In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

OCTAVIO AGUILAR,

Defendant and Appellant.

Case No. S213571

First Appellate District, Division Four, Case No. A135516
Contra Costa County Superior Court, Case No. 51202696
The Honorable Thomas M. Maddock, Judge

ANSWER BRIEF ON THE MERITS

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Did appellant forfeit his claim that he is unable to pay the booking/criminal justice administration fee, attorney fees, and/or probation supervision fees by failing to object to the fees?

INTRODUCTION

In the trial court, appellant Octavio Aguilar argued for probation, touting his uninterrupted work history, steady earnings, and payment of taxes while running a business. The trial court followed the probation officer's recommendation by granting probation and imposing various fees, including at least four fees that are statutorily predicated on the defendant's ability to pay. Appellant did not object to the fees. The court re-referred him to the probation officer, stating that the fees could be reduced if he could show he could not pay them. The record does not show he provided any further information.

On appeal, appellant challenged four fees, including a booking fee (sometimes known as a CJA fee or county assessment), on the grounds that the trial court made no finding on the record of his ability to pay and that any implied finding was unsupported by substantial evidence. In supplemental briefing to the Court of Appeal, appellant conceded that this Court had found forfeiture of an ability to pay issue concerning such a booking fee in *People v. McCullough* (2013) 56 Cal.4th 589. Appellant sought to distinguish his other fees in reliance upon *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1399. The Court of Appeal rejected his claims, finding that the holding in *McCullough* was intended to apply to all such fees.

This Court granted appellant's petition for review. He now argues that *McCullough* should be reconsidered and, alternatively, that it applies only

to booking fees. The Court of Appeal properly resolved his claim, and the judgment should be affirmed.

STATEMENT

A jury convicted appellant of inflicting corporal injury on a spouse or cohabitant. (Pen. Code, § 273.5, subd. (a).)[1] The court found true a prior conviction for battery within seven years of the present offense. (§§ 243, 273.5, subd. (e)(2).) (CT 122, 198; RT 212.)

Appellant's sentencing statement to the trial court emphasized he "has maintained a solid work history throughout his adult life, running his own heating and air conditioning business," and hopes to "go back to school to get a contractor's license to further his career and his specialized knowledge." (CT 207.) The probation officer's report detailed appellant's uninterrupted work history and payment of income taxes, noted his intent to return to work and continue his education, and listed courses on anger management, computer applications, and substance abuse prevention that appellant completed while in county jail. (CT 236-240.)

At sentencing on May 11, 2012, the court suspended imposition of sentence and placed appellant on formal probation for three years. (CT 201.) Appellant was ordered to serve 300 days in custody, with 230 days' credit for 115 actual and 115 conduct days. The court also imposed, inter alia: (1) a $500 attorney fee (§987.8, subd. (b)); (2) a $176 probation report fee (§ 1203.1b); and (3) a $564 criminal justice administration (CJA) fee, called a criminal assessment fee by the trial court (Gov. Code, § 29550-

[1] All further statutory references are to the Penal Code unless otherwise noted.

29550.3 (arrests by city/local officers)).[2] Appellant did not object. (RT 219-220; CT 201.)

In imposing sentence, the trial court said: "Many of these fees are going to be based on his ability to pay. When he contacts the probation office, he'll fill out [a] fiscal financial assessment form and he can talk with the probation deputy about his ability to pay these various fees." (RT 219; see e.g., § 987.8, subd. (b) [court may order defendant to appear before a county officer to make an inquiry into the ability of the defendant to pay all or a portion of legal assistance provided].) The record does not show any additional documentation of appellant's ability to pay was provided.

On appeal, appellant claimed the three fees should be reversed because the court had not made a finding of his ability to pay as required under the pertinent statutes. (Typed Opn. at p. 2.) The Court of Appeal held that *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough*), which found such a claim forfeited with respect to a CJA fee (a booking fee), applied to all the fees challenged by appellant. (Typed Opn. at pp. 2-3.)[3] The Court of Appeal rejected *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1399 (*Pacheco*), on which appellant relied, finding that the case was an "outlier" even before *McCullough* disapproved it, as most decisions by the Court of Appeal have required an objection to preserve claims respecting fees on appeal. (Typed Opn. at pp. 3-4.)

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[2] Appellant had been arrested by officers from the Antioch Police Department. (CT 26, 197.)

