions require the state's courts to only impose monetary sanctions on those defendants who can afford to pay them. As such, equal protection requires that courts determine whether defendants are able to pay before those courts impose monetary sanctions.

A. California monetary sanctions laws treat indigent defendants and non-indigent defendants differently.

California equal protection provisions apply both to laws that "'discriminate explicitly between groups of people,'" as well as laws that, "'though evenhanded on their face, in operation have a disproportionate impact on certain groups.'" (*Vergara v. State of California* (2016) 246 Cal.App.4th 619, 644.)[14] Thus, if Mr. Hernandez can show that the monetary sanctions facially discriminate on the basis of wealth or have a disparate impact on the poor, he has stated an equal protection claim under California law.

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[14] By contrast, under the Fourteenth Amendment, a facially neutral law only violates equal protection if it has a discriminatory purpose. (*Washington v. Davis* (1976) 426 U.S. 229, 239.)

Here, Penal Code section 1202.4, on its face, discriminates based on poverty. Subdivision (b) of that section provides that, "[i]n every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record." Under subdivision (c), a defendant's "[i]nability to pay may be considered … in increasing the amount of the restitution fine in excess of the minimum" but his inability to pay "shall not be considered a compelling and extraordinary reason not to impose [the minimum] restitution fine." This language expressly withdraws a defense to the imposition of a minimum fine for the only group of people who need it – those lacking the ability to pay. Thus, section 1202.4 discriminates against the indigent not merely by disparate impact, but on its face.

Other LFOs discriminate on their face by prohibiting consideration of ability to pay, such as Penal Code section 1001.90 and Welfare and Institutions Code section 730.6.

The assessment statutes addressed in *Dueñas*, Government Code section 70373 and Penal Code section 1465.8, may also be analyzed under article I, section 7, and article IV, section 16, of the California Constitution. These mandatory assessments are facially neutral in that they apply in the same way to rich and poor alike. But because these mandatory assessments impact indigent defendants more severely, they treat indigent and wealthy defendants differently. The many other fines, fees and assessments in the state codes – some of which are cited in

section I., *supra* – operate similarly. They have a disparately negative impact on indigent defendants because they make it more difficult for indigent defendants to successfully complete probation, to qualify for expungement of their convictions, and to integrate back into to society. These other fines and fees also disparately affect indigent defendants by saddling them with 10 percent collection fees and other late-payment penalties not imposed on those defendants able to pay their monetary sanctions immediately.

California's monetary sanctions laws treat similarly situated groups – indigent and non-indigent defendants – differently. This Court must next determine which level of scrutiny to apply when deciding whether these distinctions are legitimate.

B. California law treats discrimination based on wealth as a suspect classification, triggering strict scrutiny.

When a court examines the validity of a suspect classification or a classification touching on fundamental interests, it applies strict scrutiny. (*Serrano v. Priest (Serrano II)* (1976) 18 Cal.3d 728, 761.) Under a strict scrutiny analysis, the state bears the burden of establishing not only that it has a compelling interest that justifies the law but also that the distinctions drawn by the law are necessary to further its purpose. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 832; see *Serrano II, supra*, 18 Cal.3d at p. 761.)

California's equal protection guarantees mostly mirror those set forth in the Eighth Amendment of the U.S.

Constitution, but are in some respects broader. (*In re Antazo* (1970) 3 Cal.3d 100, 111-112; *People v. Cowan, supra,* 47 Cal.App.5th at p. 66 [Streeter, J., concurring].) Thus, while both state and federal law agree that the state may not treat similarly situated people differently without adequate justification, *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253, our state has a broader view of suspect classifications under equal protection law.

In *Serrano II,* 18 Cal.3d 728, this Court held that under the California Constitution, wealth is a suspect classification for equal protection purposes when combined with infringement of a fundamental right. (*Serrano II, supra*, at p. 768; *Serrano v. Priest (Serrano I)* (1971) 5 Cal.3d 584, 597–598.) This Court also found discrimination based on poverty – involving a law requiring a defendant to pay a fine or serve time in jail in lieu of being able to pay – involved a suspect classification warranting strict scrutiny. (*Antazo*, *supra*, 3 Cal.3d at p. 112.)[15]

Because the LFOs under review treat criminal defendants differently based on their wealth, California law requires that this Court review them under the strict scrutiny standard.

C. California's imposition of monetary sanctions without regard to ability to pay involves a fundamental interest, triggering strict scrutiny.

