IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, vs. **ANTOINE J. McCULLOUGH,** Defendant and Appellant.	**Case No.: S192513** Court of Appeal, Third Appellate District No.: C064982

Sacramento County Superior Court No. 09F08232
The Honorable, Judge Steve White

APPELLANT'S OPENING BRIEF ON THE MERITS

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IN THE SUPREME COURT
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THE PEOPLE, Plaintiff and Respondent, vs. **ANTOINE J. McCULLOUGH,** Defendant and Appellant.	**Case No.: S192513** Court of Appeal, Third Appellate District No.: C064982

ISSUE PRESENTED FOR REVIEW

Pursuant to this Court's order granting review:

This case presents the following issue: Did defendant forfeit his claim that he was unable to pay the $270.17 jail booking fee (Gov. Code, §29550.2) imposed by the trial court at sentencing, because he failed to object at the time?[1]

STATEMENT OF THE CASE AND FACTS

At approximately 11:30 p.m. on November 8, 2009, Sacramento County Sheriff's Deputies Greg Saunders, Chris Maher, and Sergeant Ken Rickett were driving an unmarked vehicle in the area of Park Drive and Croetto Way, in the City of Rancho Cordova. (1RT 3-4.)

[1] http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1977285&doc_no=S192513 (as of 9/15/11).

They were serving warrants that evening, and they had one for a man named Deleono Anthony. (1RT 4-5.) Deputy Saunders saw appellant, Antoine J. McCullough, standing in front of the address they had on file for Mr. Anthony. Deputy Maher asked Mr. McCullough if he was on probation or parole, and Mr. McCullough told him he was on parole. (1RT 17.) As the deputies approached Mr. McCullough, he said, "I have a pistol in my pocket." (1RT 7.) Deputy Saunders found a .44 magnum handgun loaded with six rounds of live ammunition in Mr. McCullough's jacket pocket. (1RT 7.)

In an amended felony complaint, Mr. McCullough was charged with one count of being an ex-felon in possession of a firearm (count 1: Pen. Code, §12021, subd. (a)(1)[2]), one count of unlawfully carrying a concealed firearm (count 2: §12025, subd. (b)(6)), and one count of unlawfully carrying a loaded firearm (count 3: §12031, subd. (a)(2)(F)). The amended complaint further alleged that Mr. McCullough served three prior prison terms, within the meaning of section 667.5, subdivision (b). (CT 22-24.)

On January 13, 2011, following the preliminary hearing, and the denial of his motion to suppress evidence (§1538.5), Mr. McCullough entered a plea of not guilty and denied the prior convictions alleged in the amended complaint, now deemed to be the information. (1RT 29.) The court asked Mr. McCullough, "[S]ir, can you afford a lawyer at this point?" Mr. McCullough responded, "No." (1RT 29.) The court "reappointed" the public defender and advised Mr. McCullough, "If it's

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[2] All further statutory references are to the Penal Code, unless otherwise indicated.

later determined that you can afford some or all of your legal representation, that will be charged against you." (*Ibid.*)

Defense counsel then advised the trial court that Mr. McCullough wanted to settle his case. After a discussion among the court and counsel, Mr. McCullough entered a plea of no contest to one count of being an ex-felon in possession of a firearm (count 1: §12021, subd. (a)(1)), and he admitting having served one prior prison term, in exchange for a dismissal of the remaining two counts and two other prison term enhancements (§667.5, subd. (b)).

When the court advised Mr. McCullough of the consequences of his plea, it told him that in addition to a restitution fine, "[t]here will be other fees related to being processed through the justice system which I'll detail at the time of the sentencing should you enter this plea." (1RT 32-33.) Mr. McCullough said he understood. (1RT 33.)

After Mr. McCullough entered his plea, he waived his right to a referral to the probation department for the preparation of a report, and requested immediate sentencing. (1RT 35.) Pursuant to the stipulated disposition, the court sentenced Mr. McCullough to serve four years in state prison, the upper term of three years on count 1, plus one year for the prison prior (§667.5, subd. (b)). The court then imposed fees and fines. It began with a restitution fine of $800. Defense counsel immediately interjected, "You honor, we would ask the court to impose the minimum of $200 restitution amount. [¶] Mr. McCullough indicated he is on a fixed income." (1RT 36.) The court rejected counsel's request. "If it turns out he is unable to pay that," the court reasoned, "he will not be required to pay that if he can't make the payment. However, it first needs to be determined whether he can make the payment. The amount I've set will remain. That is

a relatively low amount." (1RT 36.) The court then imposed additional fees, including, but not limited to, "a $270.17 main jail booking fee[.]" (1RT 36, hereinafter the "booking fee".) There was no further objection by defense counsel.

The Third District Court of Appeal granted appellant's request for relief from untimely filing the notice of appeal, and appellant's notice of appeal and request for a certificate of probable cause, which was granted, was deemed timely filed on June 8, 2010. (1CT 34-38.)

In his direct appeal before the Third Appellate District, appellant contended that the evidence was insufficient to support the trial court's implied finding of his ability to pay the booking fee, a requirement of Government Code section 29550.2. Appellant contended that his claim – based on insufficiency of the evidence – was not forfeited by his failure to object at the time of sentencing.

In the published portion of the opinion, the Court of Appeal held that appellant "forfeited his challenge to the booking fee by failing to object in the trial court." (*People v. McCullough* (2011) 193 Cal.App.4th 864, 866, review granted June 29, 2011, S192513 (*McCullough*).) The Court of Appeal relied on its previous decisions in *People v. Crittle* (2007) 154 Cal.App.4th 368 (*Crittle*), *People v. Hodges* (1999) 70 Cal.App.4th 1348 (*Hodges*), and *People v. Gibson* (1994) 27 Cal.App.4th 1466 (*Gibson*), and disagreed with the decision in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), which relied on *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*), and *People v. Lopez* (2005) 129 Cal.App.4th 1508 (*Lopez*), to hold that in order to preserve a challenge to the booking fee, a defendant must object in the trial court. Appellant relied on, but the reviewing court

distinguished this Court's decision in *People v. Butler* (2003) 31 Cal.4th 1119 (*Butler*), which involved the question of whether a defendant who fails to object at sentencing forfeits his right to contest the sufficiency of the evidence of probable cause underlying an order to submit to HIV testing. (*McCullough*, *supra,* 193 Cal.App.4th at p. 868.) *Butler* held that the general rules of forfeiture discussed in *People v. Stowell* (2003) 31 Cal.4th 1107 (*Stowell*), and *People v. Scott* (1994) 9 Cal.4th 331, 348 (*Scott*), did not bar the defendant from challenging the sufficiency of the evidence of probable cause to support the order for HIV testing. (*Butler,* at p. 1126.)

ARGUMENT

I.

APPELLANT DID NOT FORFEIT HIS CLAIM THAT HE WAS UNABLE TO PAY THE BOOKING FEE, BECAUSE NO OBJECTION IS REQUIRED FOR CLAIMS, SUCH AS THE ONE PRESENTED HERE, BASED ON INSUFFICIENT EVIDENCE.

A. Introduction.

Appellant did not forfeit his right to contest his ability to pay the booking fee on appeal. Government Code section 29550.2, which the Court of Appeal found to govern this case, requires a court to make an ability-to-pay finding as a prerequisite to the imposition of the booking fee. (See Arg. I.B., post.) In subsection I.C. appellant will show that under *Pacheco, supra,* 187 Cal.App.4th 1392, *Viray, supra,* 134 Cal.App.4th 1186, *Lopez, supra,* 129 Cal.App.4th 1508, and this Court's decisions in *Butler, supra,* 31 Cal.4th 1119, and *Stowell, supra,* 31 Cal.4th 1107, this issue is not forfeited by lack of an objection. Imposition of the booking fee is not a "discretionary sentencing choice" falling within the forfeiture rule articulated in *Scott, supra,* 9 Cal.4th 331, 348. In subsection I.D. appellant will show why the Court of Appeal's decision in this case, applying the forfeiture doctrine, is unsound and should not be affirmed by this Court. Finally, appellant contends in Argument II. that even if this court finds the traditional forfeiture rules apply to the booking fee, the issue was not forfeited in this case, because counsel did object to the imposition of the restitution fine and, once the court overruled that objection, further objection from counsel would have been futile.

