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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DEBRA MARIE JONES,

Defendant and Appellant.

D061606

(Super. Ct. Nos. SCD224454,  
SCD236717)

APPEALS from judgments of the Superior Court of San Diego County, Eugenia

A. Eyherabide, Judge. Affirmed as modified in part, reversed in part, and remanded.

Debra Marie Jones pled guilty to selling cocaine base in 2009 and was granted probation. In 2011, while on probation, she again sold cocaine base, was charged and pled guilty. After the second offense, the trial court revoked probation; sentenced Jones to county jail for concurrent terms of three years each; and ordered her to pay various fines, fees and assessments. In this appeal, Jones challenges several of the monetary impositions. We modify the judgments and affirm in part as to the amounts of certain

fees and assessments, and reverse the judgments in part and remand for resentencing regarding the imposition of certain other fines and fees.

## I.

### BACKGROUND

In case No. SCD224454, Jones was charged with selling cocaine base on December 10, 2009, in violation of Health and Safety Code section 11352, subdivision (a) (the 2009 case). Jones pled guilty, and the court suspended imposition of sentence for three years and granted her formal probation. As conditions of probation, Jones was required to serve 365 days in county jail (with credit for time served), to obey all laws, and not to use or possess any controlled substance without a valid prescription. When the court granted probation, it also ordered Jones to pay various fines, fees and assessments, including a \$200 restitution fine, a \$570 drug program fee and a \$190 criminal laboratory analysis fee.

The court revoked Jones's probation after she was charged in case No. SCD236717 with selling cocaine base on September 22, 2011, in violation of Health and Safety Code section 11352, subdivision (a) (the 2011 case). Jones again pled guilty.

At a combined sentencing hearing in the 2009 and 2011 cases, the court sentenced Jones to the low term of three years in county jail in each case. The court ordered her to serve the jail terms concurrently and awarded credit for time served in each case.

The court also ordered Jones to pay the following fees in the 2011 case: (1) a court security fee of \$40; (2) an immediate critical needs account fee of \$40; (3) a criminal justice administrative fee of \$154; (4) a drug program fee of \$570, including

penalty assessments; and (5) a laboratory analysis fee of \$190, including penalty assessments.

In the 2009 case, the court ordered Jones to pay a restitution fine, but did not specify an amount. The minute orders regarding sentencing in the 2009 and 2011 cases both specify a restitution fine of \$600.

Jones filed notices of appeal to challenge the sentences imposed in both cases.

## II.

### DISCUSSION

Jones challenges the amount of the restitution fine, criminal laboratory analysis fee and drug program fee imposed in the 2011 case. She also requests correction of the amounts of court facilities assessments and court operations assessments listed on the abstract of judgment. We shall address these issues in turn.

#### A. *The Minute Orders Directing Jones to Pay Two \$600 Restitution Fines Are Invalid*

Jones contends the minute order in the 2011 case assessing a \$600 restitution fine is invalid because the court did not set the amount of the fine when it pronounced judgment at the sentencing hearing. She asks us to impose the minimum amount for the fine or, alternatively, to remand the case to allow the trial court to set the amount. The People contend the \$600 restitution fine should be stricken from the minute order and ask us to remand the matter for determination of an appropriate restitution fine. We agree the \$600 restitution fine reflected in the minutes of the 2011 case must be stricken, and the matter remanded for determination of an appropriate restitution fine in that case. We also strike the \$600 restitution fine reflected in the minutes of the 2009 case, even though

Jones does not specifically challenge that fine, because, as we shall explain, it was unauthorized.

