In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DONNA MARIE TRUJILLO,** **Defendant and Appellant.**	Case No. S213687

Sixth Appellate District, Case No. H038316
Santa Clara County Superior Court, Case No.
Linda R. Clark, Judge

OPENING BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
CATHERINE A. RIVLIN
Supervising Deputy Attorney General
GREGG E. ZYWICKE
Deputy Attorney General
State Bar No. 173163
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5961
Fax: (415) 703-1234
Email: Gregg.Zywicke@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

Penal Code

QUESTION FOR REVIEW

Does the failure to object to a presentence investigation fee and/or a probation supervision fee forfeit a claim that the trial court failed to make a finding of the defendant's ability to pay?

STATEMENT

Defendant attempted to sell two valuable stolen Russian icons at a garage sale. On November 17, 2011, a jury convicted defendant of receiving stolen property (Pen. Code, § 496, subd. (a), further statutory citations are to this code unless otherwise specified). (4RT 78-79, 109-110, 115-116, 252-262, 5RT 328-330; CT 127.)

On April 20, 2012, the court suspended imposition of sentence and placed defendant on probation. The court imposed the following fines and fees: a $240, plus $24 (10 percent) restitution fund fine (§ 1202.4), with an equal probation revocation fine stayed (§ 1202.44); a $129.75 criminal justice administration fee (Gov. Code, § 29550.1) payable to the City of San Jose; a $40 court security fee (§ 1465.8); a $30 criminal conviction assessment fee (Gov. Code, § 70373); a presentence investigation fee "not to exceed $300" and a probation supervision fee "not to exceed $110 per month" (§ 1203.1b)[1]. (5RT 357-358; CT 171; see also CT 153-159.)

The court ordered defendant to "report to the Department of Revenue within 30 days for completion of a payment plan for the fines and fees that will be imposed. . . ." (5RT 356.) Defendant neither objected to the fines and fees, nor professed an inability to pay them. (See, e.g., 5RT 351-358.) Defendant refused to speak to the probation officer prior to sentencing. She accused that officer of conspiring against her (see CT 155-156), and failed to appear at the initial sentencing hearing (5RT 356; CT 172).

---

[1] A copy of section 12031b is attached as an sppendix to this brief. (Exhibit A.)

The Court of Appeal for the Sixth Appellate District found appellant's failure to object forfeited a challenge to the criminal justice administration fee under *People v. McCullough* (2013) 56 Cal.4th 589. (Typed opn. at p. 10.) However, the appellate court reversed and remanded with directions for the trial court to follow the statutory procedure in section 1203.1b before imposing probation related costs of the presentence investigation and probation supervision. The court found *McCullough* inapplicable to probation-related fees, noting that the fees in this case are not "de minimis."

Notwithstanding *McCullough*'s disapproval of *People v. Pacheco* (2010) 187 Cal.App.4th 1392, which allowed challenges to the sufficiency of the evidence to support an ability to pay finding to be raised for the first time on appeal, the Court of Appeal invoked *Pacheco* as authority obligating the trial court to determine defendant's ability to pay under section 1203.1b. The court stated: "Even if we were to conclude that under *McCullough* [appellant's] sufficiency of the evidence argument as to probation related costs is forfeited, there is nothing in the record to support the conclusion that anyone, whether the probation officer or the court, *made a determination of* [*her*] *ability to pay* the probation supervision fee or cost of preparing the presentence investigation report. In other words, there is nothing in the record to support the conclusion that the court or the probation officer complied with the procedural safeguards," (Typed opn. at p. 6, brackets added and fn. omitted].)

This Court granted review.

