No. B285645

In the

Court of Appeal of the State of California
Second Appellate District
Division Seven

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

v.

VELIA DUEÑAS,

Defendant and Appellant.

Superior Court, Los Angeles, Appellate Division No. BR052831
Superior Court, Los Angeles, Trial Ct. No. 5VY02034
(Hon. Eric P. Harmon, Judge Presiding)

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS[1]

Citation, Complaint and Plea.

In 2014, appellant was issued a citation for driving with an expired registration, an infraction (Veh. Code, § 4000, subd. (a)(1)), and driving while her license was suspended or revoked, a misdemeanor (Veh. Code, § 14601, subd. (a)). (CT 1.) Appellant signed a promise to appear.

After the appearance date was continued, appellant failed to appear, and a bench warrant was issued. (CT 2-3.) Another appearance date was scheduled and appellant failed to appear. (CT 4-5.) A bench warrant was again issued. (CT 6.)

In 2015, appellant was charged in a five-count misdemeanor complaint with driving while her license was suspended or revoked for reasons specified in Vehicle Code section 14601.1, subdivision (a) (Veh. Code, § 14601.1, subd. (a), count 1), driving while her license was suspended or revoked for reckless driving, or negligent or incompetent operation of a motor vehicle (Veh. Code, § 14601, subd. (a), count 2), driving without a valid license (Veh. Code, § 12500, subd. (a), count 3), and two failures to appear in court (Veh. Code, § 40508, subd. (a), counts 4 and 5). (CT 7-10.) Counts 1 and 2 alleged four prior convictions of

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[1] The record on appeal is comprised of the Clerk's Transcript certified on August 1, 2016 (CT), the Reporter's Transcript of the proceedings of July 13, 2015, and February 22, 2016 (RT), and the augmented Reporter's Transcript of the proceedings of March 17, 2016 (ART). The record also includes a Supplemental Clerk's Transcript, which is not cited herein.

driving with a suspended or revoked license in violation of Vehicle Code section 14601.1, subdivision (a). (CT 7-8.)

Appellant appeared for arraignment. (CT 11-12.) She pleaded not guilty and denied the prior convictions. (CT 11.)

Appellant later withdrew her plea on count 1, and entered a plea of no contest. (CT 21.) The remaining counts were dismissed, on the People's motion, pursuant to Penal Code section 1385. (*Ibid*; CT 24.) Prior to her plea, appellant had reviewed with her attorney the Advisement of Rights, Waiver and Plea Form. (RT 1.)

In the signed plea form, appellant initialed the following statements:

> 20. I have read and understood the applicable charts on page 2 which list the minimum and maximum penalties for the offense(s) I am charged with. . . .
>
> 21. I understand that in addition to the fine, **the Court will add assessments which will significantly increase the amount I must pay.** I will also be ordered to make restitution and to pay a restitution fine up to $1,000, unless the Court finds compelling and extraordinary reasons not to do so.

(CT 18.) The chart on page 2 indicated that the sentence for a second or subsequent violation of Vehicle Code section 14601.1 included "5 days to 1 year in jail, and a fine of $500 to $2,000." (CT 17.)

After the court accepted appellant's plea, it noted that appellant "has a probation violation case, which is B340556, and probation had been revoked previously based on her conviction." (RT 3-4.) It found that "there is a basis to violate her probation

on this case." (*Ibid*.) When the court asked defense counsel what the terms of the proposed sentence were, counsel responded: "If she returns without her license, sentenced to 30 days in jail, fine of $300 plus penalty and assessments. If she returns with her license, sentenced to just the fine, no jail." (RT 4.) Additionally, with respect to the probation violation, appellant's probation would be revoked and reinstated. (*Ibid*.)

Sentencing Hearing.

When the case was called for sentencing on February 22, 2016, the court placed appellant on 36 months of summary probation. (CT 25.) The conditions of probation, as previously agreed upon, were: 30 days in jail, a $300 fine or nine additional days in jail, and assessments. (CT 25; RT 4, 10-11.)

The court then imposed the assessments and restitution fine now being appealed: the $150 restitution fine, the $30 "criminal conviction assessment" pursuant to Government Code section 70373, and the $40 "court operations assessment" pursuant to Penal Code section 1465.8, subdivision (a)(1). (CT 25; RT 11.)

Defense counsel requested an ability-to-pay hearing for the "attorney's fees and court fees," representing to the court that appellant "is on public benefits and she's currently homeless." (RT 11.) The trial court stated,

> She has 3 years to pay them. If it gets near the time where she can suffer a consequence as a result of not paying them, which would almost never be the case, we can set a hearing at that time.

(*Ibid.*) When defense counsel pressed the issue, "[w]ith respect to the attorney's fees," the court set an ability-to-pay hearing three weeks from that date. (RT 14.) The court also stated that appellant "needs to go to the financial evaluator – that's the order of this Court – before she returns." (RT 13.)

Defense counsel said that appellant would be unable to visit the financial evaluator in that period since the conditions of her probation included 39 days in jail, and suggested that "[i]t might be simpler to do it here in court." (RT 14.) The court stated that it was unlikely that appellant would still be in custody in three weeks since "[s]he's probably going to do far less than that[,]" and that it would not "make sense" for it to review the necessary documents. The court ordered appellant to "avail [her]self of the expertise of the financial evaluator[,]" who could provide "a good baseline to start." (*Ibid.*)[2]

The court and defense counsel also discussed the consequences of appellant not appearing at the ability-to-pay hearing:

> [Counsel]: Her ability-to-pay hearing, that's civil. So the worst thing that would happen if she didn't come, which would be that the attorney's fees and the other fines would be sent to collections as opposed to at this point –
>
> The Court: That's not right. If she doesn't show up on this Court's order, it doesn't automatically transform to a civil judgment. That's not –

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[2] There is nothing in the Clerk's or Reporter's Transcript that indicates appellant went to the financial evaluator.

[Counsel]: If she were coming to show something as a condition of her probation, then it would transform into a bench warrant, but if it's purely for fees, it doesn't transform into a bench warrant.

The Court: I agree that things that are purely for fees, the Court doesn't have jurisdiction to order a bench warrant, but it does not transform, without her appearance, the fees into a civil judgment.

(RT 15.)

Ability-to-Pay Hearing.

