IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent

vs

OCTAVIO AGUILAR,

Defendant and Appellant

No. **S213571**

First District Court of Appeal, Division Four
No. A135516
Appeal from a Judgement of the Superior Court
of Contra Costa County No. CM035987
Hon. Thomas Maddock, Judge

APPELLANT'S OPENING BRIEF

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By Appointment of the Court
under the Central California Appellate Project
Independent Case System

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APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUES PRESENTED IN APPELLANT'S PETITION FOR REVIEW

A.

Does this Court's decision in *People v. McCullough* (2013) 56 Cal.4th 589 ["*McCullough*"] requiring contemporary objection to the imposition of a criminal justice administration fee1 pursuant to Government Code sections 29500 through 29500.3, apply to court-ordered payment of attorney fees (Pen. Code, § 987.8) and costs of probation supervision (Pen. Code, §1203.1b); or, does *People v. Pacheco* (2010) 187 Cal.App.4th 1392 ["*Pacheco*"] remain good law with respect to those latter statutes?

B.

Was *McCullough* correctly decided and, if so, does it encompass any and all appellate challenges to a court-ordered booking fees or only to those challenges which are based on the absence of findings with respect to a defendant's ability to pay?

ISSUE STATED IN THIS COURT'S GRANT OF REVIEW

This case presents the following issue: Does the failure to object to an order for payment of attorney fees, an order for payment of a criminal justice administration fee, and/or an order for payment of probation supervision fees forfeit a claim that the trial court erred in failing to make a finding of the defendant's ability to pay the amount in question?

STATEMENT OF CASE

By information, filed 12 March 2012, in Contra Costa County Superior Court, appellant was charged with one count of corporal injury on a spouse (Pen. Code, § 273.5, subd. (a)), committed with a belt, a dangerous and deadly weapon, (Pen. Code, § 12022, subd. (b)(1)) and having suffered a prior conviction for battery within seven years (Pen. Code, §§ 243/273.5, subd. (e)). (CT 92)

On defense motion (Pen. Code, § 1118.1), the court dismissed the deadly weapon enhancement. (CT 60)

By jury verdict, appellant was convicted of the charge. (CT 97, 122) In bifurcated proceedings without jury, appellant was found to have been convicted previously of misdemeanor battery within the meaning of Penal Code section 243, subdivision (e)(1). (RT 208)

At sentencing, the court suspended execution of sentence and placed appellant on formal probation for a term of three years on condition that he serve 300 days local custody with 230 actual and good time credits; that he perform 40 hours community service (Pen. Code § 1203.97, subd. (a)(8)) and that he attend a

batterer's intervention program (Pen. Code, § 1203.97, subd. (a)(6)). Without contemporaneous objection, the court imposed various fines and fees, including *inter alia*: (1) the costs of probation supervision at $75.00 per month [see Pen. Code § 1203.1b]; (2) a $564.00 "criminal administration assessment fee" [see Gov. Code, §§ 29550 and 29550.1]; and (3) $500.00 in "attorneys fees" [see, Pen. Code § 987.8, subd. (b)]. [1] (CT 199-201; RT 217-220)

On timely notice and appeal, appellant contested the validity of the court's order imposing the above-listed fees. On 28 August 2013, the First District Court of Appeal (Div. Four), affirmed the judgement; and on, 19 September 2012, the court's opinion was ordered published.

Appellant's petition for review was granted on 26 November 2013.

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1 Although the court's minute order and sentencing allocution did not always provide a citation, the full list of fees and fines and their corresponding authorization was: **[1]** $200.00 restitution fine (Pen. Code, §1202.4, subd.(b) and $200.00 parole revocation fine (Pen. Code, § 1204.45); **[2]** $450.00 for "Victim's Compensation Restitution;" **[3]** $200.00 "pursuant to Penal Code Section 1203.097(a)(5)" [i.e. the Domestic Violence Fund]; **[4]** costs of probation supervision at $75.00 per month [see Pen. Code § 1203.1b]; **[5]** $176.00 probation report fee [see, Pen. Code, § 1203.1b]; **[6]** $564.00 "criminal administration assessment fee" [see Gov. Code, §§ 29550 and/or 29550.1]; **[7]** $500.00 "attorneys fees" [see, Pen. Code § 987.8, subd. (b)]; **[8]** $25.00 "booking fee" [see Pen. Code, § 1463.07 authorizing an "administrative screening fee" upon conviction for persons released on their own recognizance]; **[9]** $40.00 "court security fee" [see Pen. Code § 1464.8]; **[10]** $30.0 "court conviction assessment" (Gov. Code, § 70373); **[11]** costs of alcohol testing at $10.00/ month, [see *In re Christopher H.* (1996) 50 Cal.App.4th 1001 [court's discretion].]. (CT 199, 201; RT 218-220)

STATEMENT OF FACTS

The substantive facts are not at issue in this appeal. The prosecution's evidence showed that, during an argument over whether appellant was seeing other women, appellant struck his cohabitant spouse with a belt, leaving a large reddish bruise on her thigh.

LEGAL & PROCEDURAL BACKGROUND

A. *People v. Pacheco* and Contentions on Appeal.

On appeal from the judgement (CT 220) and relying on *People v. Pacheco* (2010) 187 Cal.App.4th 1392 ["*Pacheco*"] , appellant contended that the trial court's assessments of the criminal justice administration fee, the probation supervision fee and attorney fees were imposed without applicable due process advisements and without findings or evidence of the actual costs of the services in question or appellant's ability to pay for them. (See AOB 5, 8)[2]

In *People v. Pacheco* (2010) 187 Cal.App.4th 1392, the Sixth District Court of Appeal held that, where a fine or assessment is conditioned upon the defendant's ability to pay, the sentencing court must make a finding with respect thereto; and, if such a finding cannot be inferred from the record, it is imposed without sufficient supporting evidence and may be contested on appeal without

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2 Unless otherwise noted, all statutory references are to the Penal Code. As used herein, "costs of probation supervision" refers to the fees imposed under Pen. Code, § 1203.1b; "attorney fees" refers to the fees imposed under Pen. Code, § 987.8 and "criminal justice administration fee" or "booking fees" refer to the fees imposed pursuant to Gov. Code, § 29550 through 29550.3.

objection below. (*Id.*, at p. 1399.) Likewise, where applicable, there must be evidence in the record of the actual costs of processing or services for which a defendant is made liable. (*Id.*, at p. 1400.)

In *Pacheco*, following defendant's conviction by guilty plea, the trial court imposed: a $259.50 criminal justice administration fee under Government Code sections 29550, subdivision (c) or section 29550.2; a $64 per month probation fee under Penal Code section 1203.1b, and a $100 attorney fee under Penal Code section 987.8, all without determining defendant's ability to pay. (*Id.*, at p. 1397.) Defendant's counsel interposed no objection to the assessments. (*Ibid.*)

On appeal, defendant argued that the trial court's orders were void as un-supported by sufficient evidence. (*Id.,* at p. 1397.) The court rejected respondent's argument that appellant had forfeited objection to the assessments. (*Ibid.*) Implicitly relying on this Court's decision in *People v. Butler* (2003) 31 Cal.4th 1119 ["*Butler*"], *Pacheco* ruled that defendant's claims were "based on the insufficiency of the evidence to support the order or judgment. ...[and]... such claims do not require assertion in the court below to be preserved on appeal." (*Pacheco, supra,* at p. 1397.)[3]

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3 For this proposition, the court cited its own precedent in *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217 [challenge to attorney fees based on insufficiency of evidence may be first asserted on appeal]; however, the cited portion of *Viray* explicitly relied on *Butler's* holding that "[s]uch a challenge requires no predicate objection in the trial court." (*Viray, supra*, at p. 1217, citing *People v. Butler, supra* 31 Cal.4th at p. 1126, quoting *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17 [" '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."].)

The the court ruled that each of the statutory authorizations for the fees in question were "expressly subject to a defendant's ability to pay them" (*ibid*) and that, although a "finding of the defendant's present ability to pay need not be express but may be implied through the content and conduct of the hearings [citation]... any finding of ability to pay must be supported by substantial evidence." (*Id.*, at p. 1398.)[4] Finding no such evidence, the court vacated the orders and remanded for further determination. (*Id.*, at p. 1403)

B. *People v. McCullough* and Court of Appeal Ruling.

Following this Court's decision in *People v. McCullough* (2013) 56 Cal.4th 589 ["*McCullough*"] and supplemental briefing ordered thereon, the Court of Appeal held that "[t]he reasoning of *McCullough*, applies to all the fees appellant claims were imposed without a finding of ability to pay" and that without timely objection below he had forfeited any claim of inability to pay as well as any challenge to the actual costs of the fees in question. (Slip. Opn., pp. 3, 5.)