[3] In a supplemental brief in the Court of Appeal, appellant conceded that the assessment fee "falls within the ambit of *McCullough*," but appellant sought to substitute in the supplemental brief a challenge to a $10 per month fee for alcohol testing. (Typed opn. at p .3, fn. 3.) Appellant's opening brief in this Court frames the question as a challenge to the fees he originally contested and not the alcohol testing fee.

Appellant also claimed that the trial court violated his right to due process because it failed to comply with procedures in section 1203.1b respecting the probation report fee. The Court of Appeal found that appellant had waived any failure on the part of the court to comply with the terms of Penal Code section 1203.1b, relying on *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072. (Typed Opn. at p. 4.) The Court of Appeal also observed appellant would need to bring a habeas corpus petition to address any failings on the part of the probation department to comply with section 1203.1, as such a claim would necessarily entail a review of evidence outside the record. (*Ibid.*)

This Court granted review, noting it was also granting review in *People v. Trujillo*, S213687, which reached a different conclusion in a case that involves an overlapping, though not identical set of fees.

SUMMARY OF THE ARGUMENT

Appellant forfeited the claim of error by his failure at sentencing to make a timely, specific objection to the trial court. He did not object that the trial court made no finding of his ability to pay the challenged fees, or that there was insufficient evidence of his ability to pay the fees. Nor did he object that the trial court's finding of the defendant's ability to pay was otherwise procedurally deficient.

Many opinions of this Court require a timely, specific objection in order to obtain appellate review of a trial court's exercise of sentencing discretion. That line of decisions culminated in *People v. McCullough* (2013) 56 Cal.4th 589. That decision held the defendant's failure to make an objection regarding a booking fee under Government Code section 29550.2 forfeited an appellate claim of insufficient evidence for a finding of the defendant's ability to pay. (*Id.* at p. 591.)

Contrary to appellant's argument, *McCullough* reflects a rule of general applicability regarding appellate challenges to a trial court's finding

of the defendant's ability to pay fees and fines in the amount ordered at sentencing. *McCullough* cannot properly be characterized as an exception to a rule that the issue is one of "sufficiency of the evidence" that generally can be raised for the first time on appeal.

Treating such claims as seeking review of the sufficiency of the evidence, rather than of a discretionary ruling on the facts at sentencing, ignores the several justifications for the application of the forfeiture doctrine to sentencing issues in general and to the defendant's ability to pay a fine or fee in particular. A determination of ability to pay depends on a defendant's individual circumstances considered in light of the sentencing discretion accorded to the trial court under the relevant statute. A timely and specific objection directs the trial court's attention to any needed findings as prescribed by the Legislature. The objection requirement reduces the need for appeals challenging fees and fines—appeals that may involve costs to the public exceeding the amount of payments ordered by the trial court and challenged by the defendant. The requirement also avoids unnecessary remands for resentencing on matters that were not subject to real dispute.

In the present case, where defendant touted to the trial court his uninterrupted employment history in a bid for probation, a remand for failure to make the finding of ability to pay these modest fees would be a waste of judicial resources. Appellant has forfeited the claim twice: once at the sentencing hearing and a second time when evidently he elected not to take up the court's offer to present a financial justification for reduction of the fees to the probation officer. In all probability he bypassed both chances because he actually proved he worked full time and had the ability to pay the fees to obtain probation. If appellant wanted a hearing, separate from his sentencing, nothing stopped him from objecting to the fees at the time of sentencing. Enforcing the objection requirement in cases like this

one helps to ensure the compilation of a sufficient record for review when a defendant's ability to pay is a legitimate issue in actual dispute.

No convincing rationale exists to require courts to parse, on a case-by-case basis, the statutory basis and the procedural background respecting each challenged fee for the first time on appeal before deciding if a failure to object forfeits a claim that the trial court failed to make a finding, or made a deficient finding, of the defendant's ability to pay. Timely and specific objection in the sentencing court is the rule; if an individual exception to the rule applies, it is the defendant's burden to establish it as with other forfeitures of appellate claims. As no exception applies here, appellant's failure to object forfeited the issue on appeal.

ARGUMENT

I. *PEOPLE V. MCCULLOUGH* REFLECTS A FORFEITURE RULE OF GENERAL APPLICATION TO SENTENCING CLAIMS INVOLVING A DEFENDANT'S ABILITY TO PAY A FEE ORDERED BY THE TRIAL COURT

A. Challenges to the Imposition of Fees and Fines Must First Be Raised in the Trial Court to Preserve the Issue for Appeal.