On the day of the ability-to-pay hearing, March 17, 2016, appellant filed a Notice of Motion in Support of Ability to Pay Hearing Regarding Court Fees. (CT 27.) Appellant argued on the basis of due process and equal protection that "[t]he court should not require Ms. Duenas to pay three fees totaling $220, all of which were imposed without regard for, and currently exceed, her ability to pay." (CT 34-36.) Appellant's supporting declaration set forth a number of facts that she claimed precluded her from paying the fine and fees. (CT 39-41.) Appellant pointed to her previous juvenile citations, totaling $1,088, and stated that even though she "received those citations years ago, [she] ha[d] not been able to pay them off." (CT 39.) As a result of the outstanding fees, the DMV suspended her license, and although she tried to get it back, she could not "afford the fees." (CT 40.) And she did "not qualify for the Amnesty program through the DMV." (*Ibid.*) She had since "suffered three convictions for driving on a suspended license and one conviction for a failure to appear," and every time she was fined, she "chose to go to jail

because [she] knew [she] could not afford the fees." (*Ibid.*) As a result, appellant declared that she "had been sentenced to 51 days in jail to pay for fines" she could not afford, in addition to the "90 days in jail as punishment for driving on a suspended license." (*Ibid.*) In her "other cases," she could "not afford the court costs so the judge ordered the court costs to go to collections." (*Ibid.*)

Appellant also declared the following: she "receive[d] government benefits in the form of cash aid and food stamps"; her husband was unemployed at the time, and would "[o]ccasionally, . . . get a small job as a construction worker"; she had two children, ages one and six; she had been diagnosed with cerebral palsy, and "[b]ecause of [her] disease, [she] dropped out of high school and [she] d[id] not have a job"; she and her family were "basically homeless," and they "go back and forth between [her] mom's house and [her] mother-in-law's house"; the only things she owned were "some clothes and a cell phone"; she paid $40 a month for the phone, which was sometimes disconnected because she could not "afford the payment"; she did "not have a checking account, a savings account, or a credit card"; she did "not know how much debt [she] owe[d]," and she would "get letters from collection agents, but there [was] no way to pay off the debt." (CT 40-41.) In sum, appellant stated that she could not "afford basic necessities for [her] family, much less court costs." (CT 41.) She thus declared that she would "not be able to pay the fees and the money [would] be sent to collections." (*Ibid.*) Appellant did "not want the money to go to collections because

then [she would] have more debt that [she could] never repay[,]" so she asked "the court to waive the fees" since she did "not have the money to pay them." (CT 41.) Attached to the declaration was a "Verification of Benefits" indicating that appellant received assistance in the form of $350 in cash and $649 in benefits. (CT 42.)

The court waived the attorney fees. (ART 1-2; CT 48.) Defense counsel then noted that the statutes authorizing the assessments and fine did not have an ability-to-pay component, and argued that this was unconstitutional. (2RT 4-5.) Counsel also argued that appellant was entitled to a waiver of the restitution fine under Penal Code section 1202.4. (ART 7.)

The court responded:

> So restitution fine, probation revocation restitution fine, those two have a component of compelling and extraordinary reasons, which we'll get to in one moment.
>
> The other one that was imposed, the 1465.8, the court operations assessment is $40, imposed, per count, mandatory, and then the criminal facilities assessment – I'm sorry, the criminal conviction, 70373 of the Government Code, that's also mandatory. So all four are mandatory. The two former have a component that involves compelling and extraordinary reasons; the latter two do not.

(ART 10-11.) Defense counsel agreed with this characterization, and argued that compelling and extraordinary reasons existed in this case with respect to the restitution fine. (ART 7, 11.) The court first found that the assessments were mandatory, and overruled appellant's constitutional challenges. (ART 12.)

Turning to the restitution fine, the court recited appellant's declaration almost in its entirety (ART 12-16), and found that compelling and extraordinary reasons did not exist for waiving the restitution fine (ART 17). In so ruling, the court commented:

> [L]ike everybody else, I have great compassion for indigent defendants and those people who are assessed fees or fines that they cannot pay and find themselves in dire financial straits.
>
> The puzzling thing about this matter, it doesn't stem from one case for which she's not capable of paying the fines and fees. This stems from, as she just detailed in this affidavit, continual violations of the law that make her, that make them snowball, basically. So, it's not as though she suffered one conviction and now is suffering under the difficult task of paying it off. She continually decided to drive on a suspended license even though she's been convicted time and time again. So sympathy is not really something that I consider in those assessments.

(ART 13.) The trial court went on to state:

> Anyway, however, I think it's important for the record to reflect, for any appellate purposes, that when I consider the compelling and extraordinary reasons, they go only to the defendant's current inability to pay, not to the history that I've just cited.

(ART 13-14.)

The court also noted that the payment of $220 over three years amounted to about $6 per month, which it did not consider onerous since she was paying $40 a month for her cell phone. (ART 17.)

ARGUMENT

California relies on statutory assessments and fines to sustain critical needs, such as assessments to maintain and operate its courts and restitution fines to compensate victims of crime. At bar, the trial court imposed the mandatory $40 court operations assessment, the mandatory $30 court facilities assessment, and the mandatory minimum $150 restitution fine. The court gave appellant three years to pay these amounts, stating, "[i]f it gets near the time where she can suffer a consequence as a result of not paying them, which would almost never be the case, we can set a hearing at that time." (RT 13.) Following an ability-to-pay hearing, after which the court waived attorney fees (see Pen. Code, § 987.8, subd. (b) [court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost of legal assistance]; see also Veh. Code, § 42003, subds. (c)-(d) [upon request of a defendant in a Vehicle Code adjudication, court shall consider the defendant's ability to reimburse the costs of presentence report and probation]), the court declined to waive the mandatory assessments or minimum restitution fine. (See Pen. Code, § 1202.4, subd. (d) [court shall consider inability to pay in setting restitution fine in excess of the minimum fine amount].)

Appellant argues the trial court's imposition of the assessments and restitution fine "without consideration of her undisputed inability to pay impermissibly punishes her on account of her poverty, invidiously discriminating against her

and contravening the fundamental fairness required by the Equal Protection Clause and Due Process Clause." (Appellant's Opening Brief (AOB) 11.) As a consequence, appellant maintains, courts must first consider defendants' ability to pay the assessments and restitution fines prior to imposing them.

As will be examined, *post*, under United States and California constitutional jurisprudence, equal protection and due process rights are not violated by the imposition of assessments and fines, like those at issue here, where there is no threat of imprisonment or the denial of fundamental rights and benefits in the event of a non-willful failure to pay. Absent constitutional implications, it should be left to the Legislature to address, as it has in recent legislation, the important and complex issue of debt owed to the court by those unable to pay.

I. The Assessments And Restitution Fine Are Supported By A Rational Basis.

In enacting the assessments and restitution fine, the Legislature sought to ensure adequate funding for important purposes: court facilities and operations and compensation for crime victims. Given the expansive need for both, the fine and assessments are imposed on every defendant convicted of a crime in this state. These statutes are a reasonable means for offsetting the costs of criminal proceedings and conduct, and they do not offend the constitution because neither the imposition of the assessment and fine nor the non-willful failure to pay them

results in incarcerating or depriving a defendant of any rights, benefits, or access to the courts.

A. The Assessments And Restitution Fine Further Important State Interests.

In assessing the constitutionality of the assessments and fine, the "general rule [is] that fee requirements ordinarily are examined only for rationality[.]" (*M.L.B. v. S.L.J.* (1996) 519 U.S. 102, 106 [117 S.Ct. 555, 136 L.Ed.2d 473], citing *Ortwein v. Schwab* (1973) 410 U.S. 656, 660 [93 S.Ct. 1172, 35 L.Ed.2d 572].) Under a rational basis test, "it suffices if the law could be thought to further a legitimate governmental goal[.]" (*Board of Trustees v. Fox* (1989) 492 U.S. 469, 480 [109 S.Ct. 3028, 106 L.Ed.2d 388].) The assessments and fine in this case all advance the state's legitimate interests.

