Supreme Court of California
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Supreme Court No. ___________

In the Supreme Court of the State of California

The People of the State of California, Plaintiff and Respondent, vs. Randolph Esquivel, Defendant and Appellant.	Court of Appeal No. B294024 (Div. 5) NA102362-01

Appeal from the Superior Court of California,
Los Angeles County

The Honorable Jessie I. Rodriguez, Judge

Petition for Review

Paul R. Kraus, Attorney at Law
State Bar No. 241628
Paul R. Kraus, Attorney at Law, P.C.
6114 LaSalle Avenue, #153
Oakland, CA 94611
(510) 339-3075
paul@paulrkrauspc.com

Attorney for Appellant Randolph Esquivel

By appointment of the Court of Appeal

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In the Supreme Court of the State of California

The People of the State of California,	)	
	)	Court of Appeal No.
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vs.	)	
	)	NA102362-01
Randolph Esquivel,	)	
Defendant and Appellant.	)	

Appeal from the Superior Court of California,
Los Angeles County

The Honorable Jessie I. Rodriguez, Judge

Petition for Review

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner-appellant Randolph Esquivel respectfully petitions this court for review following the unpublished decision of the Court of Appeal, Second Appellate District, 5, filed in that

court on March 26, 2020, attached hereto (the "Opinion").

QUESTIONS FOR REVIEW

1. Whether the sentencing judge failed to make an impartial appraisal of whether appellant's probation violation merited imposition of the sentence to prison, and thus failed to exercise its discretion as required by California law?

2. Whether the same failure of the sentencing judge violated appellant's right under the United States Constitution to due process of law?

3. Whether the trial court violated appellant's rights under the California and United States constitutions to due process of law and his right against the imposition of excessive fines when it imposed a court operations assessment of $40, a conviction assessment of $30, and a minimum restitution fine of $300 as set forth in *People v. Dueñas* (2019) 30 Cal.App.5th 1157; *and People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 13, 2019, No. S257844; and contrary to *People v. Hicks* (2019) 40 Cal.App.5th 320, review granted behind *Kopp* on November 26, 2019, No. S258946?

4. Whether this court should apply Senate Bill No. 136 (Stats. 2019, ch. 590, § 1) ("S.B. 136') retroactively to appellant and remand the case to the court of appeal to either itself strike the true findings on his prison prior enhancements under amended Penal Code section 667.5 subdivision (b) or to remand the case to the trial court for full resentencing?

REASONS FOR GRANTING REVIEW

Questions 1 and 2

It is equally a cornerstone of federal due process and of California law that a probationer has a right to a hearing before an impartial tribunal "to determine whether a violation of the terms of probation has occurred, and, if so, whether it would be appropriate to allow the probationer to continue to retain his conditional liberty." (*Lucido v. Superior Court (People)* (1990) 51 Cal.3d 335, 348; see also *Black v. Romano* (1985) 471 U.S. 606, 612 [105 S.Ct. 2254, 85 L.Ed.2d 636].)

Appellant did not have that here. The trial court insistently expressed its intention to revoke appellant's probation "because the defendant was convicted and physically abused the mother of his future child." (RT C-34.) It ignored credible

evidence offered that appellant had not in fact been convicted of physically abusing this woman. (RT C-34.) The court went on to offer then that it would revoke appellant's probation because "[i]f he beat another woman, that's horrible too. No matter what, he was convicted of beating another woman." (RT C-36.) When defense counsel offered evidence that appellant had not beaten another woman, the court cut her off, revoked probation, and executed the suspended five-year sentence. (RT C-36 - C-37.)

At least from the point of view of its rationale for decision, even as it shifted, the court showed a consistency of intention to revoke probation regardless of the facts as they may have been. It went on to deprive defense counsel even of the opportunity to develop the record on the very facts on which the court offered repeatedly that it was basing its decision.

Casting the question first as whether the court was aware of its discretion to reinstate probation even if appellant had violated his probation, the Opinion found that the court was aware of its discretion to reinstate probation even if appellant had violated it. (Opinion at pp. 10-11.) Reaching next the question whether appellant's domestic violence conviction was a

sufficient basis for the court's decision to revoke probation, the court found that "[e]ven if we were to accept defendant's argument that the trial court was curt with defense counsel and may not have articulated its discretion clearly, it would not be grounds for reversal. Those claims do not undermine the trial court's finding that defendant had violated his probation terms by his conviction for domestic violence and his repeated failures to report to his probation officer, both of which were proper grounds to revoke probation." (Opinion at p. 11.)

The Opinion is incorrect. The trial court's offering a factually incorrect basis for decision, shifting then the basis for its decision without any apparent reexamination of its conclusion, and finally refusing to allow development of the record to show that even the second basis for its decision may be factually incorrect are grounds for reversal.

The Opinion is thus inconsistent with *Lucido v. Superior Court (People), supra*, 51 Cal.3d at p. 348 and *Black v. Romano, supra*, 471 U.S. at p. 612 and *People v. Bolian* (2014) 231 Cal.App.4th 1415 and *People v. Urke* (2011) 197 Cal.App.4th 766 cited in the Opinion. (See Opinion at pp. 9-10.) This Court

should grant review to secure uniformity of decision and to settle these important questions of law. (Cal. Rules of Court, rule 8.500(b)(1).)

Question 3

After Velia Dueñas, an unemployed misdemeanor defendant with cerebral palsy, was convicted of driving with a suspended license and granted probation, she requested a hearing on her ability to pay a restitution fine (Pen. Code, § 1202.4), a court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)), and a conviction assessment (Gov. Code, § 70373). The trial court determined that the fine and the assessments were mandatory and rejected her constitutional arguments against imposing them. (*Dueñas, supra*, 30 Cal.App.5th at p. 1163.) The court of appeal reversed the judgment imposing the court operations assessment and the conviction assessment and remanded the case to the trial court to stay execution of the restitution fine "unless and until the People prove that Dueñas has the present ability to pay it." (*Id*. at p. 1173.)

In remanding the case for a determination of Dueñas's ability to pay, the court framed its constitutional inquiry as one of

due process, focusing on whether "it is 'fundamentally unfair' to use the criminal justice system to impose punitive burdens on probationers who have 'made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of [their] own . . ..' [Citation.]" (*Dueñas, supra*, 30 Cal.App.5th at p. 1171 [quoting *Bearden v. Georgia* (1983) 461 U.S. 660, 670 [103 S.Ct. 2064, 76 L.Ed.2d 221].) The court found that imposing "unpayable fines on indigent defendants is not only unfair, it serves no rational purpose, fails to serve the legislative intent, and may be counterproductive." (*Dueñas, supra*, 30 Cal.App.5th at p. 1171.)

The court analyzed the assessments and the restitution fine separately. Noting that while it is clear from the statutory scheme that neither the court operations assessment nor the conviction assessment are intended to be punitive, it found that they are, when a defendant lacks the ability to pay, in effect an additional punishment. (*Dueñas, supra*, 30 Cal.App.5th at p.1168.) It concluded therefore that "the assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed without a determination that the defendant is able to

pay, are . . . fundamentally unfair; imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution." (*Ibid.*)

The court found that the restitution fine, on the other hand, "is intended to be, and is recognized as, additional punishment for a crime" and may be imposed as a term of probation. (*Dueñas, supra*, 30 Cal.App.5th at p. 1169.) The court reasoned that even though the restitution fine is punitive, the statutory prohibition on considering a defendant's ability to pay the minimum fine amounts to "the criminal justice system punish[ing] indigent defendants in a way that it does not punish wealthy defendants" because failure to pay the fine forecloses automatic expungement of the conviction under Penal Code section 1203.4 upon the defendant's successful completion of probation. (*ld.* at p. 1170.) In order to preclude this asserted violation of due process and to avoid therefore finding Penal Code section 1203.4 to be unconstitutional, the court instead ordered execution of the restitution fine stayed until the court determines a defendant's

present ability to pay. (*Id*. at pp. 1172-1173.)

Courts of other districts have criticized *Dueñas* as wrongly decided. (See, e.g., *People v. Cota* (2020) 45 Cal.App.5th 786, 793-795; *People v. Hicks* (2019) 40 Cal.App.5th 320, 329, review granted November 26, 2019, S258946.) This Court granted review in *Hicks* on November 26, 2019 behind *People v. Kopp* on the following questions: (1) Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments?; (2) If so, which party bears the burden of proof regarding the defendant's inability to pay? (*People v. Hicks*, No. S258946.)

Still other courts have held that analysis under the excessive fines clause of the Eighth Amendment rather than under the due process clause is the appropriate constitutional framework within which to address whether an indigent defendant is entitled to an ability-to-pay hearing prior to a trial court's imposition of fines and assessments. (See, e.g., *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1071; *People v. Kopp, supra*, 38 Cal.App.5th at p. 96, review granted November 13, 2019, S257844.) This Court granted review in *Kopp* on November 13,

2019 on co-defendant Jason Hernandez's petition, limited to the following questions: "Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments? If so, which party bears the burden of proof regarding defendant's inability to pay?" (*People v. Kopp*, No. S257844.)

