# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

# APPELLANT'S REPLY BRIEF ON THE MERITS

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## ARGUMENT

### I.

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

Respondent advances essentially seven arguments in support of its conclusion that this Court should apply the forfeiture doctrine to claims of insufficient evidence to support the trial court's implied finding of ability-to-pay the booking fee absent an objection below: (1) a long line of cases have applied the forfeiture doctrine when a defendant fails to object to "non-jurisdictional sentencing issues" (Respondent's Brief ("RB") 7); (2) the forfeiture doctrine has been, and

should be applied to recoupment statutes, because allowing appellate review of these claims drains public resources (RB 8-11); (3) this Court should not endorse the holdings of *People v. Pacheco* (2011) 187 Cal.App.4th 1392 (*Pacheco*), *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*), or *People v. Lopez* (2005) 129 Cal.App.4th 1508 (*Lopez*) (RB12-15); (4) this Court's decision in *People v. Butler* (2003) 31 Cal.4th 1119 (*Butler*), was "extremely narrow, based on the particular statute before it" (RB 15), and to apply *Butler* outside its own fact-specific situation would create a "gaping hole" in the forfeiture doctrine (RB 15-17); (5) the booking fee cannot be compared to the HIV testing order under consideration in *People v. Stowell* (2003) 31 Cal.4th 1107 (*Stowell*), and, to the extent *Stowell* found that an HIV testing order is not "punishment," and therefore does not fall within the forfeiture rule articulated in *People v. Scott* (1994) 9 Cal.4th 331, 348 (*Scott*), the court created an "unworkable distinction which poses particular mischief when applied to fees based on ability to pay[]" (RB 17-21); (6) allowing claims of insufficient evidence to support the trial court's implied finding of ability-to-pay the booking fee to be raised for the first time on appeal would create "bizarre results" (RB 21-22); and (7) this court should follow the holdings and rationale articulated in *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072 (*Valtakis*), *People v. Gibson* (1994) 27 Cal.App.4th 1466 (*Gibson*), and *People v. Hodges* (1999) 70 Cal.App.4th 1348 (*Hodges*), and to the extent *Butler* and *Stowell* "are read to circumvent the efficiencies and fairness of *Scott* and the cases that followed, they should be expressly limited or overruled, or alternatively not applied to the recoupment fees at issue here." (RB 22-23.)

Appellant will address these contentions in seriatim and demonstrate that none of the reasons offered by respondent support application of the forfeiture doctrine to claims, such as the one made here, based on insufficient evidence to support the trial court's implied finding of ability-to-pay the booking fee.

## A. The Restitution Cases Cited By Respondent Are Distinguishable And Do Not Apply To The Booking Fee.

Respondent cites a list of cases that have applied the forfeiture doctrine when a defendant fails to object at sentencing to what it calls, "non-jurisdictional sentencing issues." (RB 7, citing *People v. Nelson* (2011) 51 Cal.4th 198, 227, *People v. Avila* (2009) 46 Cal.4th 680, 729, *People v. Gonzalez* (2003) 31 Cal.4th 745, 755, *People v. Tilman* (2000) 22 Cal.4th 300, 302-303, *Scott, supra,* 9 Cal.4th 331, 353, *People v. Walker* (1991) 54 Cal.3d 1013, 1023; see also RB 11.) However, with the exception of *Scott*, these cases addressed a defendant's failure to object to the imposition of a restitution fine. A restitution fine is not the same as a booking fee. Therefore, the forfeiture rules that apply to restitution do not apply here.

The first, and decisive distinction between a restitution fine and a booking fee, is that imposition of restitution is *a discretionary sentencing choice* which, absent objection, is subject to the forfeiture doctrine enunciated in *Scott, supra,* 9 Cal.4th 331. (*People v. Tillman* (2000) 22 Cal.4th 300, 303; *People v. Smith* (2001) 24 Cal.4th 849, 852 (*Smith*).) In contrast, imposing a booking fee is not a discretionary sentencing choice.

As we explained in the opening brief, a trial court can only impose the booking fee if there is substantial evidence of defendant's

present ability to pay it. (Gov. Code, §29550.2, subd. (a); *Pacheco, supra,* 187 Cal.App.4th at p. 1398; *People v. Nilsen* (1988) 199 Cal.App.3d 344, 347; *People v. Kozden* (1974) 36 Cal.App.3d 918, 920.) The court has no discretion to find facts for which there is not substantial evidence. (*In re K.F.* (2009) 173 Cal.App.4th 655, 661.) Therefore, in deciding whether to impose a booking fee, the trial court is making a very limited factual finding, it is finding "facts in light of an objective legal standard." (*Stowell, supra,* 31 Cal.4th at p. 1116.) The standard is quite simply: is there sufficient evidence in the record of the defendant's present ability to pay a set amount (the amount of the booking fee) on the date of sentencing.

Respondent suggests in a footnote that the ability-to-pay finding under Government Code section 29550.2, subdivision (a), is not limited to a defendant's *present* ability to pay, but allows the court to consider also a defendant's *future* ability to pay the fee, which would raise more questions than simply: is there sufficient evidence of the defendant's ability to pay the fee on the date of sentencing. However, respondent's argument is unsound. Government Code section 29550.2, subdivision (a), says nothing about a court considering the defendant's "future ability to pay."[1] Therefore, this Court cannot, without violating the fundamental cannons of statutory construction, insert a requirement to consider the defendant's future ability-to-pay into the statute. Adding language into a statute "violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes."

