IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DONNA MARIE TRUJILLO,

Defendant and Appellant.

Case No. S213687

ANSWER BRIEF ON THE MERITS

(Cal. Rules of Ct., Rule 8.520(a)(2))

Sixth Appellate District, Case No. H038316
Santa Clara County Superior Court, Case No. C1199870
Linda R. Clark, Judge

The Sixth District Appellate Program, in association with:

Randall Conner
State Bar No. 179122
160 Franklin Street, Suite 210
Oakland, CA 94607
(510) 709-4066

Attorney for Appellant

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ISSUES PRESENTED FOR REVIEW

This Court granted the California Attorney General's petition for review to address the following issue: Does the failure to object to an order for payment of a presentence investigation fee and/or an order for payment of probation supervision fees forfeit a claim that the trial court erred in failing to make a finding of the defendant's ability to pay the amount in question?

STATEMENT OF THE CASE AND FACTS

A witness found defendant in possession of two stolen Russian icons, defendant having offered to sell them at her garage sale. (IV RT 80-81, 88, 179-180.) On November 17, 2011, a jury found defendant guilty of receiving stolen property (Pen. Code,[1] § 496, subd. (a).) (V RT 328-330, CT 127.) The Santa Clara County Superior Court ordered defendant to appear for sentencing on February 3, 2011. (V RT 333.)

In a report dated February 3, 2012, the probation officer recommended that the court order defendant to pay, among other fines and fees, a presentence

[1] Further statutory citations are to this code unless otherwise specified.

investigation fee not to exceed $300, and a probation supervision fee not to exceed $110 per month. (CT 158-159.) The report contained no facts indicating defendant's ability to pay any fines or fees. (CT 153-169.) Defendant failed to appear for sentencing on February 3, 2011. (CT 136.)

On April 20, 2012, the trial court suspended imposition of sentence, placed defendant on probation, and imposed the following fines and fees: a $240 restitution fund fine with a $24 (ten percent) administrative fee (§ 1202.4), an identical probation revocation fine (§ 1202.44) (stayed pending violation of probation), a $129.75 criminal justice administration fee (Gov. Code, § 29550.1), a $40 court security fee (§ 1465.8), a $30 criminal conviction assessment (Gov. Code, § 70373), a presentencing investigation fee "not to exceed $300" and a probation supervision fee "not to exceed $110 per month" (§ 1203.1b.) (V RT 357-358, CT 171.) The court ordered defendant to report to the Department of Revenue within 30 days for completion of a plan to pay the fines and fees imposed. (V RT 356-357.) Defendant did not object to the fines and fees, and the court made no findings regarding defendant's ability to pay them. (V RT 357-358.)

The record documented the following facts relevant to defendant's income. Defendant, age 52, lived in the garage of a home occupied by numerous other persons. (IV RT 224-225, 246-247.) At sentencing, trial counsel indicated that defendant trained service dogs for disabled persons. (V RT 354.) The trial court ordered defendant to seek and maintain gainful employment, vocational or educational training, as directed by adult probation, and ordered that such employment "may of course include continuation of her participation in the canine

training activities." (V RT 357.) The court made no findings with respect to any income generated by any canine training activities. (V RT 357.)

The record also indicated that defendant suffered from mental health issues. The trial court warned defendant that it would order her removal if she failed to control herself. (V RT 352-353.) Defendant failed to control herself and the court ordered her removed from the courtroom. (V RT 353-354.) In pronouncing sentence, the court commented on defendant's issues as follows:

> I've also considered what to this Court is the defendant's very obvious emotional issues, whether or not they are psychiatrically related, or I don't know obviously, but it is very clear to the Court that the defendant's behavior here in court today, during the trial and also as I believe is reflected in her conduct when she was encountered by the police – [defendant interjection] – shows some degree of mental health concern on the part of this Court. (V RT 356.)

On defendant's appeal, the Court of Appeal for the Sixth Appellate District found that under *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough*), defendant's failure to object had forfeited her challenge to the $129.75 criminal justice administration fee imposed pursuant to Government Code section 29550.1. (Typed opn. at pp. 9-10.) However, the appellate court reversed and remanded with directions for the trial court to follow the statutory procedure in Penal Code section 1203.1b before ordering payment of probation costs, explaining that section 1203.1b – unlike booking fee statutes – "sets forth a procedure that must be followed before a trial court may impose fees for the cost of supervised probation or for the preparation of the probation report." (*Id.* at p. 5.) 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 appellant's 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." (*Id.* at pp. 6-7, fn. omitted.) The court reversed the order of probation and remanded the matter to the trial court "to follow the statutory procedure in section 1203.1b before imposing probation related costs." (*Id.* at p. 10.)

