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.	Ct. of Appeal No. B285645 App. Div. No. BR052831 Sup. Ct. No. 5VY02034

Appeal from an Order
of the Superior Court, County of Los Angeles
Hon. Eric P. Harmon, Judge

APPELLANT'S REPLY BRIEF

For the Appellant

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Respondent would have this Court incorrectly classify criminal appeals contesting the constitutionality of imposing court fees[1] on indigent defendants without considering inability to pay as indistinguishable from civil cases challenging social or economic regulation. (Respondent's Brief ["RB"] 21.) But it is hornbook law that where indigent criminal defendants are charged fees or fines they cannot afford, equal justice and fundamental fairness forbid "punishing a person for [her] poverty." (*Bearden v. Georgia* (1983) 461 U.S. 660, 671; see *Griffin v. Illinois* (1956) 351 U.S. 12, 16-17.) Indeed, the California Constitution affords even greater protection than the U.S. Constitution against such unequal treatment of indigent criminal defendants. (See, e.g., *In re Antazo* (1970) 3 Cal.3d 100, 104.)

Unsurprisingly then, Respondent seeks to minimize or negate the deprivations of basic liberties that indigent defendants suffer when the State makes punishment a direct function of financial means. (RB 38-40.) It asserts that existing "safeguards" will prevent incarceration on the basis of poverty. (RB 26.) But constitutional protections prohibit unequal treatment even absent the threat of incarceration, as Respondent admits. (RB 34.) And here, the insurmountable court debt and escalating penalties suffered as a

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[1] As stated in the opening brief, Ms. Dueñas has challenged the superior court's failure to hold that the $30 court facilities fee (Gov. Code, § 70373) and $40 court operations fee (Pen. Code, § 1465.8) are subject to an "ability to pay" determination, and in the alternative, has raised an as-applied challenge to both statutes. She has raised a facial challenge to the $150 restitution fine (Pen. Code, § 1202.4).

consequence of inability to pay deprive indigent defendants of economic self-sufficiency and minimum subsistence; access to employment, education, and medical care; and the means to care and provide for their families—in short, any hope of meaningful rehabilitation and re-entry. These fees bind indigent defendants to criminal justice system involvement no less than incarceration. Indeed, Ms. Dueñas herself has been sentenced to a total of 51 days in jail as a consequence of inability to pay court debt incurred as a juvenile. As a consequence of court debt, she has been trapped in a cycle of poverty and incarceration her entire adult life.

Respondent can come up with no sensible justification—let alone a compelling one—for demanding that indigent defendants pay court fees they transparently cannot afford. Attempting to fund the court system by fining those with the fewest resources is a "counterproductive practice" that "undermines the credibility of government and the perceived integrity of the legal process." (*Rivera v. Orange County Probation Dept.* (9th Cir. 2016) 832 F.3d 1103, 1112.)

I. The Court Fees as Applied to Ms. Dueñas Invidiously Discriminate and Impermissibly Punish on the Basis of Her Undisputed Poverty.[2]

While due process concerns involve questions of "the fairness of relations between the criminal defendant and the State," and

[2] Appellant addresses Respondent's relevant contentions without repeating arguments sufficiently stated in Appellant's Opening Brief, which are not waived, conceded, or abandoned. (*Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 526, fn.9.)

equal protection asks "whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants," for questions regarding the constitutional protections due to indigent defendants, "[d]ue process and equal protection principles converge."[3] (*Bearden*, *supra*, 461 U.S. at p. 665.)

A. Equal Justice and Fundamental Fairness Demand Robust Protections—Not Mere Rationality Review—for Indigent Defendants Charged Court Fees Without Consideration of Their Inability to Pay.