The imposition of LFOs on indigent defendants involves a fundamental interest as well. The United States Supreme Court

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[15] The U.S. Supreme Court has rejected wealth as a suspect classification. (*San Antonio School District v. Rodriguez* (1973) 411 U.S. 1, 18-29.

recently found the Excessive Fines Clause of the Eighth Amendment to be so "'fundamental to our scheme of ordered liberty'" that the clause must be applied to the states through the due process clause of the Fourteenth Amendment. (*Timbs v. Indiana* (2019) 586 U.S. ___, 203 L.Ed.2d 11, 139 S.Ct. 682.) The Court explained: "[T]he protection against excessive fines has been a constant shield throughout Anglo-American history. . . ." (*Timbs,* 139 S.Ct. at p. 689.) All 50 states have a constitutional provision prohibiting the imposition of excessive fines, either directly or by requiring proportionality. (*Ibid.*) The *Timbs* court observed that penal fines deserve special scrutiny because it is so easy for states to ratchet up their fines – sometimes unreasonably so – to raise revenue for the state, while other forms of punishment cost the states money. (*Ibid.*)

This Court must apply strict scrutiny because the imposition of monetary sanctions without regard to ability to pay violates a defendant's fundamental interest not to be punished with excessive fines.

D. Under strict scrutiny, California cannot justify the disparate treatment of indigent and non-indigent defendants.

Whether strict scrutiny is triggered because wealth is a suspect classification, because the right to be free of excessive fines is a fundamental right, or because the state has created suspect classifications affecting the fundamental right to be free from excessive fines, the state bears a heavy burden. It must demonstrate that the LFO scheme is justified by a compelling

state interest and that the interest may not be carried out any other way. (*In re Marriage Cases, supra*, 43 Cal.4th at p. 832; *Serrano II, supra*, 18 Cal.3d at p. 761.) The state cannot meet that burden.

1. The state's interest in collecting revenues does not justify imposing unpayable LFOs on indigent defendants.

The primary state interest in imposing monetary sanctions is to raise money to pay for state court operations. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1168-1169; *People v. Cota* (2020) 45 Cal.App.5th 786, 796, Dato, J., dissenting.) Funds collected from restitution fines go into the state Restitution Fund, Penal Code, §1202.4, subd. (e), whose purpose is "to assist residents of the State of California in obtaining compensation for the pecuniary losses they suffer as a direct result of criminal acts." (Gov. Code, § 13950, subd. (a).) According to California budget documents, fees collected under Penal Code sections 1001.90 and 1464 also subsidize the Restitution Fund.

While the state has an interest in helping crime victims and funding court operations, that interest is not served by attempting to collect funds from criminal defendants who simply don't have any funds to contribute, nor does it have any compelling interest in preventing courts from determining whether defendants are unable to pay. "[I]mposition of assessments and restitution fines on indigent defendants will not serve the purposes of funding the courts or the state restitution fund if they have no ability to pay." (*People v. Belloso* (2019) 42

Cal.App.5th 647, 659.) "Imposing unpayable fines on indigent defendants is not only unfair, it serves no rational purpose, fails to further the legislative intent, and may be counterproductive." (*Dueñas, supra*, 30 Cal.App.5th at p. 1167.)

In addition, as Justice Streeter pointed out in his *Cowan* concurrence, "since all defendants are permitted to interpose inability-to-pay objections as a basis to argue against the amount of a restitution fine above the minimum, I see no compelling reason why the same objection may not be made available to defendants who wish to argue against the imposition of a minimum fine on that basis." (*Cowan*, *supra*, 47 Cal.App.5th at p. 70.) In other words, the state cannot demonstrate that it can only accomplish its fund-raising goal by preventing courts from considering defendants' ability to pay some fines, fees and assessments when the law already allows ability-to-pay objections for other monetary sanctions.

Furthermore, if the state's goal is to fund court operations and provide compensation to victims of crime, the state cannot demonstrate that the only way it can accomplish that goal is by imposing fines, fees and assessments on defendants without regard for their ability to pay. Indeed, ignoring defendants' ability to pay is demonstrably counterproductive.

A November 2018 report to the Judicial Council on the Statewide Collection of Court-Ordered Debt for 2017–18 stated that "Total outstanding delinquent debt at the end of 2017–18 was $10.3 billion. This figure represents a 1.8 percent ***increase*** over the $10.0 billion reported for 2016–17." (Emphasis added.) A

January 2016 report by the Legislative Analyst's Office, *Improving California's Fines and Fees System*, notes that delinquent debt grows every year and a large portion of that unpaid debt may never be collectible because the costs of collection may outweigh the amount actually collected.

