No. S165195

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ANTHONY NAVARRO

Defendant and Appellant.

Automatic Appeal from the Superior Court
of Orange County
Case No. 02NF3143
Honorable Francisco Briseño, Judge

APPELLANT'S THIRD SUPPLEMENTAL REPLY BRIEF

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INTRODUCTION

Instead of refuting respondent's brief point-by-point, appellant will first show that respondent's assumptions regarding appellant's ability to pay the restitution fines imposed on him are wholly unrealistic and unreasonable. Appellant will then explain why the failure to object to the fines at trial does not constitute a forfeiture of the issue on appeal, and will finally discuss further the violations of appellant's constitutional rights resulting from the imposition of restitution fines without a determination of his ability to pay them.

The absence of a specific reply in this brief to any argument or assertion in respondent's brief does not indicate that appellate concedes the point, but rather that appellant did not deem the argument sufficiently worthy of a response.

ARGUMENT

I. APPELLANT HAD NO ABILITY TO PAY THE RESTITUTION FINES AT THE TIME THEY WERE IMPOSED, NOR WAS IT REASONABLY FORESEEABLE THAT HE EVER WOULD IN THE FUTURE

Appellant will first address the wide chasm between the parties' views regarding what the record shows about his ability at the time of trial to pay restitution, and will also address the nearly nonexistent prospects an indigent inmate on death row has for future earnings.

Before addressing this issue, however, it is worth recalling that for purposes of evaluating ability to pay restitution fines, there is a difference between the statutes governing restitution fines, on one hand, and victim's restitution fines, on the other. (Compare Pen. Code §§ 1202.4; 1203, subd. (b)). The former mandates that the court consider a defendant's inability to pay; the latter does not. For the purpose of the constitutional questions raised below, that is a distinction without a difference.

A. The Only Relevant Evidence Before the Court at the Time of Sentencing Showed that Appellant Had No Ability to Pay Either Fine

Respondent's brief recited many different sources of income available to appellant before the underlying crime – in respondent's words, "until July 2002[.]" (RTSB 15.) However, at the time of sentencing, appellant had been in the Orange County Jail for nearly seven years, and earnings during the period respondent is concerned with obviously have little relevance to the issue here.[1]

By the time of his sentencing in 2009 there was ample evidence that if he ever had assets that might go to pay the fines, he no longer did so. Contrary to respondent's recitation of former income, he had become indigent in 2003 and remained so during the almost six years prior to sentencing.

Navarro's trial counsel, Russell Halpern, appeared initially as retained counsel for purposes of the preliminary hearing. However, on October 27, 2003, he filed a motion to be appointed by the court. The motion was supported by appellant's own

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[1] He was booked into jail on October 19, 2002, and sentenced on July 11, 2008. (1 CT 5; 8 CT 2259-2266.)

declaration of indigency. (1 CT 30, 96; 1 RT 1-2.) As described by the judge then presiding, Halpern had been retained by appellant's family, but they were no longer able to raise further money for his services. Accordingly, Halpern sought to continue to represent appellant by court appointment instead of having the court appoint new counsel from the court's conflicts panel. (1 RT 5.) The court took the matter under submission, and on December 16, 2003, Halpern was appointed. (1 RT 7-8, 11, 23.)

Respondent does not even attempt to argue that this appointment, which depended entirely upon the court's finding that appellant was indigent, was contrary to the law or facts, or that appellant's financial circumstances had magically changed for the better during the five ensuing years he spent in jail.

It is also worth noting that in appellant's written submission attached to the presentence report, he described his financial status in purely retrospective terms, to wit: "That depend (sic) on how much work I had, only assetts (sic) were my cars and Harleys." (8 CT 2248; emphasis added.) More significant was the conclusion reached by the Chief Probation Officer in the presentence report regarding appellant's financial

condition, summarized as follows: "The Probation Department has conducted a financial evaluation and has determined that he does not have the ability to pay and, therefore, recommends the court waive the costs of the Probation report." (8 CT 2246.)

Thus, in contrast to the pre-July 2002 evidence cited by respondent, the record at the time sentence was imposed consists of the following: (1) the 2003 finding by the pre-trial judge declaring appellant indigent and therefore entitled to appointed counsel (1 RT 1, 2, 5, 23; 1 CT 96); (2) the fact that by the time of sentencing he had been in the county jail for nearly seven years, the last five of which he was indigent (1 CT 5; 8 CT 2259-2266); and (3) the Chief Probation Officer's finding that appellant did not have the ability to pay even the comparatively minuscule costs of the Probation report. (8 CT 2246.)

