No. 21-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2021

STEPHEN CAMERON ZYSZKIEWICZ,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA FIFTH DISTRICT COURT OF APPEAL

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

STEPHEN CAMERON ZYSZKIEWICZ
1501 Larkin St Apt 102
San Francisco, CA 94109
Telephone: (262) 226-6983
Email: stevez@me.com

INDEX TO APPENDIX		
DOCUMENT	**DESCRIPTION**	**PAGE #**
APPENDIX A	Order of the California Supreme Court denying petition for review in Case No. S269276, *People v. Zyszkiewicz*, filed July 28, 2021.	3
APPENDIX B	Opinion of the California Fifth District Court of Appeal in Case No. F078532. Filed May 6, 2021.	4-25
APPENDIX C	Reporter's Transcript of Sentencing, Fresno Superior Court, F18904333, dated December 10, 2018.	26-42
APPENDIX D	Statement of Justice Thomas, Standing Akimbo, LLC v. United States, No. 19-1049 (10th Cir. 2020).	43-47

S269276
California Supreme Court(Minute Order)

People v. Zyszkiewicz

Decided Jul 28, 2021

S269276	F078532 Fifth Appellate District
07-28-2021	Petition for review denied
PEOPLE v. ZYSZKIEWICZ (STEPHEN CAMERON)	Corrigan, J., was absent and did not participate.

Appendix A

Filed 5/6/21 P. v. Zyszkiewicz CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. STEPHEN CAMERON ZYSZKIEWICZ, Defendant and Appellant.	F078532 (Super. Ct. No. F18904333) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. James Petrucelli, Judge.

Michelle T. Livecchi-Raufi, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Darren K. Indermill and Kari Ricci Mueller, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

SEE CONCURRING AND DISSENTING OPINION.

Appendix B

INTRODUCTION

Appellant Stephen Cameron Zyszkiewicz was convicted by jury of maintaining a place for the purpose of selling, giving away, or using controlled substances. (Health & Saf. Code,[1] § 11366.) He was sentenced to three years in state prison and the court imposed various fines and fees.

Zyszkiewicz raises the following issues on appeal: (1) he was denied the right to present a defense that he was operating a legal marijuana collective under section 11362.775; (2) there is insufficient evidence to support his conviction; (3) the People were not entitled to amend the information following the parties' waiver of the preliminary hearing; (4) the cumulative effect of these errors necessitates reversal of his conviction; (5) he is entitled to a conditional remand to allow the court to determine whether he should be granted mental health diversion pursuant to Penal Code section 1001.36; and (6) he is entitled to a hearing on his ability to pay various fines and fees imposed by the court at sentencing.

The judgment of conviction is affirmed. We affirm the restitution fine but remand the matter to give Zyszkiewicz an opportunity to request an ability to pay hearing with respect to the court operations and facilities assessments.

PROCEDURAL HISTORY

On September 7, 2018, the Fresno County District Attorney's Office filed a criminal complaint charging Zyszkiewicz with maintaining a place for selling or using a controlled substance, hashish or marijuana (§ 11366, count 1), possession of marijuana for sale by a minor (§ 11359, subd. (a), count 2), and possession of a controlled substance, mescaline (§ 11350, subd. (a), count 3).)

---

[1] All undefined statutory citations are to the Health and Safety Code unless otherwise indicated.

On this same date, following the parties' waiver of the preliminary hearing, the court deemed the complaint an information.

On October 23, 2018, the People filed an intervening information charging Zyszkiewicz with one count of maintaining a place for selling or using a controlled substance, hashish, marijuana, and mescaline, in violation of section 11366.

On October 26, 2018, a jury found Zyszkiewicz guilty.

On December 10, 2018, the court sentenced Zyszkiewicz to the upper term of three years in state prison. The court also imposed the following fines and fees: a $900 restitution fund fine (Pen. Code, § 1202.4), an identical stayed parole revocation restitution fine (Pen. Code, § 1202.45), a $40 court security fee (Pen. Code, § 1465.8), and a $30 criminal conviction fee (Gov. Code, § 70373).

That same day, Zyszkiewicz filed a notice of appeal.

On December 24, 2018, Zyszkiewicz filed a supplemental notice of appeal.

STATEMENT OF FACTS

On March 30, 2018, detectives from the Fresno Police Department were dispatched to execute a search warrant of Zyszkiewicz's apartment. Detectives recovered a cash drawer, an iPad, and a receipt-making machine on top of the kitchen table. One of the receipts located had Zyszkiewicz's name and apartment address written on it.

Inside one of the bedrooms, they discovered "enormous amounts of marijuana, marijuana products, shipping labels, packaging material, vacuum sealers, [and] vacuum bags." With respect to the marijuana and marijuana-related products, detectives found eight 8-liter and nine 17-liter sealed tins "full of dried green marijuana," two vacuum-sealed packages of marijuana labeled "28.5 grams," one vacuum-sealed package of marijuana labeled "2,800 grams," THC-infused products, including barbecue sauce, over 50 small Carmex-type containers with various labels containing the names of different strains of marijuana written on them, 35 crystalline-type containers, over 100 cylinders containing the names of strains of liquid-concentrated cannabis, 12 push puff disposable

CO2 vaporizers, boxes of individually wrapped marijuana cigarettes, over 55 clear plastic vials with labels containing the names of various strains of marijuana, lotions, and edibles.

Detectives also recovered packaging and shipping materials from Zyszkiewicz's apartment, including: 10 small and 10 large empty wooden boxes labeled "Lull Herb Company," gel packs used for keeping items cold, miniature Ziploc baggies, brown shipping boxes, and metal tins. They also found two packages addressed to individuals with addresses in Kuwait and Afghanistan.

Inside of one of the bedrooms, there were multiple working scales with a green leafy residue on top of them.

An employee from the Department of Justice tested a sample of some of the items seized. Testing confirmed that one of the items was mescaline, a controlled substance. Other items tested were determined to be concentrated cannabis and marijuana.

At trial, Detective Jeffrey Gardner discussed the difference between a dispensary, a cooperative, and a collective. A "dispensary" is a for-profit storefront that sells marijuana and marijuana-related products, whereas, a "cooperative" or "collective" is a non-profit entity comprised of a group of individuals who share a common goal of growing and sharing marijuana and marijuana-related products. Cooperatives and collectives have membership and licensing requirements, monthly or quarterly meetings, they must be registered with the Secretary of the State of California, and members share dividends from sales of the marijuana. All products are grown and shared among members of the collective. According to Detective Gardner, dispensaries, cooperatives, and collectives are illegal in Fresno County.

Zyszkiewicz told detectives he was operating a collective, however, he would not answer Detective Gardner's questions about the collective. Zyszkiewicz admitted he did not grow his own products. He received his products from a source in Northern California and packaged and shipped them out.

DISCUSSION

I. The Trial Court Did Not Commit Prejudicial Error by Precluding Zyszkiewicz from Presenting a Collective Cultivation Defense

Zyszkiewicz contends the trial court erred by refusing to allow him to present a defense asserting that he was operating a legal marijuana collective pursuant to section 11362.775. The People assert Zyszkiewicz failed to raise a reasonable doubt that the affirmative defense applied. They further contend any error by the trial court was harmless as the evidence proffered by Zyszkiewicz to support use of the collective cultivation defense was "nonexistent." We conclude Zyszkiewicz failed to raise a reasonable doubt about the existence of the collective cultivation defense.

