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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUAN CARLOS FONSECA, Defendant and Appellant.	H048030 (Santa Clara County Super. Ct. No. E1138356)

In 2015, defendant Juan Carlos Fonseca was convicted of multiple offenses including kidnapping to commit extortion (Pen. Code, § 209, subd. (a)).[1] Fonseca appealed his convictions, and we reversed and remanded the matter for resentencing. On remand, the trial court resentenced Fonseca to a term in prison that included a sentence of life without the possibility of parole (LWOP). Fonseca appealed again. In this second appeal, Fonseca argues that his LWOP sentence is unconstitutional, and he is entitled to a youth offender parole hearing under section 3051. He claims that section 3051 violates his right to equal protection under the law because it categorically excludes him from the right to have a youth offender parole hearing. He further argues that insufficient

[1] Unspecified statutory references are to the Penal Code. In 2015, Fonseca was convicted of the following offenses: kidnapping to commit extortion (§ 209, subd. (a)), kidnapping to commit robbery (§ 209, subd. (b)(1)), torture (§ 206), assault with a deadly weapon (§ 245, subd. (a)(1)), criminal threats (§ 422), first degree robbery (§§ 211, 213, subd. (a)(1)(A)), first degree burglary (§§ 459, 460, subd. (a)), grand theft from a person (§§ 484, 487, subd. (c)), theft or unauthorized use of a vehicle (Veh. Code, § 10851, subd. (a)), and arson (§ 451, subd. (d)).

evidence supports the trial court's finding that he had the ability to pay the $10,000 restitution fine imposed under former section 1202.4 and that the trial court erred in calculating the court security fee (§ 1465.8) and court facilities assessment (Gov. Code, § 70373). We agree with Fonseca that the court security fee and court facilities assessment must be modified but reject his other claims of error. As modified, we affirm the judgment.

I. BACKGROUND

A. *Fonseca's Criminal Offenses, Trial, and His First Appeal*[2]

In February 2011, Fonseca and several other men broke into victim Gary Wise's house after he had left for the evening. The men intended to steal valuables from two safes inside Wise's house, but they discovered that they were unable to move or open them. Consequently, the men decided to wait inside Wise's home until he returned. When Wise came home, the men beat him with bats and pool sticks and moved him from the front to the inside of the house. Wise initially refused to give them the combination to the safes. The men placed a gun in his mouth, threatened his son, hit him in the groin with a pool stick multiple times, and squeezed his nose with pliers. Wise eventually relented and provided them with the combinations to his safes. The men opened the safes, took what was inside, and stole Wise's truck, which they drove into the mountains and later burned. Fonseca was 21 years old at the time the offenses were committed.

After a jury trial, Fonseca was convicted of multiple offenses including kidnapping to commit extortion (§ 209, subd. (a)) and grand theft from a person (§§ 484, 487, subd. (c)). The jury also found true multiple enhancements for personal use of a

[2] A more detailed summary of the evidence introduced at Fonseca's trial is found in this court's opinion in his prior appeal, *People v. Gonzales et al*. (Feb. 7, 2019, H042970) 2019 WL 475800 [nonpub. opn.]. On our own motion, we take judicial notice of our prior opinion. (Evid. Code, §§ 452, 459.) We provide a brief summary of the facts, which we derive from our prior opinion.

firearm (§ 12022.53, subd. (b)). The trial court sentenced Fonseca to a LWOP term for his conviction for kidnapping to commit extortion, which is a mandatory sentence if the victim "suffers death or bodily harm, or is intentionally confined in a manner that exposes [the victim] to a substantial likelihood of death" (§ 209, subd. (a)), and further imposed a 10-year enhancement for one of his firearm enhancements. The trial court stayed Fonseca's sentence for grand theft from a person under section 654. In total, Fonseca was sentenced to a total term of LWOP plus 15 years four months.

Fonseca appealed. On appeal, we concluded in part that his conviction for grand theft from a person needed to be reversed and that remand was required so that the trial court could exercise its newfound discretion to strike his firearm enhancement under section 12022.53, subdivision (h), as amended by Senate Bill No. 620.

B. ***The Motion Filed Before the Resentencing Hearing***

In February 2020, Fonseca filed a memorandum asking that the trial court exercise its discretion to strike his firearm enhancements. His memorandum also argued that the mandatory LWOP sentence for an individual who was under the age of 25 years old when his or her crimes were committed was unconstitutional because section 3051, which excluded youthful offenders sentenced to LWOP, violated equal protection principles. Fonseca argued that section 3051 was enacted following the Legislature's recognition that brain development continues into the early 20s or later and that there was no rational basis for denying youthful offenders sentenced to LWOP the opportunity to have youth offender parole hearings.

C. ***Resentencing***[3]

At the resentencing hearing held on February 25, 2020, the trial court resentenced Fonseca pursuant to this court's order on remand: the trial court struck the conviction for grand theft from a person and struck the firearm enhancements imposed under section 12022.53, subdivision (b). Fonseca was sentenced to a LWOP term, consecutive to five years four months. The trial court noted that Fonseca had raised arguments about the constitutionality of his LWOP sentence but concluded that it would "deny [the constitutional arguments]" if it were to consider them.

The trial court imposed a $400 court security fee (§ 1465.8) and a $300 court facilities assessment (Gov. Code, § 70373). The trial court also reimposed a $10,000 restitution fine under former section 1202.4 over Fonseca's objection. Fonseca argued that he would be in custody for the remainder of his life and would "never be able to pay off the $10,000." The trial court concluded: "I certainly understand he will be in prison for the rest of his life, and depending on his security classification, he may or may not have access to the better paying prison industry jobs, but there may be money put on his books or others that might help pay any restitution fines. So I will decline to change that part of the sentencing."