AB 927, which passed both houses of the California Legislature in 2019 but was vetoed by Governor Newsom, would have required ability to pay hearings at sentencings. The April 20, 2019, Assembly Public Safety Committee analysis of that bill, explained the need for the legislation:

> A San Francisco Daily Journal article from several years ago noted, "When it comes to collecting fines, superior court officials in several counties describe the process as 'very frustrating,' 'crazy complicated' and 'inefficient.'" (See *State Judges Bemoan Fee Collection Process*, San Francisco Daily Journal, 1/5/2015 by Paul Jones and Saul Sugarman.) Simply put, criminal defendants can generally not produce a substantial flow of money for fines. That well will quickly run dry. In the same Daily Journal article, the Presiding Judge of San Bernardino County was quoted as saying "the whole concept is getting blood out of a turnip." (Daily Journal, *supra*.) The article noted in particular that "Felons convicted to prison time usually can't pay their debts at all. The annual growth in delinquent debt partly reflects a supply of money that doesn't exist to be collected." (*Ibid*.)

(*Id*. at p. 5.)

The ineffectiveness and unfairness of unpayable monetary sanctions led San Francisco County to end criminal and administrative fees and discharged $32 million in debts in June 2018. Alameda County did the same, discharging $26 million in debts in November 2018. In February 2020, the Los Angeles County Board of Supervisors voted to eliminate all criminal fines and fees within its jurisdiction and to discharge or release all outstanding debt based on discretionary fees within its jurisdiction. In May 2020, San Diego County supervisors "unanimously approved eliminating fees the county assesses on juveniles through the juvenile justice system, as well as ending the collection of juvenile delinquency debt in San Diego County." (https://www.sandiegouniontribune.com/news/politics/story/2020-05-23/san-diego-county-eliminates-juvenile-justice-fees-and-debts) These local policy changes reflect a growing understanding that the imposition of unpayable LFOs is both irrational and wasteful.

Finally, given empirical evidence that the families of indigent defendants often end up paying their monetary sanctions, the state cannot justify procedures that ignore a defendant's ability to pay. In 2015, an Ella Baker Center for Human Rights report found that in 63% of the cases they reviewed, families bore the cost of criminal system-related fees, and that in 83% of those cases, the family members responsible for paying were women. The Ella Baker Center also found that one in five of these families took out loans to cover their payments. (Saneta deVuono-powell, Chris Schweidler, Alicia

Walters, and Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families* (Oakland, CA: Ella Baker Center, Forward Together, Research Action Design, 2015). When families pay these sanctions, rather than the defendants, court operations are funded by non-users and people who committed no crimes are penalized.

2. The state's interest in administering punishment cannot justify imposing unpayable LFOs on indigent defendants.

Some LFOs are explicitly punitive. (E.g., *People v. Kunitz* (2004) 122 Cal.App.4th 652, 656 [restitution fine]; *People v. Ruiz* (2018) 4 Cal.5th 1100, 1119 [criminal laboratory and drug program fees]; *People v. Gonzalez* (2017) 16 Cal.App.5th 494, 504 [sex offender fine].) The state's interest in using these LFOs to punish defendants, however, cannot justify either imposing unpayable LFOs or refusing to investigate the defendant's ability to pay LFOs.

As Mr. Hernandez explained in section I.A., *supra*, when the state imposes LFOs that a defendant simply cannot pay, those LFOs serve no rehabilitative, deterrent or retributive purpose. And the state can only craft LFOs that serve those purposes of punishment if it first determines a defendant's ability to pay. Otherwise, the state runs the risk of imposing a sentence that undermines the goals of punishment and that can never be executed.

Because California cannot justify either the disparate treatment of indigent and non-indigent defendants nor its refusal

to let courts consider a defendant's ability to pay before imposing monetary sanctions, this Court should require ability-to-pay hearings.

V. The state should bear the burden of proving an indigent defendant can pay fines and fees.

The Court also asks the parties to explain who bears the burden of proving a defendant can pay fines and fees imposed at sentencing. The burden of proof argument encompasses two questions: (1) which party has the burden of raising the issue and (2) once the issue is raised, which party bears the burden of persuasion or presenting evidence to prove ability to pay. Since the rest of this brief argues that the courts have a sua sponte duty to examine a defendant's ability to pay before imposing fines, fees and assessments, the real question here is who bears the burden of proving the defendant's ability or inability to pay.

In *People v. Dueñas*, the Court of Appeal placed all the burdens on the state, holding that none of the fines and fees in that case could be imposed unless and until the state proved the defendant can pay. Indeed, the *Dueñas* court held that the only way to avoid constitutional problems in imposing the restitution fine – whose statute explicitly bars consideration of ability to pay the mandatory minimum – would be to stay that fine unless the state proves the defendant can pay.

This Court should agree with *Dueñas*. The state should bear the burden of proof at sentencing because (1) the state seeks to impose LFOs to fund court operations; (2) the Legislature has found, on multiple occasions, that public policy favors placing the

burden on the state; (3) placing the burden on the defendant relies on an unreasonable presumption that all defendants can pay LFOs; (4) the state has control over whether incarcerated inmates will be able to earn money to pay off LFOs; (5) imposition of an unpayable LFO would result in an unauthorized sentence; and (6) the vast majority of defendants raise the issue of their indigency at the inception of the case, when they request appointed counsel.