The assessment required by Penal Code section 1465.8 is intended to "[t]o assist in funding court operations." (Pen. Code, § 1465.8, subd. (a).)[3] The statute was enacted "as part of an urgency measure to implement the Budget Act of 2003 . . . ." (*People v. Alford* (2007) 42 Cal.4th 749, 754.) "As originally

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[3]The statute authorizing the assessment reads, in relevant part: "To assist in funding court operations, an assessment of forty dollars ($40) shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code." (Pen. Code, § 1465.8, subd. (a)(1).)

enacted, the fee was 'part of an extensive statutory scheme applicable to both criminal and specified civil cases designed to fund and coordinate court security . . . .' [Citation.]" (*Id.* at p. 759.) Accordingly, the "security fee was imposed not merely upon persons convicted of crime. [Former] Government Code section 69926.5, subdivision (a), which was adopted pursuant to [the same bill as Penal Code section 1465.8], required a $20 court security surcharge also be imposed on the first paper filed on behalf of a plaintiff or a defendant in any limited and unlimited civil action or special proceeding and in probate matters." (*People v. Wallace* (2004) 120 Cal.App.4th 867, 875.)

The assessment authorized by Government Code section 70373 serves a similar purpose: "[t]o ensure and maintain adequate funding for court facilities." (Govt. Code, § 70373, subd. (a).)[4] Like the court operations assessment, "the criminal conviction assessment for court facilities was enacted as part of the budgeting process. [Citation.]" (*People v. Castillo* (2010) 182 Cal.App.4th 1410, 1414.) Enacted in 2008, "the criminal conviction assessment [was] but one component of a broader

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[4] This statute provides, in relevant part: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463 of the Penal Code, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony and in the amount of thirty-five dollars ($35) for each infraction." (Gov. Code, § 70373, subd. (a)(1).)

legislative scheme in which filing fees in civil, family, and probate cases were also raised. [Citations.]" (*People v. Brooks* (2009) 175 Cal.App.4th Supp. 1, 4.) As described in the Legislative Counsel's Digest, the bill "establish[ed] the Immediate and Critical Needs Account of the State Court Facilities Construction Fund, the proceeds of which would be used for the planning, design, construction, rehabilitation, renovation, replacement, or acquisition of court facilities, for the repayment of moneys appropriated for lease of court facilities pursuant to the issuance of lease-revenue bonds, and for the payment for lease or rental of court facilities." (Legis. Counsel's Dig., Sen. Bill 1407, 5 Stats. 2008 (2007-2008 Reg. Sess.) Summary Dig., p. 124.)

The restitution fine imposed by Penal Code section 1202.4 serves different, legitimate purposes.[5] Although "the Legislature intended restitution fines as punishment[]" (*People v. Hanson* (2000) 23 Cal.4th 355, 361), the fines serve an additional purpose

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[5] This restitution fine provision states, in relevant part:

> (b) In 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.
>
> (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. . . . If the person is convicted of a misdemeanor, the fine shall not be less than one hundred fifty dollars ($150) and not more than one thousand dollars ($1,000).

(Pen. Code, § 1202.4, (subd. (b).)

– they "are deposited to the Restitution Fund. (Pen. Code, § 1202.4, subd. (e).)" (*People v. Holman* (2013) 214 Cal.App.4th 1438, 1452.) This fund "is used to compensate victims for certain kinds of 'pecuniary losses they suffer as a direct result of criminal acts.' (Gov. Code, § 13950, subd. (a).)" (*Ibid.*) "Crime victims may apply to the Restitution Fund as one avenue to recover monetary losses caused by criminal conduct." (*Ibid.*) As the Legislature has declared, "it is in the public interest 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).) And this interest is especially compelling in California, where victims are entitled to restitution under the state constitution. (Cal. Const., art. I, § 28, subd. (b), par. (13).)

As the foregoing demonstrates, the challenged statutes serve to finance critical state functions of operating courts and compensating victims. (See *Ortwein v. Schwab*, *supra*, 410 U.S. at p. 660 [finding Oregon civil appellate filing fee constitutional and stating that the "court system incurs operating costs, and the fee produces some small revenue to assist in offsetting those expenses"].) Imposing the assessments and fine on convicted criminal defendants is a reasonable means for achieving this purpose.

B. Inability To Pay The Assessments And Fine Will Not Lead To An Infringement On Liberty.

If appellant is unable to pay the assessments and fine through no fault of her own, she does not face incarceration, probation revocation, or deprivation of any fundamental right. Failure to pay the assessments imposed under Penal Code section 1465.8 and Government Code section 70373 can never result in imprisonment because these assessments cannot be imposed as conditions of probation. (*People v. Kim* (2011) 193 Cal.App.4th 836, 842 ["neither statute [Pen. Code, § 1465.8, Govt. Code, § 70373] provides for considering a defendant's ability to pay, nor do they provide for imposing the fee or assessment as a probation condition"; "'a defendant may be imprisoned for violating a probation condition, but not for violating an order to pay costs or fees.' [Citation]"].) The assessments may only be enforced as civil judgments. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1403 [order to pay collateral costs such as Penal Code section 1465.8 assessment enforceable "only as a separate money judgment in a civil action"], disapproved on other grounds in *People v. Trujillo* (2015) 60 Cal.4th 850, 858, fn. 5 and *People v. McCullough* (2013) 56 Cal.4th 589, 599.)

As for the restitution fine, which must be imposed as a condition of probation (Pen. Code, § 1202.4, subd. (m)), there are statutory and decisional safeguards to prevent appellant from being unconstitutionally incarcerated. Under the holding of *Bearden v. Georgia* (1983) 461 U.S. 660 [103 S.Ct. 2064, 76 L.Ed.2d 221] (*Bearden*), appellant is entitled to a probation

violation hearing where the court must determine whether her failure to pay was willful. *Bearden* held that if the court found a "probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment." (*Id.* at p. 672.)[6] Furthermore, pursuant to statutory law, a failure to pay the restitution fine can only be enforced as a probation violation if it is willful. (Pen. Code, § 1214.2, subd. (b)(1).)

In finding that the restitution fine was constitutional, the Fifth Appellate District in *People v. Long* (1985) 164 Cal.App.3d 820 (*Long*), distinguished the fine from ones that would require consideration of ability to pay: "[T]he constitutional infirmity which necessitates consideration of a defendant's ability to pay restitution or a fine when failure to do so will result in imprisonment is inapplicable *by statute* to [restitution] fines imposed pursuant to [former] Government Code section 13967[7]." (*Id.* at pp. 826-827; see also *People v. Sandoval* (1989) 206

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[6] The United States Supreme Court explained that "bona fide efforts" included reasonable efforts "to seek employment or borrow money in order to pay the fine or restitution." And, that a failure to make such bona fide efforts "may reflect an insufficient concern for paying the debt [the probationer] owes to society for his crime," which would justify revoking probation and using incarceration as a penalty. (*Id.* at pp. 668-669.)