A. Background

During motions in limine, the People made an oral motion "to exclude any verbal or physical evidence of medical marijuana, anything to do with the doctors, and anything to do with collectives or cooperatives in regards to marijuana." The People argued whether Zyszkiewicz possessed a prescription for the medicinal use of marijuana had "nothing to do with maintaining a place for the unlawful selling, giving away, or using of a controlled substance," and, therefore, any such evidence was irrelevant.

Zyszkiewicz stated, "I did have ... some documentation about being a member of the Oklevueha Native American Church as well. And of course the nonprofit cannabis collective other side of the fence cannabis collective and, in fact, it would seem hard to discuss and do the trial without, you know, discussing Proposition 215 and the medical cannabis laws we had for quite some time." Following submission of the issue, the court granted the People's motion.

The following day, the People withdrew their motion with regard to excluding evidence about the collective in light of Zyszkiewicz's statements to Detective Gardner. Zyszkiewicz told Detective Gardner the marijuana seized in his apartment was for a

collective. The court granted the prosecutor's request, allowing limited references to collectives as it relates to Zyszkiewicz's statements.

Zyszkiewicz represented himself at trial. Outside of the presence of the jury, the parties discussed exhibits Zyszkiewicz intended to introduce into evidence. The first exhibit, "Defense Exhibit M," was a membership card for the Oklevueha Native American church, whose members consume cannabis and mescaline. The People objected, asserting the exhibit was not relevant. Zyszkiewicz explained members of the church "partake of cannabis, mescaline, otherwise known as peyote." The court sustained the People's objection, finding the membership card had no relevance to the charged offense of maintaining a place for selling or using controlled substances.

The next exhibit, "Defense Exhibit G," was a photocopy of a memorandum from the Fresno City Attorney's office regarding marijuana businesses. The People objected, arguing the memorandum was not relevant and it lacked foundation. The court sustained the People's objection, explaining, "it's not a certified copy of anything and, in fact, it explicitly tells you that you can't do what the charges against you are."

Zyszkiewicz also sought to introduce multiple exhibits which purportedly showed he was authorized to consume marijuana for medicinal purposes, including: recommendations for the consumption of cannabis by a physician and a psychiatrist, and two medical marijuana identification cards. The court sustained the prosecutor's objection to these exhibits based on relevance and a lack of foundation.

Finally, Zyszkiewicz presented "Defense Exhibit F," a seller's permit from the State of California Board of Equalization. The uncertified document was for a cannabis collective in San Mateo County. Zyszkiewicz claimed the permit was on display during the raid. The People objected, arguing the document lacked foundation "as it's not a certified document" and it was not relevant to the charged offense, which had occurred in Fresno County. Zyszkiewicz failed to offer a clear explanation as to how the permit was

relevant to the charged offense. The trial court sustained the People's objections to admission of the permit.

B. Legal Principles

In response to the Compassionate Use Act, the Legislature enacted the Medical Marijuana Program Act (§ 11362.7, "MMPA") to " 'to implement a plan to provide for the safe and affordable distribution of marijuana to all patients' in need of it (§ 11362.5, subd. (b)(1)(C))." (*People v. Colvin* (2012) 203 Cal.App.4th 1029, 1035.) The MMPA "provides a[n] ... affirmative defense to criminal liability for qualified patients, caregivers, and holders of valid identification cards who collectively or cooperatively cultivate marijuana." (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1171 citing § 11362.775.) However, the MMPA does not authorize the distribution of marijuana for profit. (§§ 11362.7, subds. (d), (f), (g), 11362.765, subds. (a), (b).)

"[A] defendant is entitled to a defense under the MMPA if he or she raises but a reasonable doubt as to whether the defense applies." (*People v. Baniani* (2014) 229 Cal.App.4th 45, 59.) To establish a collective cultivation defense, the defendant must show "that members of the collective or cooperative: '(1) are qualified patients who have been prescribed marijuana for medicinal purposes, (2) collectively associate to cultivate marijuana, and (3) are not engaged in a profit-making enterprise.' " (*Ibid.*, citing *People v. Jackson* (2012) 210 Cal.App.4th 525, 529; *People v. Solis* (2013) 217 Cal.App.4th 51, 57 ["A defendant invoking the [MMPA] as a defense bears the burden of producing evidence in support of that defense.].)

C. Analysis

At trial, Zyszkiewicz sought to use the collective cultivation defense established by the MMPA. From the record, it appears that nearly all of the evidence proffered by Zyszkiewicz is irrelevant to establishing the elements of the defense. Moreover, the trial court determined the evidence proffered lacked a proper foundation for its admission. Zyszkiewicz does not address the propriety of the trial court's ruling finding his evidence

inadmissible for lack of a proper foundation. Rather, he contends "[w]hether his evidence rose to the level of reasonable doubt is irrelevant to the question of whether his defense should have been permitted." His assertion is incorrect.

For the collective cultivation defense to apply, the defendant has the burden of raising "a reasonable doubt about the existence of the defense." (*People v. Orlosky* (2015) 233 Cal.App.4th 257, 269.) Although the quantum of evidence required to invoke the defense is "minimal," a defendant must proffer at least *some* admissible evidence. (*People v. Jackson, supra*, 210 Cal.App.4th at pp. 533.) As nearly all of the evidence proffered by Zyszkiewicz to meet his burden was not supported by a proper foundation or was simply not relevant to the affirmative defense, we are compelled to conclude he failed to meet his minimal burden.

The only evidence showing Zyszkiewicz may have been a member of a marijuana collective was a statement he made to Detective Gardner, claiming the marijuana in his possession was "for a collective." Zyszkiewicz did not testify at trial, nor did he offer any independent admissible evidence to corroborate his claim. Without more, his bare assertion is insufficient to support the conclusion that he was entitled to assert the collective cultivation defense.[2]

Zyszkiewicz contends the trial court thwarted him from presenting a collective cultivation defense by "ruling that because marijuana collectives are illegal in Fresno

---

[2] The record shows Zyszkiewicz did attempt to introduce evidence showing he had a medical marijuana card. It appears he was attempting to establish he was a "qualified patient" within the meaning of the MMPA. " 'A *qualified patient* is someone for whom a physician has previously recommended or approved the use of marijuana for medical purposes.' " (*People v. Jackson, supra*, 210 Cal.App.4th at p. 530, italics in original.) While the trial court ruled this evidence was not relevant—even though it pertains to an element of the collective cultivation defense—it also ruled this evidence was not supported by a proper foundation. Because Zyszkiewicz does not claim that a proper foundation had been laid for this evidence, we find no error in the court's exclusion of this evidence.

County, any evidence [he] would present relating to a collective or his medical marijuana use would be irrelevant." He contends *People v. Ahmed* (2018) 25 Cal.App.5th 136 (*Ahmed)* and *People v. Urziceanu* (2005) 132 Cal.App.4th 747 (*Urziceanu*), are instructive. We reject his argument for several reasons.

First, contrary to his assertion, the trial court did not foreclose Zyszkiewicz from presenting evidence based upon an erroneous conclusion that the collective cultivation defense could not be asserted as a matter of law. Indeed, the court considered his proffered evidence but found it lacked both relevance and a proper foundation. For example, Zyszkiewicz attempted to introduce an uncertified copy of a seller's permit for a collective in San Mateo County. Section 11362.775 requires proof that "[t]he collective or cooperative is in possession of a valid seller's permit issued by the State Board of Equalization." (§ 11362.775, subd. (b)(4).)