SUMMARY OF THE ARGUMENT

A defendant's failure at sentencing to make a timely, specific objection that the trial court erroneously failed to make a finding of the defendant's ability to pay the amount of a fine or fee, or that the trial court's finding of the defendant's ability to pay was otherwise deficient, forfeits the claim of error on appeal. Many opinions by this Court require a

timely, specific objection in order to appeal 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 the decision of the Court of Appeal below, *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. Nor is *McCullough* properly 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 a sufficiency question 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. Conversely, it helps to ensure the compilation of a sufficient record 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 fine and/or fee for the first time on appeal before the court can

determine that a failure to object forfeited an appeal based on a claim that the trial court failed to make a finding, or made a deficient finding, of his or her 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* (2013) 56 CAL.4TH 589 REFLECTS A FORFEITURE RULE OF GENERAL APPLICATION TO SENTENCING CLAIMS INVOLVING A DEFENDANT'S ABILITY TO PAY A FINE OR FEE ORDERED BY THE TRIAL COURT

A. Challenges to the Imposition of Fines and Fees 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 [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].)

B. *McCullough* is 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.*, 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.*, 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, 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. [Cite] 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. [Cite.]

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

In the present case, the Court of Appeal acknowledged the holding in *McCullough*, but nonetheless remanded for an ability-to-pay finding on authority of *Pacheco*. (Typed slip opn. at p. 6.) It reasoned that the record failed to show the finding of ability to pay presentence investigation and probation supervision fees required under section 1203.1b and

distinguished *McCullough* on the grounds that the presentence investigation and probation supervision fees are not de minimis and that the Legislature required a finding of ability to pay for such fees, with or without an objection.

The Court of Appeal incorrectly interpreted and distinguished *McCullough*, a decision in which this Court clearly fashioned a general rule of appellate forfeiture. Nothing in section 1203.1b abrogates that rule.

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 Penal Code to assess whether the forfeiture rule applies to each individual fee and/or fine. 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.)

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 by 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* (2003) 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* (1994) 25 Cal.App.4th 62, 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.)
>
> . . .
>
> 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 reverse 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.

CONCLUSION

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

Dated: January 7, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
CATHERINE A. RIVLIN
Supervising Deputy Attorney General

GREGG E. ZYWICKE
Deputy Attorney General
Attorneys for Respondent

SF2013406535
40856565.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 4,233 words.

Dated: January 7, 2014

KAMALA D. HARRIS
Attorney General of California

GREGG E. ZYWICKE
Deputy Attorney General
Attorneys for Respondent

Exhibit A

Cal Pen Code § **1203.1b** (2013)

§ 1203.1b. Payment of probation costs as condition of probation

(a) In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report, whether or not probation supervision is ordered by the court, and in any case in which a defendant is granted probation or given a conditional sentence, the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision or a conditional sentence, of conducting any preplea investigation and preparing any preplea report pursuant to Section 1203.7, of conducting any presentence investigation and preparing any presentence report made pursuant to Section 1203, and of processing a jurisdictional transfer pursuant to Section 1203.9 or of processing a request for interstate compact supervision pursuant to Sections 11175 to 11179, inclusive, whichever applies. The reasonable cost of these services and of probation supervision or a conditional sentence shall not exceed the amount determined to be the actual average cost thereof. A payment schedule for the reimbursement of the costs of preplea or presentence investigations based on income shall be developed by the probation department of each county and approved by the presiding judge of the superior court. 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 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.

(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.

(g) All sums paid by a defendant pursuant to this section shall be allocated for the operating expenses of the county probation department.

(h) The board of supervisors in any county, by resolution, may establish a fee for the processing of payments made in installments to the probation department pursuant to this section, not to exceed the administrative and clerical costs of the collection of those installment payments as determined by the board of supervisors, except that the fee shall not exceed seventy-five dollars ($75).

(i) This section shall be operative in a county upon the adoption of an ordinance to that effect by the board of supervisors.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Donna Marie Trujillo**
No.: **H038316**

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 January 7, 2014, I served the attached **OPENING 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:

Randall Conner (*2 copies*)
Attorney at Law
160 Franklin Street, Suite 210
Oakland, CA 94607

Santa Clara County Superior Court
Criminal Division - Hall of Justice
191 North First Street
San Jose, CA 95113-1090

The Honorable Jeffrey F. Rosen
District Attorney
Santa Clara County District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

Sixth District Appellate Program
100 North Winchester Blvd., Suite 310
Santa Clara, CA 95050

California Court of Appeal
Sixth Appellate District
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

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 January 7, 2014, at San Francisco, California.

Nelly Guerrero
Declarant

Signature

SF2012402103