I n *People v. McCullough* (2013) 56 Cal.4th 589, decided during the pendency of appellant's appeal, this Court held that "a defendant who fails to

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4 *Pacheco* held further that although a "county officer designated by the court may make an inquiry into a defendant's ability to pay ... it is the *court* that ultimately must make the ability to pay determination. ...[R]eferral alone does not meet the statutory directive." (*Id, supra,* 187 Cal.App.4th, at p. 1399 [italics original].) The quoted statement was made with respect to the provisions of Penal Code section 987.8, subdivision (b) governing attorney's fees; however, the court's opinion did not suggest that any different procedure of referral was applicable to the other statutory provisions involved.

contest [a] booking fee[5] when the court imposes it forfeits the right to challenge it on appeal." (*Id.*, at p. 591, 592.)

This Court contextualized the issue before it as: "whether a defendant who failed to object *that the evidence was insufficient* to support a finding of his ability to pay a booking fee when the court imposed it has forfeited his right to challenge the fee on appeal." (*Id.*, at p. 591 [italics added].) Stated alternatively, the issue before it was whether the established rule that insufficiency of evidence claims can be asserted on appeal absent objection below applied to court-ordered booking fees. (*Id.,* at p. 592.)

After a legal analysis which is discussed in greater detail below, *McCullough* held that: "Given that imposition of a fee is of much less moment than imposition of sentence, and that the goals advanced by judicial forfeiture apply equally here, we see no reason to conclude that the rule permitting challenges made to the sufficiency of the evidence to support a judgment for the first time on appeal ' should apply to a finding of ' ability to pay a booking fee under Government Code section 29550.2. (*Butler*, *supra*, 31 Cal.4th at p. 1126.) We disapprove *People v. Pacheco*, *supra*, 187 Cal.App.4th 1392, to the extent it holds the contrary." (*McCullough*, *supra,* at p. 599.)

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5 Per Government Code section 29550.2.

C. Synopsis of Contentions.

Appellant's core contention is that due process requires notice, hearing and express findings on the issues specified by statute before any of the fees in question can be imposed. Since these requirements precondition the court's authority to impose the fees, their imposition may be contested, without prior objection, for evidentiary insufficiency in support of the order made. Appellant argues: that *Pacheco's* holding with respect to attorney fees and probations costs was not overruled; that these fees and costs come within the "forfeiture exception" recognized by *McCullough* and *Butler;* and that a determination of actual costs is essential to preclude the fees in question from becoming punitive and *McCullough's* holding on booking fees should be reconsidered in this regard.

ARGUMENTS

I. *McCULLOUGH* DID NOT OVERRULE *PACHECO'S* HOLDING WITH RESPECT TO COURT – ORDERED ATTORNEY FEES AND COSTS OF PROBATION SUPERVISION.

In *McCullough*, without objection, the defendant was ordered to pay a $270.17 criminal justice administration fee pursuant to Government Code section 29550.2, subdivision (a). As noted, this Court held that, absent objection below, the defendant had "forfeit[ed] the right to challenge it on appeal." (*Id.*, at p. 591-592) *Pacheco* was disapproved "to the extent it holds to the contrary." (*McCullough,* at p. 599.)

Appellant herein was arrested by the Antioch Police Department and was booked in the county jail. (CT 222) Therefore, the imposition of a criminal justice administration fee was authorized under Government Code section 29550, subdivisions (a), (c) and (d) or alternatively section 29550.1. Accordingly, this aspect of appellant's sentence fell within the ambit of *McCullough's* holding.

However, *McCullough* did not involve a challenge to attorneys fees and probation supervision fees imposed pursuant to Penal Code sections 987.8 and 1203.1b. Moreover, *McCullough* explicitly distinguished these fees from the booking fee before it. (*McCullough*, supra, at pp. 598-599.) It is axiomatic that the rule of a case does not extend to matters not considered or encompassed within its holding. (*People v. Mendoza* (2000) 23 Cal.4th 896, 915 [no authority for an issue not decided or within holding].) Thus, *McCullough* does not affect appellant's challenge under those two sections.

Nevertheless, the Court of Appeal herein ruled that the reasoning of *McCullough* applied by analogy to attorney fees and probation supervision fees. (Slip. Opn. p. 3.) The question thus becomes whether *McCullough's ratio decidendi* applies to these two fees.

II. UNDER *McCULLOUGH'S* RATIONALE THE FORFEITURE RULE DOES NOT APPLY TO ATTORNEY FEES OR COSTS OF PROBATION SUPERVISION.

McCullough's forfeiture rule does not apply to attorney fees and probation supervision because the statutes which authorize these costs impose jurisdictional and procedural prerequisites before a defendant can be ordered to pay them. (*McCullough,* at pp. 598-599.) Such prerequisites set conditions on the trial court's underlying authority to make the orders in question and this, in turn, necessarily implicates the factual basis for the court's exercise of authority. Under *McCullough*, the existence of such preconditions entitles appellants to mount an insufficiency of the evidence challenge on appeal without prior objection below.

In *McCullough*, this Court contextualized the issue before it as whether "the rule permitting challenges to the sufficiency of the evidence to support a judgment '*should apply*' to [a finding of" ability to pay a booking fee]." (*McCullough*, at p. 599 and p. 596, citing *Butler*, at p. 1126 [italics original].) Based on this formulation of the issue, this Court then undertook to examine what factors its own precedents had relied on in allowing insufficiency of evidence claims with respect to orders and findings other than judgements predicated on the jury's verdict.

As noted, *McCullough* held that the rule allowing insufficiency of evidence challenges without prior objection did not apply to booking fees. In arriving at this conclusion, *McCullough* looked at and compared the terms of Government Code section 29550, subdivisions (a) and (c) with other other statutes authorizing the imposition of fees or sentence-related orders. This Court found that "*[i]n contrast* to the booking fee statutes, many of these other statutes provide procedural requirements or guidelines for the ability-to-pay determination." (*Id.*, at p. 598 [italics added].) *McCullough* concluded that because the Legislature "ha[d] interposed no procedural safeguards or guidelines for its imposition," a booking fee was "*de minimis*" matter as to which "the rule permitting challenges made to the sufficiency of the evidence to support a judgment for the first time on appeal" should *not* apply. (*Id.*, at p. 599.)

Thus, the ground of distinction which *McCullough* relied upon was not the amount of the fee in question nor whether the issue could be characterized as "factual" or "legal" (see infra, p. 26) but whether the statute authorizing the fee had interposed "procedural safeguards and guidelines" as a precondition to the assessment. In so ruling, *McCullough* adopted a due process standard based on legislative intent. The essence of *McCullough's* analysis was that if the legislature had deemed the matter to be significant enough to warrant due process protections,then (as in *Butler*) an insufficiency of evidence claim could be raised on appeal without prior objection.

In contrasting the booking fee statute, *McCullough* specifically noted and

distinguished awards of attorney fees (Pen. Code, § 987.8) and costs of probation supervision (Pen. Code, § 1203.1b) as requiring noticed hearing and "other procedural safeguards." (*McCullough, supra*, at pp. 598-599.) *McCullough* did not launch into a detailed review of these other statutes but, given the point being made with respect to the ground of distinction, a brief summary of these two statutes is in order.

Appointment of counsel and attorney fees in a criminal case are governed by Penal Code sections 987 through 987.81.[6] *Seriatim*, section 987, subdivision (a) provides for the appointment of counsel for indigent defendants. Subdivision (c) of the same section provides that "the court may require a defendant to file a financial statement or other financial information under penalty of perjury with the court or, in its discretion, order a defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to employ his or her own counsel." Section 987.2, subdivision (a) provides that "assigned counsel shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court[.]" Section 987.3 lists factors for determining counsel's necessary expenses and reasonable fees.[7] Section 987.4 allows recoupment of costs from a minor's

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6 Many of the provisions concern county options in arranging for representation and differences between capital and non-capital cases. These details are not germane to the issues in this appeal.

7 These include: "(a) Customary fee in the community for similar services rendered by privately retained counsel to a non-indigent client. (b) The time and labor required to be spent by the attorney. (c) The { Cont'd. on p. 13

parent or guardian. Section 987.5, subdivisions (a), (b) and (e) provide for the assessment of a $50.00 "registration fee" at the county's option, to be collected at the start of the proceedings if the defendant indicates that he is able to pay the fee and which shall be credited to any final imposition of costs at the conclusion of the case per section 987.8. Section 987.8, subdivision (f) provides that prior to the furnishing of legal assistance, the court shall give notice to the defendant that it "may, after a hearing, make a determination" as to the defendant; ability to pay all or a portion of the cost of counsel. Subdivision (a) of that same section provides for a hearing at the start of proceedings "to determine whether the defendant owns or has an interest in any real property or other assets" which are lienable by the county "for the payment of providing legal assistance to an indigent defendant."[8] Subdivision (b) of the section provides, in pertinent part, that "upon conclusion of the criminal proceedings in the trial court, ... the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. ...[and]... may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal

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difficulty of the defense. (d) The novelty or uncertainty of the law upon which the decision depended. (e) The degree of professional ability, skill, and experience called for and exercised in the performance of the services. (f) The professional character, qualification, and standing of the attorney." (Ibid.)