Fonseca filed a timely notice of appeal from the judgment.

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[3] In February 2020, Fonseca also filed a motion to continue the resentencing hearing. According to an attached declaration, Fonseca was not prepared to proceed with the resentencing hearing because his counsel had not yet received his "C" file from the California Department of Corrections and Rehabilitation. The trial court later denied his motion to continue after finding this was insufficient good cause to continue the matter. The trial court, however, stated that it would assume, for the sake of the resentencing hearing, that Fonseca's postconviction behavior had been "good."

II. DISCUSSION

A. *Equal Protection*

Fonseca, who was 21 years old at the time the offenses were committed in this case, argues that he is entitled to a youth offender parole hearing and that section 3051, subdivision (h)'s exclusion of youthful offenders (those between 18 and 25 years of age) sentenced to LWOP violates principles of equal protection under both the federal and California Constitutions. As we explain, we find no equal protection violation.

1. *Section 3051*

"The United States Supreme Court has interpreted the Eighth Amendment to impose unique constraints on the sentencing of juveniles [(those under the age of 18)] who commit serious crimes. This case law reflects the principle that 'children are constitutionally different from adults for purposes of sentencing.' " (*People v. Contreras* (2018) 4 Cal.5th 349, 359 (*Contreras*).) The United States Supreme Court has derived several limitations on juvenile sentencing, including that no juvenile that commits a nonhomicide offense can be sentenced to LWOP (*Graham v. Florida* (2010) 560 U.S. 48, 74 (*Graham*)) and no juvenile who commits a homicide offense can be automatically sentenced to LWOP (*Miller v. Alabama* (2012) 567 U.S. 460, 465 (*Miller*)). In *People v. Caballero* (2012) 55 Cal.4th 262, the California Supreme Court held that a juvenile's sentence of 110 years to life for three counts of attempted murder was the equivalent of a LWOP sentence and violated the Eighth Amendment under *Graham*. (*Id*. at p. 268.)

In response to these cases, the Legislature enacted Senate Bill No. 260, which became effective January 1, 2014. (Stats. 2013, ch. 312.) In part, Senate Bill No. 260 enacted section 3051, which created youth offender parole hearings. Under section 3051, "[a] youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger, or who was under 18 years of age as specified in paragraph (4) of subdivision (b), at the time of the controlling offense." (§ 3051, subd. (a)(1).)

Section 3051 requires the Board to conduct a "youth offender parole hearing" for a prisoner who was 25 years of age or younger at the time of the commission of the controlling offense, either during the 15th, 20th, or 25th year of the youthful offender's incarceration depending on the controlling offense. (*Id*., subd. (b).) A controlling offense is defined as the offense or enhancement of which the sentencing court imposed the longest term of imprisonment. (*Id*., subd. (a)(2)(B).)

"[T]he purpose of section 3051 is to give youthful offenders 'a meaningful opportunity to obtain release' after they have served at least 15, 20, or 25 years in prison (§ 3051, subd. (e)) and made ' "a showing of rehabilitation and maturity." ' " (*People v. Edwards* (2019) 34 Cal.App.5th 183, 198 (*Edwards*); Stats. 2013, ch. 312, § 1.) As Senate Bill No. 260 was initially a response to the United States Supreme Court and California Supreme Court cases that imposed restrictions on juvenile sentencing under the Eighth Amendment, the original version of section 3051 made youth offender parole hearings available *only* to juveniles who committed their controlling offenses before the age of 18. (Stats. 2013, ch. 312, § 4; *Contreras*, *supra*, 4 Cal.5th at p. 381.)

In subsequent years, the Legislature has since amended section 3051 several times to increase the age threshold for youth offender parole hearings, first to age 23 (Stats. 2015, ch. 471, § 1) and then to age 25 (Stats. 2017, ch. 675, § 1). (*Contreras*, *supra*, 4 Cal.5th at p. 381.) When expanding the age limitation to age 23, the Senate Committee on Public Safety noted that "[s]cience, law, and common sense" supported the provision of youth offender parole hearings to young adults between the ages of 18 and 23, as "[r]ecent scientific evidence on adolescent and young adult development and neuroscience shows that certain areas of the brain—particularly those affecting judgment and decision-making—do not fully develop until the early-to-mid-20s." (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 261 (2015-2016 Reg. Sess.) April 28, 2015, p. 3.) And when expanding the age limitation to age 25, the Assembly Committee on Public Safety noted that "[r]esearch has shown that the prefrontal cortex doesn't have nearly the

functional capacity at age 18 as it does at 25." (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1308 (2017-2018 Reg. Sess.) April 25, 2017, p. 2.) The prefrontal cortex is responsible for many important brain functions including "attention, complex planning, decision making, impulse control, logical thinking, organized thinking, personality development, risk management, and short-term memory." (*Ibid*.)

The Legislature has also amended section 3051 to extend youth offender parole hearings to juveniles serving a LWOP sentence during their 25th year of incarceration. (§ 3051, subd. (b)(4); Stats. 2017, ch. 684, § 1.5; *Contreras*, *supra*, 4 Cal.5th at p. 381.) According to an analysis by the Senate Public Safety Committee, this 2017 amendment was intended to bring California into compliance with *Montgomery v. Louisiana* (2016) 577 U.S. 190 (*Montgomery*), which held that the prohibition against mandatory LWOP terms for juvenile offenders articulated in *Miller*, *supra*, 567 U.S. 460 was retroactive. (*Montgomery*, *supra*, at p. 206.) (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 394 (2017-2018 Reg. Sess.) Mar. 21, 2017, pp. 2-3.)