Having imposed a restitution fine when it granted probation in the 2009 case, the trial court had no authority to impose an additional restitution fine when it revoked probation. A court must impose a restitution fine whenever a defendant is convicted of a crime "unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." (Pen. Code, § 1202.4, subd. (b).) When a defendant is granted probation, "the court shall make the payment of restitution fines and orders imposed pursuant to this section a condition of probation." (*Id.*, subd. (m).) The event triggering imposition of a restitution fine is conviction, and a fine imposed when a defendant is convicted and granted probation survives a later revocation of probation. (*People v. Urke* (2011) 197 Cal.App.4th 766, 779 (*Urke*); *People v. Arata* (2004) 118 Cal.App.4th 195, 202 (*Arata*); *People v. Chambers* (1998) 65 Cal.App.4th 819, 822-823.) Thus, "an additional restitution fine imposed at the time probation is revoked is unauthorized and must be stricken from the judgment." (*Urke*, at p. 779.)

Here, when the court granted Jones probation in the 2009 case, it ordered her to pay a restitution fine of \$200. After Jones reoffended and the court revoked probation, it ordered her to pay another restitution fine in that case: "In case ending 454, probation having been previously revoked, . . . [y]ou're to pay restitution per [Penal Code section] 1202.4[ subdivision] (b) to be paid as provided in Penal Code section 2085.5." The court did not specify an amount at the sentencing hearing, but the clerk entered \$600 (the amount recommended in the probation report) in the sentencing minutes. The imposition

of a second restitution fine in any amount was improper, however, because the first restitution fine survived the probation revocation. (*Urke, supra*, 197 Cal.App.4th at p. 779; *Arata, supra*, 118 Cal.App.4th at p. 202.) Thus, although Jones has not specifically challenged the \$600 fine contained in the minutes of the 2009 case, we strike that fine as unauthorized. (See, e.g., *People v. Smith* (2001) 24 Cal.4th 849, 852 (*Smith*) [an unauthorized sentence is "reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court'"]; *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6 (*Dotson*) [an unauthorized sentence "is subject to judicial correction whenever the error comes to the attention of the reviewing court"].)

The \$600 restitution fine reflected in the minutes of the 2011 case also must be stricken, because the court did not impose a restitution fine in that or any other amount when it pronounced judgment. The rendition of judgment in felony cases must be done by oral pronouncement in the defendant's presence and must include any fines that are imposed. (Pen. Code, § 1193, subd. (a), 1445; *People v. Hong* (1998) 64 Cal.App.4th 1071, 1076-1078.) As previously noted, the court generally must impose a restitution fine in every case in which a defendant is convicted of a crime. (Pen. Code, § 1202.4, subd. (b).) If the court does not impose a restitution fine at the sentencing hearing, "[t]he clerk cannot supplement the judgment the court actually pronounced by adding a provision to the minute order . . . ." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 387 (*Zackery*)). Here, the court made no mention of a restitution fine in the 2011 case when it orally pronounced judgment, but the clerk entered a \$600 restitution fine in the minutes.

Hence, that entry "must be stricken from the minutes as [it] do[es] not reflect the judgment the court pronounced." (*Zackery*, at p. 388.)

Although we must strike the \$600 restitution fine reflected in the minutes of the 2011 case, the trial court has authority to impose a restitution fine in that case. Indeed, a restitution fine is mandatory unless the court finds "compelling and extraordinary reasons" not to impose one and states those reasons on the record. (Pen. Code, § 1202.4, subd. (b); see *People v. Tillman* (2000) 22 Cal.4th 300, 302.) The trial court did not state any such reasons on the record here. We therefore remand the matter to allow the court to determine whether to impose a restitution fine in the 2011 case, and if so, in what amount. (See *Zackery*, *supra*, 147 Cal.App.4th at p. 389.)