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[1] Government Code section 29550.2, subdivision (a), states, in pertinent part: "If the person has the ability to pay, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person. . . ."

(*Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 998.) Because Government Code section 29550.2, does not include a provision for considering a defendant's *future* ability-to-pay, the "ability-to-pay" determination is limited to the defendant's *present* ability to pay the booking fee, his financial situation on the date of sentencing. (Cf. e.g., §987.8, subd. (g).)

Furthermore, when it comes to the booking fee, the trial court has *no discretion* to set, or modify the amount. The amount of the booking fee has been set by statute and can only consist of the actual cost incurred in conjunction with the arresting and booking of the person.[2] (Cf. e.g., *Smith, supra,* 24 Cal.4th at p. 853 ["In contrast to the erroneous omission of a restitution fine," setting an erroneous amount of the parole revocation fine did not involve a discretionary sentencing choice, because the trial court "has no choice and must impose a parole revocation fine equal to the restitution fine . . ."].) Because the trial court has no discretion to determine the amount of the booking fee, it is not a "discretionary sentencing choice" within the meaning of *Scott*. (*Ibid.*)

In contrast, the restitution statute explicitly gives the trial court discretion to determine the amount of the fine. "[A] fine in any amount greater than the statutory minimum, and up to $10,000, is subject to the court's discretion. ([Pen. Code,] § 1202.4, subds. (b)(1), (d).)" (*People v. Avila, supra,* 46 Cal.4th at p. 729.) In 2011, when McCullough was sentenced, Penal Code section 1202.4, subdivision (b)(1), provided in

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[2] Government Code section 29550.2, subdivision (a) provides, in pertinent part: "The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs, as defined in subdivision (c) . . ."

pertinent part: "The restitution fine *shall be set at the discretion of the court* and commensurate with the seriousness of the offense, but *shall not be less than two hundred dollars* ($200) and not more than the thousand dollars ($10,000) if the person is convicted of a felony . . ." (Italics added.)

In addition, a restitution fine is different from a booking fee because, unlike the booking fee statute, imposition of a restitution fine is not conditioned upon a finding of present ability to pay. Penal Code section 1202.4, subdivision (c), the restitution statute, states, in relevant part:

> The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum fine.

Also unlike the booking fee statute, the restitution statute places the burden on the *defendant* to demonstrate his or her inability to pay. (Pen. Code, §1202.4, subd. (d) ["A defendant shall bear the burden of demonstrating his or her inability to pay"]; *People v. Avila, supra,* 46 Cal.4th at p. 729 [same]; *People v. Romero* (1996) 43 Cal.App.4th 440, 449 [the statute "impliedly presumes a defendant has the ability to pay," and leaves it to the defendant to adduce evidence otherwise].) In contrast, a trial court can only impose the booking fee if there is substantial evidence of defendant's present ability to pay it. (Gov. Code, §29550.2, subd. (a).) The statute does not assume an ability-to-

pay, nor does it place upon the defendant the burden of demonstrating an inability to pay.

Another significant, decisive distinction between a restitution fine and a booking fee is that a booking fee is not "punishment" (*People v. Rivera* (1998) 65 Cal.App.4th 705, 708; *People v. Alford* (2007) 42 Cal.4th 749, 758-759), whereas a restitution fine is punishment. (*People v. Hanson* (2000) 23 Cal.4th 355, 361-363 [restitution fines are punishment for purposes of double jeopardy]; *People v. Walker* (1991) 54 Cal.3d 1013, 1024 [restitution fine "qualifies as punishment" for purpose of enforcing plea bargain]; *People v. Saelee* (1995) 35 Cal.App.4th 27, 30 ["A restitution fine qualifies as punishment for purposes of the prohibition against ex post facto laws"].) Because a booking fee does not qualify as punishment, "it cannot properly be considered a sentencing choice[]" subject to *Scott's* forfeiture rule. (*Stowell, supra,* 31 Cal.4th at p. 1113 ["Since HIV testing does not constitute punishment [citation], it cannot properly be considered a sentencing choice"].)

Therefore, unlike restitution, failure to object to the imposition of a booking fee does not fall under *Scott*'s forfeiture rule, because *Scott* only applies to claims involving a failure to object to the trial court's failure to properly make or articulate its "*discretionary sentencing choices.*" (*Scott, supra,* 9 Cal.4th at p. 353.) As demonstrated here, and in the opening brief, imposing a booking fee is not "discretionary," nor is it a "sentencing choice." Therefore, unlike a restitution fine, the booking fee falls outside the purview of *Scott's* forfeiture rule. The cases on which respondent relies to argue otherwise are to no avail.