Even if this Court decides that defendants have the burden of initially objecting to sanctions based on their inability to pay, this Court should find that defendants who have qualified for court-appointed counsel, who have been sentenced to lengthy terms in custody, or whose financial situations are described by Government Code section 68632 are presumptively unable to pay LFOs.

A. The state should bear the burden of proof because it benefits from the imposition of LFOs to fund court operations.

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." (*In re Winship* (1970) 397 U.S. 358, 370 (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision. (*Addington v. Texas* (1979) 441 U.S. 418, 423.) "In the

administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt." (*Id.* at pp. 423-424.) While defendants facing imposition of LFOs at sentencing have already been convicted under this heavy burden, the state continues to bear a burden of proof, albeit lower, at sentencing. At a restitution hearing, for example, the prosecution must prove the victim's losses by a preponderance of the evidence. (*People v. Jessee* (2013) 161 Cal.App.4th 501, 506-507.)

When the state wields its power to fill its coffers by imposing LFOs that can inflict serious harm on indigent defendants, it must continue to bear the risk of error and accept the burden of proving the defendant's ability to pay.

In this same vein, Evidence Code section 500 places the burden of proof on the party that hopes to benefit from a court's ruling. Thus, the Court of Appeal explained, when the state wants to send a defendant to prison for a probation violation, it bears the burden of proving his violation did not qualify for non-custodial treatment under Proposition 36. (*People v. Atwood* (2003) 110 Cal.App.4th 805, 811-812.)

Here, the state hopes to benefit from the imposition of LFOs, both so it can fund court operations and so it can avoid having to raise taxes. (See *Timbs, supra*, ___U.S.___ [139 S.Ct. 682, 689, 203 L.Ed.2d 11, 18] [accepting amici's assertion that the growth in fines and fees nationwide is likely linked to the political

difficulties in raising taxes].) It should therefore bear the burden of proving that a defendant can pay.

Finally, the government's history of using LFOs for questionable and improper purposes also militates in favor of placing the burden of proof on the state. Nearly 30 years ago, Justice Scalia explained that imposing LFOs serves substantively different, and potentially more troubling, purposes from imposing terms of incarceration.

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.

(*Harmelin v. Michigan* (1991) 501 U.S. 957, 978, fn. 9.) The current Court recently agreed: "For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties." (*Timbs, supra,* ___U.S.___ [139 S.Ct. 682, 689, 203 L.Ed.2d 11, 18].) For example, *Timbs* explained, LFOs had been used as part of the Black Codes to impose return

Blacks to involuntary servitude after the official end of slavery[16], as well as to retaliate against political enemies. (*Id.*)

The U.S. Supreme Court has explained that "allocating the burden of proof to the government furthers the objective of 'deterring lawless conduct by police and prosecution.' [Citation.]" (*Medina v. California* (1992) 505 U.S. 437, 452.) Because the state hopes not only to raise money but also to do so in the most politically palatable manner, and because this dynamic raises the specter of imposing disproportionate LFOs for improper goals, this Court should place the burden of proof on the state.

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[16] "Notwithstanding the States' apparent agreement that the right guaranteed by the Excessive Fines Clause was fundamental, abuses continued. Following the Civil War, Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws' provisions were draconian fines for violating broad proscriptions on 'vagrancy' and other dubious offenses. See, e.g., Mississippi Vagrant Law, Laws of Miss. §2 (1865), in 1 W. Fleming, *Documentary History of Reconstruction* 283-285 (1950). When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead. E.g., id. §5; see Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 Akron L. Rev 671, 681-685 (2003) (describing Black Codes' use of fines and other methods to 'replicate, as much as possible, a system of involuntary servitude'). Congressional debates over the Civil Rights Act of 1866, the joint resolution that became the Fourteenth Amendment, and similar measures repeatedly mentioned the use of fines to coerce involuntary labor. See, e.g., Cong. Globe, 39th Cong., 1st Sess., 443 (1866); *id.*, at 1123-1124."