Accordingly, and contrary to respondent's assertions, the only relevant evidence before the court at the time of sentencing was that appellant had no ability to pay either the restitution fine or the victim's restitution fine.

B. Neither Appellant Nor Any Defendant Being Sentenced to Death Had Any Realistic Possibility of Future Earnings

Respondent argues that in addition to ability to pay at the time of sentencing, the court may also consider his "future earning capacity." (RTSB 16). However, not only does the record clearly show appellant had no ability to pay at sentencing, there was also no evidence of any realistic possibility of paying such excessive fines in the future, particularly since appellant was being sentenced to death and would have no prospect of leaving prison to engage in remunerative work.

Respondent trumpets the wages that CDCR regulations permit to be paid to inmates– a ludicrous $12 to $56 per month "depending on the prisoner's skill level." (RTSB 16, fn. 4) However, it is common knowledge that death row inmates have virtually never been permitted to hold jobs.[2] Indeed, the enactment in Proposition 66 of a provision requiring that death

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[2] Of the 31 death row inmates known to Alternative Assisting Attorney Wes Van Winkle and undersigned counsel, only one has had a job, as a yard monitor, cleaning up trash.

row prisoners work would not have been necessary if such jobs were available. (Pen. Code § 2700.1.)[3]

And of course, the work requirement of section 2700.1 is itself a joke. Although subdivision (j) of Title 15, section 3040, of the California Code of Regulations provides that the availability of paid inmate jobs is contingent on institutional budgets, the authors of Proposition 66 failed to provide any funding mechanism for any of its provisions. Thus, neither the measure's cruel and arbitrary habeas corpus procedures nor its job mandate will ever have any practical effect unless the Legislature decides to provide the money to accomplish these goals, a decision the Legislature appears to have no interest in making. The measure did not create hundreds of new jobs for the 700 or so inmates on death row, nor did it mandate that those non-death-row inmates

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[3] The relevant portion of section 2700.1 reads as follows:

> Every person found guilty of murder, sentenced to death, and held by the Department of Corrections and Rehabilitation pursuant to Sections 3600 to 3602 shall be required to work as many hours of faithful labor each day he or she is so held as shall be prescribed the rules and regulations of the department.

currently with jobs must now give them up in order to give preference to capital inmates. In short, Proposition 66 has done nothing to change the status quo regarding appellant's ability to pay these fines, nor is it likely to do so in the future.

Thus, contrary to respondent's contention that appellant has an opportunity to earn such lofty incomes as $12 to $56 a month while serving his sentence (see, e.g., People v. Jones (2019) 36 Cal.App.5th 1028, 1035-1036; People v. Aviles, supra, 39 Cal.App.5th a p. 1076), such earnings are effectively unavailable to capitally sentenced inmates.

Moreover, even general population inmates have little or no control over whether they can earn money while incarcerated. Under Penal Code section 2700, the CDCR is supposed to require every able-bodied prisoner to work. However, the regulations implementing section 2700 give the CDCR near-total discretion in deciding who works, when they work, how they work, and whether and how much they get paid to work. Under 15 Cal. Code Regs., section 3040, every able-bodied inmate is obligated to work as assigned by staff, but "[a]ssignment may be up to a full day of work, education, other programs, or a combination of work,

education, or other programs." (15 CCR §3040, subd. (a).) Further, under subsection 3040(e), "Inmates assigned to clerical duties and office work positions, requiring an extensive amount of staff/inmate interaction, such as clerks and teachers' aides, shall be rotated at regular intervals to other positions within the institution even though that may result in lower pay, or no pay at all, to the inmate being rotated out of the position." (Emphasis added.) As noted above, under subdivision (j) of section 3040, the availability of paid inmate jobs is contingent on institutional budgets. Under subdivision (k), being paid to work is considered a privilege depending on available funding, job performance, seniority and conduct. Under subdivision (l), inmates are not paid for participating in education or substance abuse treatment.

Neither do the regulations favor death row inmates for jobs. Section 3041.1 of the regulations sets forth the inmate work and training assignment criteria, and there is no mention of preference for death row inmates, even post-Proposition 66. (15 CCR § 2041.1.)