8 The provision does not explicitly state or reference that the hearing is at the start of the case but that is the statute's sense in context and contrast with the other provisions in question.

assistance provided." [9]

Section 987.8 subdivision (e) provides a *"non-exclusive"* list of a defendant's procedural rights at any assessment hearing, including: "(1) The right to be heard in person. (2) The right to present witnesses and other documentary evidence. (3) The right to confront and cross-examine adverse witnesses. (4) The right to have the evidence against him or her disclosed to him or her. (5) The right to a written statement of the findings of the court." The subdivision further provides: "If the court determines that the defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability. Failure of a defendant who is not in custody to appear after due notice is a sufficient basis for an order directing the defendant to pay the full cost of the legal assistance determined by the court. The order to pay all or a part of the costs may be enforced in the manner provided for enforcement of money judgments generally but may not be enforced by contempt."

By no stretch of the imagination can an award of attorney fees under

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9 Subdivision (c) governs cases where the defendant subsequently retains private counsel and provides that "the court shall make a determination of the defendant's ability to pay as provided in subdivision (b)[.]"

Section 987 *et seq.*, be regarded as a "*de minimis*" procedural matter. On the contrary, the Legislature has explicitly promulgated detailed procedures and guidelines for assessing and determining costs. The conclusion, implicit in the distinction drawn by *McCullough*, is that attorney fees are are *not* a subject matter as to which the rationales underlying forfeiture ought to apply.

In similar fashion Penal Code sections 1203.1b through 1203.1f govern the recoupment of costs from a defendant for probation supervision, for parole supervision and for local confinement as a term of probation. In pertinent part, section 1203.1b provides that "in any case in which a defendant is granted probation or given a conditional sentence, the probation officer, ... shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision." These costs "shall not exceed the amount determined to be the actual average cost thereof. A payment schedule for the reimbursement of the costs of pre-plea or pre-sentence investigations *based on income* shall be developed by the probation department of each county and approved by the presiding judge of the superior court." (Id. [emphasis added].) However, the allowable costs shall also take "into account any amount that the defendant is ordered to pay in fines, assessments, and restitution." In other words, under section 1203.1b, the allowable probation supervision costs depend on three inter-related factors, viz: (a) the actual average costs as determined by the county's probation department, (b) a defendant's income and (c) the amount of other legally assessed debits against a defendant.

Subdivision (b) of section 1203.1b, provides that a defendant may waive the financial hearing but if he does not so waive, "the probation officer shall refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payments shall be made." Upon hearing, "[t]he court shall order the defendant to pay the reasonable costs if it determines that the defendant has the ability to pay those costs based on the report of the probation officer,..."

Subdivision (e) of section 1203.1b provides definitions and guidelines concerning *what* complex of costs are reimbursable and a defendant's "ability to pay" them. Under the subdivision, a defendant's financial liability extends to "the costs, or a portion of the costs, of conducting the pre-sentence investigation, preparing the pre-plea or pre-sentence report, processing a jurisdictional transfer pursuant to Section 1203.9, processing requests for interstate compact supervision pursuant to Sections 11175 to 11179, inclusive, and probation supervision or conditional sentence." The defendant's "ability to pay" these costs is assessed on a variety of factors, including but not limited to his: "(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."

Subdivision (b), *supra*, further provides that, where hearing is not waived, "[t]he following shall apply to a hearing conducted pursuant to this subdivision: (1) ... the defendant shall be entitled to have, but shall not be limited to, the opportunity to be heard in person, *to present witnesses* and other documentary evidence, and *to confront and cross-examine* adverse witnesses, and *to disclosure* of the evidence against the defendant, and a *written statement of the findings* of the court or the probation officer, or his or her authorized representative." (Ibid [Italics added].)

The remaining subparagraphs of the subdivision specify the findings that the court must make[10] and provide, further, that "[w]hen the court determines that the defendant's ability to pay is different from the determination of the probation officer, the court shall state on the record the reason for its order." (Pen. Code, § 1203.1b, subd. (b).)

Subdivision (c) of that same section provides that "[t]he court may hold additional hearings during the probationary or conditional sentence period to review the defendant's financial ability to pay the amount, and in the manner, as set by the probation officer, or his or her authorized representative, or as set by the

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10 *Viz.:* "(2) At the hearing, if the court determines that the defendant has the ability to pay all or part of the costs, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability. [¶] (3) At the hearing, in making a determination of whether a defendant has the ability to pay, the court shall take into account the amount of any fine imposed upon the defendant and any amount the defendant has been ordered to pay in restitution."

court pursuant to this section."

Thus again, as with attorney fees, the Legislature has provided an intricate factual and procedural matrix as a pre-requisite to imposing probation-related costs on a defendant who is granted probation. By no stretch of the imagination can the costs *or* the determinations made relative thereto be considered "*de minimis*" either in financial or legal terms. What is provided for, in both instances, is a subordinate court trial (potentially involving protracted hearings) taking place within the greater procedural context of sentencing. That they take place within that greater context does not reduce to the level of a mere itemized detail or "sentencing factor." On the contrary, they involve potentially substantial takings of property impacting others and (in the case of minors) taken from others.

To conclude. Based on *McCullough's* distinguishing rationale for applying a forfeiture rule to court-ordered booking fees, such a rule should not apply attorney fees and costs of probation supervision. [11]

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11 The distinction at issue does not depend on comparative financial burdens. Although this Court noted that the the Legislature "considers the *financial* burden of the booking fee to be *de minimis*" (*McCullough,* at p. 599 [italics added]), the distinction drawn did not depend on weighing the amount of any fee being contested; rather, *because* (whether rightly or wrongly) the Legislature considered the booking fee to be financially minimal, for that reason it interposed no procedural safeguards. *E converso*, in cases where the Legislature *does* interpose procedural safeguard it can be inferred that it does so, for among other reasons, because it does not consider the potential fee in question to be *de minimis.*

III. *McCULLOUGH'S* RATIONALE IS PREMISED ON THE RULE THAT THE FACTUAL & PROCEDURAL PREDICATES FOR A COURT'S EXERCISE OF A SPECIFIED POWER MUST BE SUPPORTED BY SUBSTANTIAL EVIDENCE THE ABSENCE OF WHICH CAN BE CONTESTED ON APPEAL WITHOUT OBJECTION BELOW.

A. *Butler* applies to Disposition of the Present Case.

In its opinion, the Court of Appeal was of the view that if *McCullough* applied to one fee (booking) it applied to any and all fees (attorney and probation supervision). (Slip. Opn. p. 4.) It opined that *McCullough's* discussion of procedural safeguards was only intended to provide emphatic strength as to how much the forfeiture rule applied to booking fees; and it noted, with evident approval, that "even before the decision in *McCullough*, the decision in *Pacheco* was an outlier, with most courts requiring an objection to preserve *fine and fee* issues for appeal." (Id, at pp. 3-4 [italics added].)[12]

In so saying, the Court of Appeal mis-apprised *McCullough's* focus. The issue in that case, as herein, is not object-dependent but jurisdictional. To see how this is so, and why the Court of Appeal was wrong, it is necessary to return to the precedents on which the *McCullough* decision relied.

In *People v. Stowell* (2003) 31 Cal.4th 1107 ["*Stowell*"], this Court held that "absent an objection in the trial court, a defendant forfeits appeal of any

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12 Moreover, since *Pacheco* was a direct application of *Butler*, the court's outlying reference was an oblique way of stating that *Butler* ought to be restricted into oblivion. Indeed, in *McCullough*, the Attorney General had urged this Court to confine *Butler's* holding "to its unique facts." (*McCullough*, at p. 593.) This Court declined to do so.

deficiency in the statutorily required finding [of probable cause] supporting an HIV testing order pursuant to Penal Code section 1202.1, subdivision (e)(6)(A), (B)" (*Stowell,* at p. 1117.) *Stowell* explained that the forfeiture rule applied because: [1] "the statute neither requires an express finding ... nor contains any sanction for noncompliance" and [2] "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." (*Ibid.*, at p. 1114[13].)

Stowell rejected appellant's argument that, analogously to Penal Code section 1385, subdivision (a), a statement of reasons was required to accompany the trial court's exercise of discretion. (*Stowell*, at p. 1115.) This Court explained that "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. ... 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." (*Id.*, at p. 1116.)