The Sixth District has reached no institutional consensus on these questions. One panel, in a divided opinion, has embraced the due process analysis in *Duenas* and has applied it to determine that court operations assessments and criminal conviction assessments should not have been imposed without an ability-to-pay hearing. (*People v. Santos* (2019) 38 Cal.App.5th 923, 935.) Another divided panel, led by the *Santos* dissenter and opposed by the *Santos* author, concluded that *Dueñas* was wrongly decided and chose not to follow it. (*People v. Adams* (2020) 44 Cal.App.5th 828, 831; see also *People v. Petri* (2020) 45 Cal.App.5th 82, 90-92 [due process does not require a finding of ability to pay before assessment of the costs set forth in *Dueñas*].)

Still other courts have taken more flexible approaches, agreeing with the outcome in *Dueñas* but also agreeing with some of *Dueñas*'s critics that the excessive fines clause is the

appropriate framework to determine whether an indigent defendant is constitutionally entitled to an ability to pay hearing before the imposition of fines and fees. (*People v. Cowan* (2020) 47 Cal.App.5th 32 [court operations assessment and conviction assessment are punitive and there is a right to an ability-to-pay hearing under the excessive fines clause]; see also *People v. Cota, supra*, 45 Cal.App.5th at pp. 800-801 [Dato, J., concurring and dissenting] [there is a right to an ability-to-pay hearing under both the due process clause and the excessive fines clause].) Justice Streeter, the author of the majority opinion in *Cowan*, filed a separate concurrence to emphasize that while he did not find *Dueñas* to have been wrongly decided, "[i]f there is a shortcoming in *Dueñas*'s reasoning, . . . it is that the panel there chose to frame its analysis exclusively in due process terms, without delving into other sources of constitutional protection," including equal protection. (*Cowan, supra*, 47 Cal.App.5th at p. 50 [Streeter, J, concurring].)

This Court has not yet decided this question. It should grant review to secure uniformity of decision and to settle these important questions of law. (Cal. Rules of Court, rule

8.500(b)(1).) It should grant review and hold this case behind the leading cases of *Kopp* and *Hicks*. (*Ibid*.)

Question 4

S.B. 136, signed into law on October 8, 2019, amends Penal Code section 667.5, subdivision (b) to provide for a one-year enhancement to a felony prison sentence for each prior prison term served only for a sexually violent felony, and to eliminate this enhancement for prior prison terms served for all other felonies. This amendment became effective January 1, 2020. (Cal. Const., art. IV, § 8, subd. (c).) Appellant's sentence was increased by two years because of two one-year prior prison term enhancements, neither of which is for a sexually violent felony. (CT 102; RT A-6.)

Amended Penal Code section 667.5, subdivision (b) applies to appellant. This Court should remand the case to the court of appeal to either itself strike his prison prior enhancements under amended Penal Code section 667.5 subdivision (b) or to remand the case to the trial court for full resentencing.

STATEMENT OF THE CASE AND FACTS

Except as otherwise noted herein, appellant adopts the statement of the case and facts in the Opinion. (Opinion at pp. 2-9.)

ARGUMENT

I.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE OPINION IS INCONSISTENT WITH OTHERS REGARDING THE SCOPE OF A COURT'S DISCRETION TO REVOKE PROBATION.

A. Introduction

In the Opinion, the Court of Appeal held that the trial court was aware of its discretion to reinstate probation even if it found that appellant had violated his probation. (Opinion at pp. 10-11.) It found that therefore the trial court did not abuse its discretion when it revoked probation. (Opinion at p. 12.)

The court found that even though appellant had failed to report timely, his probation officer gave him another chance. (Opinion at p. 12.) Appellant failed thereafter to report until he was arrested four months later on a bench warrant. (*Ibid*.) It found further that "[d]uring this time, defendant twice

intentionally gave a false name to police – because he knew he was wanted for a probation violation, and was also repeatedly shoplifting with his girlfriend. This was not a distraught man accidentally violating his probation in a confused haze; this was a defendant who knew he was in violation of probation and intentionally lied to police to avoid the consequences. The trial court's decision not to reinstate probation was well-supported. (*Ibid.*)

The court based its holding on the scope of discretion as enunciated in *People v. Bolian, supra*, 231 Cal.App.4th 1415 and *People v. Urke, supra*, 197 Cal.App.4th 766. (See Opinion at pp. 9-10.) The Opinion is incorrect and is in fact a significant departure from these authorities.

The Court of Appeal analysis avoids discussion of what the trial judge actually did. That there may be an alternative rationale for a decision does not mean that the trial court did not abuse its discretion in what it actually did.

B. The Trial Court Abused Its Discretion.

The court here did not employ its discretion appropriately in light of all the facts. First, the court denied that it even had the discretion to reinstate appellant's probation:

> If the court will give the defendant any time, even one day, the court must give the suspended time because he was [sic] already been sentenced. The law is clear. I don't have any discretion, no authority. The case law is clear on that.

(RT C-34.) The court then backtracked, offering that even if it had the discretion to reinstate appellant, which it still apparently believed it did not, it would "not exercise that discretion because the defendant was convicted and physically abused the mother of his future child." (RT C-34.)

Defense counsel responded to the court's offering of the lynchpin of its decision by asserting that the lynchpin simply was not true: it is not true, she argued, that that appellant was convicted and physically abused the mother of his future child. (RT C-34.) The mother of his future child, Viola Burciaga, she offered, was not the victim in *People v. Esquivel*, No. 8LB00642. (RT C-34.) The victim in *People v. Esquivel*, No. 8LB00642 was Viola Olivares Esquivel. (RT C-34.) What is more, counsel

offered, both women were present in the courtroom and had identified themselves to her in the manner she had described. (RT C-35.)

The same court which assiduously combed through police reports appended to the probation report to determine whether appellant was, in the light of evidence that was less clear than it needed to be, the person convicted in *People v. Esquivel*, No. 8LB00642, did not ask two women right in front of it which of them was the victim in the case. (RT C-36.) It in fact had scoffed at the idea that appellant's wife and his girlfriend would have the same relatively uncommon first name, "So his mistress and his wife have the same first name? Is that what he's saying to you?" (RT C-34.)

The court went on to speculate that the two women held appellant in low esteem, "They don't think highly of the defendant because they are not here for him." (RT C-35.) Shortly afterward, the court offered more of the same, "Okay. Just to cut this short: So his wife's name is Viola and the mistress is Viola? That's good for him." (RT C-35.)

The court then retreated to safer ground. It offered that

appellant had nonetheless been convicted of beating another woman:

> Well, I am looking at is: So if he beat the mother of his future child, that's horrible. If he beat another woman, that's horrible too. No matter what, he was convicted of beating another woman.

(RT C-36.) Defense counsel responded that appellant had not been convicted of beating another woman and that the court's assertion "misstates the evidence in front of the court." (RT C-36.) The court did not seek the particulars of her claim from counsel. Instead, it asked her in reply, apparently rhetorically, "Is it looking at them with a strong face? What is domestic violence?" (RT C-36.)

Defense counsel began to explain in response, "Your Honor, there is [sic] several different types of domestic violence," but the court had apparently had enough. (RT C-36.) Before counsel could complete her explanation, it shut her down, "Listen, I listened to you, Miss Seymour [apparently mistaking defense counsel, Mary Thorpe, Esq., for the prosecutor, Marilyn Seymour, Esq., who hadn't argued at all during sentencing], I don't need to listen anymore." (RT C-36.) The court terminated probation and imposed the suspended five-year sentence. (RT C-36 - C-37.)

The court did not discuss any of the factors which defense counsel offered in opposition or in mitigation. It did not discuss appellant's more than three years' long successful probation history prior to his violation. (RT C-33.) It did not discuss the coincidence of appellant's violation with the death of his child. (RT C-33.) It did not discuss the support and mental health services that appellant was receiving successfully in the community. (RT C-33.) It did not address the recommendation of probation, which was as aware of appellant's history and conduct as the court, that appellant be reinstated on probation. (RT C-33; see CT 62-66.) The court's lack of discussion of these factors is consistent with its statement that it lacked the discretion to reinstate probation and is inconsistent with it acting as an arbiter of whether appellant's probation should be reinstated or terminated appropriately based on all of the facts. (*Black v. Romano, supra*, 471 U.S. at p. 612; see also *Lucido v. Superior Court (People), supra*, 51 Cal.3d at p. 348.)