For the guidance of the trial court on remand, we point out that the probation report in the 2009 case erroneously recommended imposition of a restitution fine "in the amount of \$600, *plus penalty assessment*." (Italics added.) Restitution fines are not subject to penalty assessments. (Pen. Code, § 1202.4, subd. (e); *People v. Boudames* (2006) 146 Cal.App.4th 45, 50; *People v. Allen* (2001) 88 Cal.App.4th 986, 992-993; *People v. McHenry* (2000) 77 Cal.App.4th 730, 734.) To the extent the court considers the recommendation contained in the 2009 probation report in setting the amount of the restitution fine for the 2011 case, it should disregard the reference to penalty assessments. We also point out that although the minimum restitution fine was increased to \$240 as of January 1, 2012 (Pen. Code, § 1202.4, subd. (b)(1)), the minimum was only \$200 when Jones committed her offense on September 22, 2011 (Stats. 1996, ch. 629, § 3; Stats. 2011, ch. 358, § 1). Constitutional prohibitions against ex post facto laws thus require

the trial court to calculate any restitution fine to be imposed in the 2011 case on the basis of the \$200 minimum. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9; *People v. Souza* (2012) 54 Cal.4th 90, 143; *People v. Saelee* (1995) 35 Cal.App.4th 27, 30-31.)

B. *The Amounts of Criminal Laboratory Analysis Fees and Drug Program Fees Imposed by the Trial Court in the 2009 and 2011 Cases Were Unauthorized*

Jones challenges the criminal laboratory analysis and drug program fees ordered by the trial court as exceeding the amounts authorized by statute.<sup>1</sup> The People agree. We do not. The parties, both represented by experienced appellate counsel, inexplicably ignore the mandatory penalty assessments and surcharges that must be added to the base fine amounts specified in the statutes authorizing criminal laboratory analysis and drug program fees. As we shall explain, the fees imposed on Jones were actually *too low* because they did not include mandatory surcharges.

A defendant convicted of violating Health and Safety Code section 11352 "shall pay a criminal laboratory analysis fee in the amount of fifty dollars (\$50) for each separate offense" (*id.*, § 11372.5, subd. (a)), and "a drug program fee in an amount not to exceed one hundred fifty dollars (\$150) for each separate offense" (*id.*, § 11372.7, subd. (a)). These statutory fees are fines, and the amount specified in each statute

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<sup>1</sup> Although her briefing is not entirely clear, Jones seems to challenge only the criminal laboratory analysis and drug program fees imposed in the 2011 case. We nevertheless also review the corresponding fees imposed in the 2009 case, because, as we explain in the text, those fees were unauthorized. (See, e.g., *Smith, supra*, 24 Cal.4th at p. 852 [an unauthorized sentence is "reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court'"]; *Dotson, supra*, 16 Cal.4th at p. 554, fn. 6 [an unauthorized sentence "is subject to judicial correction whenever the error comes to the attention of the reviewing court"].)

represents only the base amount of the fine. (*People v. McCoy* (2007) 156 Cal.App.4th 1246, 1252; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1522; *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1696.)

"The Legislature has superimposed onto the base fine scheme a number of penalties, assessments, fees, and surcharges that could increase the base fine . . . ." (*People v. Sorenson* (2005) 125 Cal.App.4th 612, 617.) Specifically, when a criminal laboratory analysis fee or drug program fee is imposed, for every \$10 (or part of \$10) of base fine assessed, the following six penalties must also be levied: (1) a state penalty of \$10 (Pen. Code, § 1464, subd. (a)); (2) a county penalty of \$7 (Gov. Code, § 76000, subds. (a)(1), (e)); (3) a state court construction penalty of \$5 (*id.*, § 70372, subd. (a)(1)); (4) a county emergency medical services penalty of \$2 (*id.*, § 76000.5, subd. (a)(1));<sup>2</sup> (5) a DNA penalty of \$1 (*id.*, § 76104.6, subd. (a)(1)); and (6) a state-only DNA penalty of \$3 (*id.*, § 76104.7, former subd. (a)).<sup>3</sup> (*People v. Sharret* (2011) 191 Cal.App.4th 859, 863-864 (*Sharret*); *People v. Taylor* (2004) 118 Cal.App.4th 454, 456-460 (*Taylor*); *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1257.) In addition, a "state surcharge of 20 percent shall be levied on the base fine used to calculate the state penalty assessment."