However, in *People Butler, supra,* 31 Cal.4th 1119, decided contemporaneously with *Stowell*, this Court reached the opposite conclusion on an identical set of facts. In *Butler*, as in *Stowell*, the trial court had ordered HIV testing pursuant to Penal Code section 1202.1, subdivision (e)(6)(A) & (B) without

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13 Citing *People v. Mosley* (1997) 496 53 Cal.App.4th 489, 497. See *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 321 ["An order is presumed correct; all intendments are indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown."]

making an express finding of probable cause or having such a finding noted in the court's docket. (*Butler*, at pp. 1123, 1125.) Defendant did not interpose any objection in the trial court but, on appeal, argued that the testing order was "unauthorized." (*Id.*, at p. 1125.) The Court of Appeal agreed and vacated the order "because the trial court *failed* 'to make the required finding'[.]" (*Id.*, at p. 1126 [emph. added].) On the strength of *Stowell*, this Court ruled that the Court of Appeal had *erred* in holding that appellant had not forfeited his claim that the trial court had *failed* to make a requisite finding.

Nevertheless, *Butler* vacated the order and remanded for further proceedings, (*id.*, at p. 1129), because there was *insufficient evidence* in the record to support a presumed trial court finding of probable cause. (*Id.*, at p. 1126.) This Court held that "questions of sufficiency of the evidence are not subject to forfeiture." (*Id.*, at p. 1128.) Such a question, this Court said, was "fundamental." (*Id.*, at p. 1126.) "Without evidentiary support the order is invalid." (*Id.*, at p. 1124.)[14]

Read together, as they must be, the *Stowell-Butler* rule is that: absent objection below a defendant cannot complain on appeal of the trial court's *failure*

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14 *Butler's* holding was based on a *presumed* finding because, although the opinion refers only to "*such* a finding" (*id.*, at p. 1126), it is clear from elsewhere in the opinion that the trial court had failed to make any explicit and actual finding. However, as *Stowell* pointed out, "a trial court is presumed to have been aware of and followed the applicable law. [Citations.] . . . 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.)

t o *enunciate* a factual finding but he can raise the issue of whether there is *sufficient evidence* to support a implied finding of probable cause.

This hybrid rule is not as arbitrary as it might superficially seem. The forfeiture prong of the holding adheres to the rule that a defendant cannot complain of an appeal what he acquiesced in at trial; in this case, a failure to state reasons. The sufficiency prong of the holding was based on the equally well established rule any legal finding, order or judgement must be based on and supported by factual evidence whether the finding is actual or presumed and, if not, "may be contested on appeal absent objection below." (*Butler,* at p. 1126, citing *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17.)

The distinction was articulated a second time in footnote five of *Butler's* opinion in which this Court explained that, whereas "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 review. ... unauthorized sentences or sentences entered in excess of jurisdiction ... which could not lawfully be imposed under any circumstances... are reviewable regardless of whether an objection or argument was raised in the trial court." (*Butler, supra*, 31 Cal.4th, fn. 5 at p. 1128 [citations & multiple quotation marks omitted; italics added].)

The principle is as simple as it is fundamental: judicial orders, affecting the substantial rights of parties, *must* have a factual basis in accord with legal prerequisites. The due process requirement of a factual basis applies irrespective

of whether the proceedings and rights involved are criminal or civil. (See infra, p. 31.) It is for this reason that claims of insufficient evidence are never waived because they go to the jurisdiction or authority of the court to do what it did.

There is, it must be noted, an important "wrinkle" in *Stowell's* holding which cannot be relegated to a footnote, even if it has no direct impact on the present case. The Court of Appeal in *Stowell* held that the trial court *failed to make* the requisite finding (of probable cause to believe defendant carried HIV antibodies). This Court disagreed on the ground that [1] absent a statutory requirement the findings be stated on the record *or* [2] other affirmative evidence that the court had, in fact, *not* made the requisite finding, a court is presumed to have done what it is legally required to do. (*Stowell.*, at p. 1114.) Thus, in contemplation of the law, the trial court in *Stowell had* made the required findings but had "*failed*" to do was to state them on the record. The case thus boiled down to the rather common-sense proposition that if a defendant wants a statement of findings, where a statement of findings is not required, he should ask for it or forever hold his peace. That was not the issue in *Butler*, where the appellate claim focused on the fundamental issue of the basis on which the court had exercised its authority.

The underlying issue in *McCullough* was whether *Stowell* or *Butler* applied to booking fees. The controlling factor in *Butler* was that the "mandate"[15] – that is, the court's *authority* to order – HIV testing was strictly limited by statute and

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15 *McCullough, supra,* at p. 596.

unless the pre-requisites of the statute were just as strictly followed, the court's order was in excess of jurisdiction. In contrast, with respect to booking fees and unlike the other statutes, the Legislature "has interposed no procedural safeguards or guidelines for its imposition." (*McCullough, supra,* at p. 599.) This Court's reasoning as to why *Stowell* applied to booking fees also shows why the rule in *Butler* applies to attorney fees and costs of probation supervision.

The attorney fee and probation supervision cost statutes in the present case are similar to but even more strict than the statute at issue in *Stowell-Butler*. Like Penal Code section 1202.1, subdivision (e), both section 987.8 and 1203.1b require the court to make specified factual findings. In fact, whereas section 1201.1 subdivision (e) only required a low level probability to believe that the defendant might have been infected with HIV, the required findings under sections 987.8 and 1203.1b cover a *gamut* of factual financial issues relating to the actual and reasonable costs of the services rendered and to defendant's assets, income, other liabilities and present and future ability to pay them.

It would be surprising had the Legislature relegated the making of such a complexity of findings to a routine presumption and, in fact, it did not. Both statutes entitle the defendant to a statement of written findings. (Pen. Code §§ 987.8, subd. (e)(5) and 1203.1b, subd. (b)(l).) The statures are *pari materia;* absent notice, hearing and findings in the record, the trial court's order is unauthorized and void. (*People v. Flores* (2003) 30 Cal.4th 1059, 1061-1063 [order for attorney fees vacated because "it was made without the requisite notice and

hearing" and "made no finding as to whether defendant's circumstances were unusual."].)

Equally as significant, whereas section 1201.1, subdivision (e) allows a court to make the probable cause finding extemporaneously on the basis of evidence available to it from trial, both the attorney fee statute and the probation supervision fee statute involve factual issues not encompassed within the jury's verdict. As a result they require a procedurally separate and distinct hearing to determine the issues. Although the hearing may take place in *conjunction* with the preparation of a probation report and although the court's findings and orders may be stated within the "theater" of criminal sentencing, they involve a substantively distinct judicial act relating to a different subject matter. The court's jurisdiction or authority to order a given amount of "costs" is completely and entirely dependent on the requisite hearing, adjudication and determination. Given that the defendant is entitled to cross-examine witness and present evidence of his own, the court's finding is tantamount to a "verdict" on the subject-matter issues. "Without evidentiary support the order[s] [are] invalid." (*Butler*, supra, at p. 1124.)

Applying *Stowell-Butler* to the facts of this case, forfeiture did not apply to appellant's claim as to the insufficiency of evidence to support imposition of the supervision fee or attorney's fees. Although appellant's opening brief noted that there had been a *failure* of the trial court to make the requisite findings, in accordance with *Pacheco*, it proceeded to analyze whether there was evidence in

the record which indicated that actual costs involved and from which it could be implied that appellant had the ability to pay them. For the reasons stated in appellant's briefs on appeal, there was no sufficient evidence and the Court of Appeal erred in failing to reach that issue.

B. A Trial Court's Imposition of Attorney Fees and Costs of Probation Supervision is not a "Factual Issue" requiring Objection in order to preserve an Appellate Claim of Error based on Evidentiary Insufficiency.

In rejecting appellant's claims below, the Court of Appeal also relied on *McCullough's* statement "that because a court's imposition of a booking fee is confined to factual determinations, a defendant who fails to challenge the sufficiency of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal." (*Id.* at p. 597.)" (Slip. Opn. p. 3.) [16] Appellant submits that the statement relied upon has been taken out of context. The determinative issue does not depend on characterizing the issue as "factual" versus "legal" bur rather whether the trial court's order is in "excess of its authority." (*McCullough*, at p. 595.)

It is a well-known truism that courts of appeal exist to decide "legal" issues and that "factual" issues are the proper province of trial courts and ought to be developed below. Relying on this truism, the Court of Appeal evidently reasoned that because *McCullough* had distinguished *Butler* on the ground that this latter

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16 Respondent's Letter Brief of 12 July 2013, relied on the same statement. (Id., p. 2.)

case had involved "an objective legal standard" the issue therein had "extended beyond mere disagreement over the import of certain facts" (*McCullough*, at p. 595) and *Butler's* holding was inapplicable to fact-dependent determinations.

Such an interpretation flows from an erroneous premise. Probable cause determinations are *not* a so-called "legal issue." Probable cause determinations involve "factual and practical considerations of everyday life." (*Brinegar v. United States* (1949) 338 U.S. 160, 175.) "Probable cause is a question of fact to be determined from all of the circumstances...." (*MacGruer v. Denivelle* (1931) 113 Cal.App. 49, 52-53, citing *Levy v. Brannan*, 39 Cal. 485.) As this Court has itself correctly and succinctly stated, "a probable cause finding is ... a determination of the *facts in light of an objective legal standard.*" (*Stowell, supra,* at p. 1116 [italics added].)