In addition, barely three hours after terminating appellant's probation and executing his suspended sentence, the court, at the request of Viola Olivares Esquivel, the victim in

People v. Esquivel, No. 8LB00642, who was present in court, dissolved the protective order entered in that case so that Ms. Esquivel could visit appellant in prison. (RT C-40 - C-41.) In colloquy markedly incongruous with its disposition at sentencing, the court asked Ms. Esquivel if she was the baby's mother. (RT C-40.) Ms. Esquivel replied that she was not and that the baby's mother was also named Viola, consistently with the representations and argument of defense counsel during sentencing. (RT C-40; see RT C-34.) The court noted that there were no instances of domestic violence either before or after the offense of which appellant was convicted. (RT C-41.) The contrast of the court's stance here with its stance at appellant's violation hearing lends further support to the court here not acting as an arbiter of whether appellant's probation should be reinstated or terminated appropriately based on all of the facts. (*Black v. Romano, supra*, 471 U.S. at p. 612; see also *Lucido v. Superior Court (People), supra*, 51 Cal.3d at p. 348.)

The court's stance at appellant's violation hearing violated his right to have a fair and impartial judge determine only after hearing all the facts, circumstances and argument whether

termination was the appropriate disposition. (*Black v. Romano, supra*, 471 U.S. at p. 612; see also *People v. Penoli* (1996) 46 Cal.App.4th 298, 306 [improper refusal to exercise discretion as required by law can violate due process]; *Cal-American Income Property Fund VII v. Brown Development Corp.* (1982) 138 Cal.App.3d 268, 274 [proper exercise of discretion requires the court to consider all material facts and evidence and to apply legal principles essential to an informed, intelligent, and just decision]; *Pacific and Southwest Annual Conference of United Methodist Church v. Superior Court (Barr)* (1978) 82 Cal.App.3d 72, 86-88 [a judge's announced prejudgment of issues in pending pretrial motions demonstrated bias and required disqualification] *Rosenfield v. Vosper* (1941) 45 Cal.App.2d 365, 371-372 ["A trial judge should not prejudge the issues but should keep an open mind until all of the evidence is presented to him"].) The court therefore abused its discretion in terminating appellant's probation and violated his due process rights under United States and California law to have a fair and impartial judge hear all the facts, circumstances, and argument before deciding how it would rule. (*Ibid*.)

The trial court's error in appellant's violation proceeding is an abuse of discretion. Its incorrect assertions concerning its own lack of discretion, its pointed unwillingness to address squarely often easily verified factually based arguments and objections of defense counsel, and its failure to address explicitly any factor in opposition or mitigation in its decision render the entire violation proceeding fundamentally unfair because the court was not properly exercising its discretion to determine whether appellant's probation should be reinstated or terminated based on all relevant factors in support of or against those possible dispositions. The disapproval of a trial judge's prejudgment of an issue in *Pacific and Southwest, supra*, is particularly apt here:

> "[The judge] appears to have prejudged the outcome of the specific pretrial matter before him long before any judge is authorized to `tote up' or to commence his conclusionary thinking. In so doing, he has broken a prime ground rule of the judge's craft. `The trial of a case should not only be fair in fact, but it should also appear to be fair. And where the contrary appears, it shocks the judicial instinct to allow the judgment to stand.'"

(*Pacific and Southwest, supra*, 82 Cal.App.3d at pp. 87-88; quoting *Pratt v. Pratt* (1903) 141 Cal. 247, 252.)

The Court of Appeal should remand this case to the trial

court to permit appellant to present and argue his case fully and completely before a fair and impartial court exercising its discretion according to law. (*People v. Littrel, supra*, 185 Cal.App.3d at pp. 702-703; see also *Black v. Romano, supra*, 471 U.S. at p. 612; *People v. Penoli, supra*, 46 Cal.App.4th at p. 306.)

The Court of Appeal does not render the decision of the trial court any less of an abuse of discretion by re-deciding the question before the trial court. (See Opinion at pp. 11-12.) The trial court here offered a factually incorrect basis for decision, shifted the basis for its decision without any apparent reexamination of its conclusion, and finally refused to allow development of the record to show that even the second basis for its decision may have been factually incorrect. The rationale for decision in the Opinion does not detract from what the trial court actually did, especially because part of the trial court's abuse of discretion was that it limited the record to the point where information which it itself identified as crucial to its decision is either unknown or unknowable.

C. Conclusion

The Opinion is inconsistent with other decisions regarding the scope of the trial court's discretion in deciding whether to revoke probation. (*People v. Bolian, supra*, 231 Cal.App.4th at pp. 1420-1421; *People v. Urke, supra*, 197 Cal.App.4th at p. 773; *Lucido v. Superior Court (People), supra*, 51 Cal.3d at p. 348; see also *Black v. Romano, supra*, 471 U.S. at p. 612.) This Court should grant review to settle this important question of law. (Cal. Rules of Court, rule 8.500(b)(1).)

II.

THIS COURT SHOULD GRANT REVIEW ON WHETHER THE IMPOSITION OF COSTS WITHOUT AN ABILITY-TO-PAY HEARING IS CONSTITUTIONAL; IT SHOULD HOLD THIS CASE BEHIND *KOPP* AND *HICKS*.

A. Appellant's *Dueñas* Claim is Cognizable.

In the Opinion, the Court of Appeal found that this issue was not cognizable because the trial court imposed the challenged costs as part of the sentence imposed but not executed on September 11, 2015. (Opinion at pp. 8, 17-18.) It reasoned that appellant's judgment was final prior to *Dueñas* because he did not

appeal from that judgment. (Opinion at pp. 13-18.)

Appellant claims in this appeal that the holding of *Dueñas* – that it is unconstitutional to impose a court operations fee, a conviction fee, and a restitution fine without an ability-to-pay hearing – applies retroactively to him under *In re Estrada* (1965) 63 Cal.2d 740. *Dueñas* was decided on January 8, 2019. (*Dueñas, supra*, 30 Cal.App.5th at p. 1157.)

The trial court imposed sentence on November 15, 2018. (CT 100.) Appellant appealed on that date. (CT 108.)

Trial counsel did not object to the imposition of the court operations assessment, the conviction assessment, or to the restitution fine. (RT 39-49.) Appellant's claims are cognizable nonetheless because the trial court's imposition of these costs is an error of law, not a discretionary error. These claims are also cognizable because they affect appellant's substantial rights to due process of law, the equal protection of the laws, and against excessive fines under the United States and California constitutions. It would have been futile, additionally, to have objected in the trial court because the law at the time of appellant's sentencing did not provide a basis for objection.

"A defendant forfeits on appeal any 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' in the absence of objection below." (*People v. Wall* (2017) 3 Cal.5th 1048, 1075, quoting *People v. Scott* (1994) 9 Cal.4th 331, 353.) Here the trial court imposed the court operations assessment, the conviction assessment, and a restitution fine of $300 with the understanding that the imposition of these costs was mandatory regardless of appellant's ability to pay. (2CT 225; RT 39-49.) Appellant does not object to the imposition of these costs as an exercise of the court's discretion. He claims rather that the trial court could not lawfully impose these costs on an indigent defendant without first determining his or her ability to pay. His claims are thus cognizable as legal claims. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7.)

These claims are also cognizable and this court should exercise its discretion to hear them because they affect his substantial rights to due process of law, the equal protection of the laws, and against excessive fines under the United States and California constitutions. (*Sheena K., supra,* 40 Cal.4th at p. 887,

fn. 7; Pen. Code, § 1259; see U.S. Const., 5th, 8th, 14th Amends.; Cal. Const., art. I, §§ 7, subd. (a), 15, 17.)

Counsel's failure to object is additionally excused because objection at sentencing would have been futile. "'Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile . . ..'" (*People v. Gomez* (2018) 6 Cal.5th 243, 286-287, quoting *People v. Welch* (1993) 5 Cal.4th 228, 237.) A failure to object is "'excusable'" when "'governing law at the time . . . afforded scant grounds for objection.'" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1215, quoting *People v. Edwards* (2013) 57 Cal.4th 658, 705.) The controlling law on the imposition of these costs at appellant's sentencing did offer scant grounds for objection. The law not only mandated the imposition of these costs in the trial court without consideration of a party's ability to pay, but also allowed their imposition on appeal if the trial court failed to impose them. (*People v. Talibeen* (2002) 27 Cal.4th 1151, 1157.) The restitution fine statute furthermore explicitly prohibits consideration of ability to pay if the court imposes the minimum fine. (Pen. Code, § 1202.4, subd. (c); *Dueñas, supra*, 30 Cal.App.5th at p. 1170.)

When Dueñas objected to the imposition of these costs in the trial court, the law at the time was against her. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1162-1163.) "The circumstance that some attorneys may have had the foresight to raise this issue does not mean that competent and knowledgeable counsel reasonably could have been expected to have anticipated" future shifts in the law. (*People v. Black* (2007) 41 Cal.4th 799, 812.) The due process holding in *Dueñas* is a major unforeseeable change in the law governing the imposition of the court operations fee, the conviction assessment, and the restitution fine. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1166-1167, 1171-1172.) This change in the law excuses counsel's failure to object at sentencing. (*Black, supra*, 41 Cal.4th at p. 811.)