B. The Applicable Booking Fee Statute.

Government Code section 29550.2, subdivision (a) provides, in pertinent part, "[a]ny person booked into a county jail pursuant to any arrest by any governmental entity not specified in Section 29550 or 29550.1 is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. . . . The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs, as defined in subdivision (c), including applicable overhead costs as permitted by federal Circular A 87 standards, incurred in booking or otherwise processing arrested persons. *If the person has the ability to pay,* a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person. . . ." (Italics added.)

The Legislature's use of the word "if" in the italicized portion of Government Code section 29550.2, subdivision (a), quoted above, makes the ability-to-pay finding a condition precedent to imposition of the booking fee. The word "if" implies a condition on which something depends. Thus, imposition of the booking fee is dependent upon a finding of ability-to-pay.

" 'In construing any statute, we first look to its language. [Citation.] Words used in a statute . . . should be given the meaning they bear in ordinary use. [Citations.] If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. . . .' [Citation.]" (*People v. Zambia* (2011) 51 Cal.4th 965, 972, internal quotations

omitted.) " 'If the [statutory] language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls. [Citations.]' " (*People v. Anderson* (2010) 50 Cal.4th 19, 29.) Under these familiar cannons of statutory construction, if a defendant has the ability to pay, a court may impose the booking fee, but "if" and only "if" there is sufficient evidence of his or her ability-to-pay.

C. *Pacheco, Viray, Lopez, Butler* and *Stowell* Support the Conclusion That A Challenge to the Sufficiency of the Evidence to Support The Trial Court's Implied Finding of Ability-to-Pay the Booking Fee Is Not Forfeited By A Lack of Objection.

1. *Pacheco.*

In *Pacheco, supra,* 187 Cal.App.4th 1392, the Sixth District Court of Appeal squarely addressed the question of whether a defendant who fails to object to the imposition of a booking fee, based on a claim of insufficient evidence to support the trial court's implied finding of ability-to-pay, forfeits the claim on appeal. *Pacheco* found that the defendant's claims were not forfeited. "We have already held that such claims [based on insufficiency of the evidence] do not require assertion in the court below to be preserved on appeal. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1217 [challenge to order to reimburse attorney fees based on insufficiency of evidence may be first asserted on appeal]; see also *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1536-1537 [challenge to conditional order to pay attorney fees 'if appropriate' with no referral for ability to pay determination may be raised for first time on appeal].)" (*Pacheco,* at p. 1397.)

2. *Viray.*

In *Viray,* the court reversed an order to pay attorney's fees based on insufficient evidence of the defendant's ability to pay the fees, and because, "[t]he order . . . [was] entirely unsupported by evidence that the amount requested by the public defender, and allowed without opposition, represent[ed] the actual costs to the county of the services provided to defendant." (*Viray, supra,* 134 Cal.App.4th at p. 1217.)

Presiding Justice Rushing, writing for the majority of the Sixth District Court of Appeal in *Viray*, found that because the defendant's contentions on appeal went to the sufficiency of the evidence to support the order imposing attorney's fees (§987.8), "[s]uch a challenge requires no predicate objection in the trial court. (*People v. Butler* (2003) 31 Cal.4th 1119, 1126, quoting *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, ['Generally, points not urged in the trial court cannot be raised on appeal. . . . The contention that a judgment is not supported by substantial evidence, however, is an obvious exception'].)" (*Viray,* at p. 1217, internal quotations omitted.)

3. *Lopez.*

In *Lopez, supra,* 129 Cal.App.4th 1508, the defendant challenged the trial court's order to pay $1,000 in attorney's fees. (*Id.* at p. 1536.) Although the defendant did not object at sentencing, his contention on appeal was that there was no substantial evidence to support the implied finding of his ability-to-pay, or to overcome the presumption that defendant, who had been sentenced to prison, was unable to pay his public defender. (*Id.* at pp. 1536-1537.) The Sixth District Court of Appeal rejected the Attorney General's assertion that the claim was forfeited. The court found that "the sufficiency of the

evidence to support a finding is an objection that can be made for the first time on appeal. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 262; *People v. Jones* (1988) 203 Cal.App.3d 456, 461, disapproved on another ground by *People v. Tenner* (1993) 6 Cal.4th 559, 566, fn. 2.)" (*Lopez,* at p. 1537.)[3]

4. *Butler.*

a. The Reasoning and Decision in *Butler.*

In *Butler, supra,* 31 Cal.4th 1119, the trial court ordered the defendant to submit to HIV testing, pursuant to section 1202.1, subdivisions (a) and (e)(6)(A), but it did not make an express finding of probable cause. "On appeal, defendant challenged the testing order as unlawful. The Attorney General contended the issue was forfeited 'because it requires a factual determination and was not raised at trial.' " (*Butler,* at p. 1124.) The Court of Appeal rejected the Attorney General's argument on the basis of both " '[t]he failure of the court to make the required finding and the lack of any evidence on the record to support such a finding. . . .' Since 'there is nothing in the record to suggest even a possibility that bodily fluids were transferred,' [the Court of Appeal] determined the order was 'unauthorized.' " (*Ibid.*)

This Court in *Butler* noted that "[i]n the companion case of *People v. Stowell* (2003) 31 Cal.4th 1107, [the court] conclude[d] that, absent a timely objection, a defendant may not challenge such an order on appeal for lack of an express finding of probable cause or a notation of such finding in the docket." (*Butler, supra,* 31 Cal.4th at

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[3] *Viray, supra,* 134 Cal.App.4th 1186 and *Lopez, supra,* 129 Cal.App.4th 1508 are discussed more in the next section of the brief. (Arg. §I.D.2., post.)

p. 1123.) In *Butler*, however, the court was called upon to "determine whether a defendant also forfeits any challenge for insufficiency of the evidence to support a finding of probable cause if he has failed to make an appropriate objection in the trial court." (*Ibid.*)

This court held that a claim based on insufficiency of the evidence was not forfeited on appeal. (*Butler, supra,* 31 Cal.4th at p. 1123.) "We conclude that since involuntary HIV testing is strictly limited by statute and Penal Code section 1202.1 conditions a testing order upon a finding of probable cause, a defendant may challenge the sufficiency of the evidence even in the absence of an objection. Without evidentiary support the order is invalid. We therefore affirm the judgment of the Court of Appeal." (*Butler,* at p. 1123.)[4]

Butler found that while generally points not urged in the trial court cannot be raised on appeal, " '[t]he contention that a judgment is not supported by substantial evidence, however, is an obvious exception.' (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17.) This principle of appellate review is not limited to judgments, and we conclude it should apply to a finding of probable cause pursuant to section 1202.1, subdivision (e)(6)." (*Butler, supra,* 31 Cal.4th at p. 1126, fn. omitted.) In reaching this conclusion, the Court reasoned that, "[t]he fact that a testing order is in part based on factual findings does not undermine this conclusion. Probable cause is an objective legal standard[.]" (*Id.* at p. 1127.) The court cited several cases where

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[4] However, the Court concluded that defendant's contentions that the trial court did not make an express finding of probable cause, or enter the appropriate notation in the docket or minute order, were forfeited under *Stowell, supra,* 31 Cal.4th 1107, 1113-1116. (*Butler, supra,* 31 Cal.4th at p. 1123.)

other courts considered issues involving "factual findings" on appeal, and found:

> [T]hese principles of appellate review apply to Penal Code section 1202.1[.] [I]f the trial court orders testing without articulating its reasons on the record, the appellate court will presume an implied finding of probable cause. [Citation.] Nevertheless, because the terms of the statute condition imposition on the existence of probable cause, the appellate court can sustain the order only if it finds evidentiary support, which it can do simply from examining the record. Moreover, even if the prosecution could have established probable cause, in the absence of sufficient evidence in the record, the order is fatally compromised. [Citations.] Indeed, even in the case of an express finding of probable cause, the question – being one of law rather than fact – would be considered de novo on appeal.

(*Butler, supra*, 31 Cal.4th at p. 1127, citations omitted.)

b. The Reasoning of *Butler* Applies to the Booking Fee.

The reasons given by this Court for allowing a defendant to challenge the sufficiency of the evidence of probable cause underlying an HIV testing order for the first time on appeal (*Butler, supra*, 31 Cal.4th at p. 1127), apply to the booking fee.

1. *When the Court Does Not State its Reasons.*

As with an order imposing HIV testing, if the trial court imposes a booking fee without articulating its reasons on the record, the appellate court will presume an implied finding of ability-to-pay. A trial court's determination of a defendant's ability-to-pay need not be express, but may be implied through the content and conduct of the

hearing. (*Pacheco, supra,* 187 Cal.App.4th at p. 1398.) On a silent record, such as here, the reviewing court presumes the trial court regularly performed its official duties and made the requisite findings necessary to uphold the order under consideration. (See e.g., *People v. Moran* (1970) 1 Cal.3d 755, 762; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496; Evid. Code, §664.)