All of this, of course, describes the current situation. At the time of appellant's sentencing, Proposition 66 did not yet exist

and could not have been considered in determining appellant's ability to pay. At the time of sentencing, there was no realistic expectation that appellant or any capitally sentenced inmate would have the opportunity to work in the time between their sentence and their presumed execution, making the imposition of such clearly excessive fines upon a clearly indigent defendant a constitutional travesty.

Furthermore, under the system in existence since appellant was sentenced, the burden of paying an inmate's restitution fines has effectively fallen on the inmate's family, friends, attorneys, and others who seek to help the inmate acquire basic canteen items like soap, shampoo, or food items. The majority of any contribution to a death row inmate's trust account – the source of funds from which inmates may purchase canteen items or from which they may order from prison-approved catalogs – is simply seized by the CDCR. The amount seized was 55% of the contribution in 2008 and is currently up to 77%. In addition to the 70% deduction mandated by the statute,[4] the CDCR takes an

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[4] This portion of section 2700.1 reads:

(continued...)

additional 10% of the 70% as a fee, making the total 77%. [5] Counsel has heard from clients, and has confirmed with the Unrepresented Death Row Prisoner's Project staff at the California Appellate Project, that the 77% deduction is in effect.) Trust account deposits, of course, come mostly from family members or friends, many of whom will inevitably have limited funds, and they are saddled now with the knowledge that only

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[4] (...continued)
In any case where the condemned inmate owes a restitution fine or restitution order, the Secretary of the Department of Corrections and Rehabilitation shall deduct 70 percent or the balance owing, whichever is less, from the condemned inmate's wages and trust account deposits, regardless of the source of the income, and shall transfer those funds to the California Victim Compensation and Government Claims Board according to the rules and regulations of the Department of Corrections and Rehabilitation, pursuant to Sections 2085.5 and 2717.8.

[5] This appears to be an unauthorized application of section 3097(f) of the regulations, the only apparently relevant regulation. The section refers to post-2007 deductions of 50% plus a 10% fee. (Cal. Code Regs., Title 15, sec. 3097(f).) The cited regulation imposes a fee of 10% upon a restitution amount of 50%, which has been in effect since 2007. Anecdotally, the prison has applied the same 10% to the 70% mandated for death row prisoners by Penal Code section 2700.1. Appellant is unaware of the direct source, other than custom, of applying the 10% fee to the 70% deduction mandated in section 2700.1. Even if the CDCR is only adding on 10% of the first 50%, as seemingly authorized by its regulations, that still results in a 75% reduction to all monies coming into the trust account.

23% of the amount they deposit will be available to the inmate they are trying to help.

Thus, while the amounts flowing to the state from appellant's trust account are trivial, both in terms of reducing the twenty-plus-thousand dollar fines and in enriching the general fund and the Victim's Compensation Board, they can present a major obstacle not merely to appellant's well-being but also to those family members who can afford to send him money. In effect, then, the burden of the restitution fines falls upon the inmate's friends and relatives, all of whom are innocent of the inmate's offenses and of any harm to the victims.

As argued in Argument III, infra, the United States Constitution prohibits the imposition of such fines, especially in the absence of a hearing, or even an inquiry, regarding the defendant's ability to pay them.

II. NOTWITHSTANDING COUNSEL'S FAILURE TO OBJECT TO THE FINES AT TRIAL, THE ISSUE IS COGNIZABLE ON APPEAL

A. There is No Indication in the Record That The Asserted Waiver Was Counseled, Knowing, or Intelligent

In his brief, appellant argued that his counsel's failure to object to the proposed fines did not constitute a waiver of the issue because of recent rulings that the imposition of such fines on people unable to pay them violate the Due Process, Equal Protection, and Excessive Fines clauses, and because of a 2019 ruling of the United States Supreme Court that the latter clause applies to the states. (ATSB 20-23; Timbs v. Indiana (2019) ___ U.S. ___, 139 S.Ct. 682, 203 L.Ed.2d 11 [Timbs]; *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1172 [*Dueñas*]; *People v. Cowan* (2020) 47 Cal.App.5th 32 [Cowan].)

Respondent counters first that appellant was notified of his right to a financial hearing, and that his failure to assert that right was sufficient to waive his complaint on appeal. (RTSB 8; 8 CT 2246.) Respondent cites two references in the Probation Officer's presentence report that are asserted to constitute a waiver.