## B. Judicial Economy Does Not Compel Application of the Forfeiture Doctrine Here.

Respondent suggests this Court should follow the decisions in *People v. Crittle* (2007) 154 Cal.App.4th 368 (*Crittle*), *Hodges, supra,* 70 Cal.App.4th 1348, *Gibson, supra,* 27 Cal.App.4th 1466, and *Valtakis, supra,* 105 Cal.App.4th 1066, which have applied the forfeiture doctrine to challenges to the imposition of fines and fees made for the first time on appeal, and that like *Valtakis* and *Gibson* it should do so because claims of this nature waste vital judicial resources. (RB 8-11.) While appellant does not dispute that judicial economy is a principal rationale of the forfeiture doctrine (*Smith, supra,* 24 Cal.4th at p. 852), appellant would point out that the courts in *Valtakis* and *Gibson,* applied the forfeiture doctrine because the defendant failed to object to a discretionary sentencing choice, and then the courts utilized considerations of judicial economy as an *additional factor* supporting the decision to invoke the forfeiture doctrine.

In *Valtakis* and *Gibson,* the forfeiture doctrine applied because no objection was made to the court's *discretionary sentencing choice.* In *Valtakis* the court applied the forfeiture doctrine to "a defendant's failure to object at sentencing to noncompliance with the probation fee *procedures* of Penal Code section 1203.1b . . . consistent with the general waiver rules of *People v. Welch* (1993) 5 Cal.4th 228, and *People v. Scott* (1994) 9 Cal.4th 331.)" (*Valtakis, supra,* 105 Cal.App.4th at p. 1068, fn. omitted, italics added.) In *Gibson,* the court applied the forfeiture doctrine when the defendant failed to object to a *procedural defect* in the imposition of a restitution fine. (*Gibson, supra,* 27 Cal.App.4th at p. 1468.)

Here, in contrast, the booking fee is not a discretionary sentencing choice, so a failure to object does not implicate *Scott's* forfeiture rule. (Arg. §I.A., ante.) Unlike an objection predicated on the trial court's failure to make or articulate its discretionary sentencing choices, claims, such as the one made here, based on insufficient evidence require no predicate objection in the trial court. (*Butler, supra,* 31 Cal.4th at p. 1126; *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23; *People v. Rodriguez* (1998) 17 Cal.4th 253, 262; *Viray, supra,* 134 Cal.App.4th at p. 1217; *Lopez, supra,* 129 Cal.App.4th at p. 1537; *Pacheco, supra,* 187 Cal.App.4th at p. 1397; *In re K.F., supra,* 173 Cal.App.4th at p. 660; *People v. Shiseop Kim* (2011) 193 Cal.App.4th 836, 842; *People v. Christiana* (2010) 190 Cal.App.4th 1040, 1046-1047; *In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1561.)

In addition, this Court should reject respondent's contention that the forfeiture doctrine should apply here simply because the amount of money involved is not significant enough to merit appellate review. More than just the amount of the fee imposed is potentially at sake. The order imposing booking fees upon a judgment of conviction can be executed "in the same manner as a judgment in a civil action," and if the defendant was placed on probation, "[t]he court shall, as a condition of probation, order the convicted person to reimburse the county for the criminal justice administration fee." (Gov. Code, §29550.2, subd. (a).) Accordingly, if the defendant is unable to pay the booking fee, he could face serious future ramifications in the execution of the order as a money judgment (e.g., Pen. Code, §1214; Code Civ. Proc., §695.010, et seq.), or perhaps worse, it could serve as the basis for a violation of probation. Therefore, there is potentially more at sake here than simply the amount of the booking fee.

Finally, this court should reject respondent's attempt to invoke the principles of judicial economy for the same reasons it rejected this argument in *Smith, supra,* 24 Cal.4th 849. "A timely objection to a sentencing error *always* reduces the likelihood of error and the unnecessary waste of judicial resources. We have, however, determined that certain errors are so obvious and so easily fixable that correction of these errors in the absence of an objection at sentencing will not unduly burden the courts or the parties. . . [T]he Court of Appeal may correct this error without remanding for further proceedings in the presence of defendants." (*Id.* at p. 854, original italics.) In addition, applying the forfeiture doctrine here will not necessarily achieve the results respondent advocates; i.e., a reduction in litigation at the appellate level. As this Court noted in *Butler*, "applying a forfeiture rule in this circumstance would likely have the effect of converting an appellate issue into a habeas corpus claim of ineffective assistance of counsel for failure to preserve the question by timely objection. . . . [W]e would be loath to invoke a rule that would proliferate rather than reduce the nature and scope of legal proceedings. [Citation.] " (*Butler, supra,* 31 Cal.4th at p. 1128.)

Judicial economy does not justify applying the forfeiture doctrine to a claim of insufficient evidence to support the trial court's implied finding of ability-to-pay the booking fee.

### C. Respondent's Criticisms Of *Pacheco, Viray* and *Lopez* Are Without Merit.

In the opening brief, appellant thoroughly discussed the holdings of *Pacheco, Viray* and *Lopez* (AOB 8-10) and why the reviewing court here erred in distinguishing, or otherwise dismissing those decisions. (AOB 31-35.) Therefore, appellant will not repeat those points here.