As Zyszkiewicz did not explain how the permit pertains to the operation he was running out of his apartment in Fresno County, we can only infer it might be relevant to the collective cultivation defense. And, even assuming Zyszkiewicz had shown the permit was relevant, he still failed to lay a proper foundation for admission of the uncertified document. The remainder of the evidence proffered by Zyszkiewicz suffers from similar infirmities, lacking either relevance to the collective cultivation defense, a proper foundation, or both. Consequently, even if the trial court had erroneously held the defense could not be asserted as a matter of law, prejudice cannot be inferred upon this record as Zyszkiewicz failed to proffer relevant and admissible evidence showing the defense should have applied.

Second, insofar as Zyszkiewicz suggests there was other evidence he could have presented to support his defense but for the trial court's erroneous ruling, we can only speculate as to what other evidence he may be referring to. His assertion is insufficient to demonstrate actual prejudice. (*People v. Price* (1985) 165 Cal.App.3d 536, 542 [prejudice cannot be based on speculation, or "the mere *possibility* of prejudice"].)

Finally, Zyszkiewicz's reliance upon *Ahmed* and *Urziceanu* is misplaced as both cases are factually distinguishable from the instant case. In *Ahmed*, the Court of Appeal concluded that a local ban on medical marijuana dispensaries did not abrogate the medical marijuana defense in a criminal prosecution under state law. (*Ahmed, supra,* 25 Cal.App.5th at p. 143.) The appellate court explained, "[w]hile a local government remains free to enact local ordinances to regulate (or prohibit) medical marijuana operations within its jurisdiction [citations], nothing in law or logic supports an extension of local government power over land use within its borders to, in effect, nullify a statutory defense to violations of state law." (*Ibid.*)

In *Ahmed*, the record contained ample evidence supporting the conclusion that the collective cultivation defense applied. The defendant had testified the collective was being legally run, that only patients with medical marijuana cards were permitted in the sales room, that he paid taxes, his collective was a nonprofit, and all profits received were put back into the business. (*Ahmed, supra*, 25 Cal.App.5th at p. 143.) An investigating officer also testified that out of thousands of records seized, only five or six of the collective members' records did not contain California identifications. All of the members had provided a physician's recommendation for the consumption of marijuana. (*Id.* at pp. 143-144.)

In *Urziceanu,* the defendant raised the Compassionate Use Act as a defense to marijuana charges and was acquitted of cultivating marijuana and the sale of marijuana, but convicted of conspiracy to sell marijuana. (*Urziceanu, supra*, 132 Cal.App.4th at p. 782.) At trial, he had presented substantial evidence showing he was operating a marijuana collective, including: evidence showing he and his codefendant were qualified patients; the collective had established policies and procedures; members of the collectives had verified prescriptions and identities, paid membership fees, and reimbursed the defendant for costs incurred in cultivation; and members participated at the collective by assisting with cultivation, delivery, and processing new applications.

(*Id.* at p. 786.) The Court of Appeal reversed the trial court's ruling, finding the defendant had produced substantial evidence supporting the conclusion he was entitled to use the collective cultivation defense, which applied retroactively to his case. (*Id.* at pp. 785-786.)

In contrast, the record here contains virtually no evidence showing Zyszkiewicz was participating in a collective. He made no offer of proof concerning the size of his alleged collective's membership, its volume of purchases, level of member's participation, whether the collective was formally established as a nonprofit, whether it maintained financial records, its level of accountability to its members, or whether it incurred a profit or loss. (CALCRIM No. 3413 [Collective or Cooperation Cultivation Defense. (Health & Saf. Code, § 11362.775.) As the evidence proffered by Zyszkiewicz supporting use of the collective cultivation defense was practically nonexistent, his reliance upon *Ahmed* and *Urziceanu* does not assist him.

Zyszkiewicz further contends the trial court's failure to instruct on the collective cultivation defense sua sponte was prejudicial. Based upon the record before us, we are persuaded the instruction was not warranted. Zyszkiewicz did not request such an instruction and the minimal evidence that he was operating a cannabis collective was plainly insufficient to impose on the trial court a duty to give the collective cultivation instruction.

II. Substantial Evidence Supports Appellant's Conviction

Zyszkiewicz submits there is insufficient evidence supporting his conviction for selling or using a controlled substance. The People disagree, as do we. The evidence supporting Zyszkiewicz's conviction is overwhelming.

"When a defendant challenges the sufficiency of the evidence, ' "[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty

beyond a reasonable doubt." ' " (*People v. Clark* (2011) 52 Cal.4th 856, 942-943, citing *People v. Davis* (1995) 10 Cal.4th 463, 509.) "All conflicts in the evidence are resolved in favor of the judgment." (*People v. Neely* (2009) 176 Cal.App.4th 787, 793.) A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " the jury's verdict. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Section 11366 requires the People to prove (1) the defendant opened or maintained a place, (2) with the intent to sell a controlled substance. (CALCRIM No. 2440; *People v. Hawkins* (2004) 124 Cal.App.4th 675, 680; *People v. Horn* (1960) 187 Cal.App.2d 68, 73.)

When detectives executed a search warrant of Zyszkiewicz's apartment they found indicia of drug sales, including: copious amounts of marijuana and marijuana-related products, packaging and shipping materials, a cash drawer and an iPad, a receipt-making machine, and multiple working scales with marijuana residue on them. In addition, they found two shipping packages containing addresses for individuals in Kuwait and Afghanistan. When detectives asked Zyszkiewicz if he was operating a dispensary from his apartment, he claimed he was operating a collective but he would not provide any details about the collective.

From this evidence, the jury could find beyond a reasonable doubt that Zyszkiewicz maintained his apartment with the intent to sell cannabis, a controlled substance. As Zyszkiewicz's assertions to the contrary rest upon factual inferences that conflict with the judgment of conviction, or rest upon alternative explanations of the People's evidence, we do not address them.

III. The People's Amendment of the Information

Zyszkiewicz contends the People improperly amended the information following the parties' waiver of the preliminary hearing. The People contend Zyszkiewicz forfeited

his claim by failing to object. In any event, they argue the amendment was proper. We conclude Zyszkiewicz has forfeited his objection.

A. Background

On September 7, 2018, the parties agreed to an open waiver of the preliminary hearing. The court explained the open waiver would permit the People to review the discovery and add further charges pursuant to an intervening information. Zyszkiewicz indicated he understood. The court accepted the waiver, finding it had been knowingly, intelligently, and voluntarily made. The court then deemed the complaint to be an information. The information charged Zyszkiewicz with maintaining a place for selling or using a controlled substance, hashish and marijuana (§ 11366; count 1); possession of marijuana for sale by a minor, an infraction (§ 11359, subd. (a); count 2); and misdemeanor possession of a controlled substance, mescaline (§ 11350, subd. (a); count 3).

On October 23, 2018, the People filed an intervening information removing count 2 and 3, and amended count 1 to a charge of maintaining a place for selling or using a controlled substance to wit, hashish, marijuana, *and mescaline* (§ 11366; count 1). At trial, Zyszkiewicz acknowledged that a "small amount of Mescaline, one strong dose" was found in his apartment. However, he argued the People had failed to prove beyond a reasonable doubt that he was selling cannabis "or the little bit of mescaline that was [in his apartment]."

B. Legal Principles

Pursuant to Penal Code section 1009, the People are generally prohibited from amending an accusatory pleading to add additional charges following a defendant's waiver of his right to a preliminary hearing. (*People v. Peyton* (2009) 176 Cal.App.4th 642, 654.) "[Penal Code] section 1009 prohibits adding new charges to an accusatory pleading after the defendant has waived his right to a preliminary hearing on that pleading. In enacting section 1009, the Legislature determined that an accusatory

pleading cannot be amended based on evidence not taken at the preliminary hearing. And when, ... no preliminary hearing is held, the pleading cannot be amended to add additional charges." (*Ibid.*) Amendments to the accusatory pleading are prohibited "even if the defendant had notice of the underlying facts or would not be prejudiced by it." (*People v. Mora-Duran* (2020) 45 Cal.App.5th 589, 599.)