The oft-intoned dictum that courts of appeal do not decide "factual issues" is misleading. Such hornbook simplifications simply create confusion. In a case-law system, all cases arise within a specific factual context. Those facts and the inferences flowing therefrom are evaluated according to a hierarchy of legally applicable standards; in ascending order: reasonable suspicion, probable cause, preponderance of evidence, clear and convincing evidence and proof beyond a reasonable doubt. Which of these standards *ought* to apply in any type of situation or procedural context is a question of legal or judicial policy, but the determination

at hand in any given case is a factual one.[17]

Whether the legally applicable standard has been met in any given situation is a "legal" question only in the sense that it seeks to answer the question as to whether the law's procedures and standards have been complied with. But sufficiency of the evidence analysis itself is inherently factual whether it is conducted in the context of weighing the sufficiency of facts to show probable cause or to constitute proof beyond a reasonable doubt. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 318 [sufficiency of evidence in support of verdict].) Sufficiency is a matter of degree and requires the reviewing court to determine for itself whether the evidence is sufficiently "reasonable, credible [sic], and of solid value." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 1; *People v. Bassett* (1968) 69 Cal.2d 122, 138-139 ["substantial"].) In the context of probable cause, it consists of facts or evidence "providing a substantial basis from which the magistrate can reasonably conclude there is a fair probability that a person has committed a crime..." (*People v. Richardson* (2008) 43 Cal.4th 959, 989.)[18] What appellate courts do not, as a rule, do is *receive* evidence of facts. The facts, such as they may

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17 It bears remark that the law-school distinction between "law" and "fact" is mostly spurious. What is called "the law" are facts in their abstract and general form. (E.g. "a vehicle" and "a public road" *versus* "a Chevy Corvette on Route 66.) Legal questions are comprised of definitions in the abstract, procedural rules and public policy.

18 This evaluation is not so much a "mixed question of law and fact" as it is a mixed question of fact and logic. Whether inferences can be drawn from a set of facts is a question of inferential logic *and* empirical probabilities (a general factual issue). The "law" part of the analysis relates to what ultimate fact must be proved and which standard of proof applies.

or may not be, are accepted as they appear in the record and as they are presumed to have been found in support of the act, ruling or verdict at issue.

It is beyond question that appellate courts can and do determine the sufficiency of particular evidence in a variety of legal contexts. As both *Butler* and *McCullough* recognized: "Without evidentiary support [a judicial] order is *invalid."* (*McCullough*, at p. 595, citing *Butler*, at p. 1123 [original italics].) In order to determine the validity of judicial order (a paradigmatically "appellate issue"), the court must look at the *evidence* which is nothing if not a collection of facts.

However, this inescapable fact gave rise to a purely semantical problem in relation to the standard formulation of the forfeiture rule as enunciated in *People v. Scott* (1994) 9 Cal.4th 331, 354.) In *McCullough,* this Court explained the problem in the following manner:

> "In *Butler*, we confronted the *apparent* problem that the *factual component* of a probable cause finding *seemed* to place it outside the rule that we will only review for the first time on appeal " 'clear and correctable error' " that is "independent of any factual issues presented by the record." (*Scott*, *supra*, 9 Cal.4th at p. 354.) We concluded that "[t]he fact that a testing order is in part based on factual findings does not undermine [the] conclusion" (*Butler*, *supra*, 31 Cal.4th at p. 1127) that a court lacks authority to order involuntary HIV testing in the absence of probable cause.
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> "We observed that the issue presented in *Butler* extended beyond mere disagreement over the import of certain facts: "Probable cause is an objective legal standard -- in this case, whether the facts known would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." (*Butler*, *supra*, 31 Cal.4th at p. 1127.) A probable cause determination requires "applying th[is] particular legal

> standard to the facts as found." (*Ibid.*; see *Ornelas v. United States* (1996) 517 U.S. 690, 696-697.)" (*McCullough*, at p. 595 [italics added].)

In so saying, this Court was simply explaining that sufficiency of the evidence issues (i.e. the quantitative evaluation of facts in light of an applicable legal standard) are not "factual determinations" in the first instance and in the sense that the term was used in *Scott.* It was not distinguishing *Butler* on the basis that it did not involve "factual" determinations.

To conclude. The decision in *Butler* did not depend on the supposed premise that it involved a so-called "pure question of law." On the contrary, as stated in *McCullough,* "[o]ur analysis flowed from our recent sentencing forfeiture cases; we would review an appellate challenge not based on a contemporaneous objection if the trial court had been acting in *excess of its authority*." (*Id.*, at p. 595 [italics added].) Whether a court has acted in excess of authority depends on what predicate conditions the law establishes as pre-requisite to the exercise and on whether there are facts in support of the predicate. A trial court's order is equally in excess of authority whether there are insufficient facts in the record to support it or no facts at all. In either case a claim that a court imposed fee or fine was in excess of jurisdiction can be heard on appeal without objection below notwithstanding that it might have (and usually will have) a "factual component."

IV. APPELLANT HAD A FUNDAMENTAL DUE PROCESS RIGHT TO CONTEST THE LEGAL BASIS AND VALIDITY OF THE TRIAL COURT'S ASSESSMENT OF FEES, FINES OR COSTS WITHOUT PRIOR OBJECTION.

In the preceding sections, appellant has argued that, based on this Court's precedents and construing the terms of the statutes in question, *Butler* was applicable to assessments for attorney fees and costs of probation supervision and that an order imposing such costs which was not supported by sufficient evidence could be contested on appeal without objection below.

But, even without this court's precedents or without statutorily prescribed "procedures and guidelines," appellant had a due process right to contest the sufficiency of the evidence underlying the trial orders, without objection below. This right applies whether the fees in question are regarded as civil costs or as criminal sanctions because a person cannot be deprived of property without notice and hearing. A court order is always subject to attack on the ground that it was *ultra vires* or in excess of jurisdiction. The rule allowing insufficiency of evidence claims on appeal rests on the premise that a court order lacking in its required factual predicates is as unauthorized as an order which fails to conform to its procedural requisites.

A. Whether or not the Fees are Civil Costs or Punitive Sanctions, Due Process requires Notice, Hearing and Findings before they can be imposed.

Even if the statutes did not so provide, notice, hearing and findings would be required by due process. Each of the fees in question constitute a deprivation of property. It is axiomatic that a person may not be deprived of liberty or

property without notice and hearing and supported by sufficient evidence. (*Lipke v. Lederer* (1922) 259 U.S. 557, 562 ["Before collection of taxes levied by statutes enacted in plain pursuance of the taxing power can be enforced, the taxpayer must be given fair opportunity for hearing; this is essential to due process of law."]; *Central of Georgia Ry. Co. v. Wright* (1907) 207 U.S. 127, 138 ["the assessment of a tax is action judicial in its nature, *requiring for the legal exertion of the power* such opportunity to appear and be heard as the circumstances of the case require."]; *Ohio Bell Tel. Co. v. Public Utilities Comm'n* (1937) 301 U.S. 292, 300 ["The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record."]; *Fisher v. Pace* (1949) 336 U.S. 155, 160 [there must be sufficient evidence to support an order for contempt in the face of the court.]; *Goldberg v. Kelly,* (1970) 397 U.S. 254 [hearing and evidence required for withdrawal of welfare benefits]; *Morrissey v. Brewer,* (1972) 408 U.S. 471, 489 [due process hearing and findings applicable to parole revocation]; *Wolff v. McDonnell* (1974) 418 U.S. 539 [due process requires procedural protections before a prison inmate can be deprived of a protected liberty interest in good time credits]; *Roadway Express, Inc. v. Piper* (1980) 447 U.S. 752, 767 [attorney's fees should not be assessed as a sanction without fair notice and an opportunity for a hearing.]; 28 Edw. c. 3 (1354) [19].)

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19 *Vid.,* http://www.legislation.gov.uk/aep/Edw3/28/3

Even when not specified by statute, this Court has held that the fundamentals of due process applied to what it described as the "special proceeding" for the recoupment of attorney fees under the former version of section 987.8. (*People v. Amor* (1974) 12 Cal.3d 20, 29, 31.) The then version of section 987.8 did not by its terms explicitly require notice and hearing.[20] This Court declined to invalidate the statute on that basis since it did not explicitly preclude notice and hearing and since, in actual fact, defendant therein had been afforded a hearing. (*Id.*, at p. 30.) In effect, this Court read fundamental due process requirements into the statute.

In *Amor's* wake, the Legislature evidently sought to incorporate due process safeguards into the sections 987.8 and 1203.1b and, by doing so, it created fundamental liberty interests under *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 ["substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion."] But, even if it had not, the legislated safeguards would have applied under general

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20 As it then read, section 987.8 provided: "In any case in which a defendant is furnished counsel, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, the court shall make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. If the court determines that the defendant has the present ability to pay all or part of the cost, it shall order him to pay the sum to the county in any installments and manner which it believes reasonable and compatible with his financial ability. Execution may be issued on the order in the same manner as on a judgment in a civil action. The order shall not be enforced by contempt." (*Armor, supra,* fn 1, p. 25.)

due process principles.