Respondent criticizes *Pacheco* for reaching its decision – allowing a claim of insufficient evidence to support the trial court's implied finding of ability-to-pay to be raised for the first time on appeal – without having considered the decision in *Hodges,* which reached the opposite result. (RB 12-13.) This argument has no merit.[3]

As we demonstrated in the opening brief, the court in *Hodges* did not engage in any analysis whatsoever, it merely uncritically applied *Gibson.* (AOB 25-26.) The court in *Pacheco* cannot be faulted for having failed to consider *Gibson* because that case had nothing to do with the issue here. *Gibson* merely held that a defendant should not be permitted to assert for the first time on appeal a *procedural defect* in the imposition of a restitution fine. (*Gibson, supra,* 27 Cal.App,4th at p. 1468.) The issue here is manifestly different than the issue decided in *Gibson.* (See Arg. §I.A., ante.)

Respondent also criticizes *Lopez* for relying on *People v. Rodriguez, supra,* 17 Cal.4th 253, 262, and *People v. Jones* (1988) 203 Cal.App.3d 456, 461, because those cases involved the sufficiency of evidence related to enhancements and not sentencing claims. (RB 13.) However, the same criticisms could apply to *Butler.* In *Butler,* the Court cited *Tahoe National Bank v. Phillips, supra,* 4 Cal.3d at page 23, fn. 17, *a civil action,* as authority for the proposition that, "

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[3] Curiously, just as respondent complains that *Pacheco* "uncritically applied *Viray* and *Lopez*, to determine that forfeiture was inapplicable[]" (RB 12), *Hodges* uncritically applied *Gibson* to determine that forfeiture was applicable. However, *Hodges* presents a more egregious example, because *Gibson* dealt with a *restitution fine* which, we have shown, is vastly different from a booking fee. *Viray* and *Lopez,* on the other hand, addressed the attorney's fees statute (Pen. Code, §987.8), which respondent does not contend is apposite to the booking fee statute.

'Generally, points not urged in the trial court cannot be raised on appeal. [Citation.] The contention that a judgment is not supported by substantial evidence, however, is an obvious exception.' " (*Butler, supra,* 31 Cal.4th at p. 1126.) Therefore, respondent's attempt to criticize the court's analysis in *Lopez* is without merit.

Finally, like the Court of Appeal, respondent attempts to distinguish *Viray* by focusing on the portion of the opinion where the court discussed the conflict-of-interest presented by requiring counsel to object to an order awarding his or her own attorney's fees. (RB 13-14.) We have already demonstrated in the opening brief that *Viray* had *two* independent, but equally compelling reasons for rejecting the forfeiture argument, and its *second holding* – that a challenge to the sufficiency of the evidence to support the trial court's implied finding of ability to pay is cognizable on appeal – is the principle that subsequent cases, including *Pacheco,* have taken from *Viray.* (AOB 31-33; *Southern Cal. Ch. of Associated Builders etc. Com. v. California Apprenticeship Council* (1992) 4 Cal.4th 422, 431, fn. 3 [it is well settled that where two independent reasons are given for a decision, both grounds are of equal validity].)

None of the reasons offered by respondent justify rejecting the holdings, or the reasoning of the courts' decisions in *Pacheco, Viray* or *Lopez.*

## D. This Court's Decision in *Butler* Has Not Been Narrowly Applied, But Even If It Were, It Applies to the Booking Fee.

Respondent argues that this Court's decision in *Butler, supra,* 31 Cal.4th 1119 was "extremely narrow, based on the particular statute before it, and that its opinion was not to be perceived as a departure

from the more general rules of forfeiture that the Court had developed in *Scott.*" (RB 15.) Appellant disagrees that the holding of *Butler* was, or has been limited to the particular HIV testing order statute (Pen. Code, §1202.1, subds. (a) & (e)(6)(A)) under consideration in *Bulter.* Appellant would point out that reviewing courts have applied *Butler's* holding – that challenges to the sufficiency of the evidence can be raised on appeal absent objection in the trial court – in various contexts. (See e.g., *People v. Christiana, supra,* 190 Cal.App.4th 1040, 1046-1047 [defendant's challenge to the sufficiency of the evidence of order authorizing involuntary administration of antipsychotic drugs cognizable on appeal absent objection in the trial court]; *In re K.F., supra,* 173 Cal.App.4th at pp. 660-661 [challenge to certain components of a restitution order not shown by substantial evidence cognizable on appeal absent objection in the trial court]; *Viray, supra,* 134 Cal.App.4th at p. 1217 [challenge to the sufficiency of the evidence to support implied finding of ability-to-pay attorney's fees cognizable on appeal absent objection in the trial court]; *In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1561 [challenge to the sufficiency of the evidence supporting the juvenile court's finding of adoptability cognizable on appeal absent objection in the trial court]; *Pacheco, supra,* 187 Cal.App.4th 1392 [challenge to the sufficiency of the evidence of defendant's ability to pay attorney's fees, booking fees, and probation cost fees]; *People v. Shiseop Kim, supra,* 193 Cal.App.4th 836, 842 [challenge to the imposition of a fee as a probation condition].)

Respondent further suggest that by broadly interpreting the holding of *Butler* to include claims such as the one made here, it "would make *all* ability-to-pay findings subject to review on appeal despite being otherwise forfeited by absence of an objection so long as

the defendant articulated the claim as a 'sufficiency of the evidence' error rather than some other type of error." (RB 16, original italics.) Appellant disagrees.