A long line of decisions by this Court establish that nonjurisdictional sentencing issues not raised by a timely, specific objection in the trial court are forfeited. (*People v. Nelson* (2011) 51 Cal.4th 198, 227 ["At the time of his 1995 crime and his 2000 sentencing, the law called for the court to consider a defendant's ability to pay in setting a restitution fine, and defendant could have objected at the time if he believed inadequate consideration was being given to this factor"]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [forfeiture of claim of a trial court's failure to consider inability to pay restitution fine]; *People v. Gonzalez* (2003) 31 Cal.4th 745, 755 [claim challenging a trial court's reliance on defendant's use of firearms to impose the upper term sentence and a sentencing enhancement,

as well as claim that court imposed restitution without a hearing both forfeited]; *People v. Tillman* (2000) 22 Cal.4th 300, 302-303 [state's claim that trial court failed to state reasons for not imposing restitution fine forfeited]; *People v. Scott* (1994) 9 Cal.4th 3331, 353 [claims that the trial court failed "to properly make or articulate its discretionary sentencing choices" must be raised first in the trial court or they are forfeited]; *People v. Welch* (1993) 5 Cal.4th 228, 235, 237 [failure to object to probation conditions forfeits a challenge on appeal]; *People v. Walker* (1991) 54 Cal.3d 1013, 1023 [claim of failure to advise that restitution fines would be a consequence of a guilty plea forfeited].)

The decisions of this Court apply an equally well-settled rule of appellate review by requiring a defendant to make a specific and timely objection in the trial court to preserve a challenge on appeal to the discretionary sentencing choices of the trial court. (See *People v. McCullough*, *supra*, 56 Cal.4th at p. 593; *In re Sheena K.* (2007) 40 Cal.4th 875, 880-881; *People v. Scott*, *supra*, 9 Cal.4th at pp. 348-351; *People v. Welch* (1993) 5 Cal.4th 228, 232-237.)

Courts of Appeal have applied these principles to hold broadly that challenges to the imposition of fines and fees must be raised first in the trial court and will not be entertained for the first time on appeal. (See, e.g., *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [claim that trial court failed to consider ability to pay crime prevention fines forfeited]; *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1068-1076 [claim that the trial court failed to consider ability to pay a Penal Code section 1203.1b probation costs fee, inform the defendant of his statutory right to a hearing, or hold a hearing, all forfeited]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [challenge to imposition of section 29550.2 booking fee forfeited]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469 [claim that trial court failed to consider ability to pay restitution fine forfeited]; *People v. Phillips*

(1994) 25 Cal.App.4th 62, 70, 75-76 [although statutes provide for a hearing to determine ability to pay probation costs and reimburse county for cost of court-appointed attorney, the matter may be determined at sentencing; failure to object forfeits issue of whether a separate hearing should have been held pursuant to sections 987.8 and 1203.1b].)

B. *McCullough* States the Rule of Appellate Forfeiture, Not an Exception

People v. McCullough, *supra*, 56 Cal.4th at p. 593, is fully consistent with a broad application of the appellate forfeiture rule respecting these sentencing matters. There, this Court recognized the "numerous occasions" where it has observed that "'ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal.'" (*McCullough*, *supra*, 56 Cal.4th at p. 593, quoting *Sheena K.*, *supra*, 40 Cal.4th at p. 880.) The purpose of the appellate forfeiture rule is to encourage parties to "'bring errors to the attention of the trial court, so that they may be corrected.'" (*McCullough*, *supra*, 56 Cal.4th at p. 593, quoting *Sheena K.*, *supra*, 40 Cal.4th at p. 880.) Conversely, "[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided." (*McCullough*, *supra*, at p. 593, quoting *People v. Vera* (1997) 15 Cal.4th 269, 276.)

Consistent with these established principles, *McCullough*, *supra*, 56 Cal.4th 589, 598, found the need for the trial court to make a determination of ability to pay must expressly be invoked by the defendant, lest a factual inference be made otherwise. Specifically, the Court held that a defendant who failed to challenge a booking fee under Government Code section 29550.2 forfeited a claim of insufficiency of evidence as to an ability to pay finding. (*Id.* at p. 591.) This Court disapproved of *People v. Pacheco*

(2010) 187 Cal.App.4th 1392, which held that the issue of ability to pay based on sufficiency of the evidence is preserved for appellate review regardless of whether an objection is made at sentencing. (*McCullough, supra*, 56 Cal.4th at p. 599.)