This principle is routinely applied in the context of imposing, or not imposing fees or fines which require an ability-to-pay finding. For example, in *People v. Clark* (1992) 7 Cal.App.4th 1041, 1050, where a drug program fee (Health & Saf. Code, §11372.7) was imposed but the record was silent as to the defendant's ability to pay, the Court of Appeal presumed the trial court found the defendant had the ability to pay the fee. On a similarly silent record, the Court of Appeal in *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1516-1518, held that a judgment that fails to impose the drug program fee is not a legally unauthorized judgment because it is presumed the trial court found the defendant did not have the ability to pay. (See also e.g., *People v. Burnett* (2004) 116 Cal.App.4th 257, 261 ["[o]n a silent record, we presume the trial court determined that defendant did not have the ability to pay and thus should not be compelled to pay the fine [under section 290.3]"]; *People v. Phillips* (1994) 25 Cal.App.4th 62, 71 [upholding imposition of probation costs (§1203.1b) based on implicit finding of ability of pay]; *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1531 ["implicit in the imposition of the $10 section 1202.5, subdivision (a) fine is the trial court's finding defendant had the ability to pay"].) Therefore, like an HIV testing order, if the trial court orders a booking fee without making an express finding of ability-to-pay, a reviewing court will presume an implied finding of ability-to-pay.

2. *The Booking Fee And HIV Testing Order Statutes Condition Imposition of the Order On a Finding of Fact.*

As with the HIV testing order in *Butler* (§1202.1), which is conditioned upon a finding of probable cause, imposition of the booking fee is conditioned upon a finding of ability-to-pay. As set forth above, under Government Code section 29550.2 a trial court must find the defendant has the ability-to-pay as a prerequisite to imposing the booking fee. (Cf. *Butler, supra,* 31 Cal.4th at p. 1123; Arg. I.B., ante.)

Not all statutes imposing a fee or fine require a trial court to make an ability-to pay finding[5], some allow a court to consider a defendant's ability to pay, but do not make the finding a prerequisite to imposition of the fee or fine[6], and still other statutes impose a burden on the defendant to show an inability to pay.[7] Here, the

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[5] For example, no ability-to-pay finding is required for: Government Code sections 29550.1 [city's right to recover booking fees] 70370, 70373, 76000, 76000.5, 76000.10, 76104.6, 76104.7, Penal Code sections 147, 186.28, 243.4, 298.1, 308, 456, 490.5, 672, 1202.44, 1202.45, 1203.1, subdivision (e), 1203.1b, 1203.1g, 1203.1j, 1205, 1214.1, 1464, 1465.7, 1465.8, 4600, Health & Safety Code sections 11372.5, 11470.2, Vehicle Code sections 23550, 23550.5, 23554, 23560, 23566, subdivisions (a) and (b), 23568, and 42000.

[6] See for example Government Code section 70372 [if defendant is in prison court can waive fine as hardship], Penal Code sections 1001.90, 1202.4, subdivision (b) [ability-to-pay can be considered if amount exceeds $200 minimum], 1464 [after imposition court can waive all or part of fine if it works a hardship on the convicted person or his or her immediate family], Health and Safety Code section 11350, subdivision (d) [community service can be imposed in lieu of the fine].

[7] See for example section 290.3.

Legislature expressly limited the booking fee payable to the County, to those defendants who have the ability to pay it. (*Great Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal.3d 152, 155 [the Legislature is presumed to have meant what it said].)

3. *In Determining the Existence of Probable Case, or the Ability to Pay, The Trial Court is Making A Limited Factual Finding Subject to Independent Review on Appeal.*

As with an HIV testing order that is based *in part* on a factual finding, an order to pay booking fees also partial rests on a factual finding; and, both employ an objective legal standard in assaying the factual finding. With the booking fee, a trial court must determine whether there is *sufficient evidence* of a defendant's present ability to pay a fixed sum. The ability-to-pay finding, the factual determination, is measured against the objective legal standard of sufficient evidence.

A trial court can only impose the booking fee if there is substantial evidence of defendant's present ability to pay it. (Gov. Code, §29550.2, subd. (a).) "[A]ny finding of ability to pay [the booking fee] must be supported by substantial evidence." (*Pacheco , supra,* 187 Cal.App.4th at p. 1398, citing *People v. Nilsen* (1988) 199 Cal.App.3d 344, 347, and *People v. Kozden* (1974) 36 Cal.App.3d 918, 920; *In re K.F.* (2009) 173 Cal.App.4th 655, 661, ["No court has discretion to make an order not authorized by law, or to find facts for which there is not substantial evidence"].)

When a trial court imposes a booking fee, it is finding "facts in light of an objective legal standard." (*Stowell, supra,* 31 Cal.4th at p. 1116.) And, the factual finding the trial court is required to make is significantly limited by statute. The ability to pay finding is limited

to the defendant's *present* ability to pay, and there is no determination to make concerning the amount of the fee. The amount of the fee is set by statute.

Government Code section 29550.2 does not define "ability to pay." By comparison, "ability to pay" has been defined in the context of probation costs (§1203.1b), and attorney's fees (§987.8). In the context of probation, for example, section 1203.1b, subdivision (e), defines the "ability to pay" as: "the overall capability of the defendant to reimburse the costs, or a portion of the costs, . . . and shall include, but shall not be limited to, the defendant's: [¶] (1) Present financial position. [¶] (2) Reasonably discernible future financial position. In no event shall the court consider a period of more than one year from the date of the hearing for purposes of determining reasonably discernible future financial position. [¶] (3) Likelihood that the defendant shall be able to obtain employment within the one-year period from the date of the hearing. [¶] (4) Any other factor or factors that may bear upon the defendant's financial capability to reimburse the county for the costs."

Section 987.8, which addresses the defendant's ability to pay attorney's fees, similarly defines "ability to pay" as, "the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernible future financial position." (§987.8, subd. (g)(2).)

The booking fee statute does not contain a provision requiring a trial court to determine the defendant's future financial ability to pay, or to consider the various factors that may influence that determination. Government Code section 29950,2, subdivision (a) states simply, "If the person has the ability to pay, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person. . . ."

The language of Government Code section 29550.2 is subject to the maxim *expressio unius est exclusio alterius*: "The expression of some things in a statute necessarily means the exclusion of other things not expressed." (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.) "It is an elementary rule of construction that the expression of one excludes the other. And it is equally well settled that the court is without power to supply an omission." (*Estate of Pardue* (1937) 22 Cal.App.2d 178, 180-181.) Adding language into a statute "violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes." (*Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 998.) Therefore, because Government Code section 29550.2, does not include a provision for considering a defendant's future ability-to-pay, the "ability-to-pay" determination is limited to the defendant's *present* ability to pay the booking fee, his financial situation on the date of sentencing.

The trial court also has no discretion to determine the amount of the booking fee. "[A] booking fee must not exceed the actual administrative costs of booking, as further defined in the relevant statutes." (*Pacheco, supra,* 187 Cal.App.4th at p. 1400; Gov. Code,

§29550.2, subd. (a)[8]; *People v. Rivera* (1998) 65 Cal.App.4th 705, 712 [under Gov. Code, §29550.2, "[t]he fees are limited to the actual administrative costs and are assessed against all offenders who have the ability to pay the fee. . . ."].) There is, therefore, no discretion to set the amount of the fee.

Thus, the limited factual finding a trial court is required to make as a prerequisite to imposition of the booking fee – defendant's present ability-to-pay – is akin to the factual determination a court must make prior to ordering HIV testing. (*Butler, supra,* 31 Cal.4th at p. 1127.)

Also like an HIV testing order, the order imposing a booking fee can only be sustained on appeal if it finds evidentiary support, which a reviewing court can determine simply from examining the record. In the absence of sufficient evidence *in the record,* the order is fatally compromised. (*Butler, supra,* 31 Cal.4th at p. 1127.) "Under the substantial evidence rule, a reviewing court will defer to a trial court's factual findings to the extent they are supported in the record, but must exercise its independent judgment in applying the particular legal standard to the facts as found." (*Ibid.*) If there is no substantial evidence to support the trial court's determination that a defendant has the ability-to-pay, an order to pay fees is erroneous as a matter of law. (*Nilsen, supra,* 199 Cal.App.3d at p. 351; *Kozden, supra,* 36 Cal.App.3d at p. 920.)