Despite the Legislature's recent expansion of eligibility for youth offender parole hearings, section 3051 still excludes several categories of youthful offenders. (§ 3051, subd. (h).) Youthful offenders who have been sentenced "pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667 [Three Strike offenders], or Section 667.61 [One Strike offenders], or to cases in which an individual is sentenced to life in prison without the possibility of parole for a controlling offense that was committed after the person had attained 18 years of age" are not given the opportunity to have a youth offender parole hearing. (§ 3051, subd. (h).)

In this case, Fonseca was sentenced to LWOP for "a controlling offense that was committed after [he] had attained 18 years of age" (§ 3051, subd. (h)), kidnapping to commit extortion (§ 209, subd. (a)). Accordingly, he is categorically ineligible for a youth offender parole hearing under section 3051.

2. ***General Legal Principles and Standard of Review***

The Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution both guarantee all persons equal protection of the laws. The equal protection guarantee in the California Constitution is substantively equivalent to the equal protection clause in the United States Constitution, and our analysis of equal protection claims under both is substantially the same. (See *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 571-572.)

" ' " 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' " [Citation.] In other words, we ask at the threshold whether two classes that are different in some respects are sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws.' " (*People v. Foster* (2019) 7 Cal.5th 1202, 1211-1212.)

As in this case, when a statute "involves neither a suspect class nor a fundamental right, it need only meet minimum equal protection standards, and survive 'rational basis review.' [Citation.] A criminal defendant has no vested interest ' "in a specific term of imprisonment or in the designation a particular crime receives." ' [Citation.] It is both the prerogative and the duty of the Legislature to define degrees of culpability and punishment, and to distinguish between crimes in this regard. [Citation.] Courts routinely decline to intrude upon the 'broad discretion' such policy judgments entail.

[Citation.] Equal protection does not entitle the judiciary to second-guess the wisdom, fairness, or logic of the law." (*People v. Turnage* (2012) 55 Cal.4th 62, 74 (*Turnage*).)[4]

Thus, "a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. [Citations.] Further, a legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification.' [Citations.] Instead, a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' " (*Heller v. Doe* (1993) 509 U.S. 312, 320 (*Heller*).) Moreover, it is not the People's burden to demonstrate that a classification has a rational basis, and " '[a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.' " (*Ibid.*) "The underlying rationale for a statutory classification need not have been ' "ever actually articulated" ' by lawmakers, and it does not need to ' "be empirically substantiated." ' " (*People v. Chatman* (2018) 4 Cal.5th 277, 289 (*Chatman*).) The party attacking the classification bears the burden " 'to negative every conceivable basis which might support it.' " (*Heller*, *supra*, at p. 320.)

On appeal, we review de novo Fonseca's claims that section 3051 violates principles of equal protection. (*In re Murray* (2021) 68 Cal.App.5th 456, 463 (*Murray*).)

3. ***Youthful Offenders Sentenced to LWOP for a Nonhomicide Offense and Youthful Offenders Sentenced to Life with the Possibility of Parole***

First, Fonseca argues that youthful offenders sentenced to LWOP for a nonhomicide offense are similarly situated to youthful offenders who commit first degree murder and are sentenced to life with the possibility of parole. He argues that both groups are "violent youthful offenders who seek the opportunity to demonstrate after

[4] Both parties agree that rational basis review applies in this case.

extended terms of imprisonment that they should rejoin society" and are therefore similarly situated for the purposes of section 3051. Assuming that the two groups are similarly situated, we conclude that Fonseca has not met his burden to demonstrate that there is no rational basis for the Legislature's distinction between them.

Several appellate courts have concluded that section 3051's disparate treatment of youthful offenders convicted of homicide and sentenced to LWOP and youthful offenders convicted of homicide and sentenced to life terms *with* the possibility of parole does not violate principles of equal protection. (*People v. Jackson* (2021) 61 Cal.App.5th 189, 199-200 (*Jackson*); *People v. Acosta* (2021) 60 Cal.App.5th 769, 779-781 (*Acosta*); *In re Williams* (2020) 57 Cal.App.5th 427, 436; *People v. Sands* (2021) 70 Cal.App.5th 193, 204-205 (*Sands*).) These decisions have generally found that a rational basis exists for the Legislature's distinction between the two groups—defendants who are sentenced to LWOP have committed more severe crimes that warrant harsher punishments compared to defendants who are *not* sentenced to LWOP. (*Jackson*, *supra*, at pp. 199-200; *Acosta*, *supra*, at pp. 779-780; *In re Williams*, *supra*, at p. 436; *Sands*, *supra*, at pp. 204-205.) In *In re Williams*, where the defendant was convicted of special circumstance multiple murder, the Second Appellate District held that crimes that carry LWOP terms are those that the Legislature has "deem[ed] so morally depraved and so injurious as to warrant a sentence that carries no hope of release for the criminal and no threat of recidivism for society." (*In re Williams*, *supra*, at p. 436.)

We acknowledge that Fonseca was not convicted of a homicide offense in this case, and he is arguing on appeal that section 3051's treatment of youthful offenders who have committed *nonhomicide* offenses violates equal protection principles when youthful offenders convicted of homicide and sentenced to life terms with the possibility of parole will be eligible for youth offender parole hearings. The rationale set forth in *Jackson*, *In re Williams*, and *Acosta*, however, remain applicable to nonhomicide offenders sentenced to LWOP. "The Legislature has prescribed an LWOP sentence for only a small number

of crimes." (*In re Williams*, *supra*, 57 Cal.App.5th at p. 436.)[5] Moreover, " ' "[i]t is the prerogative, indeed the duty, of the Legislature to recognize degrees of culpability when drafting a Penal Code." [Citation.] . . . "The decision of how long a particular term of punishment should be is left properly to the Legislature. The Legislature is responsible for determining which class of crimes deserves certain punishments and which crimes should be distinguished from others. As long as the Legislature acts rationally, such determinations should not be disturbed." ' " (*Jackson*, *supra*, 61 Cal.App.5th at p. 200.) By adjudging certain nonhomicide crimes, such as certain types of aggravated kidnapping, to be so grievous as to carry a punishment of LWOP, the Legislature has impliedly determined that such crimes are *more* deserving of punishment compared with crimes that carry a sentence of life *with* the possibility of parole.