"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

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[3] Since equal protection and due process principles "converge" in this arena, Respondent cannot seriously contend that Ms. Dueñas "forfeited the due process claim," (RB 42), particularly while itself citing due process decisions in response to equal protection arguments. (RB 29.) In any event, Ms. Dueñas advanced due process concerns at every relevant procedural stage below. (Clerk's Transcript ["CT"] 31, 36; Appellate Division Appellant's Opening Brief ["App. Div. AOB"] 8-11; Appellant's Opening Brief ["AOB"] 12-16.) Respondent insists that raising a procedural due process claim below is not enough to preserve substantive due process concerns. (RB 42.) But the sole authority Respondent cites, which involves evidentiary forfeiture governed by statute, (*People v. Riggs* (2008) 44 Cal.4th 248, 292), offers no support for Respondent's theory. In *Riggs*, the Court *declined* to find forfeiture, stating that even if the federal constitutional claim was "merely a gloss on the objection raised at trial, it is preserved." (*Ibid.*) Even so, "[i]f a question of law only is presented on the facts appearing in the record, the change in theory may be permitted by the reviewing court." (*People v. Carr* (1974) 43 Cal.App.3d 441, 445 [permitting defendant to raise new legal theory on appeal]; see *People v. Mattson* (1990) 50 Cal.3d 826, 854 [same].) To the extent Ms. Dueñas asserts any new due process concerns, they present reviewable questions of law.

bar of justice in every American court' [citation]." (*Griffin*, *supra*, 351 U.S. at p. 17.) Respondent cannot dispute this fundamental principle or its corollary, that in the criminal justice context, a court's review of a challenged law must be "sensitive to the treatment of indigents." (*Bearden*, *supra*, 461 U.S. at p. 664.) Instead, it begins by ignoring this rule and asserting that this Court should employ "rational basis" review. (RB 21.) To support this proposition, it relies exclusively on decisions in the civil context reviewing economic and social welfare regulation. (RB 22, 41, 46.) These cases have nothing to do with constitutional questions about differential treatment of indigent criminal defendants on the basis of wealth. (See, e.g., *M.L.B. v. S.L.J.* (1996) 519 U.S. 102, 106 [challenging record preparation fee required to appeal termination of parental rights].) Since *Griffin*, "the Court has had frequent occasion to reaffirm allegiance to the basic command that justice be applied equally to all persons," and its "[s]ubsequent decisions . . . have pointedly demonstrated that the passage of time has heightened rather than weakened attempts to mitigate the disparate treatment of indigents in the criminal process." (*Williams v. Illinois* (1970) 399 U.S. 235, 241; see also *Bearden*, *supra*, 461 U.S. at p. 664; *Fuller v. Oregon* (1974) 417 U.S. 40, 47-48; *James v. Strange* (1972) 407 U.S. 128, 141-42; *Tate v. Short* (1971) 401 U.S. 395, 398-99.)

Bearden's prohibition on "punishing a person for his poverty," itself an application of *Griffin*'s equal justice principle, has likewise endured with broad application. (Appellant's Opening Brief ["AOB"] 16.) As such, Respondent cannot seriously contest that "equal justice" applies to every aspect of the "administration of [the

state's] criminal law[s]," including the instant court fees. (*Griffin*, *supra*, 351 U.S. at p. 19.) For the following reasons, Respondent's attempts to evade these principles should be rejected.

First, Respondent cannot sidestep *Griffin* and its progeny on the bare assertion that "nonpayment of the assessments and fine do not result in incarceration." (RB 45.) For starters, "*Griffin*'s principle has not been confined to cases in which imprisonment is at stake." (See *M.L.B.*, *supra*, 519 U.S. at p. 103 [applying *Griffin*'s principle to strike down application of record preparation fees to an indigent mother appealing parental rights termination].) Respondent's attempted distinction that only "the possibility of imprisonment" implicates "equal protection concerns," in cases like *Williams*, *Bearden*, and *Tate*, (RB 31; see RB 33-34), misconstrues both the holdings in these decisions and the fundamental principles underlying *Griffin*.[4] The holding in *Williams* (like *Bearden, Tate*, and *Antazo*) was rooted in the principles established by *Griffin*, a case about access to appellate review, having nothing to do with incarceration. (*Williams*, *supra*, 399 U.S. at pp. 241, 242 ["[a]pplying the teaching of the *Griffin* case" to hold that "the Illinois statute[] as

[4] To the extent Respondent points to *People v. Long* (1985) 164 Cal.App.3d 820, and *People v. Glenn* (1985) 164 Cal.App.3d 736, as holding that no penalty short of imprisonment may violate equal protection principles, (RB 27-28), those decisions are incorrectly decided under the controlling California Supreme Court authority *Antazo* and have no bearing on federal law under *Bearden* and its antecedents. (*People v. Lessie* (2010) 47 Cal.4th 1152, 1167 [holding that U.S. and California Supreme Court decisions are binding on all California courts].) Nor does either decision preclude the conclusion that the restitution fine violates federal and state equal protection and due process. (AOB 27-28.)

applied to Williams works an invidious discrimination solely because he is unable to pay the fine."].)