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[8] Government Code section 29550.2, subdivision (a) provides, in pertinent part: "The fee which the county is entitled to recover pursuant to this subdivision *shall not exceed the actual administrative costs,* as defined in subdivision (c), including applicable overhead costs as permitted by federal Circular A 87 standards, incurred in booking or otherwise processing arrested persons." (Italics added.)

Reviewing a booking fee order for substantial evidence is subject to independent review. "[E]ven when the underlying inquiry is fact intensive – as, for example, with the preliminary hearing – reviewing courts may nonetheless apply an objective standard of review." (*People v. Adair* (2003) 29 Cal.4th 895, 907, & *id.* at pp. 905-906 [although a reviewing court should ordinarily consider itself bound by the trial court's factual findings to the extent they are supported by substantial evidence, a reviewing court can then exercise its independent judgement. For example, "[t]he constitutional precept of 'reasonableness' as to searches and seizures is not a 'fact' which can be 'found' or not found in any given case. Rather, it is a standard, a rule of law, external, objective and ubiquitous, to be applied to the facts of all cases. [Citations.]"] & *id.* at p. 907 [independent review must not be conflated with the substantial evidence test].) With respect to the booking fee, the reviewing court independently reviews the record for substantial evidence of a defendant's present ability-to-pay the fee.

Thus, we have shown that the reasons given by this court in *Butler* for permitting a claim of insufficient evidence to be made for the first time on appeal, apply equally to the booking fee. (*Butler, supra,* 31 Cal.4th at p. 1127.)

c. Permitting An Appellate Challenge Here, Is Consistent with Court of Appeal Decisions and Other Authority.

The majority in *Butler* noted that its holding was "consistent with Court of Appeal decisions addressing sufficiency of the evidence for a Penal Code section 1202.1 order." (*Butler, supra,* 31 Cal.4th at p. 1127.) Similarly here, permitting an appellate challenge to the sufficiency of the evidence to support the trial court's implied finding

of ability-to-pay would also be consistent with Court of Appeal decisions that have addressed the issue.[9] Significantly, Witkin, a premier secondary legal resource, relied on *Butler* to create a "distinction" for claims based on "sufficiency of the evidence" in the materials describing when an error would otherwise be forfeited by a failure to object. It states: "*(New) Distinction: Sufficiency of the evidence:* Sufficiency of the evidence is a question necessarily and inherently raised in every contested trial of any issue of fact, and it requires no further steps by the aggrieved party to be preserved for appeal." (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000 & 2011 supp.) Reversible Error, §36, p. 62, citing *Butler, supra,* 31 Cal.4th at p. 1125; and *In re K.F., supra,* 173 Cal.App.4th at p. 660.)

Therefore, a challenge to the sufficiency of the evidence to support a trial court's implied finding of ability-to-pay is appealable in the absence of an objection below, because a finding of ability-to-pay must be supported by substantial evidence and, without evidentiary

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[9] See for example *Pacheco, supra,* 187 Cal.App.4th 1392 [challenge to the sufficiency of the evidence of defendant's ability to pay attorney's fees (§987.8), booking fees (Gov.Code, § 29550.2) and probation cost fees (§1203.1b) not forfeited by failure to object]; *People v. Shiseop Kim* (2011) 193 Cal.App.4th 836, 842 [defendant may challenge for the first time on appeal the imposition of a fee as a probation condition]; *Viray, supra,* 134 Cal.App.4th at pp. 1214-1217 [challenge to the sufficiency of the evidence of defendant's ability to pay attorney's fees may be raised for the first time on appeal]; *Lopez, supra,* 129 Cal.App.4th at pp. 1536-1537 [accord]; *In re K.F., supra,* 173 Cal.App.4th at p. 660 [aspects of a restitution order not founded on substantial evidence is cognizable on appeal without prior objection in the trial court]; see also Arg. §I.D.3, post [for cases that have applied *Butler's* rule, permitting challenges to the sufficiency of the evidence to be made for the first time on appeal, in other contexts].)

support, the order is fatally compromised. (*Butler, supra,* 31Cal.4th at pp. 1123, 1127; *In re K.F.* , *supra,* 173 Cal.App.4th at pp. 660-661.)

5. *Stowell.*

This Court's opinion in *Stowell, supra,* 31 Cal.4th 1107, the companion case to *Butler, supra,* 31 Cal.4th 1119, also supports the position that a challenge to the sufficiency of the evidence to support the trial court's implied finding of ability to pay the booking fee does not require an objection in the trial court.

In *Stowell*, the defendant sought to have an HIV testing order (§1202.1, subd. (e)(6)(A)) "invalidated because the trial court had failed to state on the record its finding of probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV had been transferred from him to Taylor [the victim] or to note the finding in the court docket or minutes." (*Stowell, supra,* 31 Cal.4th at p. 1111, fn. omitted.) The Third District Court of Appeal had concluded that, under the principles of *Scott, supra,* 9 Cal.4th 331, 352-356, and *People v. Smith* (2001) 24 Cal.4th 849, 852-853 (*Smith*), the defendant forfeited his claim on appeal. (*Stowell,* at p. 1113.)

In *Scott, supra,* 9 Cal.4th 331, 352-356, the Court determined the cognizability of certain sentencing decisions on appeal. The Court distinguished between unauthorized sentences – those that "could not lawfully be imposed under any circumstances in the particular case" (*id.* at p. 354) – and discretionary sentencing choices – those "which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (*Ibid.*) As to the former, lack of objection does not foreclose review: "We deemed appellate intervention appropriate in these cases because the errors presented 'pure questions of law' [citation] and were 'clear and correctable'

independent of any factual issues presented by the record at sentencing." (*Ibid.*) "In other words, obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable." (*Smith, supra,* 24 Cal.4th at p. 852.) With respect to the latter, however, the general forfeiture doctrine applies and failure to timely object forfeits review. Such "[r]outine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Scott*, at p. 353; *Smith,* at p. 852; *Stowell, supra,* 31 Cal.4th at p. 1113.)

In *Stowell,* this Court agreed with the Court of Appeal's result, finding the issue forfeited, but the majority did not adopt the "analytical template" of *Scott* or *Smith*, utilized by the Court of Appeal in reaching its result. (*Stowell, supra,* 31 Cal.4th at p. 1113.) The reasoning of *Stowell* illustrates why a claim of insufficient evidence to support the trial court's implied finding of ability to pay the booking fee is not forfeited in the absence of an objection at sentencing, notwithstanding that *Stowell* reached the opposite conclusion.

At the outset of its analysis, the Court in *Stowell* found that because HIV testing does not constitute "punishment [citation] it cannot properly be considered a sentencing choice[]" subject to *Scott's* forfeiture rule. (*Stowell, supra,* 31 Cal.4th at p. 1113.) The same is true with respect to the booking fee. The booking fee does not constitute punishment and therefore, it does not fall within the purview of the *Scott.*

In *People v. Rivera, supra,* 65 Cal.App.4th 705 (*Rivera*), the Third District Court of Appeal held that Government Code section 29550.2 "was enacted not as a punitive measure, but to help address the state's fiscal crisis by allowing a county to recover costs incurred

in booking or otherwise processing an arrested person who thereafter is convicted. The fees are limited to actual administrative costs and are assessed against all convicted offenders who have the ability to pay, without regard to the nature or severity of their respective offenses." (*Id.* at pp. 708-709.) In *Rivera* the issue was whether it was proper to impose the booking fee against a defendant who committed an offense before the Legislature enacted Government Code section 29550.2, or whether imposition of the fee violated the prohibition against ex post facto laws. "Because the fees are not punitive in purpose or effect," the Court of Appeal reasoned, "they do not run afoul of the prohibition against ex post facto laws." (*Id.* at p. 708; see also *People v. Alford* (2007) 42 Cal.4th 749, 758-759 [this Court endorsed the holding in *Rivera, supra,* 65 Cal.App.4th 705, 707-711, that the jail booking fee and jail classification fee "were not properly classified as punishment"].)

Therefore, because the booking fee does not constitute *punishment*, "it cannot properly be considered a sentencing choice" (*Stowell, supra,* 31 Cal.4th at p. 1113), and thus it does not fall within *Scott's* rule that "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices" raised for the first time on appeal are not subject to appellate review. (*Scott, supra,* 9 Cal.4th at p. 353.)