A claim based on insufficiency of the evidence to support the ability-to-pay finding required for imposition of a booking fee is subject to appellate review, because: (1) imposing a booking fee is not a discretionary sentencing choice; and (2) the reasons given by this Court in *Butler*, for permitting an appellate challenge in the absence of an objection below, apply equally to the booking fee. (See AOB 12-19 [the reasoning of *Bulter* applies to the booking fee].) Respondent does not dispute the analysis in the opening brief which demonstrates that the reasons given by this Court in *Butler* for allowing a claim of insufficient evidence to be made for the first time on appeal in the context of an HIV testing order, apply equally to the booking fee. (AOB 12-19.) First, as with an order imposing HIV testing, if the trial court imposes a booking fee without articulating its reasons on the record, the appellate court will presume an implied finding of ability-to-pay. (*Butler, supra*, 31 Cal.4th at p. 1127.) Second, as with the HIV testing order in *Butler*, which is conditioned upon a finding of probable cause, imposition of the booking fee is expressly conditioned upon a finding of ability-to-pay. (*Butler, supra,* 31 Cal.4th at p. 1123.) Third, as with an HIV testing order that is based *in part* on a factual finding (probable cause), an order to pay booking fees also partial rests on a factual finding (ability-to-pay); however, both employ an objective legal standard in assaying the factual finding.

"[A]ny finding of ability to pay [the booking fee] must be supported by substantial evidence." (*Pacheco , supra,* 187 Cal.App.4th at p. 1398.) When a trial court finds sufficient evidence to impose a

booking fee, it is simply finding "facts in light of an objective legal standard." (*Stowell, supra*, 31 Cal.4th at p. 1116.) It is not exercising sentencing discretion. (Arg. §I.A., ante.)

Also like the HIV testing order under consideration in *Butler*, an appellate court can sustain the booking fee order only if it finds evidentiary support, which it can do simply from examining the record. And, in the absence of sufficient evidence in the record, the order to pay the booking fee, like the HIV testing order, is fatally compromised. (Cf. *Butler, supra,* 31 Cal.4th at p. 1127.) Therefore, even if this Court should decide to narrowly construe the holding of *Butler*, the rationale of *Butler* and the rule – permitting an appellate challenge to the sufficiency of the evidence to be made for the first time on appeal – applies to the booking fee. (AOB 12-19.)

Whether other statutes that require an ability-to-pay finding will fall within *Butler*'s exception to the forfeiture rule is beyond the scope of this appeal; and, other than making the bald assertion that allowing this claim will create an exception that would swallow the rule (RB 16), respondent does not elaborate on the point. We submit, we have contradicted respondent's argument in our previous discussion which demonstrates that a restitution fine, containing an ability-to-pay provision, does fall within *Scott*'s waiver rule (Arg. §I.A., ante.) Thus, not every statute that contains an ability-to-pay requirement will fall within the exception discussed in *Butler*.

Finally, respondent also urges this Court not to endorse the majority opinion, but to follow Justice Baxter's concurring opinion in *Butler*. (RB 16-17.) For the reasons we discussed in the opening brief (AOB Arg. §I.D.3, at pp.35-41), we believe the majority view is sound and should be followed.

## E. Respondent's Attempt to Distinguish *Stowell* Is Without Merit.

Respondent contends that to the extent appellant relied on this Court's decision in *Stowell, supra,* 31 Cal.4th 1107, "appellant's analysis is flawed." (RB 17-21.) First, respondent contends that imposition of the booking fee is discretionary, the ability-to-pay determination is not straightforward, and there may not be enough evidence in the record for a reviewing court to determine the sufficiency of the evidence of a defendant's ability to pay. (RB 18.) According to respondent, "[u]nlike the factual predicate to the HIV testing provision at issue in *Butler* [sic] [whether bodily fluids were transferred], absent an objection at the sentencing hearing, there may not necessarily be a significiant factual record generated regarding ability to pay." (RB 18.) Respondent cites *Valtakis, supra,* 105 Cal.App.4th at page 1076, *Viray, supra,* 134 Cal.App.4th at page 1218, and *People v. Stanley* (1992) 10 Cal.App.4th 782, 786, as examples of where the court considered a wage range of factors in determining whether the defendant had the ability to pay the fee imposed. (RB 18.) However, these cases support appellant's view. In all three cases the defendant did not object to the imposition of a fee, yet on appeal there was sufficient evidence in the record for the reviewing court to determine whether sufficient evidence supported the trial court's ability-to-pay determination. All three cases cite to the probation report as the source of information. (*Valtakis,* at p. 1076; *Viray,* at pp. 1217-1218; *Stanley,* at p. 786.) Indeed, trial courts generally rely on the information in the probation report, and an appellate court can thereafter sustain an order to pay booking fees if it finds evidentiary support, which it can do, just as the courts did in *Valtakis, Viray,* and

*Stanley,* simply from examining the record. (Cf. *Butler, supra,* 31 Cal.4th at p. 1127.)