The phrase "*notice and hearing*" is a legal term of convenience signifying an actual determination on the merits encompassing those rights and pre-requisites that the Legislature has taken the pains to specify in subdivision (e) of section 987.8 and subdivision (b) of section 1203.1b. (*Goldberg v. Kelly, supra,* 397 U.S., at p. 270 [stated findings required to demonstrate procedural compliance]; *Morrissey v. Brewer, supra,* 408 U.S., at p. 489; *Wolff v. McDonnell, supra* 418 U.S., at p. 559.) [21]

It is immaterial whether the fees in question are denoted as civil or criminal because, as the above cases illustrate, the notice and hearing requirement applies in all events. Appellant has found no case authorizing costs and fees to be assessed "in whatever amount" against a loosing party just because he lost the case and "had his hearing at trial." Such a rule would be a prescription for arbitrariness. On the contrary, since the nature and amount of costs and fees were *not* tried to the jury, a subordinate and separate hearing on that subject matter is required and the

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21 It is noteworthy that the procedural safeguards listed in the current versions of section 987.8 and 1201.3b follow virtually *verbatim* the "minimum" due process requirements listed in *Morrissey, viz.:* "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." (*Morrissey, supra,* at p. 489.)

court's authority is correspondingly limited by the evidenced adduced.

In the present case, the fees in question cannot properly be characterized as "civil" because they are not reciprocal. The essential characteristic of "costs of suit" (as opposed to "damages" or "punishment") is their *reciprocity*. (Code Civ. Pro., §§ 1033, subd. (b) [prevailing party is entitled as a matter of right to recover costs] ; 1033.5 [costs allowed]; 1717 [reciprocal right to attorney's fees in breach of contract actions]; *Baldwin Builders v. Coast Plastering Corp.* (2005) 125 Cal.App.4th 1339, 1343.) But there is no reciprocity with respect to the booking fee, attorney fees or costs of probation supervision. If the defendant is acquitted, the local District Attorney is not required to pay the costs of his private counsel; nor is the local Public Defender's Office reimbursed from the District Attorney's budgeted funds. Thus, the fees in question lack the essential reciprocal feature of civil costs.

But granting the analogy to civil fees, even where costs and attorney's fees in civil actions are imposed independently of any sanctions or cost-shifting provisions (see Code Civ. Pro., §§ 1032 and 1033.5 and Civ. Code, § 1717), notice, hearing and findings are required. (Code Civ. Pro., §1033.5, subd.(c)(5) [requiring noticed motion and/or application supported by memorandum and affidavit]; Cal. Rules of Court, rules 3.1700, subd. (a)(1) [notice & verified memorandum of costs], 3.1702, subd. (b)(1) [notice & memorandum of attorney fees]; 8.278, subd. (c) [verified memorandum of costs on appeal].) Although it is said that the award is within the court's discretion, statutes are quite specific in

what costs are allowable (see Code Civ. Pro., § 1033, subds. (a) and (c)) and the court's "discretion may not be exercised whimsically, and reversal is required where there is no reasonable basis for the ruling or when the trial court has applied the wrong test to determine if the statutory requirements were satisfied." (*Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 635; *Baggett v. Gates* (1982) 32 Cal.3d 128, 142-143.) Most importantly, as regards the underlying issue in the present case, a factually deficient order may be asssailed on appeal for insufficiency of evidence. (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348.)

In *Westside,* plaintiffs brought suit against a state official as private attorney generals per Code of Civil Procedure section 1021.5. On noticed motion, the trial court ordered defendant to pay attorney fees of $10,870. (*Id.*, at p. 351.) Section 1021.5 provided that "[u]pon motion, a court may award attorneys' fees to a successful party ..." if the action "resulted in the enforcement of an important right affecting the public interest...." Defendant appealed the order arguing that "there [was] no evidence in the record to support the trial court's conclusion that plaintiffs were a "successful party" in this action, or that the lawsuit "resulted in" the enforcement of a right." (*Westside*, supra, at p. 352.) This Court granted the appeal on the ground that there was no evidence in the record to support the trial court's award and, as a result, "there [was] no reasonable basis for the trial court's award of attorney fees to plaintiffs." (*Id.,* at pp. 354-355.)

The same procedural safeguards apply where attorney fees do serve the

dual purpose of civil sanctions. It is not a sufficient precondition to their imposition that the party against whom they are assessed shall have lost the trial. There must be a hearing and requisite findings, as illustrated by Code of Civil Procedure section 128.5 [22] which authorizes the award of attorney fees as a sanction to control improper resort to the judicial process. The pre-requisites of this procedure were explained in *Childs v. Paine Webber Incorporated* (1994) 29 Cal.App.4th 982, *viz.*:

> "Adequate notice prior to imposition of sanctions is mandated by statute (Code Civ. Proc., § 128.5, subd. (b)) *and* by the due process clauses of the state and federal Constitutions. (Cal. Const., art. I, § 7; U.S. Const., 14th Amend.) Constitutional due process principles are offended by summary imposition of sanctions by a superior court. (*O'Brien v. Cseh* (1983) 148 Cal.App.3d 957, 961-962 [196 Cal.Rptr. 409].) . . .Thus, Code of Civil Procedure section 128.5 requires notice and opportunity to be heard prior to imposition of sanctions.
>
> "In addition, the statute requires an order imposing sanctions "shall be in writing and shall recite in detail the conduct or circumstances justifying the order." (Code Civ. Proc., § 128.5, subd. (c).) A trial judge's on-the-record oral recitation of reasons for imposing sanctions is insufficient. But no more is required than a written factual recital, with reasonable specificity, of the circumstances that led the trial court to find the conduct before it sanctionable under the relevant code section. (*Jansen Associates, Inc. v. Codercard, Inc.* (1990) 218 Cal.App.3d 1166, 1171 [267 Cal.Rptr. 516].) This means the court's written order should be more informative than a mere recitation of the words of the statute. (*Fegles v. Kraft* (1985) 168 Cal.App.3d 812, 816 [214 Cal.Rptr. 380]; *Caldwell v. Samuels Jewelers* (1990) 222 Cal.App.3d 970, 977-978 [272 Cal.Rptr. 126].)

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22 Code of Civil Procedure section 128.5 states in relevant part: "(a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. ..."

> Recitation of the facts justifying a sanctions order fulfills the rudiments of due process in two ways. First, the recitation requirement ensures the power conferred by statute will not be abused. Second, in some cases the court's recitation will be an invaluable aid to a reviewing court in determining whether the trial court abused its discretion in awarding sanctions. This purpose is equally served whether the court itself prepares the order, directs counsel to do so, or simply incorporates some specific portion of a party's papers. (*Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 124 [260 Cal.Rptr. 369], cert. den. 494 U.S. 1080 .)" (*Childs v. Paine Webber Inc. supra,* 29 Cal.App.4th, at pp. 995-996.)

Thus, assuming[23] that none of the fees in question are "punishment," the power to impose attorney fees is not "discretionary." "In *Bauguess v. Paine* (1978) 22 Cal.3d 626 [150 Cal. Rptr. 461, 586 P.2d 942] *(Bauguess)*, this Court held that trial courts may not award attorney fees as a sanction for misconduct unless they do so pursuant to statutory authority or an agreement of the parties.

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23 Although the issue may be tangential to the questions on which review has been granted, appellant does not concede that the Sixth Amendment is inapplicable to the imposition of booking and attorney fees which, given the recent decision in *Southern Union Co. v. U.S.* (2012) 567 U.S. ___ [132 S.Ct. 2344]), come within the ambit of *Apprendi v. New Jersey* (2000) 530 U. S. 466. Fines constitute punishment as much as terms of years (Southern, at slip. 5.) Whether an order to pay monies is a non-criminal fee or a punitive fine depends on whether its imposition is triggered by criminal conduct or a conviction. (*Lipke, supra*, 259 U.S., at pp. 559, 561-562 [imposition of alcoholic beverages "tax" triggered as a result of violating National Prohibition Act, not a "tax" but punishment; see also *Fuller v. Oregon* (1974) 417 U.S . 40, 44 [repayment may be imposed only upon a *convicted* defendant" (original italics)].) Here, the imposition of attorney fees is imposed only a person convicted of criminal conduct and is made on top of terms of incarceration and fines otherwise prescribed. In the present case defendant's "ability to pay" is not a mere "quantification of harm" but is the analogous functional equivalent of the "number of days" of environmental violation at issue in *Southern* ([*Id.,* at slip. P 7.)