Appellant disagrees regarding both the nature and the consequence of these statements by the probation officer. First, the routine incantation by the probation officer that the defendant had been notified of his right to a financial hearing is meaningless. Appellant was not represented by counsel at the interview, and there is no indication, either in the paragraph cited by respondent, in the recommendation portion of the presentence report, or in the earlier discussion in the report that appellant had any notice that the consequence of his failure to ask for a hearing might be the imposition of over $20,000 in fines or the waiver of his right to challenge the size of the fines. That portion of the report reads as follows:

> The defendant was given a "Notice of Right to a Financial Hearing" pursuant to 1203.1b PC and did not submit an "Adult Financial Statement." He verbally stated, however, that he has neither assets nor liabilities at this time.

(Presentence Report, 8 CT 2240.)[6]

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[6] Appellant's written statement mentioning his former assets, referred to above and at 8 CT 2248, is attached to the end of the Presentence Report. Whether it was written before or after the probation officer's reference only to a verbal statement is not evident in the record.

There is nothing here to indicate that appellant was given any notice of the consequences of not filing the financial statement or of not asking for a hearing, or that he was accompanied to the interview by counsel or otherwise advised. There was also no reason why appellant could have been expected to know that any consequences might flow from either supposed omission, particularly since it was obvious from his declaration of indigency and the fact of his long incarceration that he had no assets. Indeed, the very fact that he did not file a formal financial statement (other than the paragraph quoted above from his two-page written statement attached to the presentence report (8 CT 2247-2248)), actually supports his statement that he had no assets or liabilities that might be reported on such a statement or in such a hearing.

The right not be subjected to an excessive fine is of constitutional dignity, as the Supreme Court made clear in Timbs, supra. In California, an effective waiver of a fundamental right must be express, voluntary, knowing, and intelligent. (People v. Linton (2013) 56 Cal.4th 1146, 1171 [Miranda waiver]; People v. Collins (2001) 26 Cal.4th 297, 305 [right to jury trial].)

Whether or not the right to a hearing before imposition of any fines requires such a waiver, the sheer magnitude of the fines imposed here, and the clear application of the Excessive Fines clause to the states under Timbs, requires a knowing and intelligent waiver, which is absent from the record here.

In People v. Trujillo (2015) 60 Cal.4th 850, this court distinguished fundamental rights requiring knowing and intelligent waivers from those such the imposition of probation supervision and presentence investigation fees. At issue was a presentence investigation fee "not to exceed $300" and a probation supervision fee "not to exceed $110 per month." (Id., at p. 373.) This court relied in part on its finding, in People v. McCullough (2013) 56 Cal.4th 589, that, "Given that imposition of a fee is of much less moment than imposition of sentence, that the goals advanced by judicial forfeiture [were equally relevant in the fee context,] we [saw] no reason [in McCullough] to conclude that" forfeiture of the claim on appeal by failure to object at trial should apply. (Trujillo, supra, 60 Cal.4th at p. 857, citing McCullough, supra, 56 Cal.4th at p. 590.)

Appellant submits that there is a difference in kind between the sorts of fees discussed in Trujillo and McCullough and the over $20,000 in fees imposed upon a defendant sentenced to death where, as here, the only evidence before the trial court was that he did not even have the ability to pay the fees for the presentence report. Simply put, the fees imposed here are of a different order and different kind than the fees discussed in Trujillo and McCullough. Where, as here, a defendant had no then-ability and no realistic future ability to pay fines such as the ones imposed at sentencing, then any asserted waiver must appear from the record to be, at minimum, knowing and intelligent. There is no such waiver on this record.

B. Where, as Here, There Was Both No Tactical Reason for Counsel Not to Object and Such an Objection Would Have Been Futile, the Issue is Cognizable on Appeal

Appellant's counsel failed to object to the imposition of the massive, unwarranted restitution and victim restitution fines in this case. As argued in appellant's initial brief, the record suggests that this was simply one more example of incompetence, with no possible tactical or strategic reason. (ATSB 22-23.)