Respondent next points out that *Stowell* did apply a "general forfeiture" principle to foreclose review of challenges to the trial court's failure to express or note its probable cause findings on the record; but, respondent complains, to the extent the majority in *Stowell* declined to invoke the *Scott* "sentencing choices" rationale, because HIV testing is not punishment, the court created "an unworkable distinction which poses particular mischief when applied to fees based on ability to pay." (RB 19-21.) Confusion which, respondent contends, was highlighted by Justice Baxter in his concurring opinion in *Stowell.* (*Stowell, supra,* 31 Cal.4th at p. 1118; RB 20.)

*Stowell* refused to invalidate an HIV testing order because the trial court failed to make an express finding or notation of probable cause in the court docket or minutes. (*Stowell, supra,* 31 Cal.4th at p. 1111, fn. omitted.) The court described these issues as *procedural defects* (*id.* at p. 1114), and found the issue forfeited because: (1) an order for HIV testing does not require an express finding, or contain any sanction for non-compliance (*Stowell,* at p. 1114); and, (2) "a probable cause finding is not an exercise of the trial court's discretion but a determination of the facts in light of an objective legal standard. [Citation.] Accordingly, a trial court's failure to state or note its probable cause finding does not impair or impede a reviewing court's ability to determine the propriety of a testing order." (*Stowell,* at p. 1115.) The issue here does not involve a procedural defect in the trial court's failure to make or articulate its reasons for imposing a booking fee. Moreover, we demonstrated in the opening brief, that the reasons given by this Court in *Stowell* for applying the forfeiture doctrine

actually further demonstrate that a failure to object to the sufficiency of evidence underlying the trial court's implied finding of ability-to-pay the booking fee is ***not*** forfeited absent an objection below. (AOB 21-25.)

*Stowell* found that the forfeiture doctrine did not apply under the analytic template of *Scott* or *Smith*, because HIV testing does not constitute "punishment" and therefore, "it cannot properly be considered a sentencing choice[]" subject to *Scott's* forfeiture rule. (*Stowell, supra,* 31 Cal.4th at p. 1113.) We have shown that the same is true with respect to the booking fee. (AOB 21-25.) The booking fee does not constitute punishment and therefore, it does not fall within the purview of the *Scott*. (AOB 22-23; Arg. §I.A., ante.)

Appellant does not believe this Court's decision in *Stowell* created an "unworkable distinction." The confusion about which respondent complains, does appear to have manifested in subsequent cases. *People v. McCray* (2006) 144 Cal.App.4th 258, 263-264, appears to be the only published case that has addressed the issue, and it held that the "unauthorized sentence" exception to *Scott's* forfeiture rule did *not* apply, because the DNA order under consideration in that case was not punishment. In other words, it utilized the rationale of *Stowell* to *apply* the forfeiture doctrine.

For the reasons stated here, and in appellant's opening brief, this Court's decision in *Stowell* further exemplifies that a challenge to the sufficiency of the evidence to support a trial court's implied finding of ability-to-pay is cognizable on appeal absent an objection below.

## F. Permitting A Claim of Insufficient Evidence of Ability-to-Pay The Booking Fee To Be Made For the First Time On Appeal Will Not Create "Bizarre Results."

Respondent suggests that permitting challenges to the sufficiency of the evidence supporting a trial court's determination of ability-to-pay the booking fee to be made for the first time on appeal will create "bizarre results." (RB 21.) By way of example, respondent argues that, "important decisions like selection of the aggravated term from a sentencing triad, imposing a restitution fine above the minimum of $200 . . . and other punishment related choices, can be forfeited, absent an objection, but more nominal recoupment fees can be raised on appeal without preserving them by objection." (RB 21, fn. omitted.) This argument has no merit.[4]

As we explained in the previous sections of this reply brief, and in the opening brief, Government Code section 29550.2, subdivision (a) predicates imposition of the booking fee upon a finding of present ability to pay. (AOB 7-8.) "[A]ny finding of ability to pay must be supported by substantial evidence[]" (*Pacheco, supra,* 187 Cal.App.4th at p. 1398; *People v. Nilsen, supra,* 199 Cal.App.3d at p. 347; *People v. Kozden, supra,* 36 Cal.App.3d at p. 920), and "[n]o court has discretion to make an order not authorized by law, or to find facts for which there is not substantial evidence." (*In re K.F., supra,* 173 Cal.App.4th at p. 661.) Claims based insufficient evidence require no predicate objection

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[4] Respondent also contends that the "bizarre results of appellant's hierarchical approach to forfeiture" is demonstrated in this case. (RB 21-22.) Respondent claims that appellant did not object to the higher restitution fine, so he is foreclosed from having that decision reviewed on appeal; however, he can challenge the more nominal booking fee absent a failure to object. Respondent's analysis is based on the faulty premise that appellant did not object to the imposition of the restitution fine. However, as more thoroughly discussed in the next section of this brief, appellant did object. (See AOB 42-43; Arg. II., post.)