Without the rule excusing failure to make futile objections, counsel would be forced to raise frivolous issues to ensure appellate review on the off-chance the law were to change prior to the finality of any appeal. "'[W]e have excused a failure to object where to require defense counsel to raise an objection 'would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections

in other situations where defendants might hope that an established rule . . . would be changed on appeal.'"' (*People v. Rangel, supra*, 62 Cal.4th at p. 1215.)

The question then whether *Dueñas* applies to him because his judgment was final on November 15, 2018 is thus cognizable in this appeal. (*People v. Castellano* (2019) 33 Cal.App.5th 485 [decided by the same court as decided *Dueñas*]; but see *People v. Frandsen* (2019) 33 Cal.App.5th at 1126, 1153-1155; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1032-1033; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464.) None of the cases which the Opinion relies on supports the conclusion that appellant's claim is not cognizable. They found rather the respective retroactivity claims advanced in them were cognizable, but that the ameliorative amendments did not apply retroactively because the defendants' judgments were final prior to the effective dates of the amendments.

The Court of Appeal relied primarily on *People v. Scott* (2014) 58 Cal.4th 1415 and *People v. Ramirez* (2008) 159 Cal.App.4th 1412. In *Scott*, this court followed its holding in *People v. Howard* (1997) 16 Cal.4th 1081. In *Howard*, this court

found that if a court has imposed and stayed execution of sentence, as opposed to if it has stayed imposition of sentence, and appellant has begun probation, "the court has no authority, on revoking probation, to impose a lesser sentence at the precommitment stage." (*Id*. at p. 1095.) That sentence is final as of the date it is imposed. (*Id*. at p. 1084.) If an defendant does not challenge the sentence when it is imposed, there is no remedy on appeal when the court actually executes the sentence. (*Ibid*.)

This court followed *Howard* in *People v. Scott* (2014) 58 Cal.4th 1415, where it held that The Realignment Act of 2011 did not apply to persons who had been sentenced with execution suspended prior to the effective date of the statute but whose sentences were actually executed after the effective date of the statute. The Realignment Act provides that "[t]he sentencing changes [which it made] . . . shall be applied prospectively only to any person sentenced on or after October 1, 2011." (Pen. Code, § 1170, subd. (h)(6); see *Scott, supra*, 58 Cal.4th at p. 1421.)

Howard and *Scott* are both distinguishable from appellant's case. In *Howard*, the decision to terminate probation and execute a prison sentence is discretionary. (*Howard, supra*, 16 Cal.4th at

pp. 1086-1087.) Here, an ability-to-pay hearing would be mandatory, or at least the defendant would have an unqualified right to request one. In *Scott*, the Realignment Act was expressly prospective. (*Scott, supra*, 58 Cal.4th at p. 1421.) *Dueñas* is not.

Neither *Howard* nor *Scott* forecloses outright the possibility, as to any possible instance, that imposition of a suspended sentence is also a sentencing hearing. (*Howard, supra*, 16 Cal.4th at p. 1095; see also *ibid* [" . . . I do have reservations on the strict limitation imposed on trial courts in the sentencing area. Sentences are imposed at the conclusion of trial proceedings or acceptance of a guilty plea. It is not inconceivable that the trial court, upon later reflection and in what it may subsequently deem to the interests of justice, prefers a somewhat different sentence."] [Mosk, J., concurring]; *Scott, supra*, 58 Cal.4th at pp. 1421-1422 [application of Realignment Act to Scott a question of statutory interpretation].)

People v. Ramirez (2008) 159 Cal.App.4th 1412 is also distinguishable from appellant's case. In *Ramirez*, Francisco Ramirez pled guilty in 2003 to selling cocaine base. (*Id*. at p. 1418.) On July 24, 2003, the court sentenced him to four years in

state prison, execution suspended and placed him on probation for three years. (*Ibid*.)

On December 17, 2004, following an admission of a violation of probation, the court reinstated probation but added one year to the suspended sentence imposed on July 24, 2003. (*People v. Ramirez, supra*, 159 Cal.App.4th at pp. 1418-1419.) On August 10, 2006, after the prosecution sought revocation of probation following another violation, the court revoked probation and imposed the five-year term on Ramirez. (*Id*. at p. 1420.) Ramirez appealed on September 1, 2006. (*Ibid*.)

The court found that Ramirez could not challenge the 2004 sentence increase in his 2006 appeal. It found that the trial court "lacked authority to modify [Ramirez's] sentence upon termination of probation . . .." (*People v. Ramirez, supra*, 159 Cal.App.4th at p. 1427.) It found that Ramirez had forfeited his claim because he did not appeal the December 2004 order increasing the sentence. (*Id*. at p. 1427.) It also found that Ramirez was estopped from asserting his claim: "[B]ecause [Ramirez] agreed to the five-year sentence as part of a plea deal in which he admitted a probation violation, he is estopped to

complain that the court exceeded its jurisdiction." (*Id*. at pp. 1427-1428.)

The holdings of *Ramirez* are not relevant to this case. Here, appellant is claiming retroactive application of an intervening change in the law: the holding of *People v. Dueñas* on January 8, 2019.

Appellant's having entered a plea furthermore does not affect his claim because appellant could not have knowingly and intelligently waived a specific right which was both unknown and unknowable to him when he was sentenced in 2015. His plea agreement does not include a waiver of his appellate rights. (RT A-1 - A-21.) He also does not need to have obtained a certificate of probable cause to raise this issue. He similarly does not attack the validity of the plea when he argues that *Dueñas* applies to him because plea agreements generally incorporate the possibility that changes in the law will alter the consequences of pleas. Here, moreover, his plea does not contain a provision that his agreement will remain fixed despite changes or amendments to applicable law.

This Court has granted review in *People v. Stamps*

(S255843) and *People v. Kelly* (S255145), which present the following issue: "Is a certificate of probable cause required for a defendant to challenge a negotiated sentence based on a subsequent ameliorative, retroactive change in the law?" This court deferred further briefing in *Kelly* pending the outcome of *Stamps*. *Stamps* was argued and submitted on April 7, 2020.

Finally, *People v. McKenzie* (2020) 9 Cal.5th 40, upon which the Court of Appeal also places some reliance, compel a different result. (Opinion at p. 15-16.) The Court of Appeal acknowledged that this Court "did not expressly discuss the finality of the situation raised by this case – the finality when sentence is imposed but execution suspended." (Opinion at p. 16.)

Appellant's claim that *Dueñas* applies retroactively to him and that he was constitutionally entitled to an ability-to-pay prior to the court imposing a court security assessment, a conviction assessment, and a restitution fine is thus cognizable.

B. Due Process, Equal Protection, and Excessive Fines Analysis All Support a Right to an Ability-to-Pay Hearing.

As *Dueñas* holds, the "'constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system – all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court.'" (*Dueñas, supra*, 30 Cal.App.5th 1157, 1166, quoting *Griffin v. Illinois* (1956) 351 U.S. at 12, 17 [76 S. Ct. 585, 100 L.Ed.2d. 891] [further internal quotations omitted].)

The United States Supreme Court has also held based on this principle in *Griffin* that "the federal Constitution prohibits states from automatically revoking an indigent defendant's probation for failure to pay a fine and restitution," [and] "if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendants are available." (*Bearden v. Georgia, supra*, 461

U.S. at pp. 667-669.)

Furthermore, as *Dueñas* notes, our Supreme Court has found that "a state may not inflict punishment on indigent convicted criminal defendants solely on the basis of their poverty." (*Dueñas, supra*, 30 Cal.App.5th at p. 1166.) In *In re Antazo*, 3 Cal.3d 100, our Supreme Court invalidated the practice of requiring convicted defendants to serve jail time if they were unable to pay a fine and a penalty assessment. (*Id*. at pp. 103-104.)

Dueñas examined how, in light of these principles, the "cascading consequences of imposing fines and assessments that a defendant cannot pay" can interfere with an indigent defendant's fair treatment under the law by in effect punishing the defendant for being poor. (*Dueñas, supra*, 30 Cal.App.5th at p. 1163; see also *id*. at pp. 1166-1167.)

As to equal protection, *Dueñas* applies *Griffin*'s principle of basic equity correctly. An ostensibly neutral financial burden applied without consideration of an individual's ability to bear it necessarily inflicts hardship on an indigent defendant while being less consequential to a wealthier one even if there is no punitive

intent. It is fundamentally unfair to order an indigent defendant to pay fines and fees he or she is unable to pay whether the consequence of nonpayment is revocation of probation as was the case in *Bearden*, or is a liability that an indigent civil litigant is spared by a fee waiver.