B. The Legislature has already determined that placing the burden on the state is reasonable.

The state's current LFO scheme places the burden of proof on the state for nearly one-third of all possible LFOs.[17] Other LFO statutes either say nothing about the burden of proof or implicitly place the burden on the defendant.[18] For each of the

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[17] The following fines and fees statutes bar imposition of a monetary sanction unless the defendant can pay, which is another way of assigning the burden of proof to the state: Government Code sections 29550 (booking fee) and 29550.2 (criminal justice administration fee); Health and Safety Code sections 11372.7 (drug program fee [up to $150 per offense]) and 11377 (AIDS education fine [up to $70]); Penal Code sections 987.5 (court-appointed counsel registration fee [$50]); 987.8 (reimbursement of court-appointed counsel costs); 1001.15 (diversion fee [up to $500]); 1202.5 (theft related fines [$10]); 1202.51 (illegal dumping fines [$100 or $200]); 1203.1b (probation costs); 1463.13 (drug and alcohol program assessment fee [up to $150]); 1463.14 (DUI assessment fees [$50]); 1463.27 (domestic violence program fees [up to $250 per fine]); Vehicle Code, §§ 23649 (drug and alcohol program assessment [$100 per fine]) and Welfare and Institutions Code sections 730.5 (imposition of fines generally) and 731 (juvenile delinquency fine). Other statutes establishing fines and fees allow consideration of the defendant's ability to pay but do not require it, supporting an inference that the defendant bears the burden of proof. (See, e.g., Gov. Code, § 77850 (penalty assessment); Health & Saf. Code, § 11372.5 (lab analysis fee); Pen. Code, §§ 290.3 (sex offender registration fine [$300 or $500]); 1202.4 (imposition of restitution fine above statutory minimum [$300 to $10,000]); 1463.07 (administrative screening fee [$25]); 1464 (penalty assessments); Veh. Code, § 42007 (traffic school fee); and Welf. & Inst. Code, § 730.6 (juvenile restitution fine, imposition above statutory minimum).)

[18] Statutes allowing consideration of the defendant's ability to pay but saying nothing about the burden of proof include Gov. Code, § 77850 (penalty assessment); Health & Saf. Code, §

statutes placing the burden of proof on the state, the Legislature necessarily decided there were sound public policy reasons for placing the burden of proof on the state because it affirmatively included that burden in each law. (See *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037 [interpretations of statutes that render words surplusage are to be avoided]; *Reno v. Baird* (1998) 18 Cal.4th 640, 658 ["[i]t is a maxim of statutory construction that '[c]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word [or phrase] surplusage'"].)

Similarly, in AB 927, the Legislature examined the current LFO scheme and made the sound policy determination that not only should courts presume that certain classes of defendants are unable to pay but also that the prosecution, and not the defendant, should bear the burden of proving ability to pay. (AB 927, Report of the Assem. Comm. Pub. Saf., April 2, 2019.) The author of the bill explicitly stated that placing the burden of proof on the prosecution was intended to comply with "the Constitution's promise of fundamental fairness." When Governor Newsom vetoed AB 927, he did not disagree with these legislative

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11372.5 (lab analysis fee); Pen. Code, §§ 290.3 (sex offender registration fine [$300 or $500]); 1202.4 (imposition of restitution fine above statutory minimum [$300 to $10,000]); 1463.07 (administrative screening fee [$25]); 1464 (penalty assessments); Veh. Code, § 42007 (traffic school fee); and Welf. & Inst. Code, § 730.6 (juvenile restitution fine, imposition above statutory minimum).

findings; he merely disagreed that courts should hold ability-to-pay hearings in every case. (https://www.gov.ca.gov/wp-content/uploads/2019/10/AB-927-Veto-Message-2019.pdf.)

This Court should agree with the Legislature's assessment in AB 927, as well as in numerous prior laws, that the state should bear the burden of proving a defendant's ability to pay. (Compare *In re R.V.* (2015) 61 Cal.4th 181, 197 [deferring to Legislature's policy determination that minors should be presumed to be competent in delinquency proceedings].)

C. A sentencing proceeding that relies on an unjustified and arbitrary presumption that all defendants can pay most fines and fees violates due process.

At least one court has held that when section 1202.4 placed the burden of proving inability to pay on the defendant, it relied on an implicit presumption that defendants can pay the fine. (*People v. Romero* (1996) 43 Cal.App.4th 440, 448-449.) That presumption, however, is unreasonable, and this Court should reject it. Because defendants have a federal constitutional due process right not to be sentenced on the basis of unreasonable and arbitrary factual determinations, this Court should reject the presumptions created by state law that all convicted defendants are able to pay all possible monetary sanctions. It should instead place the burden of proving ability to pay on the state.

1. Sentencing proceedings based on unreliable information violate due process.

All defendants have a right to due process at sentencing. A sentencing hearing "violates due process if it is fundamentally

unfair." (*People v. Eckley* (2004) 123 Cal.App.4th 1072, 1080.) "'Reliability of the information considered by the court is the key issue in determining fundamental fairness' in this context." (*Ibid.*, quoting *People v. Arbuckle* (1978) 22 Cal.3d 749, 754-755.)