Fonseca relies on *Edwards*, *supra*, 34 Cal.App.5th 183 and *Contreras*, *supra*, 4 Cal.5th 349 and argues that excluding youthful offenders who commit nonhomicide offenses bears no rational relationship to the purpose of section 3051 because both types of youthful offenders committed offenses when their brains were similarly underdeveloped, and the effects of murder are more severe and irrevocable compared to a nonhomicide crime.

Edwards held that section 3051's exclusion of youthful offenders sentenced under the One Strike law (§ 667.61) violated equal protection principles.[6] (*Edwards*, *supra*, 34 Cal.App.5th at p. 197.) In reaching this conclusion, the *Edwards* court relied on dicta in

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[5] In addition to aggravated kidnapping where the victim has suffered death, bodily harm, or is intentionally confined in a manner that exposes the victim to a substantial likelihood of death (§ 209, subd. (a)), the Legislature has prescribed LWOP terms for a very limited number of offenses that do not always result in a loss of life, including treason (§ 37), felonies involving great bodily injury committed by habitual offenders (§ 667.7), and attempting to derail a train (§ 218).

[6] The One Strike law is an alternative, harsher sentencing scheme that applies to specified sexual offenses.

Contreras, *supra*, 4 Cal.5th 349. In *Contreras*, the California Supreme Court held that juvenile sentences of 50 years to life and 58 years to life under the One Strike law violated the Eighth Amendment under the standards articulated by the United States Supreme Court in *Graham*. (*Contreras*, *supra*, at pp. 356, 358-359, 379.)

Contreras had no occasion to and did not discuss equal protection principles in its analysis, as that issue was not before the court. *Contreras*, however, made several observations about the treatment of One Strike offenders under current sentencing laws. First, *Contreras* noted that One Strike offenders remained ineligible for youth offender parole hearings under section 3051, but "in light of the changing statutory landscape," it saw no reason to further opine on constitutional and statutory issues that may be rendered moot by legislative action. (*Contreras*, *supra*, 4 Cal.5th at p. 382.) Second, *Contreras* observed that section 3051's treatment of One Strike offenders "appears at odds with the high court's observation that 'defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. . . .' " (*Contreras*, *supra*, at p. 382, quoting *Graham*, *supra*, 560 U.S. at p. 69.) Third, *Contreras* acknowledged the concern that the sentencing laws removed an incentive for rapists not to kill victims because "if the defendants had killed their victims after the sexual assaults and had been sentenced to LWOP, they would have been eligible for a youth offender parole hearing after 25 years of incarceration." (*Contreras*, *supra*, at p. 382.)

After analyzing *Contreras*, *Edwards* concluded that "there is no crime as horrible as intentional first degree murder." (*Edwards*, *supra*, 34 Cal.App.5th at p. 197.) *Edwards* noted that United States Supreme Court case law has consistently meted out the harshest penalties for murderers, but section 3051 "flouts" this pattern by making youthful offender parole hearings unavailable to those who have committed a One Strike

offense.[7] (*Edwards*, *supra*, at p. 197.) *Edwards* acknowledged that sex offenders recidivate but noted that "[o]f course murderers, too, recidivate, and the state has an interest in severely punishing the crime of murder." (*Id.* at p. 199.) As a result, *Edwards* concluded that section 3051's carve-out for One Strike offenders violated principles of equal protection because there was no rational relationship for treating first degree murderers and One Strike offenders differently. (*Edwards*, *supra*, at p. 197.) In *In re Woods* (2021) 62 Cal.App.5th 740, review granted June 16, 2021 (S268740), the Second Appellate District agreed with *Edwards* and similarly concluded that section 3051's exclusion of One Strike offenders violated equal protection principles. (*Woods*, *supra*, at pp. 753-757.)

The conclusion reached in *Edwards* and *Woods* have not been unanimously adopted by the Courts of Appeal, and there is presently a split of authority on the issue. Several appellate courts have disagreed with *Edwards* and *Woods* and have determined that the threat of recidivism by One Strike offenders provides a rational basis for the Legislature's decision to exclude them from section 3051. (*People v. Williams* (2020) 47 Cal.App.5th 475, 493 (*Williams*), review granted Jul. 22, 2020 (S262229); *People v. Moseley* (2021) 59 Cal.App.5th 1160, 1170, review granted Apr. 14, 2021 (S267309); *People v. Miranda* (2021) 62 Cal.App.5th 162, 182-186, review granted Jun. 16, 2021 (S268384).) Ultimately, the California Supreme Court will resolve whether section 3051's exclusion of One Strike youthful offenders violates equal protection principles, as the issue is presently pending review. (See *Williams*, *supra*, 47 Cal.App.5th 475, review granted Jul. 22, 2020 (S262229).) And as our case does not involve a sentence under the One Strike law, *Edwards* is not entirely instructive, and we

[7] For example, the United States Supreme Court has recognized that "[t]here is a line 'between homicide and other serious violent offenses against the individual.' " (*Graham*, *supra*, 560 U.S. at p. 69.)

need not reach the issue of whether section 3051's exclusion of One Strike offenders survives rational basis review.