This Court granted review.

SUMMARY OF THE ARGUMENT

The appellate courts may decline review of a claim of error when the defendant has failed to make a timely and specific objection to a decision within the trial court's sentencing discretion. However, courts do not apply the forfeiture doctrine to clear and correctable errors of law.

As explained herein, Penal Code section 1203.1b differs from other fines and fees statutes that this Court has examined for purposes of the forfeiture doctrine. The Legislature amended this statute in 1995 to require a knowing and intelligent waiver of the defendant's right to an ability to pay hearing. The Legislature's plain and unambiguous amendments to section 1203.1b foreclose application of the forfeiture doctrine to defendant's claim in the instant case.

In *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*) and in the instant case, the Court of Appeal for the Sixth Appellate District reversed and remanded probation cost orders on the grounds that in each case, the defendant had not made a knowing and intelligent waiver of a hearing on his or her ability to pay. These cases, in short, found clear legal error and corrected it by remand to the trial court with directions to comply with the statute.

This Court's precedents do not require application of the forfeiture doctrine to the instant case. The procedures required by Penal Code section 1203.1b differ from the procedures required by Penal Code section 1202.4, a statute that this Court addressed in *People v. Avila* (2009) 46 Cal.4th 680 (*Avila*), *People v. Gamache* (2010) 48 Cal.4th 347 (*Gamache*) and *People v. Nelson* (2011) 51 Cal.4th 198 (*Nelson*). And the procedures required by Penal Code section 1203.1b differ from the procedures required by Government Code section 29550.2, a statute this Court addressed in *McCullough*.

Finally, decisions in the First and Third Districts do not require application of the forfeiture doctrine to the instant case. In *People v. Valtakis* (2003) 105 Cal.App.4th 1066 (*Valtakis*), the First District erred in interpreting the Legislature's 1995 amendments to Penal Code section 1203.1b to suit the policies underlying the forfeiture doctrine. In *People v. Snow* (2013) 219 Cal.App.4th 1148 (*Snow*), the Third District erred in construing defendant's failure to request an ability to pay hearing as a knowing and intelligent waiver his right to that hearing.

This Court should affirm the Sixth District's finding in the instant case that the forfeiture doctrine did not apply to the defendant's claim, when the trial court ordered payment of probation costs without obtaining the defendant's knowing and intelligent waiver of her right to an ability to pay hearing. The trial court's failure to comply with Penal Code section 1203.1b's requirements presented a clear and correctable legal error.

ARGUMENT

I. THE FORFEITURE DOCTRINE DOES NOT APPLY WHERE, AS HERE, THE TRIAL COURT MADE A CLEAR AND CORRECTABLE LEGAL ERROR

A. This Court has recognized that the Forfeiture Doctrine does not apply to Appeals demonstrating clear and correctable Legal Error

This Court's application of the forfeiture bar to sentencing matters began in *People v. Welch* (1993) 5 Cal.4th 228 (*Welch*), in which this Court enforced "[t]raditional objection and waiver principles" against a defendant who sought for the first time on appeal to litigate the reasonableness of probation conditions imposed by the trial court. (*Id.* at p. 236.) This Court reasoned that application of waiver principles helped to "discourage ... invalid probation conditions" and to "reduce the number of costly appeals brought on that basis" (*id.* at p. 235) as well as "encourage development of the record and a proper exercise of discretion in the trial court." (*Id.* at p. 236.)

In *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), "[f]aced squarely with the issue for the first time," this Court held that the forfeiture doctrine "should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices." (*Id.* at p. 353.) This Court reasoned in *Scott* that "[a]lthough 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." (*Id.* at p. 353.) Therefore, this Court held that the defendant had forfeited a claim that

the sentence imposed on him, "though otherwise permitted by law, [was] imposed in a procedurally or factually flawed manner." (*Id.* at p. 354.)