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<sup>2</sup> Before an emergency medical services assessment may be imposed, the county board of supervisors must elect to levy it. (Gov. Code, § 76000.5, subd. (a)(1); *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528-1529 (*Castellanos*.) The San Diego County Board of Supervisors adopted a resolution authorizing imposition of the assessment. (San Diego County Bd. of Supervisors Res. No. 07-041, dated Mar. 20, 2007.)

<sup>3</sup> Effective June 27, 2012, after Jones committed her offenses, the state-only DNA penalty was increased to \$4 for every \$10 (or part of \$10) of base fine assessed. (Stats. 2012, ch. 32, § 25.)

(Pen. Code, § 1465.7, subd. (a); see *Sharret*, at pp. 863-864; *Taylor*, at p. 457.) Thus, the net effect is that the statutory penalties add \$28 for every \$10 (or part of \$10) of base fine assessed, and the state surcharge adds another 20 percent of the base fine.

Here, in the 2011 case the trial court ordered Jones to pay "a drug program fee in the amount of \$570 including penalty assessment," and "a lab analysis fee in the amount of \$190 including penalty assessment." The court ordered Jones to pay the same amount of fees when it granted her probation in the 2009 case. The court did not itemize the various penalty assessments and surcharges added to the base fine amounts, nor was it required to do so (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1372-1373 (*Voit*); *Sharret*, *supra*, 191 Cal.App.4th at p. 864); rather, the court simply adopted the amounts recommended in the probation reports, which referenced a "penalty assessment" but not a state surcharge. Thus, in the 2009 and 2011 cases, the court imposed a base fine of \$50 for the criminal laboratory analysis fee, plus an additional \$140 for the associated statutory penalties (\$28 for each \$10 of base fine), for a total fee of \$190. In both cases, the court also imposed a base fine of \$150 for the drug program fee, plus an additional \$420 for the associated statutory penalties (\$28 for each \$10 of base fine), for a total fee of \$570. In neither case did the court impose the 20 percent state surcharges required by Penal Code section 1465.7, subdivision (a).

The failure to impose the mandatory 20 percent state surcharges on the criminal laboratory analysis fees and the drug program fees resulted in unauthorized sentences subject to correction on appeal. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157

(*Talibdeen*); *Castellanos, supra*, 175 Cal.App.4th at p. 1530; *Taylor, supra*, 118 Cal.App.4th at pp. 456-457.) The remedy for each error differs, however.

The trial court has no discretion to refuse to impose the criminal laboratory analysis fees or the related penalty assessments and surcharges, or to set the amounts of the base fine, penalty assessments and surcharge. We therefore may correct the court's errors without remanding for further proceedings. (*Talibdeen, supra*, 27 Cal.4th at p. 1157; *Smith, supra*, 24 Cal.4th at p. 854.) We do so by modifying the judgments in the 2009 and 2011 cases to impose the base fine amount (\$50), plus penalty assessments (\$140) and surcharge (\$10), for a total criminal laboratory analysis fee of \$200 in each case. (*Taylor, supra*, 118 Cal.App.4th at p. 456; *People v. Turner* (2002) 96 Cal.App.4th 1409, 1416.)

By contrast, the court does have discretion as to the drug program fees imposed in the 2009 and 2011 cases. When deciding whether to impose such a fee, the court must consider Jones's ability to pay, taking into account the amount of other fines assessed. (Health & Saf. Code, § 11372.7, subd. (b).) The court also has discretion in setting the base fine "in an amount not to exceed [\$150]." (*Id.*, subd. (a).) The record is silent regarding Jones's ability to pay the \$570 drug program fee ordered by the court in each case. Although we therefore could assume the court found she could pay that amount (see, e.g., *Castellanos, supra*, 175 Cal.App.4th at p. 1531), we note the court had no occasion to consider her ability to pay \$600, the amount due in each case when the \$150 base fine selected by the trial court is increased by the applicable penalty assessments (\$420) and state surcharge (\$30). Under these circumstances, we deem it appropriate to

remand both the 2009 case and the 2011 case to allow the trial court to determine Jones's ability to pay a drug program fee and, if it determines she has such ability, to set the amount of the fee in each case. (See *id.* at pp. 1531-1533; *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249-1250.) On remand, Jones shall have the burden of proving any claimed inability to pay. (*Valenzuela*, at p. 1250.)<sup>4</sup>