The court in *Stowell* also found that, absent an objection below, the trial court's failure to make an express finding, or notation of probable cause was forfeited, in part, because an order for HIV testing (§1202.1, subd. (e)(6)(A)) does not require an express finding, or contain any sanction for non-compliance. (*Stowell, supra,* 31 Cal.4th at p. 1114.) "In this circumstance," the court applied "the general rule

'that a trial court is presumed to have been aware of and followed the applicable law. [Citations.]' " (*Stowell,* at p. 1114, citing, inter alia, *People v. Mosley, supra,* 53 Cal.App.4th at pp. 496-497, and *People v. Martinez, supra,* 65 Cal.App.4th at p. 1517; Evid. Code, §664.) "Thus, where a statement of reasons is not required and the record is silent, a reviewing court will presume the trial court had a proper basis for a particular finding or order." (*Stowell,* at p. 1114.)

Application of the principle employed in *Stowell* does *not* bar the claim made here. As discussed above, if the trial court fails to make an express finding of ability to pay, the reviewing court implies the requisite finding, and the question becomes one of determining the sufficiency of the evidence to support that finding – a legally objective standard a reviewing court independently determines on appeal. (Arg. §I.C.4.b.1 & b.3., ante.)

Finally, the defendant in *Stowell* argued that a trial court should be required to put its finding of probable cause on the record, just as a trial court is required to state and enter its reasons on the record for a discretionary dismissal under section 1385. (*Stowell, supra,* 31 Cal.4th at pp. 1115-1116.) The Court rejected this argument because, unlike a discretionary dismissal under section 1385, ". . . a probable cause finding is not an exercise of the trial court's discretion but a determination of the facts in light of an objective legal standard. [Citation.] Accordingly, a trial court's failure to state or note its probable cause finding does not impair or impede a reviewing court's ability to determine the propriety of a testing order." (*Stowell,* at p. 1115.) The same is true with respect to the booking fee.

As we explained, making the ability-to-pay finding necessary for imposition of the booking fee is not an exercise of the trial court's

discretion, but a determination of the facts in light of an objective legal standard. (Arg. §I.C.4.b.3., ante.) A trial court can only impose the booking fee if there is substantial evidence of the defendant's present ability to pay it. (*In re K.F., supra,* 173 Cal.App.4th at p. 661, ["No court has discretion to make an order not authorized by law, or to find facts for which there is not substantial evidence"].)

Based on the foregoing, appellant's claim of insufficient evidence to support the trial court's implied finding of ability to pay, is not forfeited on appeal. (*Butler, supra,* 31 Cal.4th 1119; *Stowell, supra,* 31 Cal.4th 1109; *In re K.F., supra,* 173 Cal.App.4th at pp. 660-661; *Pacheco, supra,* 187 Cal.App.4th at p. 1397; *Viray, supra,* 134 Cal.App.4th at p. 1217; *Lopez, supra,* 129 Cal.App.4th 1537; *People v. Rodriguez, supra,* 17 Cal.4th at p. 262 [defendant could not waive his right to challenge the sufficiency of the evidence].)

D. The Court of Appeal's Determination That This Issue Was Forfeited is Not Sound and Should Not Be Endorsed By This Court.

1. *Crittle, Hodges,* and *Gibson.*

The Court of Appeal below relied on its prior decisions in *Crittle, supra,* 154 Cal.App.4th 368, *Hodges, supra,* 70 Cal.App.4th 1348, and *Gibson, supra,* 27 Cal.App.4th 1466, in finding appellant's claim forfeited by reason of his failure to object at sentencing. (*McCullough, supra,* 193 Cal.App.4th at p. 867.) These decisions do not support the conclusion that appellant's claim of insufficient evidence to support the trial court's implied finding of ability-to-pay the booking fee is forfeited by lack of an objection in the trial court.

Hodges, supra, 70 Cal.App.4th 1348 and *Crittle, supra,* 154 Cal.App.4th 368, rely on *Gibson, supra,* 27 Cal.App.4th 1466. Neither

Hodges nor *Crittle* contain any analysis. These decisions simply make a conclusory statement with reference to *Gibson*. In *Hodges,* the Third District Court of Appeal stated simply: "Finally, defendant challenges one probation condition and the imposition of a booking fee imposed pursuant to Government Code section 29550.2. These contentions are waived because defendant failed to raise them at the time of sentencing. (*People v. Welch* (1993) 5 Cal.4th 228, 234; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468.)" (*Hodges,* at p. 1357.)

Similarly, in *Crittle* the Third District Court of Appeal stated merely:

> The trial court imposed two $10 crime prevention fines based on section 1202.5, subdivision (a), which states: "In any case in which a defendant is convicted of any of the offenses enumerated in Section 211 . . . , the court shall order the defendant to pay a fine of ten dollars ($10) in addition to any other penalty or fine imposed." [¶] Since defendant did not raise the issue in the trial court, we reject his contention that the fines must be reversed because the court did not make a finding of defendant's ability to pay them, and nothing in the record shows he had the ability to pay. (See *People v. Gibson, supra,* 27 Cal.App.4th at pp. 1468-1469.)

(*People v. Crittle, supra,* 154 Cal.App.4th at p. 371.)

Because the Court of Appeal's conclusions in *Crittle* and *Hodges* rest on *Gibson,* a discussion of *Gibson* is warranted. *Gibson* was decided in 1994. In that case, the Third District Court of Appeal determined that the defendant's failure to object to the imposition of a *restitution fine,* based on the trial court's failure to *consider* his ability to pay, was waived in the absence of an objection below.

(*Gibson, supra,* 27 Cal.App.4th at pp. 1467-1468.)

Restitution, requiring Mr. Gibson to pay a total of $2,200, was imposed against him under Government Code section 13967, subdivision (a).[10] In 1994, Government Code section 13967, subdivision (a), "provide[d] in pertinent part: 'Upon a person being convicted of any crime in the State of California, the court shall, in addition to any other penalty provided or imposed under the law, order the defendant to pay restitution in the form of a penalty assessment in accordance with Section 1464 of the Penal Code and to pay restitution to the victim in accordance with subdivision (c). In addition, if the person is convicted of one or more felony offenses, the court shall impose a separate and additional restitution fine of not less than two hundred dollars ($200), *subject to the defendant's ability to pay,* and not more than ten thousand dollars ($10,000). . . .'" (*Gibson, supra,* 27 Cal.App.4th at p. 1468, fn. 1, italics in opinion.)

Thus, if the trial court determined the defendant had the ability to pay, it could set an amount of restitution, *in its discretion,* anywhere between $200 and $10,000. The issue in *Gibson*, as stated by the Court of Appeal, was whether a defendant should be permitted "to assert for the first time on appeal a *procedural defect* in imposition of a restitution fine, i.e., the trial court's alleged failure to *consider defendant's ability to pay* the fine." (*Gibson, supra,* 27 Cal.App.4th at p. 1468, italics added.)

The Court in *Gibson* found that, "a defendant should not be permitted to assert for the first time on appeal a *procedural defect* in

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[10] This section was repealed and replaced by Stats.1994, ch. 1106, § 2, effective Sept. 29, 1994.

imposition of a restitution fine[.] Rather, a defendant must make a timely objection in the trial court in order to give that court an opportunity to correct the error; failure to object should preclude reversal of the order on appeal. [Citations.]" (*Gibson, supra,* 27 Cal.App,4th at p. 1468, italics added.) It also noted that "because *the appropriateness of a restitution fine is fact-specific,* as a matter of fairness to the People, a defendant should not be permitted to contest for the first time on appeal the sufficiency of the record to support his ability to pay the fine. Otherwise, the People would be deprived of the opportunity to cure the defect by presenting additional information to the trial court to support a finding that defendant has the ability to pay." (*Ibid.*, italics added.)