However, "not every amendment to an information after a preliminary hearing is waived violates Penal Code section 1009 or a defendant's due process rights. Amendments that do not allege new charges and that do not constitute a 'significant variance' from the original are permissible." (*People v. Mora-Duran, supra,* 45 Cal.App.5th at p. 659, citing *People v. Peyton, supra,* 176 Cal.App.4th at p. 659-660.)

C. Forfeiture

Zyszkiewicz concedes he failed to object to the amendment to the information. Relying upon a concurring opinion by Justice Mosk in *People v. Smith* (2001) 24 Cal.4th 849, he requests we exercise our discretion to reach the merits of his claim, observing that "forfeiture does not *prohibit* an appellate court from reaching a nonpreserved claim, but merely *allows* it not to do so." (*Id.* at p. 854 (conc. opn. of Mosk, J.).) In the absence of a compelling reason to depart from the rule against forfeiture, we decline to exercise our discretion to reach the merits of his claim.

Zyszkiewicz fails to persuasively argue that the People's amendment to the information represented a significant variance from the original charges, that it exposed him to additional punishment, or that he otherwise lacked sufficient notice of charges against him resulting in a violation of his right to due process. The criminal complaint alleged he had maintained a place for selling or using a controlled substance, hashish or marijuana (§ 11366, count 1). The information merely added mescaline to the list of controlled substances supporting count 1. The fact that Zyszkiewicz had been found in possession of mescaline was already alleged in count 3 of the complaint (§ 11350, subd. (a)). Thus, the inclusion of mescaline in the list of controlled substances supporting

count 1 does not represent a significant variance from the original complaint. In light of Zyszkiewicz's failure to object below, we decline to address his additional arguments concerning the People's amendment of the information. His claim is deemed forfeited.

D. Sufficiency of the Evidence Supporting Count 1 Based Upon Mescaline

Zyszkiewicz further contends if this court finds he has forfeited his claim, or resolves the merits of his argument against him, that there was insufficient evidence he maintained a place for the purpose of selling or giving away or using mescaline. Assuming, arguendo, the record contains insufficient evidence showing Zyszkiewicz maintained a place for selling or using mescaline (§ 11366), that does not support reversal of his conviction.

"Where the jury considers both a factually sufficient and a factually insufficient ground for conviction, and it cannot be determined on which ground the jury relied, we affirm the conviction unless there is an affirmative indication that the jury relied on the invalid ground." (*People v. Marks* (2003) 31 Cal.4th 197, 233; see also *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129.) Zyszkiewicz suggests the small quantity of mescaline discovered in his apartment is insufficient to support count 1. However, he fails to direct this court to anything in the record which indicates the jury based their verdict of guilt on the presence of mescaline in his apartment. We therefore reject his assertion.[3]

IV. Appellant Forfeited His Assertion That He is Entitled to Mental Health Diversion

Zyszkiewicz argues he is entitled to retroactive relief pursuant to Penal Code section 1001.36, the mental health division statute. The People correctly assert

---

[3] Zyszkiewicz submits the cumulative effect of the errors asserted in part I through III of his opening brief necessitates reversal of his conviction. Because we conclude he has failed to demonstrate error based upon any of his arguments, we need not address his argument that reversal is required based upon the cumulative effect of the asserted errors.

Zyszkiewicz has forfeited his argument. Penal Code section 1001.36 was enacted June 27, 2018, months *before* the commencement of Zyszkiewicz's criminal trial. As Zyszkiewicz failed to seek relief under Penal Code section 1001.36, which applied prospectively to his case, his reliance upon *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, and *People v. Frahs* (2018) 27 Cal.App.5th 784, do not assist him.

A. The Pretrial Mental Health Diversion Statute

Penal Code section 1001.36 was enacted on June 27, 2018 and took effect immediately. (Stats. 2018, ch. 34, §§ 24, 37.) Penal Code section 1001.36 sets forth a pretrial diversion program for certain defendants diagnosed with qualifying mental disorders. (Pen. Code, § 1001.36, subd. (a).) If a defendant satisfies the six criteria specified in the statute, the court may postpone criminal proceedings to allow the defendant to undergo mental health treatment. (Pen. Code, § 1001.36, subds. (a), (c).)

If the defendant performs satisfactorily in diversion, the trial court shall dismiss the criminal charges against the defendant that were the subject of the criminal proceedings at the time of the initial diversion. (Pen. Code, § 1001.36, subd. (e).) Our Supreme Court recently held that the mental health diversion statute applies retroactively to cases not yet final as of its effective date. (*People v. Frahs* (2020) 9 Cal.5th 618, 630.) *Frahs* held "a conditional limited remand for the trial court to conduct a mental health diversion eligibility hearing is warranted when[] ... the record affirmatively discloses that the defendant appears to meet at least the first threshold eligibility requirement for mental health diversion—the defendant suffers from a qualifying mental disorder." (*Id.* at p. 640.)

B. Analysis

At the time Zyszkiewicz was originally charged, Penal Code section 1001.36 had been in effect for several months. Zyszkiewicz represented himself at trial. It was incumbent upon him to know the law, to request mental health diversion, and to make a prima facie case showing he met the minimum requirements for eligibility as set forth by

Penal Code section 1001.36, if required by the court. (Pen. Code, § 1001.36, subd. (b)(3).)

In his reply brief, Zyszkiewicz acknowledges Penal Code section 1001.36 "took effect approximately four months before his trial," but "it cannot be said that its significance was well-known and its use well-settled." We are not persuaded. Four months is a sufficient period of time to presume the legal community has become aware of the existence of a new law. And, although Zyszkiewicz represented himself at trial, he was charged with knowledge of the law, including Penal Code section 1001.36. Because he failed to seek mental health diversion at any point during the course of criminal proceedings, we decline to consider his request for diversion now.

V. Appellant is Entitled to Request an Ability to Pay Hearing

Relying upon *People v. Dueñas* (2019) 30 Cal.App.5th 1157, Zyszkiewicz asserts his due process rights were violated when the trial court imposed—without a determination of his inability to pay—restitution fines and assessments. He contends his case must be remanded back to the trial court for an ability to pay hearing.[4] The People argue forfeiture, they contend the punitive restitution fine is not unconstitutionally excessive, and imposition of the nonpunitive fines without a hearing on Zyszkiewicz's ability to pay is harmless error in light of the record.

We conclude Zyszkiewicz has not forfeited his challenge to the court assessments (Pen. Code, § 1465.8; Gov. Code, § 70373) imposed at sentencing. We further conclude, that a defendant must have the opportunity to request an ability to pay hearing before

---

[4] The question of whether a court must consider a defendant's ability to pay before imposing or executing fines, fees, and assessments and, if so, which party bears the burden of proof regarding the defendant's ability to pay, is currently pending review before the California Supreme Court. (*People v. Kopp* (2019) 38 Cal.App.5th 47, review granted Nov. 13, 2019, S257844.)

nonpunitive assessments are imposed at sentencing. Our reasoning is fully set forth in *People v. Son* (2020) 49 Cal.App.5th 565 (*Son*).