Griffin is not confined to financial barriers impeding access to the courts. (*People v. Hicks, supra*, 40 Cal.App.5th at pp. 325-326.) Though the main principle announced in *Griffin* was that the state may not treat criminal defendants more harshly on account of their poverty, "in criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." (*Griffin, supra*, 351 U.S. at p. 17.) "Under the user fee scheme the *Dueñas* court outlines, which broadly applies to civil and criminal litigants, all litigants subject to these fees are similarly situated. But while the Legislature has recognized the deleterious impact of increased court fees on indigent people, it has accommodated only indigent civil litigants with fee waivers." (*Cowan, supra*, 47 Cal.App.5th at p. 55 [Streeter, J., concurring] [internal quotations and citations omitted].)

Dueñas properly applies *Griffin*'s principle that all persons

must "'stand on an equality before the bar of justice in every American court.'" (*Dueñas, supra*, 30 Cal.App.5th at p. 1166, quoting *Griffin, supra*, 351 U.S. at p. 17.)

Excessive fines analysis produces the same result. Some courts favoring an Eighth Amendment approach to the restitution fine have concluded that "there is no due process requirement that the court hold an ability to pay hearing before imposing a punitive fine and only impose the fine if it determines the defendant can afford to pay it." (*Kopp, supra*, 38 Cal.App.5th at pp. 96-97; see also *People v. Aviles, supra*, 39 Cal.App.5th at p. 1069.) Even under excessive fines analysis, a defendant remains entitled to make a complete record as to his ability to pay: "Because ability to pay is an element of the excessive fines calculus under both the federal and state Constitutions, we conclude that a sentencing court may not impose court operations or facilities assessments or restitution fines without giving the defendant, on request, an opportunity to present evidence and argument why such monetary exactions exceed his ability to pay." (*Cowan, supra*, 32 Cal.App.5th at p. 48.) "[T]he California Supreme Court has acknowledged that both due process and

excessive fines analyses incorporate similar concepts – including ability to pay – and that it often 'makes no difference whether we examine the issue as an excessive fine or a violation of due process.'" (*People v. Cota, supra*, 45 Cal.App.5th at p. 9, quoting *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728 [Dato, J. concurring and dissenting].)

The ostensibly non-punitive character of court fees removes them from the reach of the Eighth Amendment's prohibition on excessive "fines." As observed in *Cowan*, however, for purposes of excessive fines analysis, there is no meaningful distinction between the punitive restitution fine and the mandatory court assessments. (*Cowan, supra*, 32 Cal.App.5th at pp. 44-45 .) "A monetary sanction that cannot fairly be said solely to serve a remedial purpose will be subject to scrutiny as an Eighth Amendment fine if it can only be explained as serving in part to punish." (*Ibid*, citing *Austin v. United States* (1993) 509 U.S. 602, 610 [113 S. Ct. 2801, 125 L.Ed.2d. 488].)

Cowan concludes correctly that because "ability to pay is an element of the excessive fines calculus under both the federal and state Constitutions, . . . a sentencing court may not impose court

operations or facilities assessments or restitution fines without giving the defendant, on request, an opportunity to present evidence and argument why such monetary exactions exceed his ability to pay." (*Cowan, supra*, 32 Cal.App.5th at p. 48.) Because the Eighth Amendment bars courts from imposing excessive fines, and because there is no meaningful distinction between the mandatory fees and the restitution fine as to their burden on an indigent defendant, imposition of either requires the trial court to consider a defendant's ability to pay those fines as one critical factor in the Eighth Amendment analysis and a defendant is entitled to have an ability-to-pay hearing prior to the court's imposition of those fines and fees. (*Ibid*.)

The prosecution is required to prove each element of an offense beyond a reasonable doubt. (U.S. Const., 14th Amend.; Cal. Const. art. I, § 15; *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368]; see also *People v. Centeno* (2014) 60 Cal.4th 659, 671-673; *People v. Johnson* (2004) 119 Cal.App.4th 976, 978–979.) Because these costs, if not punitive, are punitive in effect, the prosecution bears the burden of proving a defendant's ability to pay. (See *Dueñas, supra*, 30 Cal.App.5th at

pp. 1172-1173; but see *People v. Cowan, supra*, 32 Cal.App.5th at p. 49 [noting that the same division that decided *Dueñas* also decided *People v. Castellano*]; *Santos, supra*, 38 Cal.App.5th at p. 934; *Kopp, supra*, 38 Cal.App.5th at p. 96; *People v. Castellano* (2019) 33 Cal.App.5th 485, 490.)

An indigent defendant is constitutionally guaranteed an ability-to-pay hearing before a court's imposition of fines and fees under due process, equal protection, or excessive fines analysis. (*Santos, supra*, 38 Cal.App.5th at p. 935; *Dueñas*, *supra*, 30 Cal.App.5th at pp. 1172-1173; see also *Cowan, supra*, 32 Cal.App.5th at p. 48; *Kopp, supra*, 38 Cal.App.5th at pp. 96-97.)

C. Conclusion

This Court should grant review to settle these important questions of law and to secure uniformity of decision on these questions. (Cal. Rules of Court, rule 8.500(b)(1).) It should grant appellant's petition and hold this case behind the leading cases of *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 26, 2019, No. S257844, and *People v. Hicks* (2019) 40 Cal.App.5th 320, review granted behind *Kopp* on November 26,

2019, No. S258946. (*Ibid.*)

III.

THIS COURT SHOULD GRANT REVIEW AND REMAND THE CASE TO THE COURT OF APPEAL TO APPLY PENAL CODE SECTION 667.5, SUBDIVISION (B) AS AMENDED BY S.B. 136 TO STRIKE APPELLANT'S PRISON PRIORS.

A. Appellant's Claim is Cognizable.

For the reasons set forth more fully in Point II.A., *ante*, appellant's claim that Penal Code section 667.5, subdivision (b) as amended by S.B. 136 applies to appellant. Like the holding in *Dueñas*, S.B. 136 was an intervening ameliorative change in the law. Signed into law on October 8, 2019, it amends Penal Code section 667.5, subdivision (b) to provide for a one-year enhancement to a felony prison sentence for each prior prison term served only for a sexually violent felony, and to eliminate this enhancement for prior prison terms served for all other felonies. It became effective on January 1, 2020. (Cal. Const., art. IV, § 8, subd. (c).)

B. S.B. 136 Amends Penal Code Section 667.5, Subdivision (b) to Render Prior-Prison Term Enhancements Applicable

Only to Violent Sexual Offenses.

The unamended version of Penal Code section 667.5, subdivision (b), in effect at the time appellant was resentenced, required the court to enhance a prison or jail sentence for a felony conviction by one year for each prior prison or jail sentence a defendant has suffered except where he or she has remained free of felony offenses or custody for the commission of felony offenses for five years prior to the imposition of a new felony prison or jail sentence. (Pen. Code, § 667.5, subd. (b).) The court retained the authority, as it exercised here, to strike the enhancement for sentencing purposes under Penal Code section 1385, subdivision (a). (Pen. Code, § 1385, subd. (a); *People v. Bradley* (1998) 64 Cal.App.4th 386, 392-395.)

S.B. 136 amended Penal Code section 667.5, subdivision (b) effective January 1, 2020 to "instead impose that additional one-year term served for each prior separate prison term served for a conviction of a sexually violent offense, as defined." (Leg. Counsel's Dig., Sen. Bill No. 136 (2018-2019 Reg. Sess.) October 9, 2019, p. 96.) Under amended Penal Code section 667.5, subdivision (b), a court can impose a prior-prison term

enhancement only for a conviction for a sexually violent offense. (*Ibid.*)

C. Amended Penal Code Section 667.5, Subdivision (b) Applies to Appellant.

The legislative author's comments make it clear that S.B. 136 is intended to ameliorate punishment. (Sen. Pub. Saf. Comm. Analysis, Rep. on Sen Bill No. 136 (2018-2019 Reg. Sess.) September 19, 2019, pp. 2-3.)

Where, as here, a statutory amendment mitigates the punishment applicable in a criminal case and becomes effective before the judgment of conviction becomes final, the amendment, and not the statute in effect when the offense was committed, applies to the case, unless there is a clear legislative intent not to apply the change retroactively. (*In re Estrada* (1965) 63 Cal.2d 740, 744, 748; see also *People v. Floyd* (2003) 31 Cal.4th 179, 184.) "[A]bsent a saving clause, a criminal defendant is entitled to the benefit of a change in the law during the pendency of his appeal." (*People v. Babylon* (1985) 39 Cal.3d 719, 722.)

Because the amendment here to Penal Code section 667.5, subdivision (b) is ameliorative and there is no indication that the

Legislature intended prospective application only, it applies retroactively to those cases not final as of January 1, 2020.

D. Conclusion

Appellant's judgment is not yet final for the purpose of appellate review. Amended Penal Code 667.5 therefore applies to appellant. *(In re Estrada, supra,* 63 Cal.2d at pp. 744, 748; see also *People v. Floyd, supra,* 31 Cal.4th at p.184.)