More importantly, *Edwards* does not persuade us that punishment cannot serve as a rational basis for the Legislature's decision to exclude youthful offenders serving a LWOP sentence. *Edwards* placed great weight on *Contreras*'s observation that offenders that do not kill, intend to kill, or foresee that a death will occur are " 'categorically less deserving' " of the most serious forms of punishment than murderers. (*Contreras*, *supra*, 4 Cal.5th at p. 382; *Edwards*, *supra*, 34 Cal.App.5th at p. 197 ["no crime [is] as horrible as intentional first degree murder"].) *Contreras*, however, involved an Eighth Amendment challenge to a juvenile sentence; the California Supreme Court did not analyze whether LWOP sentences for nonhomicide offenses violated the equal protection clause in any way, nor did it consider the constitutionality of LWOP sentences for nonjuveniles. (See *Contreras*, *supra*, at pp. 359, 382].) "It is axiomatic that cases are not authority for propositions not considered." (*People v. Casper* (2004) 33 Cal.4th 38, 43.) *Contreras* is therefore not controlling authority on whether section 3051's exclusion of youthful offenders sentenced to a LWOP term violates principles of equal protection. (*Williams*, *supra*, 47 Cal.App.5th at pp. 492-493.)

Furthermore, were we to adopt Fonseca's position that *Edwards* compels a determination that homicide crimes are categorically more deserving of harsher punishments than nonhomicide crimes, we would be erroneously "insert[ing] our own policy concerns into the [equal protection] analysis." (*Acosta*, *supra*, 60 Cal.App.5th at p. 781.) "When conducting rational basis review, we must accept any gross generalizations and rough accommodations that the Legislature seems to have made. A classification is not arbitrary or irrational simply because there is an 'imperfect fit between means and ends.' " (*Turnage*, *supra*, 55 Cal.4th at p. 77.)

Here, the Legislature has determined that the crimes that carry LWOP sentences are more deserving of harsher punishments than crimes—even homicide offenses—that

carry non-LWOP terms. The Legislature may have done so for a variety of reasons. In the case of aggravated kidnapping (§ 209, subd. (a)) the legislative history of the statute makes "clear" that "[a]ggravated kidnapping for ransom involve[d] an inherent danger to the life of the victim" and "the penalty provisions for the crime are tied to this risk of harm." (*People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1237 (*Ordonez*); *People v. Chacon* (1995) 37 Cal.App.4th 52, 64 (*Chacon*); *People v. Castillo* (1991) 233 Cal.App.3d 36, 66 (*Castillo*); *People v. Isitt* (1976) 55 Cal.App.3d 23, 31-32 (*Isitt*).) The Legislature also sought to deter kidnappers from harming victims by imposing harsher punishments (*In re Maston* (1973) 33 Cal.App.3d 559, 566 (*Maston*)).[8] It is the Legislature's duty, not ours, to prescribe the proper term of punishment for crimes after taking into consideration factors such as "the crimes' comparative gravity" and "policy objectives like deterrence, retribution, and incapacitation." (*Sands*, *supra*, 70 Cal.App.5th at p. 205.) "[R]ational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.' " (*Heller*, *supra*, 509 U.S. at p. 319.) The logic behind a classification need not be "persuasive or sensible . . . rather than simply rational." (*Chatman*, *supra*, 4 Cal.5th at p. 289.)

Citing to the concurring opinion authored by Justice Pollak in *In re Jones* (2019) 42 Cal.App.5th 477 (*Jones*), Fonseca argues that the purpose behind section 3051

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[8] Notably, section 209, subdivision (a) has withstood both Eighth Amendment and various equal protection challenges. (See *Ordonez*, *supra*, 226 Cal.App.3d at pp. 1237-1238; *Chacon*, *supra*, 37 Cal.App.4th at p. 64; *Castillo*, *supra*, 233 Cal.App.3d at p. 66; *Isitt*, *supra*, 55 Cal.App.3d at pp. 31-32; *Maston*, *supra*, 33 Cal.App.3d at pp. 562-565.) The Courts of Appeal have generally concluded that the classification of aggravated kidnapping as a crime that warrants a LWOP term was satisfied by a rational basis—the Legislature's desire to punish a defendant (*Ordonez*, *supra*, at p. 1238) and its desire to deter a kidnapper from harming his or her victim (*Maston*, *supra*, at p. 566; *Isitt*, *supra*, at pp. 31-32).

undermines the argument that punishment can serve as a rational basis for excluding youthful offenders sentenced to LWOP. In *Jones*, Justice Pollak observed that "the purpose of section 3051 is not to measure the extent of punishment warranted by the offense the individual committed but to permit the evaluation of whether, after years of growth in prison, that person has attained the maturity to lead a law-abiding life outside of prison." (*Jones*, *supra*, at pp. 485-486 (conc. opn. of Pollak, J.).) "The presumptive fact that the LWOP sentence was based on a more serious offense provides no rational basis for the distinction because [section 3051] is not designed to determine the degree of appropriate punishment but to determine whether the individual has outgrown his or her criminality. There is no reason to conclusively presume that one such person is more likely to have satisfactorily matured than the other." (*Id*. at p. 486 (conc. opn. of Pollak, J.).)