C. *A New Abstract of Judgment Must Be Prepared to Include the Correct Amounts of All Fines, Fees and Assessments Imposed in the 2009 and 2011 Cases*

Jones complains that certain assessments listed on the abstract of judgment are incorrect. Specifically, she contends that at the sentencing hearing the trial court erroneously imposed a court facilities assessment of \$40 in the 2011 case;<sup>5</sup> the sentencing minute order corrected the amount to \$30; but the abstract of judgment improperly doubled the \$30 assessment. Jones also contends the abstract of judgment improperly doubled the \$40 court operations assessment imposed in the 2011 case. The People concede these issues. We agree the trial court erred in imposing a \$40 court facilities assessment in the 2011 case, and we order the amount corrected to \$30. We disagree with the parties that the abstract of judgment lists incorrect amounts for court

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<sup>4</sup> Because we are remanding for a determination of Jones's ability to pay the drug program fees, we need not, and do not, address her contention that her trial counsel provided constitutionally ineffective assistance by not asking the trial court to consider her ability to pay before it imposed the \$570 fee in the 2011 case.

<sup>5</sup> At the sentencing hearing, the trial court described this assessment as "an immediate critical needs account fee." The probation report on which the court apparently relied in imposing this assessment used the same terminology when referring to the court facilities assessment required by Government Code section 70373.

facilities and court operations assessments, but order preparation of a new abstract of judgment to include all fines, fees and assessments imposed in the 2009 and 2011 cases.

The parties are correct that the trial court erred at the sentencing hearing when it imposed a court facilities assessment of \$40 in the 2011 case, because the statute mandates an assessment of \$30 for each felony conviction. (Gov. Code, § 70373, subd. (a)(1).) Further, the clerk's attempt to correct this error by entering \$30 in the minutes was ineffectual, because any discrepancy between the oral pronouncement of judgment and the minute order is resolved in favor of the oral pronouncement. (*People v. Farrell* (2002) 28 Cal.4th 381, 384, fn. 2; *Zackery, supra*, 147 Cal.App.4th at p. 385.) We therefore modify the orally pronounced judgment in the 2011 case to include imposition of the mandatory court facilities assessment of \$30. (See *People v. Woods* (2010) 191 Cal.App.4th 269, 274 [modifying judgment to impose court facilities assessments that had been improperly stayed].)

We disagree with the parties, however, that the abstract of judgment incorrectly lists the amount of court facilities assessments due under Government Code section 70373, and court operations assessments due under Penal Code section 1465.8 as \$60 and \$80, respectively. The parties overlook the fact that the abstract of judgment summarizes both the 2009 case and the 2011 case. In each case, Jones had to pay a \$30 court facilities assessment and a \$40 court operations assessment because those assessments must be imposed "on every conviction for a criminal offense." (Gov. Code, § 70373, subd. (a)(1); Pen. Code, § 1465.8, subd. (a)(1); see *People v. Cortez* (2010) 189 Cal.App.4th 1436, 1439, 1442-1443 [Gov. Code, § 70373, subd. (a)(1) assessment was

properly assessed on each of defendant's convictions]; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865 [Pen. Code, § 1465.8, subd. (a)(1) "unambiguously requires a fee to be imposed for each of defendant's convictions"].) Hence, the abstract of judgment correctly included two court facilities assessments and two court operations assessments.