Second, Respondent cannot artificially narrow *Griffin* and *Bearden* to exclude unequal treatment involving the imposition of court fees on indigent defendants. Respondent suggests that outside of freedom from incarceration, only "fundamental" liberties are safeguarded for purposes of equal protection. (RB 26, 41, 42.) But *Griffin* itself did not view the right to appellate review as fundamental. (*Griffin*, *supra*, 351 U.S. at p. 18 ["It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."].) Nor was the probationer's interest in *Bearden* deemed "fundamental"; it was simply enough that he had a "significant interest" in his conditional liberty. (*Bearden*, *supra*, 461 U.S. at p. 671.)

The cases Respondent cites do not hold otherwise. The issue in *M.L.B.* was whether to apply *Griffin* and *Bearden* in a civil matter, which the Court did, after first unequivocally affirming *Griffin*'s broad applicability in the criminal context regardless of whether "the defendant faced incarceration," (*M.L.B.*, *supra*, 519 U.S. at p. 112), and then determining that the parental rights at issue were of sufficient "basic importance in our society" so as to justify additional scrutiny in the civil context. (*Id.* at p. 116 [quoting *Boddie v. Connecticut* (1971) 401 U.S. 371, 376].) In *United States v. Kras*, the Court applied rationality review to an indigent's challenge to a bankruptcy filing fee. ((1973) 409 U.S. 434, 447.) But there the Court did so on the basis that the government did not have "exclusive control" of the adjustment of debts, distinguishing situations where

defendants are "*compelled*" to "invok[e] the State's judicial machinery." (*Id.* at pp. 443, 444, italics added [quoting *Boddie*, *supra*, 401 U.S. at pp. 376-77].) The Court also noted that "[g]aining or not gaining a discharge will effect no change with respect to basic necessities." (*Id.* at p. 445.) Most significantly, *Kras* had nothing to do with indigent criminal defendants or the criminal justice system. The court fees here are wholly distinct from the bankruptcy fees at issue in *Kras*: an indigent criminal defendant has no option to divorce herself from "the State's judicial machinery." (*Id.* at p. 444.) Indigent criminal defendants without the ability to pay court fees—unlike defendants with financial means—are deprived of access to basic necessities by "compounding interest, yet more legal action, and an ever-expanding financial burden," as well as potential "loss of employment or shelter." (*Rivera*, *supra*, 832 F.3d at p. 1112, fn.7.) These burdens are made even heavier by the many additional punitive consequences both explicitly and implicitly tied to the State's machinery, ranging from harsh government-sponsored debt collection with escalating penalties to barred access to expungement and driver's license suspension. (AOB 19-21.) As the U.S. Supreme Court in *Mayer v. Chicago* recognized, "[a] fine may bear as heavily on an indigent accused as forced confinement." ((1971) 404 U.S. 189, 197.)

Third, Respondent repeats the false premise that wage garnishment and so-called "ordinary debt collections procedures" do not "invite equal protection scrutiny." (RB 32.) But this is not the holding of *James*, *Griffin*, *Williams*, or any other authority cited by

Respondent.[5] It also mischaracterizes Ms. Dueñas's argument, which challenges the assessment of fees without consideration of an indigent defendant's inability to pay, not any debt collection practice itself. Respondent asserts that "reliance on *James* is misplaced," (*ibid.*), because there the statute at issue excluded criminal defendants from an "array of protective exemptions" given to "civil judgment debtors." (RB 37.) But, in concluding that the statute at issue violated equal protection, the *James* Court expressly recognized "the potential of certain garnishment proceedings to 'impose tremendous hardship on wage earners with families to support' [citation]." (*James*, *supra*, 407 U.S. at pp. 135-36.) The difference in treatment possessed constitutional significance precisely because denial of the exemptions created a "risk" of "denying [the defendant] the means needed to keep himself and his family afloat." (*Id.* at p. 136; see *id.* at p. 135 [defining "wages" as "sustenance, with which [an indigent] supports himself and his family"].) Respondent's focus on the Court's conclusion that it was impermissible to discriminate against criminal defendant debtors as