[7] *Long* was decided under former Government Code section 13967. In 1994, the provisions relating to the restitution fine were deleted from Government Code section 13967 and incorporated into Penal Code section 1202.4. (Stats. 1994, ch. 1106, § 2, 3.)

Cal.App.3d 1544, 1550 [applying rational of *People v. Long* to direct victim restitution].) The Second Appellate District, in *People v. Glenn* (1985) 164 Cal.App.3d 736, 740, agreed, finding the statute did not violate equal protection since "imprisonment of a defendant for failure to pay the restitution fine is prohibited."

Rather, when a defendant fails to pay all or part of the restitution fine, any unpaid balance remaining at the end of the probationary period may only be enforced "in the same manner as a judgment in a civil action." (Pen. Code, § 1214.2, subd. (b)(2); see also Pen. Code, §§ 1214, subd. (a) [unpaid restitution fine may be enforced as civil judgment by California Victim Compensation Board], 1205, subd. (f) [provisions of statute providing for imprisonment until a fine has been satisfied are not applicable to restitution fine].) Consequently, there are no restraints on liberty, such as incarceration, arising from an inability to pay the assessments and restitution fine.

C. It Is Not Irrational To Impose The Assessments And Fine On All Convicted Defendants.

Appellant characterizes the imposition of these assessments and fine on an indigent defendant as "ineffective" and "wholly irrational." (AOB 22, 25-26.) But, it is not irrational to uniformly impose a fee on all convicted defendants because some defendants will have the present ability to pay all or at least some of the amount imposed, and others may gain the ability to pay.

California courts have not directly addressed the rationality of imposing assessments on indigent defendants, and appellant does not cite to any authority on this point. The Washington Court of Appeals, however, recently rejected an argument that imposing a state DNA collection fee, "victim penalty assessment," and filing fee on offenders without considering current or future ability to pay was irrational since collection was "unlikely" if a defendant could not afford it. (*State v. Seward* (Wash. Ct.App. 2016) 384 P.3d 620.) The defendant claimed that attempting to collect the fees in these circumstances is "harmful to the offenders, creates no legitimate economic incentive, and serves no legitimate purpose." (*Id.* at p. 624.) The court disagreed, finding that "imposing these fees and the assessment on all felony offenders without first considering their ability to pay is rationally related to legitimate state interests because even though some offenders may be unable to pay, some will." (*Ibid.*) Furthermore, it was rational because "defendant's indigency may not always exist." (*Ibid.*)

Indeed, as recognized by the Michigan Supreme Court in *People v. Jackson* (Mich. 2009) 769 N.W.2d 630, 640, if courts were barred from imposing attorney fees because someone was unable to pay them at the time of sentencing, it would "frustrate[] the Legislature's legitimate interest in recouping fees for court-appointed attorneys from defendants who eventually gain the ability to pay those fees."

Thus, the Legislature is in the best position to study the costs and benefits of reducing or waiving assessments and fines,

and to determine the procedures for implementing such policies. In fact, it has recently exercised its legislative prerogative to effectuate fine reductions and mitigate the adverse consequences of nonpayment. (See, e.g., Veh. Code, §§ 42008.7 [establishing 2012 traffic infraction amnesty program intended to "provide relief to individuals who have found themselves in violation of a court-ordered obligation because they are financially unable to pay traffic bail or fines" while providing "increased revenue"], 42008.8 [establishing similar amnesty program for 2015-2017]; Assem. Bill No. 103, 17 Stats. 2017 (2017-2018 Reg. Sess.) [amended Veh. Code, §§ 40509, 40509.5 & 13365 to remove failure to pay vehicle offense fines as ground for initiating driver's license suspension or hold].) And under rational basis review, whether a defendant's ability to pay should be considered before imposing an assessment or fine is a determination to be made by the Legislature. (See *Heller v. Doe* (1993) 509 U.S. 312, 330 [113 S.Ct. 2637, 125 L.Ed.2d 257] [courts "'must disregard' the existence of alternative methods of furthering the objective 'that we, as individuals, perhaps would have preferred'"].)

II. The Assessments And Fine Do Not Subject Appellant To Any Unconstitutional Deprivation.

Appellant argues that imposing the assessments and fine on her "without consideration of her undisputed inability to pay impermissibly punishes her on account of her poverty[.]" (AOB 11.) The possibility of incurring a civil judgment, however, is not

the type of deprivation contemplated by the cases on which she relies.

A. Appellant's Argument Is Mostly Premised On Decisional Authority Finding It Unconstitutional To Incarcerate Someone Or Restrict Access To The Courts Due To Inability To Pay.

It was the possibility of imprisonment – not the civil consequences of debt – that implicated the equal protection concerns raised in *Williams v. Illinois* (1970) 399 U.S. 235 [90 S.Ct. 2018, 26 L.Ed.2d 586] (*Williams*), on which appellant relies. (AOB 13-16.) In *Williams*, *supra*, 399 U.S. at p. 237, the United States Supreme Court addressed "[t]he narrow issue [of] whether an indigent may be continued in confinement beyond the maximum term specified by statute because of his failure to satisfy the monetary provisions of the sentence." In invalidating a statute requiring defendants unable to pay their fines to "work" them off through imprisonment, the court held that the "Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." (*Id.* at p. 244.)

As *Williams* makes clear, imprisoning a defendant solely on the basis of indigency violates equal protection. But *Williams* expressly disclaims the contention, similar to the one appellant makes, that a defendant who is indigent at the time of the

criminal proceedings is immune from his or her obligations to the state altogether. As *Williams* acknowledged,

> The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.

(*Williams*, *supra*, 399 U.S. at p. 244.)

Additionally, *Williams* implied that ordinary debt collection procedures do not rise to the level of punitive measures that invite equal protection scrutiny. One such procedure, wage garnishment, is argued by appellant to be "nearly identical to those [consequences] deemed intolerable by the U.S. Supreme Court in *James* [*v. Strange* (1972) 407 U.S. 128 [92 S.Ct. 2027, 32 L.Ed.2d 600]]." (AOB 20.) *Williams*, however, did not view garnishment in this manner. After acknowledging that its "holding may place a further burden on States in administering criminal justice[,]" the court quoted its decision in *Rinaldi* v. *Yeager* (1966) 384 U.S. 305, 310 [86 S.Ct. 1497, 16 L.Ed.2d 577]: "'Any supposed administrative inconvenience would be minimal, since . . . [the unpaid portion of the judgment] could be reached through the ordinary processes of garnishment in the event of default.' [Citation.]" (*Williams*, *supra*, 399 U.S. at p. 245.) The United States Supreme Court was thus careful to emphasize that equal protection did not shield indigent defendants from all the consequences of a criminal conviction.