in the trial court. (*Butler, supra,* 31 Cal.4th at p. 1126; *Tahoe National Bank v. Phillips, supra,* 4 Cal.3d at p. 23; *People v. Rodriguez, supra,* 17 Cal.4th at p. 262; *Viray, supra,* 134 Cal.App.4th at p. 1217; *Lopez, supra,* 129 Cal.App.4th at p. 1537; *Pacheco, supra,* 187 Cal.App.4th at p. 1397; *In re K.F., supra,* 173 Cal.App.4th at p. 660; *People v. Shiseop Kim, supra,* 193 Cal.App.4th at p. 842; *People v. Christiana, supra,* 190 Cal.App.4th at pp. 1046-1047; *In re Gregory A., supra,* 126 Cal.App.4th at p. 1561.) And, absent sufficient evidence to support the order under consideration, the order cannot stand. (*Ibid.*)

The fact that other "more serious" sentencing decisions may be subject to *Scott's* forfeiture rule is not a valid reason for applying *Scott's* forfeiture rule here. We have shown that the forfeiture doctrine articulated in *Scott* does not apply to the booking fee, because imposing a booking fee is not "discretionary" nor is it a "sentencing choice." (Arg. §I.A., ante.) The forfeiture doctrine should not be applied simply to circumvent what respondent perceives as an anomaly. Other such so-called "anomalies" currently exist. For example, a defendant may not object to the imposition of a restitution fine for the first time on appeal, because the imposition of restitution is a discretionary sentencing choice. However, if the court errs in imposing the corresponding parole revocation fine, that is correctable on appeal, because it does not involve an act of sentencing discretion under *Scott.* (*Smith, supra,* 24 Cal.4th at p. 853.) Similarly, the booking fee does not fall within *Scott's* forfeiture rule because it is not a "discretionary sentencing choice." Another example along the same lines is that a defendant may object for the first time on appeal to the imposition of a suspended parole revocation fine (Pen. Code, §1202.45) if, for example, he was sentenced to life without the possibility of

parole. (*People v. Carr* (2010) 190 Cal.App.4th 475, 482, fn. 6; *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1097.) These courts found the issue cognizable on appeal under *Scott's* "unauthorized sentence" exception to the forfeiture rule, notwithstanding that under respondent's reasoning, the "more serious" sentencing choice would be imposition of the restitution fine. As these examples demonstrate, respondent's argument is without merit.

Appellant submits it would create an anomaly to apply *Scott's* forfeiture rule to sentencing matters, such as the one presented here, that do *not* involve a failure to object to the trial court's discretionary sentencing choices. For the reasons stated above, and in the opening brief, *Scott's* forfeiture rule does not apply to the booking fee.

## G. This Court Should Not Follow *Valtakis, Gibson,* or *Hodges* And It Should Not Limit, Or Overrule The Holdings of *Butler* or *Stowell.*

Finally, respondent asks this Court to follow the holdings and rationale articulated in *Valtakis, supra,* 105 Cal.App.4th 1066, *Gibson, supra,* 27 Cal.App.4th 1466, and *Hodges,* 70 Cal.App.4th 1348, and suggests that to the extent *Butler* and *Stowell* "are read to circumvent the efficiencies and fairness of *Scott* and the cases that followed, they should be expressly limited or overruled, or alternatively not applied to the recoupment fees at issue here." (RB 22-23.) Appellant disagrees.

For the reasons we thoroughly discussed in the opening brief, appellant maintains that this Court should not rely on the holdings or rationale of *Valtakis, supra,* 105 Cal.App.4th 1066 (see AOB 39-40), *Gibson, supra,* 27 Cal.App.4th 1466 (AOB 26-31), or *Hodges,* 70 Cal.App.4th 1348 (AOB 25-26). *Valtakis* and *Gibson* involved a failure

to object to the trial court's discretionary sentencing choices which, absent objection, falls within *Scott's* forfeiture rule. We have shown that imposition of a booking fee is not a discretionary sentencing choice, and *Scott* does not apply. *Hodges* uncritically applied *Gibson* without a shred of analysis, so it provides no guidance for this Court.

Also, for the reasons we thoroughly discussed in the opening brief, this Court need not expressly limit, or overrule *Butler* or *Stowell*, because neither decision circumvents this Court's decision in *Scott*. (AOB 10-25.) Despite respondent's attempt to argue otherwise, not every issue that arises at sentencing invokes an exercise of the trial court's sentencing discretion. Imposition of a booking fee presents one example of where a court does not exercise sentencing discretion when it elects to impose the fee. Determining whether probable cause exists to support an HIV testing order, presents another example of where a court is not exercising "sentencing discretion." The majority opinions in *Butler* and *Stowell* reflect sound reasoning, and, in appellant's view, reinforce the well-established rule that the forfeiture doctrine articulated in *Scott* applies when a defendant fails to object to the trial court's discretionary sentencing choices. The fact that the booking fee is not a discretionary sentencing choice, does not require this Court to alter its opinions in *Butler* or *Stowell*.

For the reasons stated here and in the opening brief, appellant contends that a claim of insufficient evidence to support the trial court's implied finding of ability-to-pay the booking fee is cognizable on appeal absent an objection below. (AOB 6-41.)

## II.

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

Respondent disagrees with appellant's conclusion that appellant did not forfeit his claim that he was unable to pay the booking fee, because he *did object* to the imposition of the restitution fine and, after the court overruled that objection, any further objection to the booking fee would have been futile. (RB 23-25.) Without citing any authority to support its position, respondent claims that because this point was not raised in the Court of Appeal, appellant cannot raise the claim now. (RB 23-24.) Appellant disagrees.