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[5] Respondent cites dicta in *Williams*, (RB 32), quoting dicta from *Rinaldi v. Yeager* (1966) 384 U.S. 305, speculating that unpaid fines "could be reached through the ordinary processes of garnishment in the event of default." (*Rinaldi*, *supra*, 384 U.S. at p. 310.) *Williams* and *Rinaldi* did not consider a constitutional challenge to wage garnishment or other debt collection methods, nor did either court have occasion to consider the circumstances of the wage garnishment and debt collection methods at issue here. But even so, the suggestion that wage garnishment might satisfy the balance of individual and State interests where the State has a strong penological purpose, as in *Williams*, has no bearing on the balancing of non-penological State interests related to the court fees at issue in this appeal.

compared to civil debtors overlooks exactly what matters for purposes of this appeal: *James* recognized the deprivation of wages and other practices imposing "tremendous hardship" on the poor to be a constitutionally significant "burden" on basic liberties. (*Id.* at pp. 135-36.) Based on this recognition, the *James* Court applied a robust scrutiny akin to that in *Bearden*. (*Id.* at pp. 135-36.) The reasoning of *James* applies with full force here.[6]

B. Assessment of the Court Fees Without Considering Ms. Dueñas's Inability to Pay is Unconstitutional.

Bearden sets forth the framework for determining whether a statute operates as a penalty on the basis of poverty: Courts must consider "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose." (*Bearden*, *supra*, 461 U.S. at pp. 666-67 [quoting *Williams*, *supra*, 399 U.S. at p. 260] [conc. opn. of Harlan, J.].) Respondent ignores this framework entirely, asserting falsely that "appellant does not offer a separate analysis for her argument." (RB 43.) That is not the case. (AOB 18, 19-21 [analyzing "[t]he first two *Bearden* factors"], 21-23 [analyzing "[t]he

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[6] Respondent's attempt to rely on *Washington v. Davis* (1976) 426 U.S. 229, 242, is misplaced. (RB 37.) In *M.L.B. v. S.L.J.*, the U.S. Supreme Court took up and squarely rejected this contention, concluding that "[i]t suffices to point out that this Court has not so conceived the meaning and effect of" *Washington*'s application in the context of *Griffin* and its progeny. (*M.L.B.*, *supra*, 519 U.S. at p. 127; see *id.* at pp. 125-27; *Griffin*, *supra*, 351 U.S. at p. 17, fn. 11 ["[A] law nondiscriminatory on its face may be grossly discriminatory in its operation."].)

remaining *Bearden* factors"].) Imposition of the fees at issue on Ms. Dueñas cannot withstand scrutiny under the *Bearden* framework.

1. Mandatory Court Fees Impose "Tremendous Hardship" on an Indigent's Basic Liberties and Subsistence.

As set forth in the opening brief, the first two *Bearden* factors are the "nature" and "extent" of the indigent defendant's "individual interest affected." (461 U.S. at pp. 666-67). Respondent does not seriously contest that the imposition of court fees on Ms. Dueñas "impose[s] tremendous hardship" (*James*, *supra*, 407 U.S. at p. 136) as to economic self-sufficiency and minimum subsistence, as well as on access to the employment, medical care, and education required to escape poverty. (AOB 19-21.) Rather, Respondent speculates that purported "safeguards" mitigate the punitive consequences from inability to pay court fees and prevent incarceration on this basis. (RB 26, 38.) Not if you are in Ms. Dueñas's shoes. To take but one example, Respondent argues that Ms. Dueñas has not sufficiently explained "why" discretionary expungement "would be denied" to indigent defendants based on their nonpayment. (RB 40.) But Respondent's query is not an articulation of a real safeguard. Tellingly, Respondent cannot cite any authority requiring courts to consider an indigent defendant's inability to pay or prohibiting courts from denying expungement on that basis; nor does Respondent assert that courts do. As Respondent knows, courts have the power to, and routinely do, consider whether a defendant has "paid all fines and costs" in evaluating whether to grant discretionary expungement. (*People v.*