Nevertheless, we order preparation of a new abstract of judgment. An abstract of judgment is a statutorily sanctioned and official record of a judgment of conviction, and it is intended to summarize the judgment accurately. (Pen. Code, §§ 1213, 1213.5; *People v. Delgado* (2008) 43 Cal.4th 1059, 1070.) The abstract must specify the amount of and statutory basis for each fine, fee, penalty and assessment imposed on the defendant. (*People v. Eddards* (2008) 162 Cal.App.4th 712, 717-718; *People v. High* (2004) 119 Cal.App.4th 1192, 1200 (*High*)). Here, although the abstract of judgment purports to summarize the convictions and sentences in both the 2009 and 2011 cases, it includes none of the restitution fines the court imposed, specifies only one criminal laboratory assessment fee and only one drug program fee, and imposes unauthorized amounts for those fees. We may order correction of an abstract that does not accurately reflect the judgment of the sentencing court (*People v. Mitchell* (2001) 26 Cal.4th 181, 185), and we shall do so here.

Finally, before we dispose of this appeal, we stress the obligation of the probation officer, counsel and the trial court to ensure the correct amounts of all required fines, fees, penalties and assessments are imposed at the sentencing hearing. "Although we recognize that a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts." (*High, supra*, 119 Cal.App.4th

at p. 1200.) The probation officer should prepare a report containing recommendations regarding all mandatory fines, fees, penalties and assessments. Neither counsel nor the court should uncritically accept those recommendations, however, or rely on the clerk to supply the missing details in the minutes. Rather, counsel should discuss all applicable fines, fees, penalties and assessments in their sentencing memoranda; and the court should review those memoranda, the probation report and the applicable statutes to ensure the proper amounts of all required fines, fees, penalties and assessments are orally imposed at the sentencing hearing.<sup>6</sup> Careful attention to this routine aspect of sentencing would prevent errors and omissions like those that occurred in this case, and reduce the number of costly and time-consuming appeals taken on that basis.

#### DISPOSITION

In case No. SCD224454, the \$190 criminal laboratory analysis fee listed in the order granting probation dated March 30, 2010, is modified to \$200. The \$570 drug program fee listed in that order is reversed, and the matter is remanded to the trial court to determine whether Jones has the ability to pay such a fee; and if it determines she has such ability, to set the amount of the fee. The \$600 restitution fine listed in the minute order dated March 19, 2012, is stricken. In all other respects, the judgment is affirmed.

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<sup>6</sup> As noted earlier, at the sentencing hearing the court need not itemize all of the incremental state and county penalty assessments and surcharges that are added to the base fine amount. Oral imposition of the base fine amount coupled with a shorthand reference to penalty assessments (e.g., defendant "shall pay a \$50 criminal laboratory analysis fee plus penalty assessments") is sufficient, provided the total amount of the fine is listed in the minutes and the abstract of judgment. (*Voit, supra*, 200 Cal.App.4th at p. 1373; *Sharret, supra*, 191 Cal.App.4th at p. 864.)

In case No. SCD236717, the \$40 court facilities assessment orally imposed at the sentencing hearing on March 19, 2012, is modified to \$30. The \$190 criminal laboratory analysis fee imposed at that hearing is modified to \$200. The \$570 drug program fee imposed at that hearing is reversed, and the matter is remanded to the trial court to determine whether Jones has the ability to pay such a fee; and if it determines she has such ability, to set the amount the fee. The \$600 restitution fine listed in the minute order dated March 19, 2012, is stricken, and the matter is remanded to the trial court to determine whether there exist compelling and extraordinary reasons not to impose a restitution fine; and if so, the court shall state those reasons on the record; but if not, the court shall impose a restitution fine. In all other respects, the judgment is affirmed.

Upon remand, after the trial court makes its determinations regarding the restitution fine in case No. SCD236717 and the drug program fees in case Nos. SCD224454 and SCD236717, the court shall prepare an amended abstract of judgment that summarizes the convictions and sentences in both cases, including the amounts of and statutory bases for all fines, fees, penalties and assessments imposed (except that incremental state and county penalty assessments and surcharges added to base fine amounts need not be separately itemized, see fn. 6, *ante*); and shall forward a

certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

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IRION, J.

WE CONCUR:

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McCONNELL, P. J.

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HUFFMAN, J.