The United States Supreme Court has "sustained due process objections to sentences imposed on the basis of 'misinformation of constitutional magnitude.' [Citations.]" (*Roberts v. United States* (1980) 445 U.S. 552, 556.) "A court's reliance, in its sentencing and probation decisions, on factually erroneous sentencing reports or other incorrect or unreliable information can constitute a denial of due process." (*Eckley* at p. 1080.)

In *Townsend v. Burke* (1948) 334 U.S. 736, the petitioner was not represented by counsel when he pleaded guilty to robbery and burglary charges. (*Id.* at p. 737.) The court imposed sentence based on an earlier charge that was dismissed and two charges where he had been found not guilty. (*Id.* at p. 740.) Townsend was granted habeas relief because "while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." (*Id.* at pp. 740-741.)

In *Eckley*, *supra*, 123 Cal.App.4th 1072, the defendant was convicted of abusing her children. When the court denied probation and sentenced the defendant to prison, it relied "on sentencing documents (a probation report, two psychological

reports, and a letter from a prison administrator) containing material factual misstatements" that were unsupported and contracted by the trial evidence. (*Id*. at pp. 1074, 1079.) Relying on *Townsend* and *Tucker, Eckley* held "the inaccuracies in the four sentencing documents require that the sentence and denial of probation be vacated." (*Eckley*, *supra*, 123 Cal.App.4th at p. 1081.) A new sentencing hearing was required because the incorrect claims "exaggerated the defendant's callousness," and the trial court relied on those statements and "emphasized [the] defendant's callousness" when it imposed the prison sentence. (*Ibid*.)

Trial courts thus have a due process duty to consider only reliable information in imposing sentences. The evidentiary presumption that all defendants are able to pay LFOs, as described by *People v. Romero, supra,* 43 Cal.App.4th 440, 448-449, inserts factual assumptions into the sentencing process that are so unreliable that they violated due process.

2. Statutes that place the burden of proving indigency on defendants violate due process because they rely on an unreasonable and arbitrary presumption that all defendants are able to pay monetary sanctions.

The evidentiary presumption that all defendants are able to pay LFOs, as described by *People v. Romero, supra,* 43 Cal.App.4th 440, 448-449, inserts factual assumptions into the sentencing process that are so unreliable that they violate due process. In *Romero*, the Court of Appeal explained that the

language in Penal Code section 1202.4 requiring the defendant to prove his inability to pay "makes sense only if the statute is construed to contain an implied rebuttable presumption, affecting the burden of proof, that a defendant has the ability to pay a restitution fine." This Court has cited that "rebuttable presumption" language with approval. (*People v. Avila* (2009) 46 Cal.4th 680, 729.)

Romero suggests that every statute placing the monetary sanction burden of proof on defendants contains an implied rebuttable presumption that all defendants can pay. Because that presumption has no basis in fact and is arbitrary, this Court should find that it violates due process.

A rebuttable presumption imposes a duty of producing evidence. (Evid. Code, § 603.) The U.S. Supreme Court has held that even though legislatures may create rules of evidence directing fact-finders to infer one fact from the proof of other facts, such legislative presumptions are invalid when they are entirely arbitrary or irrational, or create an invidious discrimination. (*Bandini Petroleum Co. v. Superior Court, Los Angeles County* (1931) 284 U.S. 8, 18-19 [52 S.Ct. 103, 107, 76 L.Ed. 136, 144].)

The U.S. Supreme Court later held that a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. (*Leary v. United States* (1969) 395 U.S. 6, 33-36 [89 S.Ct.

1532, 1546-1548, 23 L.Ed.2d 57, 80-82].) Although most evidentiary presumptions in criminal cases risk violating the Fourteenth Amendment's requirement that the prosecution prove guilt beyond a reasonable doubt – an issue not present in this case – evidentiary presumptions in civil cases also have been found to be so arbitrary they violate due process.

Thus, in *Western & Atlantic R. Co. v. Henderson* (1929) 279 U.S. 639, 642, the high court invalidated a presumption used in civil suits that a railroad company was presumed to have been negligent if their equipment damaged or injured people, livestock or property. The court observed, "The mere fact of collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or of both or without fault of anyone. Reasoning does not lead from the occurrence back to its cause. And the presumption was used to support conflicting allegations of negligence." (*Id.* at pp. 642-643.)

Here, the many statutes placing the burden of proving indigency on defendants indulge an irrational presumption that people who have been convicted of crimes can pay all LFOs. In fact, we know that the vast majority of criminal defendants who are eligible for appointed counsel (because they face incarceration) are indigent because they actually qualify for court-appointed counsel.[19] The mandatory rebuttable

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[19] "More than eight out of ten criminal defendants prosecuted in California Superior Courts require appointment of

presumption implied by the fines and fees laws is therefore irrational and should not be indulged at sentencing hearings.

D. The state should bear the burden of proof because it has substantial control over whether imprisoned defendants will be able to earn money in custody.