In addition, reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. (People v. Brooks (2017) 3 Cal.5th 1, 92, quoting People v. Welch (1993) 5 Cal.4th 228, 237 [19 Cal. Rptr. 2d 520, 851 P.2d 802].) As this court recently explained:

> Indeed, "[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 of evidence would be changed on appeal.'" (People v. Edwards (2013) 57 Cal.4th 658, 705 (Edwards).) "In determining whether the significance of a change in the law excuses counsel's failure to object at trial, we consider the 'state of the law as it would have appeared to competent and knowledgeable counsel at the time of the trial.'" (People v. Black (2007) 41 Cal.4th 799, 811 (Black), quoting People v. De Santiago (1969) 71 Cal.2d 18, 23.) "The circumstance that some attorneys may have had the foresight to raise th[e] issue does not mean that competent and knowledgeable counsel reasonably could have been expected to have anticipated the high court's decision … ." (Black, at p. 812.)

(People v. Perez (2020) 9 Cal.5th 1, 5.

The recent cases applying the Excessive Fines and Due Process clauses to restitution fines came more than a decade after

the sentencing herein. An objection on the now-applicable grounds of the Excessive Fines Clause would have been futile before the 2019 decision in Timbs v. Indians, supra. So, too, it was not until 2019 that Dueñas, supra, suggested that the due process clause applies to fines assessed without a hearing on the defendant's ability to pay. Thus, it would have been futile for that objection to have been made at the time of sentencing herein.

III. BOTH THE RESTITUTION FINE AND THE VICTIM'S RESTITUTION PAYMENTS WERE UNCONSTITUTIONALLY EXCESSIVE AND SHOULD NOT HAVE BEEN IMPOSED WITHOUT A PRIOR DETERMINATION OF ABILITY TO PAY

Respondent argues generally that the fines imposed below were not unconstitutionally excessive, and specifically that the victim's restitution payment was not punitive in nature and thus "fundamentally different . . . because its purpose is not to punish the defendant . . . but to make the victim reasonably whole by reimbursing the victim for economic losses caused by the defendant's criminal conduct." Thus, respondent asserts, the fines are intended as civil remedies rather than as criminal punishment. (RTSB 13-14, citing People v. Evans (2019) 39 CAl.App.5th 771, 775-777; People v. Harvest (2000) 84 Cal.App.4th 641, 649-650.) Insofar as section 1202.3 subdivision (b) directs the court to consider the defendant's inability to pay, it may be said to provide a stronger basis for appellant's challenge on appeal. Nevertheless, given the constitutional underpinnings of appellant's argument, and given his obvious inability to pay, the result is the same.

A. Both the Restitution and Victim Restitution Fines Were Punitive and Therefore Subject to the Excessive Fines Prohibition, the Due Process Clause, and the Timbs Analysis

Regarding respondent's assertion that the victim's restitution fine is also different because it is in the nature of a civil penalty (RTSB 12-13), appellant has already answered this argument in his initial brief. (ATSB 9-12 and cases there cited.) Furthermore, the Unites States Supreme Court has answered that contention in Timbs and in Austin v. United States (1993) 509 U.S. 602, and the Court of Appeal has answered it in Cowan, supra, 47 Cal.App.5th at pp. 44-45.

With regard to the Victims Restitution fine, any actual restitution applied for by the Montemayors has long since been paid. Any minor contributions that might accrue from appellant's trust fund goes to the state treasury's victims restitution fund. (People v. Holman (1913) 214 Cal.App.4th 1438, 1452.) The harm to the state in losing these de minimis contributions pales in comparison to the very real burden placed on an inmate trying to obtain some basic of life and his family or friends who with to help him do so. This is punishment, plain and simple.

> The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, "as punishment for some offense." [Browning-Ferris Industries v. Kelco Disposal 492 U.S. 257 (1989)], at 265 (emphasis added). "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." United States v. Halper, 490 U.S. 435, 447-448 (1989). "It is commonly understood that civil proceedings may advance punitive and remedial goals, and, conversely, that both punitive as well as remedial goals may be served by criminal penalties." Id., at 447. See also United States ex rel. Marcus v. Hess, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring). Thus, the question is not, as the United States would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment

(Austin v. United States, supra, 509 U.S. 602, at pp. 609-10.)

Moreover, the characterization of the victim's restitution fine as a civil remedy was essentially the argument advanced by the state in Timbs, supra, regarding the in rem remedy of confiscation of Mr. Timbs' Range Rover to pay off a fine that constituted one-quarter of the value of the vehicle.

> As a fallback, Indiana argues that the Excessive Fines Clause cannot be incorporated if it applies to civil in rem forfeitures. We disagree. In considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted.
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> . . . . .