We find Fonseca's reliance on the concurrence in *Jones* unpersuasive. First, Justice Pollak's concurrence is not binding (*People v. Lucatero* (2008) 166 Cal.App.4th 1110, 1116), and *Jones* concerned a different issue—whether section 1170, subdivision (d)(2)'s exclusion of youthful offenders serving a LWOP sentence from eligibility to petition the trial court to recall a sentence violated equal protection principles. (*Jones*, *supra*, 42 Cal.App.5th at p. 480.) Second, the presumptive fact that a LWOP sentence is the result of a crime that the Legislature has deemed to be more serious than a crime that does not result in a LWOP sentence *does* provide a rational basis for the distinction set forth in section 3051, as we have explained above. Although the Legislature did not expressly state that it considered punishment when enacting section 3051, a rational basis can be based on " 'rational speculation unsupported by evidence or empirical data,' " and there is no requirement that the underlying rationale for a statutory classification be explicitly stated. (*Heller*, *supra*, 509 U.S. at p. 320; *Chatman*, *supra*, 4 Cal.5th at p. 289.) Section 3051 may not be "a sentencing statute per

se, it nevertheless impacts the length of sentence served." (*Murray*, *supra*, 68 Cal.App.5th at p. 464; *Sands*, *supra*, 70 Cal.App.5th at p. 205.)

We acknowledge that when enacting section 3051, the Legislature stated that its purpose was "to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established." (Stats. 2013, ch. 312, § 1.) Although punishment is not wholly contradictory to this stated purpose, there is some friction. As we have stated, by expanding youth offender parole hearings to those aged 25 years and younger, the Legislature expressly recognized our current knowledge of the impact of age on the development on certain aspects of the brain, particularly those aspects that control rationality and decision-making—aspects that can have a significant impact on criminality. (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 261 (2015-2016 Reg. Sess.) Apr. 28, 2015, p. 3; Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1308 (2017-2018 Reg. Sess.) Apr. 25, 2017, p. 2.) Logically, *all* youthful offenders, regardless of their underlying commitment offenses, committed crimes when their brains were similarly underdeveloped. Recognizing this tension, Justices of the Courts of Appeal and the California Supreme Court have urged the Legislature to reconsider its exclusion of certain youthful offenders from section 3051. Particularly, as it relates to youthful offenders sentenced to LWOP for nonhomicide crimes, we share their concerns. (*Acosta*, *supra*, 60 Cal.App.5th at p. 781; *Jones*, *supra*, 42 Cal.App.5th at pp. 486-487 (conc. opn. of Pollak, J.); *People v. Montelongo* (2020) 55 Cal.App.5th 1016, 1041 (conc. opn. of Segal, J.), review denied Jan. 27, 2021, S265597; see *Montelongo*, *supra*, at p. 1041 (conc. stmt. of Liu, J., denying review); *Jackson*, *supra*, 61 Cal.App.5th at p. 202 (conc. stmt. of Liu, J., denying review).)

Nonetheless, rational basis review sets a "high bar," which ensures "that democratically enacted laws are not invalidated merely based on a court's cursory conclusion that a statute's tradeoffs seem unwise or unfair." (*Chatman*, *supra*, 4 Cal.5th at p. 289.) As we have determined, Fonseca has not met his burden " 'to negative every

conceivable basis which might' " support section 3051's exclusion of youthful offenders who are serving a LWOP sentence. (*Heller*, *supra*, 509 U.S. at p. 320.) As a result, his equal protection challenge on this ground fails.

4. ***Youthful Offenders Sentenced to LWOP and Juvenile Offenders Sentenced to LWOP***

Next, we consider Fonseca's argument that section 3051 violates equal protection principles by treating youthful offenders (those between the ages of 18 and 25) sentenced to LWOP and juvenile offenders (those under the age of 18) sentenced to LWOP differently. Juvenile offenders sentenced to LWOP terms, unlike youthful offenders sentenced to LWOP terms, are eligible for youth offender parole hearings. (§ 3051, subds. (b)(4) & (h).) Assuming that the two groups are similarly situated, we find no equal protection violation as there is a rational basis for the Legislature's distinction between them.

Multiple Courts of Appeal have reached the conclusion that the age between youthful offenders and juvenile offenders supplies a rational basis for section 3051's distinction as "both the United States Supreme Court and our high court have repeatedly found the bright line drawn between juveniles and nonjuveniles to be a rational one when it comes to criminal sentencing." (*Jackson*, *supra*, 61 Cal.App.5th at pp. 196-197; *Acosta*, *supra*, 60 Cal.App.5th at pp. 779-780; *Murray*, *supra*, 68 Cal.App.5th at pp. 463-464; and see also *Jones*, *supra*, 42 Cal.App.5th at p. 481.) In *Acosta*, *supra*, 60 Cal.App.5th 769, the Fourth Appellate District observed that section 3051 was amended to permit youth offender parole hearings for juvenile LWOP offenders to comply with *Montgomery*, *supra*, 577 U.S. 190 without having to resort to costly resentencing hearings. (*Acosta*, *supra*, at p. 779.) Thus, the Legislature did not include youthful offenders with LWOP sentences "presumably because *Montgomery* did not compel such treatment for young adults." (*Id*. at p. 780.)

We agree with the Courts of Appeal in *Jackson*, *Acosta*, and *Murray* and conclude that it is rational for the Legislature to treat juvenile offenders sentenced to LWOP and youthful offenders sentenced to LWOP differently because of their age. (See *Acosta*, *supra*, 60 Cal.App.5th at pp. 779-780.) Moreover, mandatory LWOP sentences cannot be imposed on juvenile offenders, whereas mandatory LWOP sentences may be imposed on youthful offenders who commit crimes after they have reached the age of 18. (*Ibid*.; *Miller*, *supra*, 567 U.S. at p. 465.)[9]

In sum, we find no merit in Fonseca's claim that section 3051's treatment of juvenile offenders sentenced to LWOP and youthful offenders sentenced to LWOP violates the principles of equal protection as there is a rational basis for treating the two groups differently. (See *Chatman*, *supra*, 4 Cal.5th at p. 289.)