Insofar as the People argue the existing record demonstrates the court's failure to conduct a hearing on Zyszkiewicz's inability to pay is harmless beyond a reasonable doubt, we disagree. Zyszkiewicz has not yet had the opportunity to request a hearing on his ability to pay and to make a showing that he could not pay the assessments imposed at sentencing. Thus, the existing record is necessarily incomplete with respect to his ability to pay the assessments.

With respect to the restitution fine (Pen. Code, § 1202.4, subd. (b)), Zyszkiewicz failed to object to imposition to the fine below. Consequently, his argument is deemed forfeited.

Even assuming Zyszkiewicz had lodged a timely objection below, we reject his assertion that an ability to pay hearing was constitutionally required before imposition of the fine, which is punitive in nature.[5] As we have explained in *People v. Son*, *supra*, 49 Cal.App.5th at pages 578-579: "[I]n light of the United States Supreme Court precedents clarifying that, under the Constitution, indigency is not a bar to enforcement of monetary judgments arising from unpaid fines imposed as *punishment*, we disagree with *Dueñas* to the extent it ... holds an ability to pay hearing is constitutionally required before imposition of the restitution fine." We therefore reject Zyszkiewicz's challenge to the restitution fine under *Dueñas*.

Finally, as to Zyszkiewicz's assertion claiming the fines and assessments are "excessive" under the excessive fines clauses of the federal and state Constitutions, we need not resolve his claim. As discussed, Zyszkiewicz is entitled to a limited remand for

---

[5] The court also imposed and stayed a matching $900 parole revocation restitution fine (Pen. Code, § 1202.45, subd. (a)). However, because this fine is essentially a corollary of the restitution fine imposed under Penal Code section 1202.4, subdivision (b), we will not separately address it. (See Pen. Code, § 1202.45, subd. (a).)

purposes of requesting an ability to pay hearing on the assessments imposed at sentencing. On remand, Zyszkiewicz may raise his challenge to the restitution fine under the excessive fines clause in the first instance.

A. Background

During sentencing, the court imposed the following fines and fees: a restitution fine in the amount of $900 (Pen. Code, § 1202.4); a suspended matching parole revocation fine (Pen. Code, § 1202.45); a $40 court security fee (Pen. Code, § 1465.8); and a $30 criminal conviction assessment (Gov. Code, § 70373).

B. Forfeiture

The People argue Zyszkiewicz is not entitled to relief because he did object to the assessments and fines in the trial court. With respect to the restitution fine, "[c]ourts have generally declined to apply the forfeiture doctrine where the minimum restitution fine was imposed because the statute expressly precludes objection in that circumstance." (*People v. Montes* (2021) 59 Cal.App.5th 1107, 1116; *Son, supra,* 49 Cal.App.5th at pp. 596-597; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1031.)

Alternatively, where the trial court imposes a restitution fine in excess of the minimum required by statute (over $300), an objection based upon a defendant's asserted inability to pay "would not have been futile under governing law at the time of [their] sentencing hearing[s]." (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154; *People v. Lowery* (2020) 43 Cal.App.5th 1046, 1054; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1073-1074.) Under this circumstance, "[Penal Code] [s]ection 1202.4 expressly contemplates an objection based on inability to pay." (*Frandsen,* at pp. 1153-1154; *Lowery,* at pp. 1053-1054; *Aviles,* at pp. 1073-1074.)

Here, because a $900 restitution fine was imposed, Zyszkiewicz had the statutory right to object to the fine insofar as it exceeded the minimum amount required by statute. (See Pen. Code, § 1202.4, subd. (c).) Because Zyszkiewicz failed to object, we conclude he forfeited his challenge to the restitution fine under basic forfeiture principles.

However, we decline to infer because Zyszkiewicz failed to object to imposition of the restitution fine upon statutory grounds, he also necessarily forfeited his constitutional challenge to imposition of the court operations (Pen. Code, § 1465.8) and court facilities assessments (Gov. Code, § 70373). The court operations and facilities assessments must be imposed by the court "on *every conviction* for a criminal offense." (Pen. Code, § 1465.8; Gov. Code, § 70373, italics added.) Zyszkiewicz "falls into that dwindling category of defendants who had no realistic opportunity to contest the imposition of fines and fees at the time of their pre-*Dueñas* sentencing. (*Son, supra*, 49 Cal.App.5th at p. 598 [conc. opn. of Snauffer, J.], citing *People v. Castellano* (2019) 33 Cal.App.5th 485, 489-490.) "[P]rior to *Dueñas*, it was not reasonably foreseeable that a trial court would entertain an objection to assessments that are prescribed by statute." (*People v. Santos* (2019) 38 Cal.App.5th 923, 932.) Thus, while the defendant in *Dueñas* requested a hearing on her ability to pay attorney fees and court fees (*Dueñas, supra*, 30 Cal.App.5th at p. 1162), it is unreasonable to expect other defendants, pre-*Dueñas*, to have made a similar request.

Dueñas announced a new, unexpected application of the law. When, as here, a defendant's challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture. (*Son, supra*, 49 Cal.App.5th at p. 598; *People v. Montes, supra*, 59 Cal.App.5th 1107; *Jones, supra*, 36 Cal.App.5th at p. 1034; but see, *People v. Frandsen, supra*, 33 Cal.App.5th at pp. 1153-1154 [defendant forfeited challenge by not objecting to the assessments and restitution fine at sentencing].) We therefore reject the People's assertion that Zyszkiewicz forfeited his challenge to imposition of the court operations and facilities assessments.

C. The Eighth Amendment

Zyszkiewicz also argues the court-imposed fines and fees are unconstitutional under the excessive fines clauses of the federal and State Constitutions. In light of our

conclusion that he is entitled to an ability to pay hearing on the court assessments, we need not address his claim that the fines and fees imposed are "excessive" within the meaning of the Eighth Amendment of the federal Constitution and article I, section 17 of the California Constitution. On remand, Zyszkiewicz shall have the opportunity to request a hearing on his ability to pay the restitution fine. Should he request a hearing on his ability to pay the fines and assessments imposed by the court, he shall have the burden of demonstrating an inability to pay.

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded for further proceedings. On remand, Zyszkiewicz shall be afforded the opportunity to request an ability to pay hearing with respect to the court facilities assessment (Gov. Code, § 70373) and the court operations assessment (Pen. Code, § 1465.8). If Zyszkiewicz requests a hearing and he demonstrates an inability to pay these assessments, they must be stricken; otherwise they shall remain in effect. The restitution fine previously imposed is affirmed, as an ability to pay hearing is not constitutionally required with respect to the restitution fine.

SMITH, Acting P.J.

I CONCUR:

SNAUFFER, J.

DE SANTOS, J., Concurring and Dissenting

I concur with the majority in every respect but one. As to appellant's claim under *People v. Dueñas* (2019) 30 Cal.App.5th 1157, I agree with the majority that appellant forfeited his claim as to the restitution fine for the reasons stated. However, I disagree that we cannot infer he also forfeited his claim as to the court security fee and criminal conviction assessment. Because appellant failed to object to the $900 restitution fine, as a practical matter, I infer he would not have complained on similar grounds to the substantively smaller amount of $70 for the fee and assessment. (See *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033.) As such, I would affirm the judgment in whole and not order remand for appellant to request an ability to pay hearing on the court security fee and criminal conviction assessment.

DE SANTOS, J.

No. F18904333 No. _____

THE APPELLATE COURT OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

Appeal from the Superior Court of Fresno County

Honorable James Petrucelli, Judge

Department 61

-o0o-

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

STEPHEN CAMERON ZYSZKIEWICZ,

Defendant and Appellant.