Beyond these other concerns, the state should bear the burden of proving a defendant's ability to pay because it, and not the defendant, has substantial control over whether a defendant sentenced to prison will have access to paid work while in prison.

The Court of Appeal acknowledged in *People v. Taylor* (2019) 43 Cal.App.5th 390, 402, that a prisoner's assignment to a paid position "is a privilege" that depends on "available funding, job performance, seniority and conduct." (Cal. Code Regs., tit. 15, § 3040, subd. (k); accord, *People v. Rodriguez* (2019) 34 Cal.App.5th 641, 649.) The wages paid to California inmates range from 8 to 37 cents per hour, with only the most skilled workers earning top wage. (Cal. Code of Regs., tit. 15, § 3041.2, subd. (a)(1).) Moreover, monthly earnings are capped so that even an inmate who worked four 40-hour weeks in a month would make less than the sum total of his hourly wages. For example, an inmate who worked four 40-hour weeks at 37 cents an hour would make only $56 in a month instead of $59.20 ($0.37 at 40 hours per week for four weeks).

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counsel." (Benner, Laurence A. (2009) *"Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California,"* California Western Law Review: Vol. 45 : No. 2, Article 2, 263, 311.)

Inmates have no constitutional right to work. (*Baumann v. Arizona Dept. of Corrections* (9th Cir. 1985) 754 F.2d 841, 845.) A prisoner's expectation of keeping a specific prison job, or any job, does not implicate a property or liberty interest under the Fourteenth Amendment. *(James v. Quinlan* (3d Cir. 1989) 866 F.2d 627, 630.)

As Mr. Hernandez explained in section II.A.3, *supra*, defendants sentenced to prison may be required to work at a very low-paying job, may be required to work for free, or may not be offered work at all. "The available programs for work and education vary from prison to prison." (*In re Player* (2007) 146 Cal.App.4th 813, 824, disapproved on other grounds in *In re Jenkins* (2010) 50 Cal.4th 1167, 1182.) All of these decisions belong, in the first instance, to the state.

The District Attorney's office and Department of Corrections are both part of this state's executive branch of government. (*People v. Parmar* (2001) 86 Cal.App.4th 781, 793 [District Attorney]; *People v. Horton* (1968) 264 Cal.App.2d 192, 196 [Department of Corrections].) As such, the prosecutor should have little difficulty obtaining information about an inmate's eligibility for work assignments and the types of assignment which may be available to him. By contrast, many inmates have no idea how to acquire this same information, while others lack the language or writing abilities necessary to make a formal request. For these logistical reasons, it makes sense to place the burden on the prosecution to prove that the defendant can obtain

the type of prison employment that will enable him to pay the financial obligations imposed.

Since an incarcerated defendant cannot compel the state to employ and pay him, the state should have the burden of demonstrating how that defendant will be able to pay off his LFOs.

E. Imposing unpayable LFOs results in unauthorized sentences, and defendants have no duty to object to an unauthorized sentence.

An unauthorized sentence is one that "could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) An unconstitutional sentence is unauthorized because it cannot lawfully be imposed. For example, a sentence that violates ex post facto is unauthorized, *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248, as is a sentence that violates equal protection. (*People v. Noyan* (2014) 232 Cal.App.4th 657, 663-664 and fn. 4.) An unauthorized sentence may be corrected at any time, with or without an objection by the defendant. (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

Under both the Eighth and Fourteenth amendments, as well as the state constitution, imposing unpayable LFOs on criminal defendants is unconstitutional. Because imposition of unpayable LFOs renders a sentence unconstitutional and unauthorized, the state should bear the burden of proving a defendant has the ability to pay and of demonstrating that it is not asking the court to impose an unauthorized sentence.

F. Most defendants facing felony and misdemeanor charges raise the issue of their indigency at the inception of the case by requesting appointed counsel.

Under Penal Code section 987, trial courts have a duty to ask defendants at arraignment whether they request appointed counsel. Appointment of counsel is contingent on the defendant's indigency. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 344-345; *People v. Lara* (2001) 86 Cal.App.4th 139, 150 ["absolute duty to appoint counsel to represent an indigent defendant"].)

The court may, but need not, require a defendant to submit a confidential financial statement to establish the defendant's right to appointed counsel. (Pen. Code, § 987, subd. (c).) Before the public defender's office is appointed as counsel, it must verify the defendant's indigence by assessing his income, expenses, debt, and other relevant financial data. (Gov. Code, § 27707.) The final determination of indigence is made by the court. (*Ibid.*; *People v. Vaughn* (1981) 124 Cal.App.3d 1041, 1046.) As such, public defender clients, all of whom have already been financially evaluated and found indigent by the court, are legally entitled to a presumption of indigence for most purposes. (See, e.g., *Vaughn*, at pp. 1045–1046 [defendant, a public defender client, was entitled to a free trial transcript]; *People v. Santos* (2019) 38 Cal.App.5th 923, 933; *People v. Rodriguez* (2019) 34 Cal.App.5th 641, 645.)