This Court should therefore grant review and remand the case either to the Court of Appeal to consider whether it should itself strike the true findings on appellant's prison prior enhancements under amended Penal Code section 667.5 subdivision (b) or whether it should remand the case to the trial court for full resentencing.

CONCLUSION

The Opinion is inconsistent with other decisions regarding the scope of the trial court's discretion in deciding whether to revoke probation. This Court should grant review to settle this important question of law. (Cal. Rules of Court, rule 8.500(b)(1).)

This Court has not heretofore decided the question whether

imposition of a court operations assessment, a conviction assessment, or an unstayed restitution fine without a determination by a trial court that a defendant presently has the ability to pay these costs violates a defendant's rights to due process under the United States and California constitutions. This Court should grant review to settle these important questions of law and to secure uniformity of decision on these questions. (Cal. Rules of Court, rule 8.500(b)(1).) It should grant appellant's petition and hold this case behind the leading cases of *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 26, 2019, No. S257844; *People v. Hicks* (2019) 40 Cal.App.5th 320, review granted behind *Kopp* on November 26, 2019, No. S258946; and *People v. Stamps* (S255843, cause argued and submitted on April 7, 2020) (*Ibid.*)

This Court finally should grant review and remand the case either to the Court of Appeal to consider whether it should itself strike appellant's prison prior enhancements under amended Penal Code section 667.5 subdivision (b) or whether it should

remand the case to the trial court for full resentencing.

Respectfully submitted,

APPELLANT RANDOLPH
ESQUIVEL

By: ______________________________

Paul R. Kraus,
Attorney at Law, P.C.
6114 LaSalle Avenue, #153
Oakland, CA 94611
(510) 339-3075
State Bar No. 241628

Attorney for Appellant
Randolph Esquivel

CERTIFICATION OF COMPLIANCE

Counsel hereby certifies under penalty of perjury under California Rules of Court, rule 8.504(d)(1) that the word processing software word count function shows on Corel Word Perfect shows that this document contains 8,392 words, excluding tables and indices, which is within the

authorized maximum of 8,400 words.

Paul R. Kraus
Attorney at Law

PROOF OF SERVICE BY MAIL

State of California)
(ss.: Oakland

County of Alameda)

I, Paul R. Kraus, do hereby declare and state as follows:

1. I am an attorney at law licensed to practice before all courts of the State of California.

2. On June 4, 2020, I served the within **Petition for Review** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope, postage prepaid, in the United States Mail at my place of business at 6114 La Salle Avenue, #153, Oakland, California 94611, or by email where there is an email address listed, as follows:

Court of Appeal
Second Appellate District, Division 5
300 S Spring Street
Floor 2, North Tower
Los Angeles, CA 90013

Attorney General - State of California
Ronald Reagan Office Building
300 South Spring Street, N Tower, #1701
Los Angeles, CA 90013
docketingLAawt@doj.ca.gov

Maria Morrison, Esq.
California Appellate Project
520 S. Grand Avenue, 4th Floor
Los Angeles, CA 90071
capdocs@lacap.com

Mr. Randolph Esquivel, Inmate No. BH9729
California Correctional Institute
24900 Highway 202
Tehachapi, CA 93561

The Honorable Jessie I. Rodriguez
Governor George Dukmejian Courthouse
275 Magnolia Avenue
Long Beach, CA 90802

Office of the District Attorney
Governor George Dukmejian Courthouse
275 Magnolia Avenue, Suite 3195
Long Beach, CA 90802

3. I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing. Under that practice, correspondence for mailing is deposited in the ordinary course of business while away on business in a repository of the United States Mail in Oakland, California, postage prepaid, on the same day it is collected and processed.

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Paul R. Kraus
State Bar No. 241628

Filed 3-26-20

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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COURT OF APPEAL – SECOND DIST.
FILED
Mar 26, 2020
DANIEL P. POTTER, Clerk
kdominguez Deputy Clerk

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDOLPH STEVEN ESQUIVEL,

Defendant and Appellant.

B294024

(Los Angeles County Super. Ct. No. NA102362)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesus I. Rodriguez, Judge. Affirmed.

Paul R. Kraus, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Randolph Steven Esquivel was convicted, by plea, of willfully attempting to burn a structure (Pen. Code, § 455).[1] A prison sentence of five years was imposed, but execution was suspended, and he was granted probation. Upon violation of probation, his probation was revoked and the previously imposed sentence executed. Defendant appeals, arguing: (1) the court was unaware of its discretion to reinstate probation; and (2) his previously-imposed sentence is now improper in several respects, due to changes in the law. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Underlying Offense*

Around 1:00 a.m., on August 7, 2015, defendant pounded on the window of the apartment occupied by Cecilia Hernandez and Iker Garcia. Garcia scared defendant off, but defendant returned 20 minutes later. At this point, he poured a bottle of lighter fluid on the apartment's front door and Garcia's truck. Defendant was arrested at the scene; he appeared intoxicated. Defendant had no previous relationship with Hernandez or Garcia, but had previously visited their upstairs neighbor.[2]

2. *Defendant's Plea*

Defendant was charged by information with willful attempt to burn (§ 455) and possession of flammable material with the intent to maliciously use (§ 453, subd. (a)). With respect to both

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] The probation report in connection with this incident suggests the person who lived upstairs was defendant's girlfriend.

counts, he was alleged to have suffered two prior prison terms (§ 667.5, subd. (b)), a prior strike (§ 667, subds. (b)-(j)), and a prior serious felony conviction (§ 667, subd. (a)(1)).

On September 11, 2015, Defendant agreed to enter a negotiated plea of no contest to the count of willful attempt to burn, and admit the priors, in exchange for a five-year suspended sentence.

The sentence was calculated as follows: The three-year high term for intent to burn, plus two years for the two prior prison terms. The strike and prior serious felony conviction enhancements were stricken in the interests of justice. The five-year term was imposed and stayed, pending successful completion of five years formal probation. The court explained to defendant that if he violated probation, he would be sentenced to the full five years. The court explained, "Even if I'm not around, there is no other judge that has the option or discretion to strike it and simply give you a better sentence. The five years have been imposed and stayed."

Relevant conditions of probation required defendant to obey all laws, use only his true name, not give false information to any police officer, and not use force against anyone. Defendant accepted all the terms and conditions of probation.

Certain fines and fees were also imposed: (1) a restitution fine of $300 (Pen. Code, § 1202.4, subd. (b)); a criminal conviction facilities assessment fee of $30 (Gov. Code, § 70373, subd. (a)); and a court security fee of $40 (Pen. Code, § 1465.8, subd. (a)(1)).

3. *Defendant is Reminded to Report to Probation*

On June 14, 2016, the matter was called for a possible probation violation.[3] Defendant was present in court and was told to "report to probation without any excuses."

4. *Probation is Revoked for Failure to Report*

Two years later in August 2018, the probation officer submitted a report "Regarding Desertion of Probationer." It indicated that defendant last reported on March 9, 2018, failed to report on April 27, 2018, and had not reported since. Probation did not have a current telephone number or address for defendant, and recommended that probation be revoked and a bench warrant be issued.

On August 17, 2018, probation was revoked and a bench warrant issued. In September 2018, defendant was arrested, appeared in court, and was remanded pending the receipt of a supplemental probation report.

5. *The Probation Officer's Supplemental Report*

On October 10, 2018, the probation officer submitted a supplemental report. The report indicated two arrests since defendant last reported to probation: (1) an arrest in Brea for providing false identification to police (Pen. Code, § 148.9) and driving without a license (Veh. Code, § 12500, subd. (a)); and (2) an arrest in Fullerton for theft (Pen. Code, § 484). The report also disclosed that, while defendant was on probation in this case, he was also under post-release community supervision (Pen. Code, § 3455) in another case, and previously had multiple arrests for unidentified violations of his post-release community supervision.

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[3] The record on appeal is missing the probation report which led to this hearing.

The probation officer interviewed defendant, who claimed that the reason he had failed to report to probation was because he was in custody for violating his post-release community supervision. "According to the defendant, when asked if he suffered any new arrests since absconding from probation the defendant stated, yes, and explained they were mistakes and they were simple violations based on his appearance while out in the community. He stated he is frequently stopped by officers for this reason."

The probation officer's report included a recommendation that probation be reinstated with an additional term and condition of suitable jail time. The officer explained, "Since this is the defendant[']s first potential probation violation on this case,[[4]] and given the defendant[']s prior reporting history it appears he has made an effort to comply with probation conditions. According to the defendant the only reason why he is even before the court for this violation is simply because he was in custody at the time and was unable to report to his probation officer."