Although *Gibson* did not utilize the terminology used today, it held that a defendant who does not object to the trial court's discretionary sentencing choice to impose a restitution fine above the minimum amount, forfeits the issue on appeal. (Cf. *Gibson, supra,* 27 Cal.App.4th at p. 1468 [defendant should not be permitted "to assert for the first time on appeal a *procedural defect* in imposition of a restitution fine . . ."] and *Scott, supra,* 9 Cal.4th at p. 334 [a discretionary sentencing choice is one "which, though otherwise permitted by law, [was] imposed in a *procedurally . . . flawed manner*"].) Since *Gibson* was decided, this court has made clear that imposition of a restitution fine is a "discretionary sentencing choice" which, absent objection, is subject to the forfeiture doctrine enunciated in *Scott, supra,* 9 Cal.4th 331. (*People v. Tillman* (2000) 22 Cal.4th 300, 303; *Smith, supra,* 24 Cal.4th at p. 852.) This is all the Court of Appeal decided in *Gibson.*

Moreover, the trial court's alleged failure to "consider" the defendant's ability to pay in *Gibson* is not the issue here. In contrast to *Gibson*, a defendant who challenges the sufficiency of the evidence to support the trial court's implied finding of ability to pay is *not* suggesting the trial court failed to *consider* his or her ability to pay. A challenge to the sufficiency of the evidence in this context presupposes the trial court *considered* and impliedly *found* the defendant had the ability to pay. Therefore, the issue considered and actually decided in *Gibson* is clearly different from the issue here.

Notwithstanding that *Gibson* only addressed the question of whether a defendant can object on appeal to the trial court's discretionary sentencing choice in setting the amount of restitution, it also discussed the sufficiency of the evidence. After deciding that a failure to object to the trial court's discretionary sentencing choice forfeits the issue on appeal, the reviewing court gratuitously stated, without citation to any authority, "A challenge to the sufficiency of evidence to support the imposition of a restitution fine to which defendant did not object is not akin to a challenge to the sufficiency of evidence to support a conviction, to which defendant necessarily objected by entering a plea of not guilty and contesting the issue at trial." (*Gibson, supra,* 27 Cal.App.4th at p. 1468-1469.) This dicta appears to be the source of the problem. However, this statement is neither a correct statement of law, nor does it have any authoritative force, because it was not part of the ratio decidendi of the opinion.

Gibson's statement regarding the sufficiency of the evidence is at odds with the Court's conclusion in *Butler* that challenges to the sufficiency of the evidence are *not* limited to judgments. (*Butler, supra,* 31 Cal.4th at p. 1126; see also 6 Witkin & Epstein, Cal.

Criminal Law, *supra,* Reversible Error, §36, p. 62 ["Sufficiency of the evidence is a question necessarily and inherently raised in every contested trial of any issue of fact, and it requires no further steps by the aggrieved party to be preserved for appeal"].) Therefore, to the extent *Gibson* is inconsistent with *Butler*, *Gibson* is not good law. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In addition, *Gibson's* statement about the sufficiency of the evidence was not necessary to its decision and was therefore dictum. "It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered." (*People v. Knoller* (2007) 41 Cal.4th 139, 155, citations and internal quotations omitted.) "An appellate decision is not authority for everything said in the court's opinion but only for the points actually involved and actually decided." (*Ibid.*, citations and internal quotations omitted.)

Because the issue in *Gibson* concerned only whether a defendant should be permitted "to assert for the first time on appeal a *procedural defect* in imposition of a restitution fine[]" (*Gibson, supra,* 27 Cal.App.4th at p. 1468, italics added), and did *not* encompass the question of whether sufficient evidence supported the trial court's implied finding of the defendant's ability to pay a $2,200 restitution fine, that aspect of *Gibson's* discussion lacks authoritative force. (See e.g., *People v. Knoller, supra,* 41 Cal.4th at p. 155.) "The doctrine of precedent, or stare decisis, extends only to the ratio decidendi of a decision, not to supplementary or explanatory comments which might be included in an opinion." (*Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, 1006, citations and internal quotations omitted.)

Notwithstanding these well-established principles of appellate practice, the Third District Court of Appeal in *Crittle* and *Hodges* took the dicta from *Gibson* and – without a shred of further analysis – mechanically applied it to the crime prevention fee (*Crittle*), and the booking fee (*Hodges / McCullough*). Because *Gibson* addressed only a discretionary sentencing choice – a procedural defect in the imposition of a *restitution fine* – it's application must be limited to the issue it considered.

2. The Reasoning of *Viray* and *Lopez* Apply to the Booking Fee.

The Court of Appeal here also found appellant's claim forfeited because it did not believe the reasoning of *Viray, supra,* 134 Cal.App.4th 1186, or *Lopez, supra,* 129 Cal.App.4th 1508 applied to the booking fee. Therefore, it disagreed with *Pacheco's* conclusion – relying on *Viray* and *Lopez* – that a claim based on insufficient evidence to support the trial court's implied finding of ability to pay the booking fee is cognizable on appeal absent an objection in the trial court. (*McCullough supra,* 193 Cal.App.4th at pp. 868-871.) However, in distinguishing *Viray* and *Lopez,* the reviewing court ignored the most critical aspects of those decisions.

In *Viray,* the trial court ordered the defendant to reimburse attorney's fees to the public defender's office, in the amount of $9,200, pursuant to section 987.8. (*Viray, supra,* 134 Cal.App.4th at p. 1213.) On appeal, the defendant raised four challenges to the imposition of the attorney's fees order. (*Id.* at pp. 1213-1214.) The Court of Appeal found two issues dispositive: first, that "insufficient evidence was adduced to establish that defendant was able to pay the fees;" and secondly, "the amount allowed was excessive and unsupported by

evidence of the actual cost to the county." (*Id.* at p. 1214.) Before reaching the merits, the Sixth District Court of Appeal "consider[ed] respondent's contention that defendant ha[d] failed to preserve her challenge to the reimbursement order for appeal because she lodged no predicate objection in the trial court." (*Ibid.*)

The court in *Viray* rejected the forfeiture argument for *two* independent, but equally compelling reasons. First, the court found the forfeiture doctrine should not apply because there was an inherent conflict-of-interest presented by requiring counsel to object to an order awarding him fees, and thus, the defendant was essentially unrepresented by counsel at the time. (*Viray, supra,* 134 Cal.App.4th at pp. 1215-1216.) In *Viray,* the public defender "himself – the very person who was supposedly protecting defendant's rights in the matter – . . . brought the fee request to the court's attention[.]" (*Id.* at p. 1216.) Given this circumstance, the court stated, "We do not believe that an appellate forfeiture can properly be predicated on the failure of a trial attorney to challenge an order concerning *his own* fees." (*Id.* at p. 1215,original italics.) The court, however, limited its holding by noting that:

> Obviously this analysis has no application where the defendant has engaged independent counsel before reimbursement is ordered. [Citation.] . . . Our remarks apply where, at the time of a reimbursement order, the defendant's sole representative is the same publicly financed counsel for whose services reimbursement is sought.

(*Viray, supra,* 134 Cal.App.4th at p. 1216, fn. 15.)

The second reason stated by the court in *Viray* for rejecting the People's forfeiture argument was because, "two of defendant's

contentions – and the two we here reach – go to the sufficiency of the evidence to support the order. Such a challenge requires no predicate objection in the trial court." (*Viray, supra,* 134 Cal.App.4th at p. 1217, citing *Butler, supra,* 31 Cal.4th at p. 1126, and *Tahoe National Bank v. Phillips, supra,* 4 Cal.3d at p. 23, fn. 17.)

In distinguishing *Viray,* the court here focused *only* on the portion of the opinion in *Viray* where the court discussed the conflict-of-interest presented by requiring counsel to object to an order awarding attorney's fees, and concluded, "[u]nlike *Viray,* there is no conflict of interest in this case." (*McCullough, supra,* 193 Cal.App.4th at pp. 869-871.) However, the court in *Viray* made clear that it had two independent bases for rejecting the forfeiture argument. (*Viray, supra,* 134 Cal.App.4th at pp. 1215-1216.) Moreover, *Viray's* second holding – that a challenge to the sufficiency of the evidence to support the trial court's implied finding of ability to pay is cognizable on appeal – is the principle that subsequent cases have taken from *Viray.*[11] The reviewing court here, however, completely ignored this critical aspect of the decision in *Viray.*

The reviewing court did the same thing in distinguishing *Lopez, supra,* 129 Cal.App.4th 1508, it only focused on a portion of the court's opinion. (*McCullough, supra,* 193 Cal.App.4th at p. 870.) The court here focused only on the portion of the opinion in *Lopez* where the court found that the attorney's fees statute (§987.8, subd. (g)(2)(B)) contains a presumption that those sentenced to prison are unable to

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[11] No published opinion has cited *Viray* for the proposition that an order awarding attorney's fees is cognizable on appeal under the conflict-of-interest rationale.

pay[12], and the *Lopez* court's conclusion that, "[w]e construe this part of the statute to require an express finding of unusual circumstances before ordering a state prisoner to reimburse his or her attorney." (*Lopez,* at p. 1537.)