Appellant submits that this issue is responsive to the issue presented in this case, which this Court framed as follows: "Did defendant forfeit his claim that he was unable to pay the $270.17 jail booking fee (Gov. Code, §29550.2) imposed by the trial court at sentencing, because he failed to object at the time?" The fact that appellant's objection to the restitution fine had been overruled, making further objection to the imposition of the booking fee futile, is fairly included within the issue this Court asked the parties to brief.

"On or after ordering review, the Supreme Court may specify the issues to be briefed and argued. Unless the court orders otherwise, the parties must limit their briefs and arguments to those issues *and any issues fairly included in them*." (Cal. Rules of Court, rule 8.516(a), italics added; see also *id.* at (b)(1).) This Court may

consider all issues fairly embraced in the petition. (*People v. Perez* (2005) 35 Cal.4th 1219, 1228, citing *People v. Braxton* (2004) 34 Cal.4th 798, 809; see also *Gross v. FBL Financial Services, Inc.* (2009) 557 U.S. 167, __ [129 S.Ct. 2343, 2348, fn. 1].) "This court is empowered to decide issues necessary for the proper resolution of the case before it, whether or not raised in the courts below." (*Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, 1078, fn. 4.) Because this issue is necessary for the proper resolution of appellant's claim, this Court can and should consider it.

As to the merits, respondent contends that "appellant's request at the trial court could not and did not constitute an objection to any finding, let alone a finding an [sic] unrelated fee." (RB 24.) There are two reasons why this Court can readily reject respondent's argument. First, respondent misconstrues the issue. Appellant has not suggested that his trial counsel's objection to the $800 restitution fine was an objection to the imposition of the booking fee. Appellant contends that because the trial court had *just* overruled defense counsel's objection to the imposition of an $800 restitution fee, finding it to be a "relatively low amount," it would have been futile for counsel to then object to the imposition of a $270.17 booking fee.

Second, respondent's argument that counsel's statement to the court, and request for a lower restitution fine, was not an objection based on inability to pay, but simply a "request," defies credulity. (RB 22.)[5] "In a criminal case, the objection will be deemed preserved if,

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[5] As soon as the court imposed an $800 restitution fine, counsel immediately interjected, "You honor, we would ask the court to impose the minimum of $200 restitution [sic] amount. [¶] Mr. McCullough indicated he is on a fixed income." (1RT 36.)

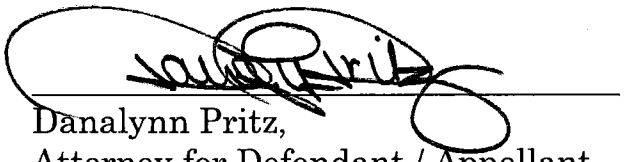
despite inadequate phrasing, the record shows that the court understood the issue presented." (*People v. Scott* (1978) 21 Cal.3d 284, 290, citations omitted.) Here, defense counsel's statement is clearly an objection to the imposition of the restitution fine on the ground that Mr. McCullough lacked the ability to pay. The record reveals that the trial court understood this objection when it responded, "If it turns out [appellant] is unable to pay that [amount], he will not be required to pay that if he can't make the payment. However, it first needs to be determined whether he can make the payment. The amount I've set will remain. That is a relatively low amount." (1RT 36.) The colloquy between the court and counsel clearly demonstrates that, even though defense counsel did not state the words, "I object," counsel did object and the court understood and ruled on the objection. Therefore, respondent's position has no merit. Appellant did not forfeit this issue, and for the reasons stated here, and in the opening brief, the booking fee should be stricken. (See AOB 42-43.)

## CONCLUSION

Predicated on the foregoing, and that set forth in the opening brief, appellant respectfully requests that the judgment of the Court of Appeal be reversed, and, that this Court find that appellant did not forfeit his right to contest his ability to pay the booking fee for the first time on appeal.

Dated: January 23, 2012 Respectfully Submitted,

LAW OFFICES OF PRITZ & ASSOCIATES,



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

Appellant's Reply Brief on the Merits consists of 7,043 words as counted by the word-processing program used to generate the brief.

Dated: January 23, 2012 Respectfully Submitted,

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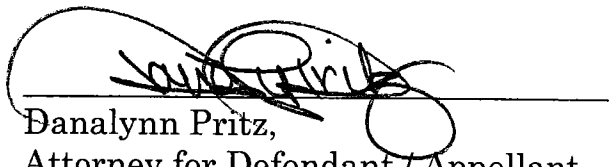

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## PROOF OF SERVICE
*(People v. McCullough, S192513)*

STATE OF CALIFORNIA, COUNTY OF VENTURA

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

On January 24, 2012, I served the foregoing document, described as: **APPELLANT'S REPLY BRIEF ON THE MERITS** on the interested parties in this action by transmitting: [ ] the original; [ X ] a true copy thereof as follows:

**Party Served: SEE ATTACHED MAILING LIST**

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

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

EXECUTED at Westlake Village, California on January 24, 2012.

Danalynn Pritz

**MAILING LIST**
***(People v. McCullough, S192513)***

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