6. *Motion Requesting Revocation of Probation*

A few weeks later, the prosecution filed a motion requesting revocation of probation, which painted a somewhat different picture of defendant's violations. The motion acknowledged that defendant's probation had already been preliminarily revoked, but alleged further facts constituting a violation of probation. Specifically, the motion attached police reports detailing the Brea and Fullerton arrests alluded to in the

[4] The probation officer was apparently unaware of the potential violation in June 2016.

supplemental probation report. It also represented that on March 6, 2018, defendant was convicted of domestic violence (§ 243, subd. (e)).

The Brea police report indicated that in June 2018, defendant had been driving a car with an expired registration and with no driver's license. He identified himself to police using his brother's name, and subsequently admitted that he had lied about his identity because he was wanted for a probation violation. The Fullerton police report indicated that in August 2018, defendant and his girlfriend were arrested for shoplifting from a Target. Again, defendant gave police his brother's name; his true identity was revealed after he was fingerprinted.

7. *Probation Revocation Hearing*

At the hearing on the probation violation, the prosecution sought judicial notice of the file regarding defendant's domestic violence conviction. Defendant objected that there was no confirmation that he was the defendant in that case. The court overruled the objection and took judicial notice, stating that the identity of the defendant does not go to the issue of judicial notice. Then, turning to the issue of identity, the court concluded that defendant had, in fact, been the defendant who sustained the conviction, based on the identical name and date of birth, similar physical description, and the victim having been associated with defendant. The file indicated that the domestic violence incident occurred on February 23, 2017, and defendant entered his plea in that case on March 3, 2018.

The court also took judicial notice of all of the files before it, which included the Brea and Fullerton police reports.

Finally, the court heard testimony regarding defendant's failure to report. Deputy Probation Officer Ronald Story was defendant's supervisor for post-release community supervision,

and was also assigned to supervise him on probation in this case. He explained that defendant last reported to him in August 2017. Since that time, he has either been in custody or in absconsion.

In April 2018, when defendant was required to report to Officer Story, he telephoned and explained that his girlfriend had lost a baby when she was eight months pregnant, and he was distraught. He claimed to have forgotten when to report. Officer Story told him to report before April 27 or be in violation; defendant did not report. Officer Story testified that defendant is required to inform him of arrests or convictions, and confirmed that when defendant called in April 2018, he did not tell Officer Story about the domestic violence conviction he had sustained in early March 2018.

Defendant offered no witnesses in defense. Instead, counsel argued that this was not a "significant violation." Counsel argued that there was confusion regarding defendant's reporting requirements, and he was having difficulty due to his girlfriend's miscarriage. Counsel noted that the file for the domestic violence conviction indicated that, at the time of defendant's plea, he was in custody and was given time served. Counsel then speculated that if defendant "was in custody when this miscarriage was happening, of course, he would have pled to get out of custody in order to be present for his girlfriend when she's going through this difficult time."

The court found defendant in violation of probation for multiple reasons: he failed to report to probation; he failed to inform probation of his domestic violence conviction; and he did, in fact, sustain the domestic violence conviction.

8. *Sentencing*

The court turned to sentencing. Defendant argued for reinstatement of probation with jail time, arguing that defendant

was now getting mental health services for PTSD and bipolar disorder, and that he had a better support system in place.

The court stated, "if the court will give the defendant any time, even one day, the court must give the suspended time because he was already sentenced. The law is clear. I don't have any discretion, no authority. The case law is quite clear on that. [¶] Even if I had the authority not to – given the discretion, I will not exercise that discretion because the defendant was convicted and physically abused the mother of his future child."

Although defense counsel suggested the court had misidentified the domestic violence victim, the court found this to be a distinction without a difference, stating, "So if he beat the mother of his future child, that's horrible. If he beat another woman, that's horrible too. No matter what, he was convicted of beating a woman." Defense counsel then said the word "beating" was a misstatement of the evidence; the court responded, "Is it looking at them with a strong face? What is domestic violence?" Defense counsel replied that there are different types of domestic violence. The court ended argument; defense counsel stated that the court was "misstating what's in front of the court."

Concluding that there were at least four to six probation violations, the court imposed the five-year sentence on which execution was previously suspended. The court also stated, "The fines are mandatory minimum [fines]." It imposed the $300 restitution fine, $30 court security fee and $40 criminal conviction facilities assessment fee.[5]

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[5] The court also purported to impose "a $300 parole revocation restitution fine per [Penal Code] section 1202.44. That fine is stayed pending successful completion of parole." Defendant does not address this fine, nor do we.

Defendant filed a timely notice of appeal.

DISCUSSION

On appeal, defendant initially argued: (1) the court misunderstood its discretion to reinstate probation, and therefore did not make an impartial appraisal of whether probation should be reinstated; and (2) the restitution fine and court fees could not have been imposed without a determination of his ability to pay them, under the recent decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). In supplemental briefing, defendant argued a third ground: an intervening change in the law that requires the two prior prison term enhancements to be stricken. As we shall discuss, the parties' briefing on the prior prison term enhancements also applies to, and defeats, defendant's *Dueñas* argument.

1. ***There Was No Error in Failing to Reinstate Probation***

"A probation violation does not automatically call for revocation of probation and imprisonment. [Citation.] A court may modify, revoke, or terminate the defendant's probation upon finding the defendant has violated probation. [Citation.] The power to modify probation necessarily includes the power to reinstate probation. [Citations.] Thus, upon finding a violation of probation and revoking probation, the court has several sentencing options. [Citation.] It may reinstate probation on the same terms, reinstate probation with modified terms, or terminate probation and sentence the defendant to state prison. [Citations.] [¶] If the court decides to reinstate probation, it may order additional jail time as a sanction." (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420 (*Bolian*).) If the court terminates probation, the sentence options depend on whether imposition of sentence had previously been suspended, or if sentence had been imposed but execution suspended. In the former situation, the

court has full sentencing discretion; in the latter situation, "upon revocation and termination of probation, the court must order that imposed sentence into effect." (*Id*. at pp. 1420-1421.)

"The decision whether to reinstate probation or terminate probation (and thus send the defendant to prison) rests within the broad discretion of the trial court. [Citations.]" (*Bolian, supra,* 231 Cal.App.4th at p. 1421.) " 'The discretion of the court to revoke probation is analogous to its power to grant the probation, and the court's discretion will not be disturbed in the absence of a showing of abusive or arbitrary action. [Citations.]' [Citation.]" (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.)

However, if the court is unaware of its discretionary authority, it cannot exercise informed discretion. Remand is appropriate if the record indicates the court misunderstood or was unaware of the scope of its discretionary powers. (*Bolian, supra,* 231 Cal.App.4th at p. 1421.)

Defendant argues the court did not understand its discretionary power to reinstate probation, based on the court's statement: "[I]f the court will give the defendant any time, even one day, the court must give the suspended time because he was already sentenced. The law is clear. I don't have any discretion, no authority."

This is a correct statement of the court's discretion *if the court does not reinstate probation*, because sentence was previously imposed with only its execution suspended. The court may not "re-sentence." However, the statement is incorrect if the trial court meant that it lacked discretion to reinstate probation with suitable jail time.

Taken alone, the trial court's statement is ambiguous. In context, however, the court immediately addressed the circumstance of what it would do if it did, in fact, have discretion:

“[G]iven the discretion, I will not exercise that discretion because the defendant was convicted and physically abused the mother of his future child.” Thus, even if the court was unclear as to its discretion to reinstate probation, the court unambiguously indicated that it would not exercise its discretion to do so.

Focusing on several of the court’s statements during sentencing, defendant argues that the court did not truly exercise its discretion. We disagree; the essence of the court’s conclusion was that defendant’s domestic violence conviction takes the case out of the realm of those in which the court might reinstate probation. Even if we were to accept defendant’s argument that the trial court was curt with defense counsel and may not have articulated its discretion clearly, it would not be grounds for reversal. Those claims do not undermine the trial court’s finding that defendant had violated his probation terms by his conviction for domestic violence and his repeated failures to report to his probation officer, both of which were proper grounds to revoke probation.

Similarly, defendant draws support from the fact that the court “did not discuss any of the factors which defense counsel offered in opposition or in mitigation.” But there is no authority which requires a court to address and reject every factor raised by a defendant at a probation violation hearing, particularly when the court expresses the reasons for its refusal to reinstate probation. That the trial court did not affirmatively acknowledge facts that might have supported reinstatement of probation does not detract from the trial court’s proper exercise of its decision or suggest, as appellant does, that the trial court “failed to make an

impartial appraisal" of whether defendant should have been given a second chance on probation.[6]

We find no abuse of discretion. While defendant would characterize his probation violation as a simple failure to report while suffering the trauma of his girlfriend's miscarriage, the facts paint a very different picture. When defendant called Officer Story in April 2018, explaining that his failure to report was caused by the girlfriend's miscarriage (and neglecting to mention the intervening domestic violence conviction), Officer Story gave defendant a second chance and told him to report by April 27. Defendant did not report in April. Defendant did not report in May, June, July or August, either, and a bench warrant was issued. During this time, defendant twice intentionally gave a false name to police – because he knew he was wanted for a probation violation, and was also repeatedly shoplifting with his girlfriend. This was not a distraught man accidentally violating probation in a confused haze; this was a defendant who knew he was in violation of probation and intentionally lied to police to avoid the consequences. The trial court's decision to not reinstate probation was well-supported.