The California Supreme Court similarly addressed a situation where a person was incarcerated for nonpayment of a fine. (*In re Antazo* (1970) 3 Cal.3d 100 (*Antazo*).) There, like *Williams*, the court agreed with the defendant's contention that "imprisonment solely because of his financial inability to pay the fine imposed on him as a condition of probation offends the equal protection clause of the Fourteenth Amendment." (*Id.* at p. 108.) And like *Williams*, *Antazo* confined its holding to the circumstances before it:

> [W]e do not hold that the imposition upon an indigent offender of a fine and penalty assessment, either as a sentence or as a condition of probation, constitutes of necessity in all instances a violation of the equal protection clause. Depending upon the circumstances of the particular case and the condition of the individual offender, there are a variety of ways in which the state may fine the indigent offender, as alternatives to imprisonment, without offending the command of equal protection [citation].

(*Id.* at p. 116.) While the court did not specify alternatives, it noted that *Williams* had. (*Id.* at p. 114, fn. 13.) One of the proposed solutions in *Williams* was "an installment plan as is currently used in several States" (*Williams*, *supra*, 399 U.S. at p. 244, fn. 21), which is effectively what the trial court ordered when it allowed appellant to pay the $220 over the three-year period of probation. In appellant's case, the trial court went even further, inviting appellant to return to court near the end of that period if she was still unable to complete payment. (1 RT 11.)

The reasoning in *Williams* was also applied in two other United States Supreme Court cases cited by appellant: *Tate v.*

Short (1971) 401 U.S. 395 [91 S.Ct. 668, 28 L.Ed.2d 130] (*Tate*), which held that an indigent defendant could not be incarcerated for a fine-only offense simply because he could not pay the fine or fee, and *Bearden*, *supra*, 461 U.S. 660, which held that probation could not be revoked on the basis of an inability to pay a fine. Both cases clearly involved restraints on liberty due to indigency.

Unlike those cases, in *Griffin v. Illinois* (1956) 351 U.S. 12 [76 S.Ct. 585, 100 L.Ed. 891] (*Griffin*), the inability to the pay a fee did not trigger incarceration. But it deprived defendants of a right found to be an integral part of the state trial system. In *Griffin*, the court noted that Illinois granted a right to appeal a criminal conviction to all defendants. However, in order to receive a fair and full appeal, it was necessary for the defendants to furnish the appellate court with a transcript. The petitioners sought to appeal their convictions, but were unable to pay for the necessary transcript, and the state refused to provide the transcripts at no cost. (*Griffin*, *supra*, 351 U.S. at pp. 13-14.) *Griffin* found that the Illinois law violated due process and equal protection by invidiously discriminating between those who could afford a transcript and those who could not. (*Id.* at pp. 18-19.) In striking down this practice, the court observed that "[a]ppellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant." (*Id.* at p. 18.) The court continued: "the ability to pay costs in advance bears no rational relationship to the defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. . . . ¶ There is no

meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." (*Id.* at pp. 18-19.)

Appellant's reliance on *Williams*, *Tate*, *Bearden* and *Griffin* is misplaced. The fees and fines they addressed were inextricably tied to the defendants' liberty or denial of access to an integral aspect of the court system. In contrast, the assessments and fine challenged by appellant are untethered to any such interest. For the same reason, appellant's reliance on cases addressing bail determinations (AOB 16) also fails.

B. Unlike The Statute In *James v. Strange*, California Law Does Not Deprive Defendants Of The "Array Of Protective Exemptions" Available To Other Civil Judgment Debtors.

Other than cases involving incarceration or deprivation of appellate rights, appellant relies mainly on *James*, *supra*, 407 U.S. 128. (AOB 15-16, 20-21.) Her reliance on *James* is misplaced.

James dealt with a Kansas recoupment statute that allowed the state to recover legal defense fees expended on behalf of indigent defendants by way of civil proceedings initiated after trial. The court did not find the recoupment itself to be unconstitutional. Rather, it was how the fees were recouped: the statute "strips from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors,

including 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." (*James*, *supra*, 407 U.S. at p. 135.) In recognizing that the "the Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class singled out[]' [citation]," the court found that "[t]his requirement is lacking where . . . the State has subjected indigent defendants to such discriminatory conditions of repayment." (*Id.* at p. 140.) The court further stated, "to impose these harsh conditions on a class of debtors who were provided counsel as required by the Constitution is to practice . . . a discrimination which the Equal Protection Clause proscribes." (*Id.* at p. 140.)

Absent the type of invidious discrimination found in *James*, appellant fails to offer authority that the mere imposition of a post-conviction fine or fee is unconstitutional. The United States Supreme Court, in *Fuller v. Oregon* (1974) 417 U.S. 40, 46 [94 S.Ct. 2116, 40 L.Ed.2d 642] (*Fuller*), suggested it was not when it upheld a statutory scheme that permitted fees to be conditionally imposed on indigent defendants. There, Oregon law allowed the state to seek repayment of attorney fees it expended on behalf of criminal defendants. It was clear that the statutes were "directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation." (*Id.* at p. 46.) The court found the statutes

consistent with equal protection, and distinguished them from the Kansas statute at issue in *James*. (*Id.* at p. 48.) In contrast, the court found that "no denial of the exemptions from execution afforded to other judgment debtors is included in the Oregon statutes." (*Id.* at p. 47.)

Unlike in *James*, the statutes in the instant case are facially neutral. The assessments and fine apply to every convicted defendant and make no distinction between indigent and nonindigent defendants. Unless a facially-neutral law has a discriminatory intent, it is constitutional even if it disproportionately impacts a group. (*Washington v. Davis* (1976) 426 U.S. 229, 242 [96 S.Ct. 2040, 48 L.Ed.2d 597] ["we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another"].) Appellant suggests that the statutes are facially discriminatory when she likens the Kansas statute in *James* to California's debt collection practices, claiming that California "also strips criminal debtors of certain protections given to other civil judgment debtors." (AOB 21, fn. 5.) However, the consequences visited upon a defendant owing court debt are almost indistinguishable from those arising from any other debt to the state.

Appellant identifies only a single difference: Penal Code section 1214, subdivision (e), which exempts court fees from section 683.020 of the Code of Civil Procedure. (AOB 21, fn. 5.) That section provides, in part: "Except as otherwise provided by

statute, upon the expiration of 10 years after the date of entry of a money judgment . . . (a) The judgment may not be enforced. . . ." (Code Civ. Proc., § 683.020.) But, creditors can renew money judgments for an additional 10 years by simply filing an application prior to the expiration of the term. (Code Civ. Proc., §§ 683.110-683.130.) Unlike the statute in *James*, this provision does not deny criminal debtors of "the very exemptions designed primarily to benefit debtors of low and marginal incomes." (*James*, *supra*, 407 U.S. at p. 139.) Thus, subdivision (e) of Penal Code section 1214 is an enforcement procedure that obviates the need for the State to file an application to renew the judgment. It does not speak to the rights and protections otherwise available to court debtors. Furthermore, this enforcement procedure is only a slight deviation from how debt is generally enforced. The *James* court "recognize[d] . . . that the State's claim to reimbursement may take precedence, under appropriate circumstances, over the claims of private creditors and that enforcement procedures with respect to judgments need not be identical." (*Id.* at p.138.)