REPORTER'S TRANSCRIPT ON APPEAL

VOLUME 5 of 5
(Pages 1201 - 1217)

Fresno, California December 10, 2018

-o0o-

REPORTER'S TRANSCRIPT

-o0o-

A P P E A R A N C E S:

FOR THE PLAINTIFF AND RESPONDENT: XAVIER BECERRA, Attorney General of the State of California
LISA A. SMITTCAMP, District Attorney of the County of Fresno

FOR THE DEFENDANT AND APPELLANT: IN PROPRIA PERSONA

REPORTED BY:
JOANNA MAGALLANES, C.S.R.
Certificate No. 13846

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

CENTRAL DIVISION

Before the Honorable James Petrucelli, Judge

Department 61

-o0o-

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. STEPHEN CAMERON ZYSZKIEWICZ, Defendant.	Case No. F18904333 REPORTER'S TRANSCRIPT

Fresno, California — December 10, 2018

-o0o-

A P P E A R A N C E S

FOR THE PEOPLE: LISA A. SMITTCAMP, District Attorney of the County of Fresno
BY: ASHLEY PAULSON
Deputy District Attorney

FOR THE DEFENDANT: ELIZABETH DIAZ, Public Defender of the County of Fresno
BY: FRANZ CRIEGO
Richard Ciummo & Associates

Reported by:

JOANNA MAGALLANES, C.S.R.
Certificate No. 13846

MASTER INDEX - VOLUME 5 - (Pages 1201-1217)

SESSIONS

PAGE

DECEMBER 10, 2018
MORNING SESSION 1204

DECEMBER 10, 2018 - MORNING SESSION

(The following proceedings were held in closed court, in the presence of Court, Counsel and the Parties:)

THE COURT: We're calling case number F18904333. This is the People of the State of California versus Stephen Cameron -- I have a hard time with your name, sir, I apologize. Is it Zyszkiewicz?

THE DEFENDANT: Zyszkiewicz.

THE COURT: Zyszkiewicz. Thank you.

Please state your appearances.

MS. PAULSON: Good morning, Your Honor. Ashley Paulson for the People.

MR. CRIEGO: Good morning, Your Honor. Franz Criego on behalf of the defendant who is present, in custody.

THE COURT: This is the date and time set for sentencing.

Does the defendant waive arraignment for judgment of sentence?

MR. CRIEGO: So waived.

THE COURT: Have counsel and the defendant received the probation officer's report, that is the report of Rodney Jones, dated 11/21/18, consisting of 18 pages, additionally there's a letter from the father attached, and the Court has received a couple of letters from the defendant -- have you had an opportunity review those?

MR. CRIEGO: Yes, Your Honor.

THE COURT: All right. Are there any additions or corrections to the probation report?

MR. CRIEGO: Not to the report.

MS. PAULSON: No, Your Honor.

THE COURT: All right. Would counsel for the defendant like to be heard?

MR. CRIEGO: Judge, first of all, my client's mother and wife are present. The mother wishes to address the Court.

THE COURT: That's fine. She has addressed the Court previously, but she's welcome to address the Court at this time.

THE MOTHER: Now?

THE COURT: Please. Come forward and state your name for the record, if you would, and spell your first and last name.

THE MOTHER: My name is Karen, K-a-r-e-n; Zyszkiewicz, Z-y-s-z-k-i-e-w-i-c-z.

THE COURT: Thank you. You may proceed.

THE MOTHER: I'm asking you, Judge Petrucelli, to please consider an alternative to prison for our son Stephen. In many ways, he's still quite naive, trusting, and gentle. He is a nonviolent person. He has not harmed anyone. And I fear that in a prison situation, he might be grievously harmed. I don't think he is equipped to protect himself. Can't the idea of rehab for him be reconsidered? He needs serious psychiatric help, because his thinking is way off, as

evidenced by his decision to represent himself at trial and by other things he has set. I wonder if he might be bipolar. I believe his ongoing depression and the drugs he has used have done this to him. What about house-arrest and use of ankle monitors combined with therapy? Could that be an option? If there are no other options, please place him where he can get the most help possible and be in the safest environment possible. He is not a lost cause. It will take much effort, but I believe with all my heart that our son can get back on the right course if he gets the right help. Thank you.

THE COURT: Thank you, ma'am.

And does the wife wish to be heard? Mr. Criego, does the wife wish to be heard?

MR. CRIEGO: The answer is no, Judge.

THE COURT: All right.

MR. CRIEGO: The defendant does.

THE COURT: Would defendant like to be heard?

MR. CRIEGO: Yes.

THE COURT: Please, sir. You can sit down.

THE DEFENDANT: Everyone in this courtroom understands that this case concerns marijuana and not heroin or crystal meth or crack. And it's most often a misdemeanor for sales. And even in this case, I'm eligible for probation. I'm incredibly remorseful for my actions and how much I've hurt my family. I have mentally conflicting circumstances surrounding cannabis because I've seen patients with MS, seizures -- I

keep hearing from the internet, music, and media about the positive. My whole life, it was frustrating not to be able to figure it out, when I can figure out other things like software engineering degree, while working full-time, and working two jobs after graduating. In jail, the doctor and therapist ask about crystal meth use, but I have not tried it, and I seem to be the only inmate who is not a crystal meth user. I try to get help for my cannabis use with the substance abuse disorder program in jail, and they told me I was okay because I did not have withdrawal symptoms or the same pattern of use as crystal meth or heroin addicts. In short, they said it was okay to use a couple dollars a day of cannabis, and I did not have a problem. For me, it is medicating symptoms of depression and PTSD, using the cannabis instead of pharmaceuticals. And they did give me some pharmaceuticals in jail.

I don't even drink coffee every day. I take a sip of alcohol every couple of weeks, maybe. I eat organic, vegan foods, raw fruits, and salads, and this helps my mental state, along with running 3 miles 3 times per week.

In jail, the beatings, fights, and riots, pepper spray are quite scary. And I've never seen or been involved in anything like this in my life until now. I try to avoid being involved, though inmates claim it is required. My whole life, I've never been in trouble, until 2016, and that was over several hundred dollars worth of MDMA. I understand it is

wrong, or at a minimum, taboo. I did have a problem understanding why people take MDMA a couple times a year, and why it is illegal if it's readily available. And again, music, and internet, and things make it seem okay, and average people at my jobs had used it without issue. In no way do I seek to be on the wrong side of the law. For that crime, they gave me a sheriff's work program, but I went to jail for 60 days because I had moved away. I desperately want to be a good person. This is my first experience being denied jobs, as it resulted of the felony conviction. I suffer psychological distress now for two years. It's humiliating and a humbling experience. I am embarrassed for my actions. But it feels like I don't deserve to be a part of society. I thought I could move away from the cannabis users, but even after going to Clovis, there's an older lady, there's other neighbors -- and I've told them I can't figure out how to deal with the government. And I've contacted the State, Fresno, and Clovis. It's quite embarrassing to be in trouble with the police. It was nice that the neighbor lady made sure my wife was okay when they were at my apartment. I had no idea I would cause my family so much pain by having the medical cannabis products in the closet when probation came to check. I was already having a nervous breakdown about going to the San Mateo jail, and now the inmates in Fresno are telling me that prison is even worse than the Fresno jail, and that rape is common, and that makes me scared.

It's just been an incredibly hard time for me the past couple of years with my uncle, victim of a carjacking, and my mother had suffered cancer. I did give her some CBD cannabis because I had read something on the internet about the cannabis and cancer. I haven't been able to visit them that much with all the court dates. My family has yet to give up on me. My dad, a Vietnam vet. And my mom who made sure I was raised with good moral values and opportunity. I can only beg them for forgiveness. My primary work has been software engineering, working through college -- nonprofit cannabis collective is a side project. And I drain all my finances. As of last summer, I had worked for a software startup called Critical Bloom. An employed contractor for that, as well. I was the primary breadwinner. The next step for my education will be a master's degree.