(*Id.* at pp. 634-639 [italics added].) Noting the "serious due process problems" that would arise if trial courts had unfettered authority to award fees as sanctions. (*id* at pp. 637-638) *Bauguess* prohibited trial courts from using fee awards to punish misconduct unless the Legislature, or the parties, authorized the court to impose fees as a sanction. Affirming *Bauguess* this Court recently stated, "If this court were to hold that trial courts have the inherent power to impose sanctions in the form of attorney's fees for alleged misconduct, trial courts would be given a power without procedural limits and potentially subject to abuse." (*Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 809.)

To conclude. From whatever perspective the fees are regarded, their imposition is not a *de minimis* ministerial act but constitutes a substantial adverse consequence to the defendant who retains fundamental due process rights with respect thereto. These rights are not limited to mere implied notice but include express factual findings and evidentiary support for the orders in question. A claim of "insufficient evidence" goes to the fundamental authority of the court to do what it did. In no case can the necessary procedural and factual predicates be presumed from a silent record.

B. Contemporary Objection To Absence of Factual Findings cannot be required of Defendant.

Whether rising by operation of statute or by constitutional prescription, the existence of due process safeguards with respect to the imposition of attorney fees and costs of probation answers the question as to whether contemporaneous objection at trial is required to preserve an appellate claim of insufficient evidence.

The answer is: no.

This answer follows from *McCullough* itself. As previously discussed, the core holding of *McCullough,* framed with reference to *de minimis* booking fees, was that a claim of insufficient evidence could not be raised on appeal without objection below; i.e. without calling the court's attention to the deficiency so that it might be cured. (*Id.*, at p. 593 ["corrected or avoided"].)

McCullough did not hold that an appellate claim of insufficient evidence was forfeited in all cases but rather affirmed the general rule that prior objection was not required with respect to an insufficient evidence objection that went to sentences entered in 'excess of jurisdiction.' (*McCullough,* at p. 596 citing, *Butler, supra,* 31 Cal.4th, 1128 fn. 5, citing *People v. Smith* (2001) 24 Cal.4th 849, 852 ["exception to the waiver rule for " 'unauthorized sentences' or sentences entered in 'excess of jurisdiction.' " [citation omitted]."].)

Under *McCullough* whether the forfeiture rule or the insufficiency rule applied depended on whether the claim went to the underlying authority of the court to make the order in question and this, in turn, depended on whether specific procedural pre-requisites and restriction were placed on the subject matter in question. For the reasons stated, attorney fees and costs of probation supervision were not *de minimis*, and the forfeiture rule invoked by *McCullough* does not apply.

In line with *People v. Amor, supra,* 12 Cal.3d 20, courts of appeal have invalidated attorney fee and probation related orders which did not conform to

notice and finding requirements, notwithstanding lack of objection below. In *People v. Heath* (1989) 207 Cal.App.3d 892, the court reversed "the imposition of attorney fees" because the defendant had not been given the notice required by section 987.8. (*Id.*, at pp. 902-903.) The court's opinion made no reference to a contemporaneous objection stating merely that "[a] review of the record" indicated noncompliance with the statute. In *People v. Poindexter* (1989) 210 Cal.App.3d 803, the court of appeal reversed both an order to pay attorney fees and costs of a probation report (Pen. Code, § 1203.1b, subd. (a)) because the court had failed to give defendant notice of a *second* hearing on the matter, had made no finding as to defendant's ability to pay *and* because "the record [did] not indicate that the trial court considered any evidence of actual costs when it fixed the costs of representation at $600 and of preparation of the probation report at $562." (*Poindexter,* at p. 810.) In footnore 3, the opinion cited a portion of the transcript which indicated a completely acquiescent and non-objecting defendant. (*Ibid.*) Nevertheless, the orders were vacated due to the insufficiency of evidence in the record to demonstrate procedural compliance and substantive findings. (*Id.*, at p. 811.)

In its opinion, in the present case, the Court of Appeal ruled that "[f]airness demands an objection in order to allow the prosecution [sic] to marshal the facts to support the calculation of the fees." With respect, fundamental fairness prohibits the demand. It is constitutionally untenable to require a defendant to assist in his own prosecution. Because sentencing is both a critical and adversarial stage of the

proceedings (*Mempa v. Rhay* (1967) 389 U.S 128 [right to counsel at critical stage of sentencing]; *In re Calhoun* (1976) 17 Cal.3d 75, 84 [ex parte information undermines adversarial testing at sentencing]; *In re Brown* (2013) 218 Cal.App.4th 1216, 1229 [ineffective assistance at sentencing undermines adversarial process]) a defendant should not be required to argue against his own interests by calling attention to defects in the State's pursuit of adverse consequences to him.

The analogy to evidentiary trial objections does not hold. It is settled that a defendant cannot complain of error which he himself "invited." (*People v. Wickersham* (1982) 32 Cal.3d 307, 330.) It is also settled that a defendant must object to the attempted *introduction* and admission of evidence which he feels is either legally inadmissible or tactically prejudicial to his case. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1261.) But the limitation is contained within the rule.

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the *erroneous admission* of evidence unless ... [t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." " '[T]he objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which *exclusion* is sought, and to afford the [party opponent] an opportunity to establish its admissibility.' [Citation.]" (*People v. Hayes, supra,* 21 Cal.4th 1211, 1261 [italics added].)

This rule does not equate with a requirement that a defendant is required to alert the court as to "*deficiencies*" in a prosecutor's case such as to allow the State an "opportunity" to "cure" the defect. Such a holding would contravene the bed-rock presumption of criminal *and* civil cases that a defendant is not required by

operation of law to serve as his own prosecutor and that it is the plaintiff he carries the burdens and risks of proof.

To illustrate. If a prosecutor, in its case-in-chief, fails to adduce evidence to prove a required element of the crime, the defendant is not obligated to object to the deficiency in proof in order to afford the prosecution a "fair opportunity" to prove the case against him. It is constitutionally elementary that a defendant can abide his silence and rest his defense entirely on the prosecutor's case, defective as it might be. A defendant has the *option* to move for dismissal at the close of the prosecution's case or at the end of trial (Pen. Code, § 1118.1) but it has never been held that he must interpose such an objection at trial prior to raising an insufficiency claim on appeal.

The point is also illustrated when consideration is given to the reason a case reversed on insufficient evidence grounds cannot be retried. It is typically said, in a perfunctory way, that double jeopardy prevents retrial. The more salient reason retrial is not allowed is that to allow it would do no more than provide a delay to the defense's "curing" of the prosecution's deficiency. Whether a defendant were required to "alert" the prosecution to fatal defect in its case at trial or whether he can wait to do so on appeal so that the prosecution can cure the defect on remand amounts to the same thing. In either situation, the shield of an insufficiency objection would be turned into a sword onto which the defendant is invited to fall.

This is not to argue that a defendant can sit on his hands when improper evidence or evidence prejudicial to his interests is *introduced*. Likewise,

objection is required when the trial judge in his or her fact-finding capacity makes an affirmative finding based on erroneous or improperly considered facts. But the same principle applicable to prosecution "deficiencies" of proof should apply to judicial ones. A special hearing on the assessment of costs is adversarial. If there is an "alerting" to be done, it ought to be done by the prosecutor not by the defendant. The defendant retains the right to abide his silence and then demur to legal and/or factual sufficiency to what has been done.

This is certainly the case with respect to civil judgements which are deemed excepted to by operation of law (Code Civ. Proc., § 647.) In such cases, the insufficiency of the findings to support the judgment may be urged on appeal although appellant neither excepted to the findings nor sought their amendment. (*Robison v. Leigh* (1957) 153 Cal. App.2d 730, 733.) Since orders to pay attorney fees and costs of probation supervision are both enforceable as *civil* judgements (Pen. Code, §§ 987.8, subd. (e) and 1203.1b, subd. (d)) that is the rule which obtains.

Appellant submits the ground on which *Butler* and *McCullough* both stand is the accepted the principle that insufficiency objections going to the court's authority to impose a sentence or order were not forfeited but could be asserted on appeal absent objection below. The court's authority to impose a particular sentence derives from the jury's verdict which must be based on evidence sufficient to satisfy the due process requirement of proof beyond a reasonable doubt. The same evidentiary principle applies to the court's authority to impose

an order for costs. Since that authority does not derive from the jury's verdict (which encompassed no findings on actual costs or ability to pay them), it must derive from somewhere. That "somewhere" is the separate and subordinate trial and findings on the issues of costs. If the fact-finder has made the requisite findings, it has authority to order the costs. If it has not in fact made them, it has does not.

McCullough's focus on whether the Legislature had provided "procedures and guidelines" was based on an analysis of the jurisdictional role of the procedures and factual findings in question. If the requisite factual findings went to the court's underlying authority then an insufficiency claim (without prior objection) would lie on appeal, as much as it would to the criminal aspect of the judgement.

V. DETERMINATION OF ACTUAL COSTS IS ESSENTIAL TO THE EXISTENCE OF THE COURT'S LAWFUL AUTHORITY TO ORDER THEIR PAYMENT & TO PREVENT IMPROPER PUNISHMENT.