C. The Legislature Did Not Intend for Courts to Have to Parse Fines and Fees Statutes on a Case By Case Basis

Appellant acknowledges *McCullough*, but wants it overruled or its holding limited to the one fee this Court addressed. He asserts that the record failed to show the finding of ability to pay the pre-sentence investigation fee required under section 1203.1b or the attorney fee ordered pursuant to section 987.8 and attempts to distinguish *McCullough* on the grounds that the presentence investigation fees, alcohol testing fees, and attorneys fees at issue here are not de minimis, as are the booking fees, and that the Legislature required a finding of ability to pay for such fees, with or without an objection.

Nothing in section 1203.1b, however abrogates the general rule of forfeiture recognized in *McCullough*. *McCullough* reached its conclusion by referencing an array of fines and fees, from restitution fines (former Gov. Code, § 13967 [see now § 1202.4]) to drug program fees (Health & Saf. Code, § 11372.7), all of which can only be preserved for appellate review by objection. (See *People v. Forshay* (1995) 39 Cal.App.4th 686, 689-690; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517.) This Court said: "By 'failing to object on the basis of his [ability] to pay,' defendant forfeits both his claim of factual error and the dependent claim challenging 'the adequacy of the record on that point.'" (*McCullough, supra*, at p. 597, quoting *Forshay, supra*, at pp. 689-690.)

Nothing in the Court's language suggested an appellate court must go through the relevant code section to assess whether the forfeiture rule applies to each individual fee and/or fine imposed in the trial court. The

fundamental principle is that appellate forfeiture applies to such nonjurisdictional issues. *McCullough* relied, in part, on *People v. Simon* (2001) 25 Cal.4th 1082, 1086. The latter decision applied appellate forfeiture to a defendant who failed to enter a timely trial objection to venue. Observing that the People bear the burden of proving both proper venue of a criminal case and a defendant's ability to pay a booking fee by a preponderance of the evidence, the Court reasoned: "[A] defendant who does nothing to put at issue the propriety of imposition of a booking fee forfeits the right to challenge the sufficiency of the evidence to support imposition of the booking fee on appeal, in the same way that a defendant who goes to trial forfeits his challenge to the propriety of venue by not timely challenging it." (*McCullough*, *supra*, 56 Cal.4th at pp. 597-598.) This language implies a broad forfeiture principle with respect to nonjurisdictional issues like the present one, which is not confined to booking fees, or for that matter to sentencing issues.

McCullough also cited in support of its holding other statutes that "similarly require[] a court to determine if a defendant is able to pay a fee before the court may impose it," including probation supervision fees (§ 987.8), work furlough and electronic monitoring fees (§ 1208.2), parole supervision and treatment fees (§§ 646.94, 3006), reimbursement for cost of court-appointed counsel (§ 987.8), and drug program fees (Health & Saf. Code, § 11372.7). The Court observed these statutes contain varying procedural safeguards not contained in the booking fee statute, such as provision for notice and a hearing and a list of factors that should be taken into account in determining ability to pay. The Court said that the absence of similar procedural safeguards or guidelines for the imposition of booking fees showed the Legislature considered the burden of the booking fee to be de minimis and made "the rationale for forfeiture particularly strong." (56 Cal.4th at p. 599.) That the Court made its forfeiture ruling in a

"particularly strong" case does not imply that the related and analogous cases do not fall under the rule.

As *McCullough* reflects, appellate forfeiture applies generally to a claim of omission or deficiency in the trial court's findings of a defendant's ability to pay a required fine or fee. What the failure to object forfeits is an appellate court's review of the reasonableness of the sentencing discretion delegated to the trial court by the Legislature, based on the factual findings—either express or implied—made by the court at sentencing. The availability of appellate review of that discretionary matter ultimately does not turn on the mechanics of a court's consideration of the defendant's ability to pay, on the amount of a particular fine or fee, or on the characterization of a challenge to that amount as a sufficiency-of-the-evidence claim.

Such an exercise of sentencing discretion based on the trial court's factual findings is no different, for present purposes, than a requirement that the trial court supply reasons to support its selection of a particular sentence within an authorized range (see *Scott*, *supra*, 9 Cal.4th at pp. 348-351), or a requirement that the trial court determine the defendant's eligibility for, or the conditions of, probation within the parameters set by statute (see *Welch*, *supra*, 5 Cal.4th at p. 232).