Guillen (2013) 218 Cal.App.4th 975, 994; see, e.g., *People v. McLernon* (2009) 174 Cal.App.4th 569, 573, 575-76.) Respondent argues that assessment of these court fees upon indigent defendants without considering their inability to pay does not result in "depriving a defendant of any rights, benefits, or access to the courts." (RB 22.) But California courts have expressly held that expungement is a "substantial benefit." (See, e.g., *Guillen*, *supra*, 218 Cal.App.4th at p. 1001 ["Even though the statutory relief is not a true or complete expungement of the conviction, it is a substantial benefit, and restores the probationer in most respects to preconviction status."].) To deny indigent defendants expungement on equal terms with wealthy defendants is to deprive them of a "substantial benefit" for no other reason than their poverty.

And, in any case, the "safeguards" to which Respondent alludes are manifestly insufficient. For example, Respondent concedes that indigent defendants are subject to a $300 late penalty for their inability to pay court fees under Penal Code, section 1214.1, (RB 40), but notes that defendants may appear before the court, "explain the reason for the nonpayment," and potentially "avoid the additional assessment." (RB 41.) But Penal Code, section 1214.1 requires defendants to show "good cause" in order to avoid the late penalty. (Pen. Code, § 1214.1(a).) Nowhere does the statute permit or require courts to consider inability to pay in finding "good cause"; nor does Respondent cite a single authority documenting any court doing so. Respondent also attempts to rely on the fact that criminal judgment debtors are subjected to many of the same harmful and burdensome practices—including late penalty

determinations, wage garnishment, and other debt collection methods—as civil judgment debtors. (RB 37.) Not only is this incorrect, (AOB 12, fn. 13), but this is the wrong comparison group for purposes here. The constitutional question, as posed in *Williams* and elsewhere, is whether indigent defendants are "expose[d]" to the same "risk" as wealthy criminal defendants, not whether indigent criminal debtors are exposed to the same risk as indigent civil debtors. (*Williams*, *supra*, 399 U.S. at p. 242.)

Respondent also contends that driver's license suspension comes with an adequate safeguard because suspensions result only from willful nonpayment of fines. (RB 39.) But Ms. Dueñas, who is indigent, homeless, and disabled, has had her own driver's license suspended due to inability to pay past court debt, and she was sentenced to 51 days in jail as a direct consequence of inability to pay fines related to past driver's license suspension. (CT 40.) Indeed, multiple lawsuits have documented the ubiquitous practice of suspending driver's licenses without consideration of ability to pay. (See, e.g., *Mata Alvarado et al. v. Los Angeles County Super. Ct.*, No. BC628849 (Super. Ct. of Los Angeles County, filed Aug. 2, 2016).) While it is true that parts of Vehicle Code, sections 40509, 40509.5, and 13365 have been repealed, Respondent is incorrect in asserting that "past court debt" would not cause Ms. Dueñas to suffer the consequences of "these statutory provisions," (RB 39), since Ms. Dueñas's driver's license is already suspended, and the obligation to pay the instant court fees remains a barrier to Ms. Dueñas paying down court debt already barring her from removing her license suspension.

Moreover, Respondent fails to acknowledge, let alone grapple with, the impact of the collective consequences of court debt on the indigent—including harsh collection methods, such as wage garnishment, charging interest, asset levying, and tax refund intercepts, as well as potential inability to obtain expungement. (AOB 19-21.) As Respondent admits, "[i]f a defendant is indigent, he or she is not at fault for the nonpayment." (RB 40.) Here, these unwarranted consequences "risk denying [Ms. Dueñas] the means needed to keep [her]self and [her] family afloat." (*James*, *supra*, 407 U.S. at p. 136.) The fees deepen the cycle of poverty and criminal justice system involvement for those who are most in need of "reasonable opportunity of employment, rehabilitation and return to useful citizenship." (*Id.* at p. 139.)

Respondent also argues that "since the assessments and fine are not due yet, none of these collateral consequences have occurred at this time." (RB 39.) But here, the court has already determined Ms. Dueñas to be indigent, (CT 48), so the instant deprivations of liberty can be assumed from the fees' imposition. A different approach would be inconsistent with *Bearden* and its antecedents, none of which hinged on whether the defendant asserting his rights had been deprived of liberty prior to asserting his claim; for example, in *Bearden*, the defendant asserted his claim at his probation revocation hearing, necessarily prior to the revocation.