> . . . [R]regardless of whether application of the Excessive Fines Clause to civil in rem forfeitures is itself fundamental or deeply rooted, our conclusion that the Clause is incorporated remains unchanged.

(Timbs v. Indiana, supra, 139 S.Ct., at pp. 690-691.)

In addition, even if the victim's restitution fine is regarded as a civil penalty, there is no functional difference. In People ex rel. Lockyer v. R.J. Reynolds Tobacco (2005) 37 Cal.4th 707, 728, involving a civil penalty, this court noted that the penalty was,

> subject both to the state and federal constitutional bans on excessive fines as well as state and federal provision barring violations of due process. It makes no difference whether we examine the issue as an excessive fine or a violation of due process.

Respondent argues that the fines are not unconstitutionally excessive, because that analysis focuses on the gravity of the offense, and, most relevant here, that an inability to pay a fine does not, by itself, render a fine unconstitutionally excessive. (RTSB 13, citing People v. Aviles (2019) 39 Cal.App.5th 1055, 1070, citing United States v. Bakajian (1998) 524 U.S. 321, 337-338 and People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., supra, 37 Cal.4th at p. 728.) None of these cases, however, involved the issue of the defendant's inability to pay. Indeed, in

Avilas, in contrast to this case, the record showed that defendant Avilas had the ability to pay the amounts ordered in his case. (39 Cal.App.5th at p. 1061.)

Respondent is also mistaken in asserting that under the Excessive Fines Clause, the inability of pay does not by itself render a fine excessive. (RTSB 13, citing United States v. Bakajian, supra.) Bakajian states that "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: the amount of the forfeiture must bear some relationship to the gravity of the offense it is designed to punish." (524 U.S. at pp. 334-335, citing Austin v. United States (1993) 509 U.S. 602, 622-633, and Alexander v. United States (1993) 509 U.S. 544, 559.)

In *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., supra,* 37 Cal.4th 707, this Court relied on *Bajakajian* to set forth four considerations for determining Excessive Fines proportionality: (1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) *the defendant's ability to pay*. (*Lockyer* at p. 728.) Although *Bajakajian* did not actually address ability to pay as part of its

proportionality test, this Court read *Bajakajian* in conjunction *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1322, to include consideration of ability to pay as part of the Excessive Fines analysis. (*Lockyer* at p. 728.)

Respondent spends most of a page in their brief arguing that the fines imposed were not grossly disproportionate to the gravity of the offense. (RTSB 14.) The contention is irrelevant to the excessive fines analysis and the question of appellant's ability to pay. Appellant did not address the proportionality argument in his initial brief, and does not assert it here. It is simply beside the point.

B. The Moral Underpinnings of Both the Eighth Amendment and the Due Process Clause Are Offended by the Fines Imposed Here

There is an additional point to me made regarding the moral disparity between appellant's indigency and the imposition of over twenty thousand dollars in unpayable fines (which is effectively a tax falling mainly upon his family). That is the moral question raised by in excess of twenty thousand dollars in fines imposed on an indigent defendant with no ability, and no future ability, to pay the fines.

Underlying the Eighth Amendment's prohibition against cruel and unusual punishments, is a sense of moral correctness. Thus,

> A death judgment is invalid under the Eighth Amendment if imposed by a sentencer that believed it lacked the ultimate moral responsibility to determine the appropriate penalty under all the individual circumstances. (Citations)

(People v. Melton (1988) 44 Cal.3d 713, 761.)

> "The Eighth Amendment guards against the execution of those who are 'insufficient[ly] culpab[le],' [citation], in significant part, by requiring sentencing that 'reflect[s] a reasoned moral response to the defendant's background, character, and crime.'

(California v. Brown (1987) 479 U.S. 538, 545 (O'Connor, J., concurring).)

> . . . [U]nless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete . . . .

(Graham v. Florida (2010) 560 U.S. 48, 85(Stevens, J., concurring).)

> In the face of evidence of the hazards of capital prosecution, maintaining a sentencing system mandating death when the sentencer finds the evidence pro and con to be in equipoise is obtuse by any moral or social measure. And unless application of the Eighth Amendment no longer calls for reasoned moral judgment in substance as well as form, the Kansas law is unconstitutional.