Nor does the issue of forfeiture focus on the amount of the fee or fine in a particular case. Whether the fine is "de minimis" or substantial, an objection is required. For example, in *People v. Nelson*, *supra*, 51 Cal.4th 198, the Court upheld an invocation of the appellate forfeiture rule where the defendant had failed to object on the grounds of inability to pay a $10,000 restitution fine. (*Id.* at p. 227 ["At the time of his 1995 crime and his 2000 sentencing, the law called for the court to consider a defendant's ability to pay in setting a restitution fine, and defendant could have objected at the time if he believed inadequate consideration was being given to this

factor."].) The Court reiterated that there is no requirement that the sentencing court make an express finding of an "ability to pay" and that the absence of specific findings does not demonstrate that the court failed to properly consider the issue. (*Id.* at p. 227.) Appellant undermined below his "de minimis" argument by including in his list of offending fees the alcohol testing fee that is less burdensome than the booking fee this Court found de minimis and subject to forfeiture in *McCullough.*

Additionally, challenges to ability-to-pay findings, or the lack thereof, concern "factual determinations" not legal conclusions. *McCullough* so recognized by citing in support of its holding both *People v. Welch*, *supra*, 5 Cal.4th at page 236 [probation conditions], and *People v. Scott*, *supra*, 9 Cal.4th 331, 354-355 [sentencing reasons], both decisions of the Court concerning claimed sentencing errors that "encompass[] factual matters only," which are forfeited in the absence of a trial objection. (*McCullough*, *supra*, 54 Cal.4th at p. 597.) The forfeiture principle announced in *Welch*, reiterated in *Scott*, and reaffirmed in *McCullough*, clearly applies to a much broader range of sentencing decisions than whether to impose a booking fee based on a defendant's ability to pay.

That conclusion is not altered by the fact that a claim involving the sufficiency of evidence for a finding of crime normally does not require a defendant to object to preserve the issue on appeal. (See, e.g., *People v. Butler* (2003) 31 Cal.4th 1119, 1126.) The latter rule comfortably coexists with the appellate forfeiture doctrine because true sufficiency claims are normally preserved by the plea of not guilty in criminal cases, and because the deeply rooted right to due process and to the presumption of innocence compels the principle that only guilty persons are subject to criminal punishment. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 316-319.)

By contrast, a requirement that the trial court consider the defendant's ability to pay a fine or fee is a creature of statute and a relatively novel one

at that. (See *People v. Valtakis*, *supra*, 105 Cal.App.4th 1066, 1068, 1071-1073 ["Section 1203.1b and other recoupment statutes reflect a strong legislative policy in favor of shifting the costs stemming from criminal acts back to the convicted defendant" and "replenishing a county treasury from the pockets of those who have directly benefited from county expenditures."], quoting *People v. Phillips*, supra, 25 Cal.App.4th at p. 69.) Legislative conditions like ability-to-pay considerations on a court's discretionary sentencing choice rarely, if ever, implicate constitutional interests of the defendant. Indeed, many fees are not punishment at all. (See, e.g., *McCullough*, *supra*, 56 Cal.4th at p. 598 [noting that jail booking fee is not "punishment" for constitutional purposes].)

D. Strong Policy Reasons Support the Requirement of an Objection Below

The Legislature's addition of an ability-to-pay component to any given fine or fee affords no basis for excusing the defendant from ordinary appellate forfeiture rules that apply at sentencing. The policy decision to require a trial court to consider a defendant's ability to pay with respect to some (though by no means all) fees and/or fines is typically the only basis for the defendant to mount a challenge to the trial court's discretionary setting of the amount in the first place. All the more reason, the defendant should mount the challenge when and where it has the potential of doing the defendant the most good—in the trial court. There is simply no good reason for appellate courts to allow the defendant to sandbag such claims.

Forfeiture in the context of a trial court's discretionary sentencing choices is a well-articulated principle, given the ease of correction and judicial efficiency when such matters are addressed at sentencing:

> The parties have ample opportunity to influence the court's sentencing choices under the determinate scheme. As a practical matter, both sides often know before the hearing what sentence is likely to be imposed and the reasons therefor. Such

> information is contained in the probation report, which is required in every felony case and generally provided to the court and parties before sentencing. ([Pen. Code,]§§ 1191, 1203, subds. (b) & (g), 1203c, 1203d, 1203.10; [Cal. Rules of Court,] rules 411, 411.5(a)(8), (9); *People v. Edwards* (1976) 18 Cal.3d 796, 801 & fn. 8 [].) In anticipation of the hearing, the defense may file, among other things, a statement in mitigation urging specific sentencing choices and challenging the information and recommendations contained in the probation report. (§ 1170, subd. (b); rule 437.) Relevant argument and evidence also may be presented at sentencing. (§ 1204; rule 433.)
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> . . .
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> Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them.