Similarly, for misdemeanor appeals, the Rules of Court presume indigency for appeal when the defendant was

represented by appointed counsel at trial. (Cal. Rules of Court, Rule 8.851(a)(1)(B).)

Other courts have recognized "the reality that many felony defendants are indigent." (*People v. Acosta* (2018) 28 Cal.App.5th 701, 707-708.) In *Acosta*, the court held that that reality supported the recommendation that trial courts sua sponte investigate a defendant's ability to pay before imposing sex offender registration fees under Penal Code section 290.3.

Because the majority of defendants facing felony or misdemeanor charges establish at the inception of the case that they are indigent, the state should bear the burden at sentencing to show they can pay LFOs.

G. If this Court believes that defendants should bear any portion of the burden of proof, it should still find that a defendant's indigency – as manifested by the appointment of counsel or other factors – constitutes prima facie evidence that the defendant cannot pay monetary sanctions.

As explained in section F., *supra,* the state knows that most criminal defendants are indigent by virtue of the fact that they have qualified for court-appointed counsel. This fact, and other financial conditions described in Government Code section

68632[20], should establish a prima facie case that a defendant is unable to pay LFOs.

If this Court decides that the state does not bear the burden of proof in all instances, it should at least find that a defendant's use of appointed counsel or financial condition as described in Government Code section 68632 states a prima facie case of inability to pay LFOs and shifts the burden of proving ability to pay to the state.

H. Cases placing the burden of proof on defendants are wrong.

All the post-*Dueñas* cases that have addressed burdens placed the burden of objecting and of proving inability to pay on the defendant.[21] None of the cases rejecting *Dueñas'* placement of

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[20] This statute presumes that court fees should be waived for litigants who receive a wide variety of public benefits, such as Supplemental Security Income, welfare, food assistance, and Medi-Cal, whose monthly income is 125 percent or less of the federal poverty level, and those who cannot pay court fees without using money the litigants need to take care of their families.

[21] *People v. Cowan* (2020) 47 Cal.App.5th 32, 49; *People v. Venegas* (2020) 44 Cal.App.5th 32, 42; *People v. Lowery* (2020) 43 Cal.App.5th 1046, 1053; *People v. Keene* (2019) 43 Cal.App.5th 861, 863-864; *People v. Taylor* (2019) 43 Cal.App.5th 390, 402; *People v. Anderson* (2019) 42 Cal.App.5th 780, 787; *People v. Belloso* (2019) 42 Cal.App.5th 647, 662; *People v. Rodriguez* (2019) 40 Cal.App.5th 194, 206; *People v. Jenkins* (2019) 40 Cal.App.5th 30, 40-41; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1073; *People v. Torres* (2019) 39 Cal.App.5th 849, 860; *People v. Santos* (2019) 38 Cal.App.5th 923, 934; *People v. Kopp* (2019) 38 Cal.App.5th 47, 95-97; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033; *People v. Frandsen* (2019) 33 Cal.App.5th

the burdens, however, confronted any of the arguments set forth in this brief. None has considered the fact that the state's current LFO scheme places the burden of proof on the state for nearly one-third of all possible LFOs, many of which are indistinguishable in purpose or size from the LFOs that either place the burden on the defendant or fail to address the burden of proof at all. Nor has any of the cases placing the burden of proof on the defendant addressed the legislative history of the LFOs or the constitutional implications of presuming that all defendants are able to pay all LFOs.

After considering the explanations set forth here for placing the burden of proof on the state, this Court should agree that the limited analyses contained in the Court of Appeals' cases fail to adequately consider all the factual, legal and policy reasons for placing the burden of proof on the state, and should reject those holdings.

1126, 1154; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; *People v. Castellano* (2019) 33 Cal.App.5th 485, 490-491.

CONCLUSION

For the reasons set forth herein, this Court should hold that no court may impose LFOs on a criminal defendant without determining that the defendant can pay the LFOs, and it should place the burden of proving ability to pay on the state.

Respectfully submitted,

Dated: August 7, 2020 By:

REBECCA P. JONES
Attorney for Appellant
JASON HERNANDEZ

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I, Rebecca P. Jones, counsel for Jason Hernandez, certify pursuant to the California Rules of Court that the word count for this document is 17,157 words, excluding the tables, this certificate, and any attachment permitted under rule 8.360. This document was prepared in Word Perfect and this is the word count generated by the program for this document.

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Respectfully submitted,

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PEOPLE V. KOPP et al.
Case No. S257844

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