B. ***Ability to Pay the Restitution Fine***

Relying on *People v*. *Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Fonseca argues that the trial court was required to find that he had an ability to pay the restitution

[9] Courts of Appeal have also expressed concerns with section 3051's distinction between juveniles sentenced to LWOP and youthful offenders sentenced to LWOP. (See *Murray*, *supra*, 68 Cal.App.5th at pp. 464-465; *Jones*, *supra*, 42 Cal.App.5th at p. 486 (conc. opn. of Pollak, J.).) Justice Pollak wrote in his concurring opinion in *Jones*: "Both a person sentenced to LWOP for a crime committed while under 18 and a person receiving the same sentence for a crime committed when 18 or slightly older committed their offenses before their character was necessarily 'well formed' and when their judgment and decisionmaking were likely to improve." (*Jones*, *supra*, at p. 486 (conc. opn. of Pollak, J.).) Moreover, Justice Liu observed in his concurring statement denying review in *Jackson*, *supra*, 61 Cal.App.5th 189, that section 3051 excludes certain 18-to-25-year-olds from youth offender parole hearings "even though the Legislature has recognized that these mitigating attributes 'are found in young adults up to age 25' and 'that the ordinary process of neurological and cognitive development continues for several years past age 18.' " (*Jackson*, *supra*, at p. 202 (conc. stmt. of Liu, J.); see also *Montelongo*, *supra*, 55 Cal.App.5th at p. 1041 (conc. stmt. of Liu, J.).) We again join with our colleagues to encourage the Legislature to reconsider and revisit section 3051's exclusion of youthful offenders sentenced to LWOP for nonhomicide crimes.

fine before it was imposed, and insufficient evidence supports the trial court's ability-to-pay determination. We conclude that Fonseca did not meet his burden to demonstrate that he had an inability to pay, and the trial court did not err in imposing the restitution fine.

1. ***General Legal Principles and Standard of Review***

Former section 1202.4, subdivision (b) required that the trial court impose a restitution fine in every case where a person is convicted of a crime "unless [the trial court] finds compelling and extraordinary reasons for not doing so and states those reasons on the record." At the time Fonseca committed his underlying offenses in February 2011, the minimum restitution fine was $200 and the maximum fine was $10,000 for individuals convicted of a felony offense. (Former § 1202.4, subd. (b)(1); Stats. 2010, ch. 351, § 9.)

Former section 1202.4, subdivision (d) provided in pertinent part: "[T]he court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or the victim's dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant's inability to pay may include the defendant's future earning capacity. A defendant shall bear the burden of demonstrating the defendant's inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required." The trial court has the discretion to determine the exact amount of restitution fine to impose and we review its decision for an abuse of discretion. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1321.)

In *Dueñas*, *supra*, 30 Cal.App.5th 1157, the Second Appellate District concluded that due process required the trial court to stay execution of any restitution fine unless and until it holds an ability-to-pay hearing and finds that the defendant has the ability to pay. (*Id*. at p. 1172.) Courts of Appeal, including panels of this court, have reached different conclusions as to whether *Dueñas* was correctly decided (*People v*. *Hicks* (2019) 40 Cal.App.5th 320, 325, review granted Nov. 26, 2019, S258946; *People v*. *Santos* (2019) 38 Cal.App.5th 923, 933-934 (*Santos*); *People v*. *Adams* (2020) 44 Cal.App.5th 828, 831-832; *People v*. *Petri* (2020) 45 Cal.App.5th 82, 92), and the issue is presently pending before the California Supreme Court (*People v*. *Kopp* (2019) 38 Cal.App.5th 47, review granted Nov. 13, 2019, S257844).

Even if we assume *Dueñas* was correctly decided, "it is the defendant's burden to demonstrate an inability to pay [a restitution fine], not the prosecution's burden to show the defendant *can* pay, as the *Dueñas* decision might be read to suggest." (*Santos*, *supra*, 38 Cal.App.5th at p. 934.)

On appeal, Fonseca characterizes his argument as a claim that substantial evidence does not support the trial court's determination that he had the ability to pay the fine. Although an appellate court usually reviews for substantial evidence a trial court's resolution of disputed factual issues (*People v*. *Trinh* (2014) 59 Cal.4th 216, 236), "[w]hen the trier of fact has expressly or implicitly concluded that the party with the burden of proof failed to carry that burden and that party appeals, it is somewhat misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment" (*Shaw v*. *County of Santa Cruz* (2008) 170 Cal.App.4th 229, 279 (*Shaw*)). "This is because such a characterization is conceptually one that allows an attack on (1) the evidence supporting the party who had no burden of proof, and (2) the trier of fact's unassailable conclusion that the party with the burden did not prove one or more elements of the case. [Citations.] Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence

compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' " (*Ibid*.)

2. ***The Evidence Does Not Compel a Finding that Fonseca is Unable to Pay***

Based on the record before us, we conclude that the evidence does not compel a finding, as a matter of law, that Fonseca was unable to pay the restitution fine. Fonseca failed to provide any evidence in support of his claim that he had an inability to pay, and the trial court properly relied on the fact that Fonseca could earn prison wages and receive monetary gifts while incarcerated.

During the resentencing hearing, Fonseca requested that the trial court "delete" the restitution fine because he would "be in custody for the remainder of his life" and would "never be able to pay off the $10,000." Aside from this cursory argument, Fonseca presented no evidence and did not request a further hearing on his ability to pay the fine. In response, the trial court stated: "I certainly understand he will be in prison for the rest of his life, and depending on his security classification, he may or may not have access to the better paying prison industry jobs, but there may be money put on his books or others that might help pay any restitution fines. So I will decline to change that part of the sentencing."