(*People v. Scott*, *supra*, 9 Cal.4th at pp. 350-351, 353-354.)

Beyond the question of cost savings in requiring an objection below (see *Valtakis*, *supra*, 105 Cal.App.4th at pp. 1073-1076), the matter concerns fairness and efficiency:

> As a matter of fairness to the trial court, a defendant should not 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. (*People v. Saunders* [(1993)] 5 Cal.4th [580], at p. 590, 20.) 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]. 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.

> Equally important, the need for orderly and efficient administration of the law—i.e., considerations of judicial economy—demand that defendant's failure to object in the trial court to imposition of the restitution fine should preclude him from contesting the fine on appeal. (See, e.g., *People v. Welch*[, *supra*,] 5 Cal.4th [at p.] 235 (*Welch*); [. . . .].) Defendants routinely challenge on appeal restitution fines to which they made no objection in the sentencing court. In virtually every case, the probation report put the defendant on notice that a restitution fine would be imposed. *Requiring the defendant to object to the fine in the sentencing court if he or she believes it is invalid places no undue burden on the defendant and ensures that the sentencing court will have an opportunity to correct any mistake that might exist, thereby obviating the need for an appeal.* Conversely, allowing the defendant to belatedly challenge a restitution fine in the absence of an objection in the sentencing court results in the undue consumption of scarce judicial resources and an unjustifiable expenditure of taxpayer monies. It requires, in almost all cases, the appointment of counsel for the defendant at taxpayers' expense and the expenditure of time and resources by the Attorney General to respond to alleged errors which could have been corrected in the trial court had an objection been made. Moreover, it adds to the already burgeoning caseloads of appellate courts and unnecessarily requires the costly depletion of appellate court resources to address purported errors which could have been rectified in the trial court had an objection been made. This needless consumption of resources and taxpayer dollars is unacceptable, particularly since it greatly exceeds the amount of the fine at issue. Statewide, taxpayers are spending hundreds of thousands of dollars on challenges to relatively minuscule restitution fines.

(*Gibson, supra*, 27 Cal.App.4th at pp. 1468-1469, italics added and some citations omitted.)

McCullough is the rule of appellate forfeiture rather than an exception. Presentence investigation and probation supervision fees involve the same type of factual determinations of ability to pay as are needed for numerous other fees and/or fines. Nothing contained in section 1203.1b abrogates the forfeiture doctrine with respect to review of such

determinations. It is neither administrable nor logical to allow appeals despite the absence of an objection to one common set of fees and/or fines, but to find an appellate forfeiture of identical claims for lack of an objection to assorted other common fees and fines. This Court should affirm the determination of the Court of Appeal and find that the defendant's failure to object on the grounds of ability to pay forfeited the issue.

II. FAILURE TO STRICTLY COMPLY WITH LEGISLATIVE DIRECTION ON HOW TO MAKE AN ABILITY TO PAY DETERMINATION IN THE ATTORNEY FEE AND PROBATION SUPERVISION CONTEXT DOES NOT PRECLUDE BASING THE ABILITY TO PAY FINDING ON EVIDENCE OTHERWISE IN THE RECORD

Appellant cites *People v. Pacheco*, *supra*, 187 Cal.App.4th at p. 1398, which confirms that a trial court's finding of ability to pay can be express or implied and will be upheld on appeal so long as it is supported by substantial evidence. (AOB 6.) Since the required finding will be implied and upheld so long as substantial evidence of the defendant's ability to pay appears, appellant cannot fault the trial court for failing to make an express finding of his ability to pay on the record here; an implied finding is precisely what *Pacheco* permits. (See also *People v. Phillips*, *supra*, 25 Cal.App.4th at p. 71.) Nevertheless, appellant complains that the record does not show the trial court followed the procedures set forth in section 1203.1b[4] and 987.8[5] for gathering evidence of his ability to pay. (AOB 10.)

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[4] The statutory procedures in section 1203.1b, subd. include:

(a) The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination

(continued...)

(...continued)
of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver."

(b) When the defendant fails to waive the right provided in subdivision (a) to a determination by the court of his or her ability to pay and the payment amount, 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. The 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, or his or her authorized representative. The following shall apply to a hearing conducted pursuant to this subdivision:

(1) At the hearing, 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.

(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.