C. For Defendants Unable To Pay The Assessments And Fine, There Are Safeguards To Protect Debtors From The Consequences Described by Appellant.

Even in the absence of a *James*-like facially-discriminatory statute, appellant argues that imposing the assessments and fine "without consideration of inability to pay 'impose[s] tremendous hardships' [citation] on economic self-sufficiency and minimum

subsistence . . . ." (AOB 19.) These hardships, she argues, arise from the collateral consequences of incurring debt from not paying the assessments and restitution fine, including: "harsh and punitive collection methods," the possibility of being "denied discretionary expungement," and, "[p]rior to June 2017," possible suspension of a driver's license. (AOB 19-20.) But since the assessments and fine are not due yet, none of these collateral consequences have occurred at this time. Moreover, there are safeguards in place to protect indigent defendants from these collateral consequences.

While appellant claims that "[p]rior to June 2017, defendants unable to pay court fees were subject to a driver's license suspension or hold[,]" she recognizes that these statutory provisions have been repealed. (AOB 20, citing former Veh. Code, §§ 40509, subd. (b), 40509.5, 13365, subd. (a).) Furthermore, even under the former provisions, a suspension or hold could only be initiated if a person "*willfully* failed to pay," not if he or she was "unable" to pay, as appellant contends. (See former Veh. Code, §§ 40509, subd. (b), 40509.5, emphasis added.) Thus, appellant's inability to pay her "past court debt" would not have made her subject to these statutory provisions. (AOB 20.) And in any case, appellant is specifically challenging the assessments and fine imposed in the instant case, not past cases.

With respect to expungement, appellant claims that "[i]ndividuals with 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." (AOB 20, citing Pen. Code, § 1203.4, subds. (a), (c).)[8] But appellant fails to explain why this discretionary relief would be denied to those who demonstrate an inability to pay in their expungement applications. If a defendant is indigent, he or she is not at fault for the nonpayment.

Appellant also claims that defendants unable to pay their debt "are subject to a $300 late penalty." (AOB 19, citing Pen. Code, § 1214.1.) Under Penal Code section 1214.1, subdivision (a), the court "may" impose a penalty "of up to" $300 for failure to pay a "fine." However, the additional assessment "shall not become effective until at least 20 calendar days after the court mails a warning notice to the defendant by first-class mail . . . ." (Pen. Code, § 1214.1, subd. (b)(1).) "If the defendant appears within the time specified in the notice and shows good cause . . . for the failure to pay a fine . . ., the court shall vacate the assessment." (*Ibid.*) Moreover, payment of the underlying debt "shall not be required in order for the court to vacate the assessment at the time of appearance . . . ." (Pen. Code, § 1214.1, subd. (b)(2).) An indigent defendant would thus have the

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[8] Some defendants are entitled to mandatory expungement if they "ha[ve] fulfilled the conditions of probation." (Pen. Code, § 1203.4, subd. (a).) But appellant is precluded from mandatory relief because she was convicted of violating Vehicle Code section 14601.1, which is an offense that is expressly excluded from the mandatory expungement provision. (See Pen. Code, § 1203.4, subd. (c)(1) [mandatory expungement not applicable to violations described in Veh. Code, § 12810, subds. (a)-(e), which includes Veh. Code § 14601.1].)

opportunity to explain the reason for the nonpayment and avoid the additional assessment.

Consequently, the non-willful payment of the assessments and fine will result in substantially the same type of debt owed by any other debtor. Appellant does not provide any authority to show that, for purposes of equal protection, there is a fundamental interest in not incurring debt. In fact, the United States Supreme Court has held that equal protection does not require waiver of a fee for an indigent debtor seeking bankruptcy discharge since "[t]here is no constitutional right to obtain a discharge of one's debts in bankruptcy." (*United States v. Kras* (1973) 409 U.S. 434, 446 [93 S.Ct. 631, 34 L.Ed.2d 626].) The court explained that "[b]ankruptcy is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated. [Citation.]" (*Ibid.*) The court also found that the fee had no effect on a suspect class. (*Ibid.*) "Instead, bankruptcy legislation is in the area of economics and social welfare[,]" and invokes a "rational justification" standard. (*Ibid.*)

III. Imposition Of The Assessments And Fine Comports With Due Process.

Appellant argues that the statutes violate substantive due process. (AOB 11-12, 20.)[9] However, appellant never raised this argument in the trial court. In her written motion, appellant first raised an equal protection argument, and then raised a second argument that "[c]ourt fees and costs are subject to due process requirements." (AOB 36) But this was a procedural due process challenge since it was based on the claim that she "received no notice of applicable fees." (AOB 37.) During the hearing, defense counsel continued with this procedural due process line of argument and told the court that appellant "was not notified that any court costs would be asserted against her." (ART 2.) When defense counsel argued that appellant was constitutionally entitled to an ability-to-pay hearing, she never mentioned substantive due process, and only cited *Fuller* in support, which is an equal protection case. (ART 4-5, 9.) Appellant thus forfeited the due process claim. (See *People v. Riggs* (2008) 44 Cal.4th 248, 292 [defendant "forfeited [federal constitutional] claim by failing to identify that ground in his objections to the trial court"].)

Since appellant has not identified any fundamental liberty rights at stake, her argument that the statutes violate substantive due process also fails on the merits. Apart from

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[9] Appellant does not expressly specify whether her claim relates to procedural or substantive due process, but the decisions she relies on to make this argument rested, at least in part, on substantive due process grounds.

noting the observation in *Bearden*, *supra*, 441 U.S. 660, 665 that sometimes equal protection and due process converge in cases involving indigency and the criminal justice system (AOB 12), appellant does not offer a separate analysis for her argument. The starting point for such an analysis is clear: To determine "whether an asserted interest is a fundamental liberty interest protected by due process[,] . . .the court must [first] make a '"careful description" of the asserted fundamental liberty interest.' (*Washington v. Glucksberg* [(1997) 521 U.S. 702, 721 [117 S.Ct. 2258, 117 L.Ed.2d 772]].) This 'careful description' is concrete and particularized, rather than abstract and general . . . ." (*Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 940, superseded by statute on other grounds as stated in *Pangilinan v. Palisoc* (2014) 227 Cal.App.4th 765, 771, fn. 4.)

Appellant has not identified any interests that have yet been infringed upon by the imposition of the assessments and fine since she has not claimed to have been subjected to enforcement efforts. Other jurisdictions have found that defendants in these circumstances are not deprived of due process.

The Second Circuit of the United States Court of Appeals found that "the imposition of assessments on an indigent, per se, does not offend the Constitution." (*United States v. Pagan* (2d Cir. 1986) 785 F.2d 378, 381.) "It is at the point of enforced collection of the principal or additional amounts, where an indigent may be faced with the alternative of payment or imprisonment, that he 'may assert a constitutional objection on

the ground of his indigency.' [Citation.]" (*Ibid.*) This conclusion was based upon its earlier decisions finding that "'financial obligations may be imposed upon a defendant who is indigent at the time of sentencing but subsequently acquires the means to discharge his obligations.'" (*United States v. Hutchings* (2d Cir. 1985) 757 F.2d 11, 14, quoting *United States v. Brown* (2d Cir. 1984) 744 F.2d 905, 911.)