The decisions that Respondent cites from other jurisdictions do not prove otherwise. (RB 43-45.) *State v. Beasley*, a Florida decision, held that "a court must determine if the defendant has the ability to pay" court costs, but could do so when "the state seeks to

enforce the collection." ((Fla. 1991) 580 So.2d 139, 142.) In *United States v. Pagan*, the Second Circuit held that a defendant's constitutional objection to "mandatory assessments" imposed under 18 U.S.C. § 3013 was "not yet ripe for adjudication" because enforcement had not occurred. ((2d Cir. 1986) 785 F.2d 378, 381.) And in *People v. Jackson*, the Michigan Supreme Court rejected a Sixth Amendment challenge to an attorney's fees recoupment statute, holding that a "postsentence, pre-enforcement ability-to-pay assessment" would be constitutional. ((Mich. 2009) 769 N.W.2d 630, 640.)

Beasley, *Jackson*, and *Pagan* are not binding on California courts, nor do they have any persuasive authority here. *First*, on their own terms, none of the decisions offer reasoning grounded in *Bearden*'s actual holding. *Beasley* merely recites Florida precedent without offering independent reasoning, and *Pagan* and *Jackson* point only to dicta from *Bearden*. *Second*, unlike in those jurisdictions, California does not have a judicial mechanism for ability-to-pay determinations regarding court fees at the time of enforcement. Respondent fails to cite any authority suggesting otherwise and indeed conceded the point, arguing below that imposition of court fees was not subject to any post-sentencing challenge. (Appellate Division Respondent's Brief ["App. Div. RB" 11.) *Third*, the superior court here interpreted the fees statutes as "mandatory" and as not requiring it to consider Ms. Dueñas's ability to pay—at any point. This constitutes reversible legal error. Tellingly, Respondent attempts to rely on the superior court's suggestion that the court could "set a hearing" closer in time to the

deadline for Ms. Dueñas to pay her court fees. (RB 20.) But doing so concedes the crucial point underscored in the three cases, that our Constitution requires consideration of ability to pay prior to the enforcement of such fees onto indigent defendants. As such, Respondent should agree that this Court must at minimum determine, first, that consideration of ability to pay prior to enforcement is constitutionally required and, second, that any such hearing must have accompanying procedural protections. Otherwise, Respondent's position permits the government to wholly circumvent constitutional requirements and evade judicial review.

2. Imposing Mandatory Court Fees on Indigent Defendants Does Not Rationally Promote the State's Interest of Revenue Generation.

As stated in the opening brief, the remaining *Bearden* factors mandate courts to consider "the rationality of the connection between legislative means and purpose," and "the existence of alternative means for effectuating the purpose." (461 U.S. at p. 667). Mandatory imposition of court fees on indigent defendants does not rationally further the State's purported interest, which is neither punitive nor rehabilitative, but, as Respondent admits, (RB 22-23), is exclusively to generate revenue for the State. (*People v. Castillo* (2010) 182 Cal.App.4th 1410, 1413 [court facilities fee]; *People v. Alford* (2007) 42 Cal.4th 749, 759 [court operations fee].)

Respondent ignores the fact that both California and federal courts have recognized that imposing a fee statute with the sole purpose of raising revenue against a defendant who cannot afford to pay is ineffective and irrational. (See, e.g., *Tate*, *supra*, 401 U.S. at

p. 399 [invaliding a fee statute designed "to augment the State's revenues" because the statute "obviously does not serve that purpose; the defendant cannot pay because he is indigent"]; *Antazo*, *supra*, 3 Cal.3d at p. 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" as 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.)