(4) When 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.

(c) The 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 court pursuant to this section.

(d) If practicable, the court shall order or the probation officer shall set payments pursuant to subdivisions (a) and (b) to be made on a monthly basis. Execution may be issued on the order issued pursuant to this section in the same manner as a judgment in a civil action. The order to pay all or part of the costs shall not be enforced by contempt.

(continued...)

He urges that a probation-related fee or an attorney-related fee should be stricken absent a record showing procedural compliance with the statutes,

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(...continued)

(e) The term "ability to pay" means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of conducting the presentence investigation, preparing the preplea or presentence 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, 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.

(f) At any time during the pendency of the judgment rendered according to the terms of this section, a defendant against whom a judgment has been rendered may petition the probation officer for a review of the defendant's financial ability to pay or the rendering court to modify or vacate its previous judgment on the grounds of a change of circumstances with regard to the defendant's ability to pay the judgment. The probation officer and the court shall advise the defendant of this right at the time of rendering of the terms of probation or the judgment.

[5] Section 987.8, subdivision (b) provides:

In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, 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. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court 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 assistance provided.

even if the record contains substantial evidence of the defendant's ability to pay the fee. (AOB 11-18.)

Appellant argues, in effect, that the procedural steps in statutes authorizing fees conditioned on the defendant's ability to pay are mandatory, rather than directory. Whether a statutory provision is mandatory, hence jurisdictional, or merely directory, depends on legislative intent. Where consequences are attached to a failure to act in accordance with legislative direction, the direction is mandatory. "[F]ailure to comply with a mandatory provision of a statute renders the proceeding to which it relates void, while noncompliance with a directory provision of a statute does not result in the invalidity of the proceeding or action taken." (*Campbell Elementary Teachers Assn., Inc. v. Abbott* (1978) 76 Cal.App.3d 796, 805.) If the statute includes no means of enforcement, its requirements are directory, not mandatory. (*Id.* at p. 806.) "Courts must examine 'whether the statutory requirement at issue was intended to provide protection or benefit to . . . individuals . . . or was instead simply designed to serve some collateral, administrative purpose." (*People v. Gray* (2014) ___ Cal.4th ___ [2014WL961038 *6], quoting *People v. McGee* (1977) 19 Cal.3d 948, 963.) Generally, the "provisions defining the time and mode in which public officials shall discharge their duties . . . which are obviously designed merely to secure order, uniformity, system and dispatch in the public bureaucracy are held to be directory." (*Cal-Air Conditioning, Inc. v. Auburn Union School Dist.* (1993) 21 Cal.App.4th 655, 673; see also *People v. McGee*, *supra*, 19 Cal.3d at pp. 958-959.)

The statutes at issue here direct and instruct public officials how to conduct an orderly and consistent inquiry into the defendant's ability to pay the fee. By the terms of these statutes, such procedures may be waived by the defendant. Moreover, there is no enforcement mechanism as to these procedures such as would indicate the procedural features were intended to

be mandatory. Hence, noncompliance with those procedural steps do not render void an express or implied finding of the defendant's ability to pay. So long as substantial evidence of ability to pay appears in the record, the finding requirement is satisfied. (See *Pacheco*, *supra*, 187 Cal.App.4th at p. 1398.)

The defendant can waive the procedure set forth in section 1203.1b for determining ability to pay probation-related fees. Although the defendant's waiver must be knowing and intelligent, the statute contains no requirement that it be express or that it be made on the record. Indeed, the statute appears to contemplate that a waiver will be made to the probation officer, not to the court. (§ 1203.1, subd. (a).) Although the statute uses "shall" language describing the procedures to follow if there has been no waiver, those procedures are primarily instructive to the public officials of how such an inquiry should be made. The provisions do not preclude reliance by the defendant and the probation officer on substantial information provided at an earlier date and they do not provide an enforcement mechanism in the event of a failure to strictly comply with the provisions. The only requirement that any of the procedures be placed on the court record occurs if there is no waiver and the court finds an ability to pay an amount different from an amount determined by the county officer, in which case the court should state its reasons for the departure, up or down, on the record. (§ 1203.1b, subd. (b)(4).) There is a permissive review procedure in place that may be invoked at any time and which does not require changed circumstances. (§ 1203.1b, subd. (c).)

Section 987.8, subdivision (b) is expressly permissive. The statute repeatedly uses the terms "may" and "in its discretion" when referring to the actions of the court. No consequences are mentioned in the event of procedural defects such as holding a hearing on reimbursement of attorney costs at the same time as the sentencing hearing, or making a preliminary

finding of an ability to pay a certain amount, subject to the defendant's election to submit evidence to a county revenue officer.