The Florida Supreme Court has likewise recognized this distinction between imposing and enforcing a fee on an indigent defendant claiming a due process violation. In addressing a due process challenge to imposing over $50,000 in fines and fees on a convicted defendant without first conducting an ability-to-pay hearing, that court found that "a trial court is not required to determine a convicted criminal defendant's ability to pay statutorily mandated costs prior to assessing costs unless the applicable statute specifically requires such a determination." (*State v. Beasley* (Fla. 1991) 580 So.2d 139, 142.) Rather, "[i]t is only when the state seeks to enforce the collection of costs that a court must determine if the defendant has the ability to pay." (*Ibid.*)

The Michigan Supreme Court applied the same analysis in *People v. Jackson*, *supra*, 769 N.W.2d 630. There, the court found that the constitutional principles articulated in cases such as *James* and *Bearden* did not require an ability-to-pay hearing before a court imposes attorney fees; one was only required before enforcement. (*Id.* at pp. 634-643.) The court noted that "when considering an ability-to-pay analysis, there is a substantive

difference between the imposition of a fee and the enforcement of that fee." (*Id.* at p. 641.) Appellant has not been subjected to any efforts to collect payment of the assessments and fine imposed in this case. The court gave appellant the entirety of her three-year probationary period to pay the assessments and fine. (1RT 17.)

Since appellant does not claim that the court has enforced the assessments and fine, the only possible particularized interest appellant describes is the right be free from debt and to not be subject to ordinary collections practices. (See AOB 19-21.) But appellant does not provide any authority where due process was found to encompass this interest. The two due process cases on which appellant primarily relies, *Bearden* and *Griffin*, entailed the "significant interest of the individual in remaining on probation" (*Bearden*, *supra*, 461 U.S. at p. 671) and the right to "adequate and effective appellate review" of a criminal conviction, which the court noted had "become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of defendant" (*Griffin*, *supra*, 351 U.S. at pp. 18, 20). Here, nonpayment of the assessments and fine do not result in incarceration or present obstacles to an appeal of a conviction, and thus are not analogous to the interests in *Bearden* and *Griffin*.

The scope of fundamental liberty interests extends beyond the circumstances of *Bearden* and *Griffin*. For example, they include "associational rights . . . ranked as 'of basic importance in our society,'" such as "[c]hoices about marriage, family life, and the upbringing of children[.]" (*M.L.B. v. S.L.J.* (1996) 519 U.S.

102, 116 [117 S.Ct. 555, 136 L.Ed.2d 473].) But as the court in *Kras* found when declining to extend equal protection and due process to bankruptcy filing fees: "We see no fundamental interest that is gained or lost depending on the availability of a discharge in bankruptcy." (*Kras*, *supra*, 409 U.S. at p. 445.) It distinguished the bankruptcy fees from the ones addressed in *Boddie v. Connecticut* (1971) 401 U.S. 371 [91 S.Ct. 780, 28 L.Ed.2d 113], where the court invalidated on due process grounds mandatory fees and other costs imposed on indigent individuals seeking to initiate divorce proceedings. The *Kras* court explained:

> The *Boddie* appellants' inability to dissolve their marriages seriously impaired their freedom to pursue other protected associational activities. Kras' alleged interest in the elimination of his debt burden, and in obtaining his desired new start in life, although important and so recognized by the enactment of the Bankruptcy Act, does not rise to the same constitutional level. See *Dandridge* v. *Williams*, 397 U.S. 471 (1970); *Richardson* v. *Belcher*, 404 U.S. 78 (1971). If Kras is not discharged in bankruptcy, his position will not be materially altered in any constitutional sense. Gaining or not gaining a discharge will effect no change with respect to basic necessities.

(*Kras*, *supra*, 409 U.S. at pp. 444-445; see also *Ortwein*, *supra*, 410 U.S. at p. 659 [in holding that appellate filing fee required of indigent welfare recipients seeking review of reduction of benefits did not violate due process, court found that the interest in increasing welfare payments "has far less constitutional significance than the interest of the *Boddie* appellants"].)

Appellant's interest in avoiding any debt that may result from the assessments and fine, especially where she is entitled to all of the protections afforded any other debtor, is thus not a fundamental one implicating constitutional protection. And where the statute does not encroach on a fundamental right, the question is whether it is "rationally related to legitimate government interests." (*Washington v. Glucksberg*, *supra*, 521 U.S. at p. 728.) As demonstrated, *ante*, at pages 11 through 19, the assessments and fine satisfy that test.

IV. The Assessments And Fine Do Not Discriminate Against A Suspect Class.

Appellant also separately challenges the assessments and fine on the basis that they should be subjected to strict scrutiny review. (AOB 16-17.) A statute invites this level of constitutional review when it "operates to the peculiar disadvantage of a suspect class." (*Massachusetts Board of Retirement v. Murgia*, (1976) 427 U.S. 307, 312 [96 S.Ct. 2562, 49 L.Ed.2d 520].) Classifications based on race, alienage and nationality are considered "inherently suspect." (*Graham v. Richardson* (1971) 403 U.S. 365, 372 [91 S.Ct. 1848, 29 L.Ed.2d 534].) The United States Supreme Court has never held that wealth, alone, falls into this category. (*San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1, 29 [93 S.Ct. 1278, 36 L.Ed.2d 16] ["this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny"] (*Rodriguez*); *Maher v. Roe* (1977) 432 U.S. 464,

471 [97 S.Ct. 2376, 53 L.Ed.2d 484] ["this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis"].) Appellant does not contend otherwise with respect to the United States constitution, but she argues that the California constitution is different in this regard since "California's Equal Protection Clause, which is more protective than its federal counterpart, recognizes wealth as a suspect class and subjects wealth-based discrimination to strict scrutiny." (AOB 17.)

However, as appellant herself points out, "'[t]he Fourteenth Amendment's guarantee of equal protection and the California Constitution's protection of the same right (Cal. Const., art. I, § 7, subd. (a), art. IV, § 16, subd. (a)) are substantially equivalent and are analyzed in a similar fashion.'" (AOB 12, fn. 1, quoting *Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 207.) "'[C]ogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution.' [Citations.]" (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353.) Appellant fails to identify any cogent reasons for departing from United States Supreme Court decisional authority on equal protection.