The portion of the opinion in *Lopez* relied on by the reviewing court here, was the reason for striking the order awarding attorney's fees – the basis for the court's decision *on the merits*. Before reaching the merits of the claim, however, the *Lopez* court addressed respondent's forfeiture argument.

> Defendant did not object at the time, but on appeal he contends that the court had no evidence supporting the implied finding of his ability to pay or overcoming the presumption that defendant, who has been sentenced to prison, is unable to pay his public defender. The Attorney General asserts that this challenge has been waived and that there was evidence supporting the order. [¶] In the absence of a guilty plea, the sufficiency of the evidence to support a finding is an objection that can be made for the first time on appeal.

(*Lopez, supra*, 129 Cal.App.4th at pp. 1536-1537, citations omitted.) The Court of Appeal here ignored the court's discussion of the forfeiture issue in *Lopez*.

The reviewing court here offered no cogent basis for distinguishing *Viray* or *Lopez*. In fact, we have shown these decisions are fully consistent with the conclusion that a claim of insufficient

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[12] Section 987.8, subdivision (g)(2)(B), states, in pertinent part: "Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense."

evidence to support the trial court's implied finding of ability-to-pay may be raised on appeal absent an objection below. (See Arg. §I.C.2 & C.3, ante.)

3. It Was Error For the Reviewing Court to Distinguish the Majority Opinion in *Butler* and Rely Instead on the Concurring Opinion.

Finally, the reviewing court distinguished the majority opinion in *Butler, supra,* 31 Cal.4th 1119, on the grounds that *Butler* "did not involve a belated challenge to the imposition of a fee[,]" and because the order under consideration in *Butler* required a finding of probable cause. (*McCullough, supra,* 193 Cal.App.4th at p. 868.)

The fact that *Butler* did not specifically address "a fee" is not a valid basis for distinguishing its rationale. Courts have applied *Butler's* holding – that challenges to the sufficiency of the evidence can be raised on appeal absent objection in the trial court – in various contexts. (See e.g., *People v. Christiana* (2010) 190 Cal.App.4th 1040, 1046-1047 [defendant's challenge to the sufficiency of the evidence of order authorizing involuntary administration of antipsychotic drugs cognizable on appeal absent objection in the trial court]; *In re K.F., supra,* 173 Cal.App.4th at pp. 660-661 [challenge to certain components of a restitution order not shown by substantial evidence cognizable on appeal absent objection in the trial court]; *Viray, supra,* 134 Cal.App.4th at p. 1217 [challenge to the sufficiency of the evidence to support implied finding of ability-to-pay attorney's fees cognizable on appeal absent objection in the trial court]; *In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1561 [challenge to the sufficiency of the evidence supporting the juvenile court's finding of adoptability cognizable on appeal absent objection in the trial court].) Indeed, we

have shown that the reasons underlying the decision in *Butler* apply here. Just as the order under consideration in *Butler* required a finding of probable cause, imposition of the booking fee requires a finding of present ability to pay. (Arg. §I.C.4.b., ante.)

The reviewing court, however, found, "*Butler* does not support defendant's position." (*McCullough, supra,* 193 Cal.App.4th at p. 868.) It reached this conclusion by relying on Justice Baxter's concurring opinion in *Butler, supra,* 31 Cal.4th 1119, " '[I]t remains the case that *other* sentencing determinations may not be challenged for the first time on appeal, even if the defendant claims that the resulting sentence is unsupported by the evidence. This includes claims that the record fails to demonstrate the defendant's ability to pay a fine [citation] . . . ' (*Butler, supra,* 31 Cal.4th at p. 1130 (conc. opn. Baxter, J.).)" (*McCullough,* at p. 868, original italics.)

Justice Baxter's concurring opinion in *Butler,* cited *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072 (*Valtakis*), *Gibson, supra,* 27 Cal.App.4th at pages 1468-1469, *People v. McMahan* (1992) 3 Cal.App.4th 740, 750 (*McMahan*) and *Scott, supra,* 9 Cal.4th 331. (*Butler, supra,* 31 Cal.4th at pp. 1130-1131 (conc. opn. Baxter, J.).) We have already demonstrated that *Scott* and *Gibson* are not applicable to the booking fee. The booking fee is not punishment and therefore does not constitute a "discretionary *sentencing* choice" within the meaning of *Scott*. (*Stowell, supra,* 31 Cal.4th at p. 1113.) In addition, the booking fee lacks other significant characteristics of a typical "discretionary sentencing choice" and therefore, *Scott* does not apply.

Scott held that "the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its *discretionary sentencing choices*." (*Id.* at p. 353, italics added.) As we

demonstrated, making the ability-to-pay finding necessary for imposition of the booking fee is not an exercise of the trial court's discretion, but a determination of the facts in light of an objective legal standard. A trial court can only impose the booking fee if there is substantial evidence of defendant's present ability to pay it. The court has *no discretion* to find facts for which there is not substantial evidence. (*In re K.F., supra,* 173 Cal.App.4th at p. 661.)

Imposition of the booking fee is also not a "discretionary sentencing choice" within the meaning of *Scott,* because the court has *no discretion* to set, or modify the amount of the fee. (See e.g., *People v. Poindexter* (1989) 210 Cal.App.3d 803, 810-811 [the statute governing reimbursement of court-appointed attorney's fees (§987.8) "does not give the court any discretion to determine the reasonable value of those services. [Citation.]"]; cf. also *Smith, supra,* 24 Cal.4th at p. 853 ["In contrast to the erroneous omission of a restitution fine," setting an erroneous amount of the parole revocation fine did not involve a discretionary sentencing choice, because the trial court "has no choice and must impose a parole revocation fine equal to the restitution fine . . ."].) Because the trial court has no discretion to determine the amount of the booking fee, it is not a traditional "discretionary sentencing choice" within the meaning of *Scott.*

Also, unlike a "discretionary sentencing choice," when a court imposes a booking fee it does not generally have various factors to weigh and consider. Ordinarily, a trial court would consider the information in the probation report, outlining such things as whether the defendant has any money, or is presently employed, and decide whether there is sufficient evidence of the defendant's present ability to pay a fixed sum. If the defendant has the money to pay the booking

fee on the date of sentencing, the fee can be imposed; if not, it can't. The determination is relatively straightforward.

By contrast, sentencing discretion typically requires a trial court to make various choices, and to weigh various factors in tailoring a sentence to the particular case. "The choices available commonly include the decision to order probation rather than imprisonment, to impose the lower or upper term instead of the middle term of imprisonment, to impose consecutive rather than concurrent sentences under certain discretionary provisions, and to strike or stay certain enhancements or waive a restitution fine. . . ." (*Scott, supra,* 9 Cal.4th at p. 349.) With a booking fee, the trial court is not weighing or balancing various factors in an attempt to fashion an appropriate disposition. The court is finding a fact, whether there is substantial evidence of defendant's present ability to pay a fixed sum. (*Stowell, supra*, 31 Cal.4th at p. 1116.)

In addition, "[t]he statutes and sentencing rules generally require the court to state 'reasons' for its discretionary choices on the record at the time of sentencing." (*Scott, supra,* 9 Cal.4th at p. 349.) "The [statement of reasons] requirement encourages the careful exercise of discretion and decreases the risk of error. In the event ambiguities, errors, or omissions appear in the court's reasoning, the parties can seek an immediate clarification or change. The statement of reasons also supplies the reviewing court with information needed to assess the merits of any sentencing claim and the prejudicial effect of any error." (*Id.* at p. 351.) Here, in contrast, when imposing the booking fee, a trial court is not required to state its reasons, and the court's failure to make an express finding of ability-to-pay "does not impair or impede a reviewing court's ability to determine the propriety

of [that] order." (*Stowell, supra,* 31 Cal.4th at p. 1115.) Imposition of a booking fee is simply not a "discretionary sentencing choice" within the meaning of *Scott.*

Valtakis, supra, 105 Cal.App.4th 1066, 1072, is also not authority for the proposition that appellant's claim of insufficient evidence to support the trial court's implied finding of ability-to-pay the booking fee is forfeited absent an objection below. In *Valtakis* the court held, "that a defendant's failure to object at sentencing to noncompliance with the probation fee procedures of Penal Code section 1203.1b waives the claim on appeal, consistent with the general waiver rules of *People v. Welch* (1993) 5 Cal.4th 228, and *People v. Scott* (1994) 9 Cal.4th 331.)" (*Valtakis, supra,* 105 Cal.App.4th at p. 1068, fn. omitted.) *Valtakis* concluded:

> "[C]laims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner" [*Scott, supra,* 9 Cal.4th at pp. 351-352], which is exactly the claim here: the probation fees, otherwise permitted, were procedurally flawed (for absence of notice, a hearing or a finding) and factually flawed (for absence of evidence that the defendant had the ability to pay). The unauthorized-sentence exception does not apply.