The present case features the not unusual circumstance of a defendant affirmatively showing the court that he is an individual of some financial means and able to meet his obligations. Obviously, that was intended by him to encourage the court to make a probationary disposition. Such circumstances render largely academic the procedural steps in the fee statutes, which, by their nature, contemplate criminal defendants with questioned, not unquestioned, financial resources.

Insistence on a record showing strict obedience in all cases to statutory procedures in cases like this one (and many others) to the point of rendering void the implied findings of the court is counterintuitive and contrary to public policy. The Legislature presumably understood that point and, consequently, omitted enforcement mechanisms that might otherwise have reflected a mandatory, rather than a directory, intention. Accordingly, the statutes reflect a legislative intent that the finding of ability to pay the fee be supported by substantial evidence, regardless of the state of the record respecting compliance with the procedural steps delineated in the authorizing statute.

III. NOR MUST EACH SENTENCING COURT MAKE AN INDEPENDENT FINDING OF THE ACTUAL COSTS OF BOOKING

Appellant contends that there is a danger that "fees" imposed without a contemporaneous determination of actual costs could become onerous "fines." He thus argues that *McCullough* should be reconsidered and all the cost-based fees imposed in this case should be reversed because the trial court relied on the fee schedule, rather than independently determining the actual costs of booking.

The only real significance of appellant's argument is that it belies his claimed concern for the conservation of judicial resources. He asserts,

based on no evidence, that fees restricted to actual cost reimbursement, like booking fees, will get out of hand and become punitive elements of public finance absent a finding by the trial court of the actual cost of the underlying service provided in the case. The administrative costs that such determinations would entail are clearly unacceptable as a matter of sound public polity and ordinary common sense.

The cost determination is made when the fees are set by each county's board of supervisors, on the basis of actual cost data submitted by the service provider, generally the sheriff. The fee set by the board is listed on the county fee schedule and imposed until the schedule is revised. The booking fee imposed in this case appeared on the Contra Costa County fee schedule because it was set by the board of supervisors following a hearing at which the Sheriff provided actual cost data.[6] Defendant has presented no evidence that such administrative "user" fees as booking fees have been set in a manner inconsistent with the implementing legislation. He certainly has not presented evidence that the booking fees have become punitive by exceeding actual cost. (See *People v. Rivera* (1998) 65 Cal.App.4th 705, 710-711 [booking fees reflecting actual costs are not punitive].)

California's open meeting laws (see, Govt. Code, § 54950) and related public notice and posting protocols provide a means for obtaining, analyzing, and objecting to the data underlying the setting of booking fees

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[6] By separate motion, respondent has requested the Court take judicial notice of Contra Costa County Ordinance No. 2011-13, enacted at the June 28, 2011, Board of Supervisors meeting and the supporting document, "Contra Costa County Criminal Justice Administrative Fee Methodology," which are attached to the judicial notice motion and available on the Contra Costa County Board of Supervisors website at http://66.166.146.155/docs/2011/BOS/20110628_153/8319_bookingfeeord (2).doc and http://66.166.146.155/docs/2011/BOS/20110628_153/8319_ BOOKCALC2011.pdf respectively.

(or any other fee set by a similar means) at the county level. This eliminates the need for considering whether to put trial courts to the task of evaluating the account books of the relevant agency before assessing such fees in criminal cases. That *McCullough* does not require case by case determination of actual costs of services provides no basis to reconsider its rationale.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

Dated: March 20, 2014

Respectfully submitted,

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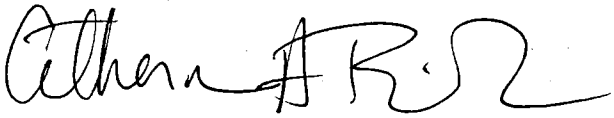
CERTIFICATE OF COMPLIANCE

I certify that the attached Answer Brief on the Merits uses a 13 point Times New Roman font and contains 6,545 words.

Dated: March 20, 2014

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Octavio Aguilar***

No.: **S213571**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 20, 2014, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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Court of Appeal of the State of California
Division Four
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Via Hand Delivery on 3/20/2014

First District Appellate Project
Via Email Only: eservice@fdap.org

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 20, 2014, at San Francisco, California.

A. Bermudez
Declarant

A. Bermudez
Signature

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