Respondent does not dispute that the State has numerous alternative methods of raising funds, such as through its general taxation powers, that do not punish and infringe on the basic liberties of indigent defendants by placing the onus of funding the court system on those least capable of shouldering that burden. (AOB 23.) Respondent cursorily concludes that an indigent defendant should not be "immune from his or her obligations to the state." (RB 32.)[7] But to the extent Respondent intends to argue that

[7] To the extent Respondent cites *Williams* to argue that considering ability to pay in assessing non-punitive court fees would constitute "inverse discrimination" against non-indigent defendants, (RB 32), this position would render impermissible the bedrock features of our system of criminal justice, such as the right to counsel for the indigent and fee waivers, and numerous other criminal fee statutes requiring consideration of ability to pay. The argument is untenable.

the State has a penological interest in fining indigent defendants, this cannot apply to the court facilities fee and court operations fee, which do not serve a penological purpose. (AOB 22.) To the extent that restitution serves any penological interest, as explained at length in Ms. Dueñas's opening brief, that interest is far outweighed by the irrational nature of such imposition without consideration of ability to pay, especially where there are readily available alternatives. (AOB 25-28.)

II. The Court Fees Also Fail Under Traditional Equal Protection Analysis.

A. Imposing the Court Fees on Ms. Dueñas Cannot Withstand the Strict Scrutiny Demanded by California's Constitution.

It is undisputed that California's robust constitutional protections for indigent criminal defendants extend at least as far as their federal counterparts. (RB 48.) As such, this Court may conclude that the fees violate the California Constitution for the same reasons explained *infra*, section I, subsections A and B. However, California's Constitution provides an additional and independent basis to prohibit the assessment of court fees to indigent defendants without consideration of inability to pay. "The equal protection guarantee of article I, section 7 of the California Constitution, while substantially similar to that of the Fourteenth Amendment, has independent meaning and may, in some cases, provide broader rights than those granted by the federal constitution." (*People v. Leung* (1992) 5 Cal.App.4th 482, 494.) In *Antazo*, the California Supreme Court held that "discrimination based upon poverty" involves a "suspect classification[]" subject to

"strict scrutiny." (*Antazo*, *supra*, 3 Cal.3d at pp. 111, 112.) As Respondent notes, (RB 50), *Antazo* was decided prior to the U.S. Supreme Court's determination that wealth is not a suspect class under federal law. (See *San Antonio Independent School Dist. v. Rodriguez* (1973) 411 U.S. 1, 24.) However, *Serrano v. Priest* ("*Serrano II*"), subsequently made clear that the California Constitution goes beyond the federal constitution by recognizing wealth as a suspect class and subjecting wealth-based discrimination to heightened scrutiny. ((1976) 18 Cal.3d 728, 761, 765-66.)

Respondent argues that *Serrano II* did "not hold that wealth, standing alone, could be the basis of a suspect classification." (RB 51.) But here, as in the *Antazo* context, the classification based on poverty is uniquely linked to the treatment of indigent criminal defendants in the criminal justice system—it does not stand alone. Respondent is also wrong that "no court has since held that wealth-based classifications are suspect when divorced from the fundamental right of education guaranteed by our state constitution." (RB 52.) Subsequent California courts continue to rely on *Antazo*, and those decisions have repeatedly confirmed that *Antazo* describes the standard of review to be applied by California courts to indigent defendants subject to deprivations of liberty. (See *Hartzell v. Connell* (1984) 35 Cal.3d 899, 921 [conc. opn. of Bird, J.] [citing *Antazo* as the state constitutional standard for scrutiny]; see also *Charles S. v. Super. Ct.* (1982) 32 Cal.3d 741, 750-51 [describing *Antazo*'s holding, including that "wealth is a suspect classification," and holding that "[s]imilar reasoning is applicable to indigent juveniles"]; *Furey v. Com. On Jud. Performance* (1987) 43

Cal.3d 1297, 1314 [citing *Antazo* as valid constitutional standard]; *Johnson v. Super. Ct.* (1975) 15 Cal.3d 248, 265 [conc. opn. of Mosk, J.] [citing *Antazo* for "axiomatic" equal protection standard].)

Here, the court fees penalize indigent defendants in comparison to those with financial means, as defendants with the ability to pay are not subjected to the harsh and punitive consequences that impose "tremendous hardship" on indigent defendants. (AOB 19-21.) Because the State has numerous means of raising funds available to it, (AOB 26-27), "it is clear that this particular mechanism for promoting [the] state interest is not 'necessary' in the constitutional sense," nor appropriately tailored to its objective. (*Antazo*, *supra*, 3 Cal.3d at p. 114.) The restitution fine fairs no better. (AOB 25-28.)