In line with *McCullough's* reasoning, appellant has hitherto focused on procedural prerequisites (whether statutorily or constitutionally implied) which exist with respect to attorney fees and costs of probation supervision. However, the attorney fee, probation costs and booking fee statutes *all* limit the assessment to the "reasonable" or "actual costs" involved. (See Pen. Code §§ 987.6, subd. (a), 987.8, subds. (d), (f)(1); § 1203.1b ["reasonable cost" of investigation, report, supervision]; Gov. Code §§2550, subd. (c) [" actual administrative costs"] and

2500.2 [specifying allowable costs of "receiving an arrestee into the county detention facility." (Ibid.)[24] Appellant submits that the significance of this factor was not given due consideration in *McCullough.*

McCullough was based on the assumption that, whatever else might be at issue, the booking fee was *not* a punitive fine but merely a neutral recoupment of expenses incurred in the proceedings. "Recoupment statutes such as section 987.8(b) reflect a legislative concern for " 'replenishing a county treasury from the pockets of those who have directly benefited from county expenditures.' " (*People v. Flores* (2003) 30 Cal.4th 1059, 1068.) By parity of reasoning, the same characterization would apply to attorney fees and costs of probation supervision. Assuming *arguendo* that such costs can be regarded as non-punitive despite their non-reciprocal nature or in

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24 Viz: "As used in this section, "actual administrative costs" include only those costs for functions that are performed in order to receive an arrestee into a county detention facility. Operating expenses of the county jail facility including capital costs and those costs involved in the housing, feeding, and care of inmates shall not be included in calculating "actual administrative costs." "Actual administrative costs" may include the cost of notifying any local agency, special district, school district, community college district, college or university of any change in the fee charged by a county pursuant to this section. "Actual administrative costs" may include any one or more of the following as related to receiving an arrestee into the county detention facility:

(1) The searching, wrist-banding, bathing, clothing, fingerprinting, photographing, and medical and mental screening of an arrestee.

(2) Document preparation, retrieval, updating, filing, and court scheduling related to receiving an arrestee into the detention facility.

(3) Warrant service, processing, and detainer.

(4) Inventory of an arrestee's money and creation of cash accounts.

(5) Inventory and storage of an arrestee's property.

(6) Inventory, laundry, and storage of an arrestee's clothing.

(7) The classification of an arrestee.

(8) The direct costs of automated services utilized in paragraphs (1) to (7), inclusive.

(9) Unit management and supervision of the detention function as related to paragraphs (1) to (8), inclusive.

light *Southern Union, supra,* 567 U.S. ___ [132 S.Ct. 2344], they remain non-punitive *only* to the extent that they are strictly confined to actual expenditures. Once the assessed fee exceeds the actual costs it becomes to that extent a punitive consequence; i.e., a fine.

It follows that the determination of actual costs is not a mere ministerial matter. It is as essential to the court's authority to impose the fee as is the determination of the defendant's ability to pay it. In other words, the trial court does not have authority to impose a *fine* labelled "attorney fees" or "booking fee."

When a court imposes a term of years, it is irrelevant whether the defendant can "afford" to take the time "off." The same is true with fines. While the court may adjust the fine in accordance with the realistic expectancy of getting it (see *Southern Union, supra*, at slip p. 9 [re colonial practice]) the inconvenience to the defendant is as immaterial as the pain of any punishment. Thus, once a "fee" exceeds the actual loss to the State or the ability of the defendant to defray it, it looses its character as neutral recoupment and becomes punitive.

After *Southern Union*, once the cost-recoupment "fee" becomes a fine, the required predicate findings must be made by the jury. But assuming that it suffices for the findings to be made judicially, they still must be made and cannot be implied *sub silentio.* In terms of *McCullough's* "procedures and guidelines," the existence of an "actual cost" requirement in the booking fee statutes puts them on equal footing with the attorney fee and probation supervision statutes.

Even without reference to the Rubicon between cost-recoupment and

punishment, findings with respect to *actual* costs are needed in order to avoid "the serious due process problems that would arise if trial courts had unfettered authority to award fees as sanctions" (*Bauguess v. Paine, supra,* 22 Cal.3d, at pp. 637-638) and which would arise from "a power without procedural limits and potentially subject to abuse." *(Olmstead v. Arthur J. Gallagher & Co., supra,* 32 Cal.4th, at p. 809.) Although the book fee statutes contain only "guidelines" and do not prescribe specific procedures, this Court should follow its precedent in *People v. Amor, supra,* 12 Cal.3d, at pp. 29-30, by reading basic due process procedures into the statute rather than finding them to be affirmatively precluded by mere statutory omission.

This aspect of the issue was not considered in *McCullough* which did not contain any discussion of the legal significance of the cost guidelines in Government Code section 2500.2. Appellant respectfully submits that this aspect of the issue warrants reconsideration and that an appellate claim of insufficient evidence applies equally to booking costs.

VI. APPLICATION OF FOREGOING PRINCIPLES TO CASE.

For all the reasons discussed, appellant submits that the trial court's failure to state any findings with respect to the fees in question rendered its fee orders non-compliant with due process requirements. Assuming that express findings were not required, as to one of or more of the fees, there was no evidence in the record to support even an implied finding of appellant's financial ability to pay the them. (AOB 10-12 ; ARB -2-3)

According to the probation report, appellant had worked in the heating and air conditioning trade since 1991. (CT 234, 236) At the time of the offense, appellant was self-employed in partnership with the victim; however both the business and the house were in the victim's name as she had a somewhat more legal immigration status. (CT 236-237) According to the probation report, "Defendant opined that he was probably making between $15 and $18 an hour and had worked very long hours... when he filed taxes last year he made between $18,000 and $20,000." (CT 236) Appellant has an EPA certification for handling freon and was making $430/mo payments on his automobile on which he owed $9,000.00 (CT 237) From the foregoing, it can be concluded that appellant has employable skills which in theory would earn him $15.00 to $18.00 an hour.

However, the probation report also noted that "the defendant had an immigration hold." (CT 223) Appellant was born in Mexico (CT 233) and came to the United States in 1991. (CT 234) The probation department was not able to verify the legality of appellant's immigration status. (CT 240) In addition, appellant was under two other grants of probation at the time of the present offense (CT 223) and at the time of sentencing was pending a violation hearing. (CT 237-238)

Respondent has argued that an implied finding of appellant's ability to pay can be made "on the basis that appellant was a successful business man with a 20-year history of employment with his own heating and air conditioning business." (RAB 3)

Although appellant may have had a solid work history, the real question concerns his "reasonably discernible future financial position" (*Pacheco*, supra, at pp. 1398, 1401.) His actual and prospective financial situation was extremely dubious, given the existence of an immigration hold and the possibility of deportation and/or indefinite I.C.E. detention. Even without reference to such a hold, there is no basis in the record for inferring that appellant is independently employable given his unknown immigration status and given that his prior employment was by and through the victim with whom he has been ordered to have no contact. (see CT 229)

In addition, there was no evidence in the record as to the "actual costs" of any of the services in question. Assuming *arguendo* that the cost issue is moot with respect to booking fees, the legal fact remains that both section 987.8, subdivision (e)(4)-(5) and 1203.1b, subdivision (b)(1) guaranteed appellant the right to confront and cross-examine adverse witnesses and to have the evidence against him disclosed. Such pre-requisites cannot be satisfied by judicial notice on appeal.[25]

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25 For the reasons stated in appellant's reply brief (ARB, 3-4 & fn 3) the same considerations do, in actuality, apply to the actual costs of booking fees. The documents accompanying respondent's Request for Judicial Notice (filed 15 April 2013) contained ambiguities and discrepancies which it is not the province of an appellate court to unravel and which were the proper subjects of cross examination. In reply to an anticipated parade of horribles it suffices to say that as a practical matter defense counsel often stipulate to prosaic and routine matters as to which little purpose would be served by time consuming court-room antics which would serve no purpose other than to antagonize the trial judge.

CONCLUSION

For the foregoing reasons appellant respectfully requests that his judgement and sentence be reversed.

Word Count Certification

The undersigned counsel certifies under penalty of perjury that the word count for this brief is: 13, 820 words

Dated: 12 February 2014

Respectfully Submitted

KIERAN D. C. MANJARREZ
Attorney for Appellant

PROOF OF SERVICE BY MAIL

Title: People v. Antonio Aguilar **Case No.:** S213571 /A135516

The undersigned declares:

I am a citizen of the United States of America, over the age of eighteen years and counsel for appellant herein. My business address is 1535 Farmers Lane 133, Santa Rosa, CA 95405.

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On 13 February 2014 I served the attached, **APPELLANT'S OPENING BRIEF ON THE MERITS** on the parties in this action by placing a true copy thereof, in a sealed envelope with first class postage fully prepaid, in the United States Mail, addressed as follows:

[x] Supreme Court of California, 350 McAllister St. San Franciso CA 94102 (14)
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Sworn this 13 February 2014, at Santa Rosa, California.

Kieran D. C. Manjarrez