(Kansas v. Marsh (2006) 548 U.S. 163, 211 (Souter, J., dissenting)

> The Eighth Amendment, under our precedent, is supposed to impose a moral backstop on punishment, prohibiting sentences that our society deems repugnant.

(Moore v. Texas (2017) 137 S. Ct. 1039, 1058 (Roberts, C.J., dissenting).)

> The Eighth Amendment stands as a shield against those practices and punishments which are either inherently cruel or which so offend the moral consensus of this society as to be deemed "cruel and unusual."

(South Carolina v. Gathers (1989) 490 U.S. 805, 821(O'Conner, J., dissenting).

Timbs makes clear that at issue here is the Excessive Fines Clause, but the failure of the court to even inquire as to appellant's ability to pay, much less order a hearing, may also be considered a violation of due process, as set forth in Dueñas. A similar underlying sense of morality underlies the Due Process Clauses of the Fifth and Fourteenth Amendments:

> It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history.

(Solesbee v. Balkcom (1950) 339 U.S. 9, 16 (Frankfurter, J., dissenting).)

> Thus, when the question at issue alludes to " notions of what is fair and right and just, " Solesbee v. Balkcom, 339 U.S. 9, 16, 70 S.Ct. 457, 460, 94 L.Ed. 604 (1950)

> (Frankfurter, J., dissenting), fundamental fairness is implicated such that the inquiry has constitutional due process ramifications."

(Cherry v. Jago (6th Cir. 1983) 722 F.2d 1296, 1302 (Jones, J., dissenting).)

> It must be concluded that this is not the kind of process that comports with " the deepest notions of what is fair and right and just. " It may be appropriately characterized as "overzealousness in an attempt to reach, through the criminal process (and indeed to destroy) those whom we may regard as undesirable citizens."

(Ex Parte Wells (N.D. Cal. 1950) 90 F. Supp. 855, 858.)

There are two final points to be made. Respondent's asserts that the defendant had the burden not only to raise the issue of inability to pay a fine but also to present evidence thereof. (RTSB 14-15.) In fact, he actually did so by: (1) presenting sufficient evidence of his indigency to convince the trial court to appoint counsel; (2) presenting sufficient evidence to the probation office for them to find that he did not even have the ability to pay for the pre-sentence report; and (3) by telling the probation officer that he had no assets or income, therefore declining a hearing he would have thought futile since he had nothing to discuss.

Respondent claims that nothing in the record points to circumstances casting doubt on Navarro's ability to obtain the

funds in the future, so that it can be presumed that he had the ability to satisfy the imposed fine through his prison wages and "future earnings." (RTSB 17.) If this matter were not so serious, this argument would be laughable. None of the cases respondent cites involve capital sentences, and, as explained above, neither at the time of sentencing nor even now, post-Proposition 66, is there any prospect that work is available for death row inmates.

CONCLUSION

For the foregoing reasons, the restitution and victim's restitution fines imposed herein should be reversed.

DATED: March 3, 2021

Respectfully submitted,

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RICHARD I. TARGOW
Attorney for Appellant

CERTIFICATE OF LENGTH OF BRIEF

I, Richard I. Targow, attorney for appellant herein, hereby certify that this brief uses a 13-point Century Schoolbook font and contains 5370 words.

_____
RICHARD I. TARGOW

DECLARATION OF SERVICE

Re: People v. Anthony Navarro No. S165195

I, RICHARD I. TARGOW, certify:

I am, and at all time mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Post Office Box 1143, Sebastopol, California 95473.

I served a true copy of the attached APPELLANT'S THIRD SUPPLEMENTAL REPLY BRIEF on each of the following, by TrueFiling or by placing same in an envelope or envelopes addressed, respectively, as follows:

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Office of the Attorney General
P.O. Box 85266-5299
San Diego, CA 92186-5266

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Santa Ana, CA 92701

Anthony Navarro, Appellant (Mail)

For each mail recipient, each said envelope was then, on March 3, sealed and deposited in the United States Mail at Sebastopol, California, with postage fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd day of March, 2021, at Sebastopol, California.

_____
RICHARD I. TARGOW
Attorney at Law

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. NAVARRO (ANTHONY)**
Case Number: **S165195**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **rtargow@sonic.net**

3. I served by email a copy of the following document(s) indicated below:

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

3/3/2021
Date

/s/Richard Targow
Signature

Targow, Richard (87045)
Last Name, First Name (PNum)

Richard I. Targow, Attorney at Law

Law Firm