B. The Court Fees Cannot Survive Rationality Review.

Respondent argues that the court fees survive rationality review because they "are a reasonable means for offsetting the costs of criminal proceedings and conduct." (RB 21.) There is no dispute that the State's goals with respect to funding court operations and facilities are legitimate. But the fees are not a "reasonable means" to serve this purpose. *Ortwein v. Schwab*, the case upon which Respondent relies, upheld an appellate filing fee to challenge welfare benefit determinations because "the fee produces some small revenue to assist in offsetting those expenses." ((1973) 410 U.S. 656, 660.) The same cannot be said here with respect to the fee scheme's application to indigent defendants, as the scheme "obviously does not serve that purpose; the defendant cannot pay because he is indigent." (*Tate*, *supra*, 401 U.S. at p. 399.) Respondent

ignores federal precedent directly refuting its assertion, (AOB 22), instead pointing to one decision by a divided panel of a Washington state appellate court, (*State v. Seward* (Wash. 2016) 384 P.3d 620), and a decision by the Michigan Supreme Court, (*Jackson*, *supra*, 769 N.W.2d 630). (RB 29.) In *Seward*, a Washington state appellate court upheld the assessment of court fees as "rationally related to legitimate state interests" in raising revenue "because even though some offenders may be unable to pay, some will," and even if a defendant is "indigent at the time of sentencing," his "indigency may not always exist." (*Seward*, *supra*, 384 P.3d at p. 624.) *Jackson* reasoned similarly. (*Jackson*, *supra*, 769 N.W.2d at p. 641 [noting that the State had a "legitimate interest in recouping fee[s]" from "defendants who eventually gain the ability to pay"].) Neither decision is persuasive. First, the fact that "some [defendants] will" be able to pay the fees is irrelevant to the statute's rationality as applied to an indigent defendant, who by definition "cannot pay because he is indigent." (*Tate*, *supra*, 401 U.S. at p. 399.). Furthermore, as Chief Judge Bjorgen aptly observed in his dissent in *Seward*, for truly indigent defendants like Ms. Dueñas, the inescapable consequence "is to harness" the indigent "to a growing debt that they realistically have no ability to pay, keeping them in the orbit of the criminal justice system," and "actively contradict[ing]" the State's purpose; such a "dragnet rationale[]" cannot "save a law that contradicts its purpose in some instances by pointing out that the law will serve its purpose in others or by hypothesizing that the contradiction may someday cease." (*Seward*, *supra*, 384 P.3d at p. 626 [dis. opn. of Bjorgen, C.J.].) Even

under rational basis review, courts invalidate legislation "where the purported rationale for challenged legislation is too attenuated or irrational in light of the legislation's effect." (*Ibid*.) Judge Bjorgen pointed out that the *Seward* majority's "uses of the imagination are far removed" from even the "rudimentary fit" required by rationality review. (*Id.* at pp. 590, 591.) So, too, here, the court fees fail even that low bar.

CONCLUSION

Ms. Dueñas asks this Court to vacate the superior court's order imposing $220 in court fees and determine, based upon the court's finding that she is indigent, that the order be reduced to $0. In the alternative, Ms. Dueñas requests that this Court vacate and remand for consideration of her ability to pay and feasible alternatives.

Respectfully submitted,

DATED: January 9, 2018 By 

KATHRYN EIDMANN
Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

Under Rule 8.1012(d) of the California Rules of Court, I hereby certify that this brief contains 5,551 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare this brief.

By 

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am employed by Public Counsel in Los Angeles California. I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is Public Counsel, 610 S. Ardmore Ave., Los Angeles, CA 90005.

On January 9, 2018, I served a true copy of the following document:

APPELLANT'S REPLY BRIEF

on the following persons:

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and also sent a true copy to Defendant-Appellant Velia Dueñas at 3725 Fushia Ct., Bakersfield, CA 93313

by UNITED STATES MAIL: By enclosing the documents in a sealed envelope or package address to the persons at the address above and placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage prepaid.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

This declaration was executed on the date of January 9, 2018, at Los Angeles, California.

Shahrad Ardaghi
Declarant