In an effort to explain why the California constitution should be interpreted differently, appellant relies mostly on *Antazo*, *supra*, 3 Cal.3d 100. But this case did not purport to interpret the Equal Protection Clause of the California constitution; it relied on federal equal protection jurisprudence in

finding that incarcerating a defendant because he could not pay a fine "constituted an invidious discrimination based on his poverty in violation of the equal protection clause of the Fourteenth Amendment." (*Id.* at p. 115.) [10]

To be sure, in applying the Fourteenth Amendment, *Antazo*, *supra*, 3 Cal.3d 100, found the incarceration to amount to "discrimination based upon poverty," and held that "the instant case involves 'suspect classifications' which must be reviewed and evaluated under the stricter standards mentioned [therein]." (*Id.* at p. 112.) But those passages must be taken in context. The discrimination in that case resulted in a deprivation of liberty because of an inability to pay a fine. As the United States Supreme Court explained in discussing cases where it previously found de facto discrimination against indigent defendants, "[t]he individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." (*Rodriguez*, *supra*, 411 U.S. at p. 20.) Appellant suffers no such acute deprivation of a benefit afforded to someone who could pay the impositions.

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[10] Any contention that *Antazo* was interpreting the state's Equal Protection Clause is belied by the fact the clause was added to Article I, section 7 of the California constitution in 1974, about four years after *Antazo* was decided. (See *Strauss v. Horton* (2009) 46 Cal.4th 364, 484, fn. 2.)

Even if *Antazo* intended to recognize a wealth-based suspect classification under the Fourteenth Amendment, the U.S. Supreme Court clarified three years later that it had "never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny[.]" (*Rodriguez*, *supra*, 411 U.S. at p. 20.) In that case, the plaintiffs alleged that a school funding scheme discriminated on the basis of wealth in violation of the Equal Protection Clause. The court, in its assessment of lower court decisions on this matter, criticized the approach by which courts ignored the "unique features of the alleged discrimination," and instead "assumed their findings of a suspect classification through a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth." (*Id.* at p. 19.) The court elaborated:

> This approach largely ignores the hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged "poor" cannot be identified or defined in customary equal protection terms, and whether the relative – rather than absolute – nature of the asserted deprivation is of significant consequence. Before a State's laws and the justifications for the classifications they create are subjected to strict judicial scrutiny, we think these threshold considerations must be analyzed more closely than they were in the court below.

(*Ibid.*)

Here, there is no categorical deprivation of a benefit. Equal protection thus does not prohibit the imposition of the

assessments and fine solely because defendants may have having varying wealth. "Absolute equality is not required; lines can be and are drawn and we often sustain them. [Citations.]" (*Douglas v. California* (1963) 372 U.S. 353, 357 [83 S.Ct. 814, 9L.Ed.2d 811].)

Apart from *Antazo*, which is based on the United States constitution, appellant offers only one other decision in arguing that wealth classifications are suspect under the California constitution, *Serrano v. Priest* (1974) 18 Cal.3d 728 (*Serrano II*). (AOB 17.) This case does not hold that wealth, standing alone, could be the basis of a suspect classification.

In *Serrano II,* which addressed state constitutional challenges to the public school funding scheme similar to those at issue in *Rodriguez*, the court held that "for purposes of assessing our state public school financing system in light of our state constitutional provisions guaranteeing equal protection of the laws (1) discrimination in educational opportunity on the basis of district wealth involves a suspect classification, and (2) education is a fundamental interest." (*Serrano II*, *supra*, 18 Cal.3d at pp. 765-766.) This holding was specifically limited to those circumstances where wealth intersects with the fundamental right of education guaranteed by our state constitution.[11] The

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[11] Relying on this same rationale – that the education was a fundamental right – the court had previously held in *Serrano v. Priest* (1971) 5 Cal.3d 584, 589, 604-610 (*Serrano I*) that the United States constitution also required strict scrutiny review of classifications based on the school district wealth. But in light of *Rodriguez*, *supra*, 411 U.S. 1, which was decided after *Serrano I*, the court in *Serrano II*, *supra*, 18 Cal.3d 728, 762 acknowledged

court expressly passed on the issue of whether strict scrutiny should be applied in other circumstances, stating "we need not address the problem . . . whether in applying our *state* equal-protection provisions we should insist upon strict scrutiny review of all governmental classifications based on wealth, thus elevating such classifications to a level of 'suspectedness' equivalent to those based on race." (*Id.* at p. 766, fn. 45.) And no court has since held that wealth-based classifications are suspect when divorced from the fundamental right of education guaranteed by our state constitution. Since the statutes in the instant case do not infringe on the right to education, or any other fundamental right, there is no authority to support the finding of a suspect classification.

CONCLUSION

The cases on which appellant relies do not support her position that the imposition of the two assessments and restitution fine prior to a hearing and finding of an ability-to-pay is unconstitutional. The two assessments do not subject appellant to any threat of incarceration. And prior to any threat of incarceration as to the restitution fine, appellant would be statutorily and constitutionally entitled to a hearing, and the

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that "it is clear that *Rodriguez* undercuts our decision in *Serrano I* to the extent that we held the California public school financing system (if proved to be as alleged) to be invalid as in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution."

court would be required to make a finding that her failure to pay is willful. Furthermore, the Legislature has not created a statutory scheme which deprives a criminal defendant of the protections afforded to civil debtors, as was the case in *James*.

Guided by the foregoing statutory provisions and constitutional principles from the United States and California courts, respondent respectfully urges this Court to affirm the imposition of the assessments and restitution fine imposed here.

DATED: December 18, 2017

Respectfully submitted,

Michael N. Feuer, City Attorney
Debbie Lew, Assistant City Attorney
Rolando R. Reyes, Deputy City Attorney

By: _____/s/_____
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PEOPLE OF THE STATE OF CALIFORNIA

CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies, pursuant to California Rules of Court, rule 8.883(b)(1), that this Respondent's Brief contains 10,500 words, including footnotes. I have relied on the word count of the Microsoft Word 2013 program used to prepare the brief.

/s/

PROOF OF SERVICE BY MAIL

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION SEVEN

VELIA DUEÑAS V. SUPERIOR COURT
(PEOPLE OF THE STATE OF CALIFORNIA)
Court of Appeal No. B285645
(Appellate Div. No. BR052831; Trial Crt. No. 5VY02034)

I, the undersigned, am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the above-referenced action. My business address is 200 North Main Street, James K. Hahn City Hall East, 5th Floor, Los Angeles, California 90012.

I am readily familiar with the practice of the Los Angeles City Attorney's Office, City Hall East, for collection and processing correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

On **December 18, 2017,** I served the following document

RESPONDENT'S BRIEF

by placing a true copy in a sealed envelope(s) for collection and mailing, following ordinary business practice, at 200 North Main Street, 500 City Hall East, Los Angeles, California 90012. The person(s) served, as shown on the envelope(s), are:

Honorable Eric P. Harmon
Judge of the Superior Court
Van Nuys Courthouse
Department 113
14400 Erwin Street Mall
Van Nuys, CA 91401

Kathryn A. Eidmann
Elizabeth Hadaway
Attorney at Law
610 South Ardmore Avenue
Los Angeles, CA 90005

Office of the Attorney General
State of California
300 South Spring Street
5th Floor-North Tower, Suite 5001
Los Angeles, CA 90013

Clerk of the Court
Appellate Division
Los Angeles Superior Court
Department 70, Room 607
111 North Hill Street
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on **December 18, 2017**, at Los Angeles, California.

YOLANDA FLORES, Secretary