2. *The Sentencing Issues Are Not Cognizable on This Appeal*

A. *Introduction to the Sentencing Issues*

Effective January 1, 2020, section 667.5, subdivision (b) was amended to apply only if the defendant's prior prison terms were for sexually violent offenses. (Stats. 2019, ch. 590, § 1.)

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[6] Defendant attempts to parlay his argument that the court misunderstood its discretion into a federal due process violation because the court was not an impartial arbiter. We see no evidence of impartiality.

Defendant's prior prison terms were not. Defendant contends, and the prosecution agrees, that this amendment is retroactive, and applies to all cases not yet final at the time of its effective date. But, respondent argues defendant's sentence became final for the purposes of retroactive application of ameliorative amendments when it was imposed in 2015, and defendant failed to challenge it on appeal at the time.

Defendant also challenges the imposition of a restitution fine and two court fees without a hearing on his ability to pay, under the relatively recent authority of *Dueñas*. But if the fine and fees were imposed, and became final, back in 2015, it also is too late to challenge them on this appeal.

Thus, the issue raised by both contentions – which we find to be dispositive – is when defendant's sentence became final for the purpose of challenging the sentence on appeal.

B. *Appealability of a Probationary Judgment*

Section 1237, subdivision (a) provides that an appeal may be taken from a judgment of conviction, and that, for purposes of appealability, an order granting probation "shall be deemed to be a final judgment."

For this reason, if a defendant receives a probationary sentence following a finding of guilt at trial, the defendant must immediately appeal to challenge any errors at trial; he cannot wait until probation is revoked and he is sentenced to prison to then raise those issues. (*People v. Howard* (1965) 239 Cal.App.2d 75, 77.) "Under section 1237 of the Penal Code, appellant could have challenged the merits of his conviction on an appeal from the order granting probation which is deemed to be a final judgment. [Citation.] Appellant's 'acceptance of probation would not . . . prevent him from taking advantage of any error inhering in the judgment . . . but merely forecloses action based on errors

committed at the trial which his acceptance of the benefits . . . estops him from reviewing.' [Citation.] Since no appeal was taken within the allowable time from this order, appellant is now precluded from going behind the order granting probation. [Citation.]" (*Ibid.*)

C. *Appealability of a Probationary Judgment Extends to the Imposed Sentence on Which Execution is Suspended*

The issue of whether a sentence that has been imposed, but with execution suspended pending probation, is final for purposes of appeal at the time of the order granting probation was addressed in *People v. Scott* (2014) 58 Cal.4th 1415. That case concerned the Criminal Justice Realignment Act, which changed punishment for certain offenders from state prison to county jail. The Realignment Act specifically provided that it applied to any person sentenced on or after October 1, 2011. In *Scott*, the defendant's prison sentence was imposed prior to the October 1, 2011 date, but it was suspended until defendant's probation was revoked sometime later. The Supreme Court concluded the defendant was not eligible for jail under the Realignment Act; its rationale was that defendant had been "sentenced" when the sentence was initially imposed. (*Id.* at p. 1421.) The court held a defendant is sentenced when a judgment "imposing punishment is pronounced even if execution of the sentence is then suspended. A defendant is not sentenced again when the trial court lifts the suspension of the sentence and orders the previously imposed sentence to be executed." (*Id.* at p. 1423.) The defendant's failure to appeal from the originally imposed sentence barred a future appeal of the sentence upon probation violation.

The same analysis governed *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1423. In that case, a four-year sentence was imposed but execution was suspended. When defendant violated probation for a second time the parties entered into a negotiated disposition: Defendant was reinstated on probation with some additional terms and conditions. As part of the agreement, the court also increased the four-year suspended sentence to five years. When defendant subsequently violated probation and the five-year sentence was executed, defendant sought to challenge the improper increase. He could not do so, as he had failed to timely appeal the increase when it was imposed as part of the negotiated disposition. "[W]hen a court imposes sentence but suspends its execution at the time probation is granted, a defendant has the opportunity to challenge the sentence in an appeal from the order granting probation. [Citation.] If the defendant allows the time for appeal to lapse during the probationary period, the sentence becomes final and unappealable. [Citation.] This is so regardless of the fact the defendant will not serve the sentence unless the court revokes and terminates probation before the probationary period expires." (*Id.* at p. 1421.) The appellate court also rejected the defendant's argument that the court lacked jurisdiction to increase the sentence, and jurisdictional errors may be raised at any time. The court found that the trial court had exceeded its jurisdiction but had not lacked jurisdiction. The failure to appeal the increased sentence at the time it was imposed was fatal. (*Id.* at pp. 1421-1427.)

The Supreme Court recently resolved a related, but distinguishable, issue, holding that when a convicted defendant is placed on probation with *imposition* of sentence suspended, the judgment of conviction is not final. (*People v. McKenzie* (2020)

___ Cal.5th ___ [2020 WL 939371].) In that case, the defendant pleaded guilty in 2014, and imposition of sentence was suspended pending probation. In 2016, defendant's probation was revoked, and a prison sentence imposed. While defendant's appeal was pending, an ameliorative statute was enacted and went into effect. Defendant sought the benefit of that statute. (*Id.,* at p. *1.) The prosecution argued that defendant was not entitled to the benefit of the statute as he did not appeal his conviction in 2014. (*Id.* at p. *2.) The Supreme Court disagreed. For these purposes, there is no judgment of conviction without a sentence. (*Id.* at p. 3.) Prior to the imposition of sentence, the case was not sufficiently final. The *McKenzie* court did not expressly discuss the finality of the situation raised by this case – the finality when sentence is imposed but execution suspended. However, its conclusion that imposition of sentence is necessary for a judgment of conviction is in line with *Scott* and *Ramirez*.

D. *Application to the Present Appeal*

1. The Prior Prison Term Issue is Not Cognizable.

In 2015, defendant admitted the two then-valid prior prison terms, and sentence was imposed on the prior prison terms, although execution of sentence was suspended. Defendant did not timely appeal and that sentence became final. The subsequent amendment to section 667.5, subdivision (b) has no effect on this case. As to this amendment, defendant is situated the same as if sentence had not only been imposed but executed in 2015 – that is, if he had been immediately committed to prison. The sentence would have been final in 60 days, and the 2020 amendment would have no retroactive application to defendant. That defendant here had the advantage of a grant of probation and an opportunity to avoid prison does not provide an

opportunity to take advantage of a subsequent statutory amendment enacted long after his sentence became final.[7]

2. The *Dueñas* Issue is Not Cognizable

Defendant challenges his $300 restitution fine, $30 court security fee and a $40 criminal conviction facilities assessment fee under *Dueñas*, because the court did not determine his ability to pay the fine and fees prior to their imposition.

The problem with defendant's argument is that once again the fine and fees were imposed in 2015 and appellate review is now time-barred. The court referred to the fine and fees again when probation was revoked, stating, "The fines are mandatory minimum [fines]." On appeal, the prosecution takes the position that the court did not impose a second set of fines and fees, but simply "again went over appellant's fines." While the court's statement may have been ambiguous, the prosecution's implied concession is correct. A restitution fine imposed at the time probation is granted survives the revocation of probation; a second restitution fine would be unauthorized. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 820-821.) The proper procedure is to simply direct that the abstract of judgment reflect only the fine previously imposed. (*People v. Cropsey* (2010) 184 Cal.App.4th 961, 965-966.)

Similarly, the $40 criminal conviction facilities assessment is imposed "on every conviction," (Pen. Code, § 1465.8) and the $30 court security fee is likewise imposed "on every conviction"

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[7] Because the issue is one of finality of judgments, the fact that defendant's sentence was the result of a negotiated plea is irrelevant. Section 1016.8's ban on plea bargains requiring defendants to waive future benefits of legislative enactments has no bearing on the case.

(Gov. Code, § 70373). As we have explained, defendant was convicted only once, in 2015, no appeal was taken, and his sentence has long since become final. The fees could only be imposed once. Defendant did not appeal the fine or fees at the time they were imposed; they have therefore become final, and cannot be challenged on appeal from the revocation of probation.[8]

DISPOSITION

The judgment is affirmed.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

KIM, J.

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[8] Here, defendant's abstract of judgment correctly reflects a single restitution fine, but does not include the fees at all. It is unclear if the abstract intentionally omitted the fees as previously imposed as a condition of probation, or in error. Although the parties do not address this point, we direct the trial court to make clear that the abstract of judgment reflects that only one set of fees and fines has been imposed.

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 6/4/2020 by Ines Calanoc, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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Last Name, First Name (PNum)

Law Firm