In jail, my vegetarian diet sometimes has meat. I don't mean to be picky, but vegetarian is just part of my moral compass, nonviolence, and it helps me feel good. It would be best for my career, reentry into society and quitting cannabis if I was allowed to take care of my diet and exercise programs, see my family, dog, and talk to my regular psychologist. I have been trying to deal with issues for two years. I'm an above average inmate when it comes to education, career, and drug use. I've used cannabis, but I've already quit. I'm not a high risk for recidivism or victimizing anyone. And I can reenter society with relative

ease and go back to the software field. I do enjoy being a valuable member of society. Donating plasma, going to the state council meetings, Woodward Park runs, dog parks. I try to not make many friends, as sometimes people get me in trouble. My dog is my best friend. I have a hard time understanding social taboos. But I am not a bad person and do not regularly commit crimes. I had trouble understanding why it was bad, because cannabis helped me feel not depressed. It seems like it had more support than ever. And the smell of it is just outside the courthouse. It just seems so commonplace.

MR. CRIEGO: Can I interrupt? May we approach for a quick second?

THE COURT: Sure.

(Thereupon, a discussion was held at sidebar which was not reported.)

THE COURT: Back on the record. Both counsel is present. Mr. Zyszkiewicz, you may continue.

THE DEFENDANT: I'm sorry for my past shortcomings. Already, the situation is terrible. Doing crime really isn't my thing. I always try to do things properly with the government. And, honest matter, I -- I'm truly sorry for the bottom of my heart for the pain I've caused. I'm sorry to keep missing holidays, the court dates. I -- I had thought that we should bring the market controlled by gangs into -- as normal people, and reduce violence, like it happened to my uncle. I'm just really sorry.

THE COURT: Is that it? Anything else, sir?

THE DEFENDANT: And I won't do it again. I fully understand. I fully understand the laws, and I'm remorseful.

THE COURT: Thank you.

Counsel wish to be heard?

MR. CRIEGO: No, Your Honor. Submit.

THE COURT: Counsel for the People?

MS. PAULSON: Yes, Your Honor. Thank you.

The People agree with probation's recommendation of the aggravated term of 3 years. As this Court knows, the defendant was on formal probation out of San Mateo County for Health and Safety Code 11379(a), and Health and Safety Code 11359(b). The People have great sympathy for the defendant's family; however, we are here because of the defendant's actions, not the defendant's family's actions. And this is the first time the defendant has indicated he has any remorse. The defendant walked into this courtroom during his opening statements and pulled out THC in this courtroom. He brought some of the THC that was the exact same as the detectives had seized from his apartment. The People believe that the defendant is not naive and he is, in fact, very intelligent and extremely manipulative, based on his actions and especially the letters that he keeps writing to the court. The People believe that in this case it is completely appropriate for the defendant to be sentenced to prison for 3 years. Thank you.

THE COURT: Submitted, counsel?

MS. PAULSON: Submitted.

THE COURT: Submitted?

MR. CRIEGO: Just one quick comment, Judge.

THE COURT: Sure.

MR. CRIEGO: The fact that he was on probation in Santa Clara -- San Mateo, would give rise to the occasion, preventing him from having the mitigated term, but does not preclude him from having the middle term. Submit.

THE COURT: Thank you.

Then the Court has considered the probation report as noted, and the letters from both the family and the defendant, and considered the defendant's comments. Pursuant to rule 4.413, consideration of eligibility for probation, the defendant is statutorily eligible for probation without limitation for the offenses.

With regard to rule 4.412, circumstances and aggravation, that's relating to the crime; clearly the matter in which this crime was carried out indicates planning, sophistication, and professionalism. The facts pertaining to the defendant -- the defendant's prior convictions as an adult are numerous and of increasing seriousness. The defendant was on probation of parole when the crime was committed.

With regards to circumstances and mitigation pursuant to rule 4.423, this Court finds no factors in mitigation related to the crime or the defendant. The defendant currently has 92

days credit; that is 46 actual days, 46 good time/work time, credits for a total of 92. Although the defendant is statutorily eligible without limitation, this Court has concerns related to his inability, as the defendant was placed on probation previously for similar crimes in San Mateo County, just a little over a year ago, and for very similar conducts. Based on the amount of marijuana found and other drugs, as well as the way it was packaged, stored, and labeled for distribution, it appears in this course, the defendant merely moved his illegal operation to Fresno County. When he was interviewed by the probation officer, it was apparent that he was concerned with law enforcement conducting a probation compliant search of his residence while he was in custody serving his 120-day sentencing in San Mateo County. Additionally, based on the e-mail he sent to his assigned probation officer in San Mateo County, it appears he was more concerned about the amount of product that he lost when he -- than he was about obeying the law and obeying the laws under his probationary terms. And this Court has sat through the trial and has listened to the defendant, and this defendant was clearly aware of what he was doing, and more importantly thought that the Court and the laws of this State were wrong and that he was right. And it appears to this Court that he operated an illegal cannabis dispensary out of his home while he was on probation.

Accordingly, it is ordered that he be denied probation,

and the defendant be committed to the California Department of Corrections and Rehabilitation in case number F18904333 as to Count 1 for the aggravated term of 3 years. The defendant has received total time credits of 92 days; that is 46 actual, 46 good time/work time credits. In compliance to Penal Code Section 1202.4, the defendant is to pay a restitution fine of 900 dollars. In compliance with Penal Code Section 1202.45, the defendant is to pay an additional restitution fine of 900 dollars if the period of parole is ordered, but that is suspended, unless parole is revoked. In --

MR. CRIEGO: I'm sorry. Does the Court mean to say 458 for the last fine, meaning 045 on both? Second fine should be I believe 0.

THE COURT: I believe the first one is .4, and the second one is .45.

MR. CRIEGO: Thank you.

THE COURT: Thank you.

In compliance with Penal Code Section 296, the defendant is ordered to provide buccal swab samples and right thumbprint, a full palm print of each hand, and any blood specimens or other biological samples for law enforcement analysis. The defendant will be included in the State of California's DNA forensic identification database and databank. This order is to be included in the abstract of judgment. Defendant is ordered to pay a security fee of 40 dollars pursuant to Penal Code Section 1465.8(a)(1) for each

conviction. A 30 dollar assessment fee pursuant to Government Code Section 70373 for each conviction. A probation report fee of 296 dollars pursuant to Penal Code Section 1203.1(b). And you are to make arrangements within 30 days following your release from custody at the Action Center in Fresno County. There will be no attorney's fees ordered.

The Court has received the prohibited persons form filed by the defendant. And the probation report notes that there were no firearms noted, and the Court will execute the appropriate order under Proposition 63 compliance.

Sir, you have a right to appeal from the judgment of this Court to the appellate courts for any ruling this Court has made from your trial, from your conviction, and from the sentence this Court has just imposed. If you wish to file an appeal, you have 30 days to file a Notice of Appeal. That 30-day period starts to run from today. If you wish to file a Notice of Appeal, you should first ask your attorney to file a Notice of Appeal on your behalf. If your attorney fails to file a Notice of Appeal on your behalf and you want to appeal, you must file your own Notice of Appeal upon your request. You must file a timely Notice of Appeal with the clerk of this court, and not with the Court of Appeal. If you cannot afford an attorney, an attorney will be provided at no cost or expense to you. And your attorney will be provided with a transcript of all proceedings at no cost or expense to you. If you intend to appeal, you must file a timely Notice of

Appeal, as I have just explained to you.