(*Valtakis, supra,* 105 Cal.App.4th at p. 1072.)

Because the booking fee is not a "discretionary sentencing choice" within the meaning of *Scott,* it follows that the reasoning of *Valtakis,* applying *Scott's* forfeiture rule to a challenge of noncompliance with the probation fee procedures of section 1203.1b, does not apply to the booking fee. The absence of sufficient evidence

of defendant's present ability to pay the booking fee is not a "factual flaw," because a trial court has no discretion to find facts for which there is not substantial evidence. (*In re K.F., supra,* 173 Cal.App.4th at p. 661; see also *People v. Adair, supra,* 29 Cal.4th at pp. 905-906.)

Similarly, *McMahan, supra,* 3 Cal.App.4th 740, 750 does not apply here. In *McMahan*, the probation report recommended imposition of the sex offender fine pursuant to section 290.3. In 1992, when *McMahan* was decided, section 290.3 provided: "Every person convicted of a violation of any offense listed in subdivision (a) of section 290 shall, in addition to any imprisonment or fine, or both, imposed for violation of the underlying offense, be punished by a fine of one hundred dollars ($100) upon the first conviction or a fine of two hundred dollars ($200) upon the second and each subsequent conviction, *unless the court determines that the defendant does not have the ability to pay the fine*. . . ." (Italics added.)[13]

At sentencing, the trial court imposed the fine. (*McMahan, supra,* 3 Cal.App.4th at p. 748.) The defendant raised no objection and made no attempt to show he did not have the ability to pay the fine. (*Id.* at p. 750.) On appeal, the defendant claimed the fine was improperly imposed because the trial court did not first make a finding that he had the ability to pay. (*Ibid.*) The Court of Appeal rejected this argument. It found that the statute placed the burden on the *defendant* to affirmatively argue *against* the application of the fine and demonstrate why it should not be imposed – otherwise, the issue is forfeited. (*Id.* at pp. 749-750.)

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[13] Section 290.3 currently provides for a $300 fine upon the first conviction, and $500 for subsequent qualifying offenses.

The booking fee statute does not affirmatively place the burden on the defendant to *disprove* an ability to pay. Government Code section 29550.2, subdivision (a) states, *"If* the defendant *has the ability to pay*, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person . . . " (Italics added; cf. §290.3 ["unless the court determines that the defendant does *not have the ability to pay* the fine"], italics added.) In the absence of any Legislative indication to the contrary, the defendant does not bear the burden to prove his *inability* to pay the booking fee. (Cf. e.g., §1202.4, subd. (d) ["A defendant shall bear the burden of demonstrating his or her inability to pay"].) *McMahan, supra,* 3 Cal.App.4th 740, is therefore distinguishable.

E. <u>Conclusion.</u>

We have shown that this Court's decisions in *Butler* and *Stowell,* as well as the Court of Appeal decisions in *Pacheco, Viray, Lopez,* and *In re K.F.,* support the conclusion that a claim of insufficient evidence to support the trial court's implied finding of ability-to-pay the booking fee is cognizable on appeal absent an objection below. The rationale of *Butler* clearly applies in this context. Imposition of the booking fee is not a discretionary sentencing choice with the meaning of *Scott* or *Smith.* A finding of ability-to-pay must be supported by substantial evidence of the defendant's present ability to pay. Without evidentiary support, the order is invalid as a matter of law, and subject to independent review on appeal. Therefore, appellant did not forfeit his claim that he was unable to pay the $270.17 booking fee by reason of his failure to object in the trial court.

II.

APPELLANT DID NOT FORFEIT HIS RIGHT TO CONTEST HIS ABILITY TO PAY THE BOOKING FEE, BECAUSE DEFENSE COUNSEL DID OBJECT, AND FURTHER OBJECTIONS WOULD HAVE BEEN FUTILE.

As set forth in the statement of the facts, as soon as the trial court began imposing fees and fines, defense counsel objected. The trial court began by imposing an $800 restitution fine (§1202.4), and counsel immediately interjected, "You honor, we would ask the court to impose the minimum of $200 restitution [sic] amount. [¶] Mr. McCullough indicated he is on a fixed income." (1RT 36.) The court told counsel that, "If it turns out [appellant] is unable to pay that [amount], he will not be required to pay that if he can't make the payment. However, it first needs to be determined whether he can make the payment. The amount I've set will remain. That is a relatively low amount." (1RT 36.)[14] The court then imposed additional fees, including, but not limited to, "a $270.17 main jail booking fee[.]" (1RT 36.) There was no further objection by defense counsel.

Given that the trial court had *just* overruled defense counsel's objection to the imposition of an $800 restitution fee, finding it to be a "relatively low amount," it would have been futile for counsel to object to the imposition of a $270.17 booking fee. A defendant's failure to object at trial does not preclude the issue from appellate review

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[14] It is not clear from the record who was going to determine appellant's ability to pay the various fines and fees that were imposed. There was no referral to the probation department, or to the Department of Revenue, and appellant was sentenced to state prison.

where an objection at trial would be futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Here, there can be no doubt that an objection would have been futile. The trial court had just overruled defense counsel's objection to the imposition of an $800 restitution fine, finding it to be a "relatively low amount." Obviously, the booking fee was less than that, so the trial court would have overruled any objection. Counsel is not required to proffer futile objections. (*People v. Anderson* (2001) 25 Cal.4th 543, 587; *People v. Hines* (1997) 15 Cal.4th 997, 1038, fn. 5; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648 .)

Appellant therefore preserved the right to challenge his ability to pay the booking fee on appeal. The record here is devoid of any evidence of appellant's ability to pay. Indeed, the only evidence on this subject tends to establish appellant did not have the ability to pay. After appellant entered his not guilty plea, he told the court he could not afford an attorney (1RT 29), and apparently he could not afford the $800 restitution fine. (1RT 36.) There was no probation report in this case, and no evidence concerning appellant's financial situation on the date of sentencing. Accordingly, there is no sufficient evidence to support the trial court's implied finding of appellant's ability to pay the booking fee. Appellant did not forfeit this issue, and the fee should be stricken.

CONCLUSION

Predicated on the foregoing, appellant respectfully requests that the judgment of the Court of Appeal be reversed; and, that this Court hold that appellant did not forfeit his right to contest his ability to pay the booking fee for either or both of the following reasons: (1) because claims, such as the one made here, based on insufficient evidence of the trial court's implied finding of ability-to-pay the booking fee are cognizable on appeal, absent an objection in the trial court; and/or (2) because his counsel did preserve the issue by objecting to the restitution fine and counsel was excused from having to lodge any further objections on the grounds that further objections would have been futile.

Dated: November 2, 2011 Respectfully Submitted,

LAW OFFICES OF PRITZ & ASSOCIATES,

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CERTIFICATE OF WORD COUNT
[California Rules of Court Rule 8.520(c)(1)]

Appellant's Opening Brief on the Merits consists of 12,177 words as counted by the word-processing program used to generate the brief.

Dated: November 2, 2011 Respectfully Submitted,

LAW OFFICES OF PRITZ & ASSOCIATES,

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PROOF OF SERVICE
(People v. McCullough, S192513)

STATE OF CALIFORNIA, COUNTY OF VENTURA

I am employed in the County of Ventura, State of California. I am over the age of 18 and not a party to the within action; my business address is 3625 East Thousand Oaks Boulevard, Suite 176, Westlake Village, California 91362.

On November 2, 2011, I served the foregoing document, described as: **APPELLANT'S OPENING BRIEF ON THE MERITS** on the interested parties in this action by transmitting: [ ] the original; [X] a true copy thereof as follows:

Party Served: SEE ATTACHED MAILING LIST

[X] (BY MAIL) I am familiar with the regular mail collection and processing practices of said business, and in the ordinary course of business, the mail is enclosed in a sealed envelope with postage thereon fully prepaid and deposited with the United States Postal Service on same day. I deposited such envelope in the mail at Thousand Oaks, California.

[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED at Westlake Village, California on November 2, 2011.

Danalynn Pritz

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