The trial court's comments reflect that it properly considered Fonseca's ability to earn prison wages and the possibility that he may receive monetary gifts while incarcerated. " ' "Ability to pay does not necessarily require existing employment or cash on hand." [Citation.] "[I]n determining whether a defendant has the ability to pay a restitution fine, the court is not limited to considering a defendant's *present* ability but may consider a defendant's ability to pay in the future." [Citation.] This include[s] the defendant's ability to obtain prison wages and to earn money after his release from custody.' " (*People v. Aviles* (2019) 39 Cal.App.5th 1055, 1076 (*Aviles*).) Even small

monetary gifts from family and friends have been deemed relevant to an ability to pay determination. (*People v. Potts* (2019) 6 Cal.5th 1012, 1055-1057.)

In this case, Fonseca was 25 years old when he was sentenced for the first time, and he was 30 years old at the time of his resentencing hearing. "Wages in California prisons currently range from $12 to $56 a month. [Citations.] And half of any wages earned (along with half of any deposits made into [a defendant's] trust account) are deducted to pay any outstanding restitution fine." (*People v. Jones* (2019) 36 Cal.App.5th 1028, 1035; see *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 ["defendant's ability to obtain prison wages" is properly considered when determining ability to pay]; *Santos*, *supra*, 38 Cal.App.5th at p. 934 [same].) There is nothing in the record to indicate that Fonseca is not able-bodied or unable to physically work. Assuming that he earns $56 a month and half of his earnings are applied toward his restitution fine, it will take him approximately 30 years to pay his restitution fine. Although this is a significant amount of time, it is much less than his LWOP sentence, and the trial court could have reasonably concluded that he failed to carry his burden to "present evidence of his . . . inability to pay." (*People v. Castellano* (2019) 33 Cal.App.5th 485, 490; *Aviles*, *supra*, 39 Cal.App.5th at p. 1062 [defendant sentenced to term of 82 years to life had ability to pay $10,600 in restitution fines, $160 in court operations assessments, and $120 in court facilities funding assessments].)

Fonseca argues that his ability to work in prison will depend on the availability of prison jobs, and there is no guarantee that he will be able to secure a paying position. On appeal, Fonseca cites to various publications by the California Department of Corrections and Rehabilitation that purportedly demonstrate the scarcity of paid prison jobs. These publications, however, were not presented to the trial court and we may not consider them on appeal in the first instance. (See *People v. Fairbank* (1997) 16 Cal.4th 1223,

1249 ["we cannot consider on appeal evidence that is not in the record"].) Likewise, Fonseca also presented no evidence of his inability to obtain a paid position.[10]

Fonseca also claims that because he was represented by an alternate defender, his indigence is presumed. We disagree. The fact that Fonseca was represented by appointed counsel alone does not demonstrate that he is unable to pay his restitution fine. "[A] defendant may lack the 'ability to pay' the costs of court-appointed counsel yet have the 'ability to pay' a restitution fine." (*People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397.) The indigency statute, former section 987.8, defined an ability to pay in the context of attorney fees and indicated that such a determination was based on a defendant's *present* financial condition. (Former § 987.8, subds. (b), (g)(2).) In contrast, courts have uniformly recognized that a defendant's probable future prison wages can be considered when determining an ability to pay a restitution fine. (*Aviles, supra*, 39 Cal.App.5th at p. 1076.)

Here, Fonseca bore the burden to present evidence of his inability to pay, which he failed to do. Accordingly, based on the record before us, we cannot say that there is uncontradicted and unimpeached evidence that *compels* a finding that Fonseca is unable to pay the challenged restitution fine through a combination of prison wages and monetary gifts. (See *Shaw*, *supra*, 170 Cal.App.4th at p. 279; *People v. Romero* (1996) 43 Cal.App.4th 440, 449 [trial court should presume ability to pay a restitution fine when defendant adduces no evidence of inability to pay].) Moreover, absent evidence that the

[10] In his reply brief, Fonseca argues that the trial court is presumed to know of his inability to pay the restitution fine based on the low rates of pay and the paucity of available prison jobs. Although we agree that the trial court is presumed to know the governing law (*People v. Braxton* (2004) 34 Cal.4th 798, 814), the lack of paid prison positions is not a legal principle. The availability of prison jobs is a factual matter that may change over time. As it was Fonseca's burden to demonstrate his inability to pay, it was incumbent on him to present evidence to the trial court to support his claims.

trial court breached its duty to consider Fonseca's ability to pay, we conclude that the trial court did not abuse its discretion when setting the restitution fine. (See *People v. Nelson* (2011) 51 Cal.4th 198, 227.)

C. ***Fees***

Finally, Fonseca argues, and the Attorney General concedes, that the court security fee imposed under section 1465.8 and the court facilities assessment imposed under Government Code section 70373 must be reduced. We agree with the parties that the judgment must be modified.

At resentencing, the trial court imposed a $400 court security fee under section 1465.8 and a $300 court facilities assessment under Government Code section 70373. Section 1465.8, subdivision (a)(1) requires that the trial court impose a court security fee of $40 for every criminal conviction. Government Code section 70373, subdivision (a)(1) requires that the trial court impose a court facilities fee of $30 for every criminal conviction. After this court reversed Fonseca's grand theft conviction following his first appeal, Fonseca stood convicted of nine offenses. Thus, the court security fee should be reduced to $360 and the court facilities assessment should be reduced to $270.

III. DISPOSITION

The judgment is modified by reducing the court security fee imposed under Penal Code section 1465.8 to $360 and the court facilities assessment imposed under Government Code section 70373 to $270. A certified copy of the modified abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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Wilson, J.

WE CONCUR:

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Elia, Acting P.J.

_____
Bamattre-Manoukian, J.

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