Do you understand your rights of appeal as I've explained them to you, sir?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions regarding that?

THE DEFENDANT: No.

THE COURT: Then the defendant is remanded to the custody of the sheriff for delivery to the custody of the director of corrections. The Department of Corrections may designate an execution of the sentence, committing the defendant to the California state prison for the term just imposed. Any previous orders setting bail and release are hereby terminated.

Good luck, sir.

MS. PAULSON: Thank you, Your Honor.

MR. CRIEGO: Thank you, Judge.

(Proceedings concluded.)

(Volume 5 consists of pages 1201 through 1217. There are no pages 1217 through 1500. There are no further volumes.)

-o0o-

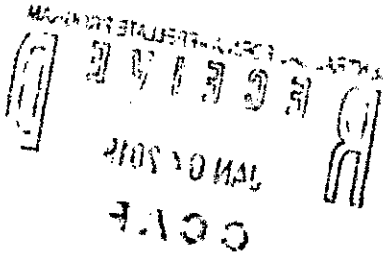
STATE OF CALIFORNIA)
) ss.
COUNTY OF FRESNO)

I, JOANNA MAGALLANES, Official Certified Shorthand Reporter of the State of California, County of Fresno, do hereby certify that the foregoing transcript, pages 1201 through 1217, inclusive, is a complete, true and correct transcription of the stenographic notes as taken by me in the above-entitled matter.

DATED: FRESNO, CALIFORNIA

December 28, 2018.

JOANNA MAGALLANES, CSR
OFFICIAL SHORTHAND REPORTER
CERTIFICATE NO. 13846



SUPREME COURT OF THE UNITED STATES

STANDING AKIMBO, LLC, ET AL., *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 20–645. Decided June 28, 2021

The petition for a writ of certiorari is denied.

Statement of JUSTICE THOMAS respecting the denial of certiorari.

Sixteen years ago, this Court held that Congress' power to regulate interstate commerce authorized it "to prohibit the local cultivation and use of marijuana." *Gonzales* v. *Raich*, 545 U. S. 1, 5 (2005). The reason, the Court explained, was that Congress had "enacted comprehensive legislation to regulate the interstate market in a fungible commodity" and that "exemption[s]" for local use could undermine this "comprehensive" regime. *Id.*, at 22–29. The Court stressed that Congress had decided "to prohibit *entirely* the possession or use of [marijuana]" and had "designate[d] marijuana as contraband for *any* purpose." *Id.*, at 24–27 (first emphasis added). Prohibiting any intrastate use was thus, according to the Court, "'necessary and proper'" to avoid a "gaping hole" in Congress' "closed regulatory system." *Id.*, at 13, 22 (citing U. S. Const., Art. I, §8).

Whatever the merits of *Raich* when it was decided, federal policies of the past 16 years have greatly undermined its reasoning. Once comprehensive, the Federal Government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary.

This case is a prime example. Petitioners operate a med-

Appendix D

ical-marijuana dispensary in Colorado, as state law permits. And, though federal law still flatly forbids the intrastate possession, cultivation, or distribution of marijuana, Controlled Substances Act, 84 Stat. 1242, 1247, 1260, 1264, 21 U. S. C. §§802(22), 812(c), 841(a), 844(a),[1] the Government, post-*Raich*, has sent mixed signals on its views. In 2009 and 2013, the Department of Justice issued memorandums outlining a policy against intruding on state legalization schemes or prosecuting certain individuals who comply with state law.[2] In 2009, Congress enabled Washington D. C.'s government to decriminalize medical marijuana under local ordinance.[3] Moreover, in every fiscal year since 2015, Congress has prohibited the Department of Justice from "spending funds to prevent states' implementation of their own medical marijuana laws." *United States* v. *McIntosh*, 833 F. 3d 1163, 1168, 1175–1177 (CA9 2016) (interpreting the rider to prevent expenditures on the prosecution of individuals who comply with state law).[4] That policy

---

[1] A narrow exception to federal law exists for Government-approved research projects, but that exception does not apply here. 84 Stat. 1271, 21 U. S. C. §872(e).

[2] See Memorandum from Dep. Atty. Gen. to Selected U. S. Attys., Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009); Memorandum from Dep. Atty. Gen. to All U. S. Attys., Guidance Regarding Marijuana Enforcement (Aug. 29, 2013). In 2018, however, the Department of Justice rescinded those and three other memorandums related to federal marijuana laws. Memorandum from U. S. Atty. Gen. to All U. S. Attys., Marijuana Enforcement (Jan. 4, 2018). Despite that rescission, in 2019 the Attorney General stated that he was "'accepting the [2013] Memorandum for now.'" Somerset, Attorney General Barr Favors a More Lenient Approach to Cannabis Prohibition, Forbes, Apr. 15, 2019.

[3] See Congress Lifts Ban on Medical Marijuana for Nation's Capitol, Americans for Safe Access, Dec. 13, 2009.

[4] Despite the Federal Government's recent pro-marijuana actions, the Attorney General has declined to use his authority to reschedule marijuana to permit legal, medicinal use. *E.g.*, *Krumm* v. *Holder*, 594 Fed. Appx. 497, 498–499 (CA10 2014) (citing §811(a)); Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53688

has broad ramifications given that 36 States allow medicinal marijuana use and 18 of those States also allow recreational use.[5]

Given all these developments, one can certainly understand why an ordinary person might think that the Federal Government has retreated from its once-absolute ban on marijuana. See, *e.g.*, Halper, Congress Quietly Ends Federal Government's Ban on Medical Marijuana, L. A. Times, Dec. 16, 2014. One can also perhaps understand why business owners in Colorado, like petitioners, may think that their intrastate marijuana operations will be treated like any other enterprise that is legal under state law.

Yet, as petitioners recently discovered, legality under state law and the absence of federal criminal enforcement do not ensure equal treatment. At issue here is a provision of the Tax Code that allows most businesses to calculate their taxable income by subtracting from their gross revenue the cost of goods sold *and* other ordinary and necessary business expenses, such as rent and employee salaries. See 26 U. S. C. §162(a); 26 CFR 1.61–3(a) (2020). But because of a public-policy provision in the Tax Code, companies that deal in controlled substances prohibited by federal law may subtract only the cost of goods sold, not the other ordinary and necessary business expenses. See 26 U. S. C. §280E. Under this rule, a business that is still in the red after it pays its workers and keeps the lights on might nonetheless owe substantial federal income tax.

As things currently stand, the Internal Revenue Service is investigating whether petitioners deducted business expenses in violation of §280E, and petitioners are trying to

---

(2016).

[5] Hartman, Cannabis Overview, Nat. Conference of State Legislatures (June 22, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx. The state recreational use number does not include South Dakota, where a state court overturned a ballot measure legalizing marijuana. *Ibid.*

the watertight nationwide prohibition that a closely divided Court found necessary to justify the Government's blanket prohibition in *Raich*. If the Government is now content to allow States to act "as laboratories" "'and try novel social and economic experiments,'" *Raich*, 545 U. S., at 42 (O'Connor, J., dissenting), then it might no longer have authority to intrude on "[t]he States' core police powers . . . to define criminal law and to protect the health, safety, and welfare of their citizens." *Ibid.* A prohibition on intrastate use or cultivation of marijuana may no longer be necessary *or* proper to support the Federal Government's piecemeal approach.