However, as this court reviewed in *McCullough*, *Scott* and *Welch* had each distinguished between an alleged factual error that had not been addressed below or developed in the record because the defendant failed to object, and a claimed legal error, which "can be resolved without reference to the particular sentencing record developed in the trial court." (*McCullough, supra,* 56 Cal.4th at p. 594, quoting *Welch, supra,* 5 Cal.4th at p. 235.) "We observed that we may review an asserted legal error in sentencing for the first time on appeal where we would not review an asserted factual error." (*Ibid*, citing *Scott, supra,* 9 Cal.4th at p. 355 ["fact-specific errors ... are not readily susceptible of correction on appeal"].) "In the case of an asserted legal error, '[a]ppellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing.'" (*Ibid*, quoting *Scott, supra,* 9 Cal.4th at p. 354.)

Following *Scott*, this Court has considered claims that the forfeiture doctrine should apply in several cases regarding sentencing matters and post-trial orders in criminal cases. Two such cases relating to fines and fees imposed at sentencing reached different results based upon the nature of the trial court's alleged error.

In *People v. Tillman* (2000) 22 Cal.4th 300 (*Tillman*), this Court considered the Attorney General's appeal of a trial court's failure to state reasons for not imposing a restitution fine under Penal Code section 1202.4 and a matching parole revocation fine under Penal Code section 1202.45. (*Id.* at p. 302.) Citing *Welch*

and *Scott*, this Court found that the Attorney General had forfeited his claim of error on appeal by failing to object in the trial court. (*Id.* at p. 303.)

In contrast to *Tillman,* in *People v. Smith* (2001) 21 Cal.4th 849 (*Smith*), this Court found no forfeiture of the Attorney General's claim that the trial court had imposed an erroneous parole revocation fine under Penal Code section 1202.45. (*Id.* at p. 853.) Reviewing *Welch* and *Scott* regarding clear and correctable errors of law, this Court reasoned that Penal Code section 1202.45 required a fine identical to the restitution fine under Penal Code section 1202.4, and that "[b]ecause the erroneous imposition of a parole revocation fine presents a pure question of law with only *one* answer, any such error is obvious and correctable without reference to any factual issues in the record or remanding for further findings." (*Id.* at pp. 852-853.)

Two other of this Court's decisions, both regarding appeals of HIV testing orders, also reached different results based upon the nature of the trial court's alleged error. In *People v. Stowell* (2003) 31 Cal.4th 1107 (*Stowell*), the defendant appealed an order for HIV testing, which required a finding of probable cause to believe that "blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim ..." (*Id.* at p. 1112, quoting Pen. Code, § 1202.1, subd. (e)(6)(A).) The defendant contended that the trial court had not made an express finding of probable cause and had not, as required, noted its finding on the court docket and minute order. (*Ibid.*) Applying general forfeiture principles because an HIV testing order is not punishment, and hence not a sentencing choice, this Court presumed that the trial court had made an implied finding of probable cause, and had hence satisfied the statutory prerequisite for the order. (*Id.* at pp. 1114-1117.)

But, this Court reached the opposite result in *People v. Butler* (2003) 31 Cal.4th 1119 (*Butler*), the companion case to *Stowell*. In *Butler*, as in *Stowell*, the defendant contended that the trial court had not made an express finding of probable cause and had not noted its finding on the court docket and minute order. (*Id.* at p. 1125.) This Court found that, as in *Stowell*, the defendant had forfeited his appeal of these errors by failing to object in the trial court. (*Id.* at pp. 1125-1126.) However, the Court of Appeal had also premised its reversal of the testing order on "the lack of any evidence on the record" to support an implied finding of probable cause. (*Id.* at p. 1126.) Like the appellate court, this Court found insufficient evidence in the record from which the trial court could have made an implied finding of probable cause. (*Ibid.*) Concluding that the statute required a finding of probable cause as a prerequisite to a testing order, this Court found the testing order invalid as a matter of law. (*Id.* at pp. 1126-1127.)

Finally, in the case of *In re Sheena K.* (2007) 40 Cal.4th 875 (*Sheena K.*), this Court found that the forfeiture doctrine did not apply to a minor's claims on appeal that a juvenile probation condition forbidding her association with "anyone disapproved of by probation" was unconstitutionally vague and overbroad. This Court found that a challenge to a term of probation on the ground of unconstitutional vagueness or overbreadth that is capable of correction without reference to the particular sentencing record developed in the trial court can present a pure question of law. (*Id.* at p. 887.) It concluded that "[d]efendant's challenge to her probation condition as facially vague and overbroad presents an asserted error that is a pure question of law, easily remediable on appeal by modification of the condition. [Citations.]" (*Id.* at 888.)

In summary, this Court demonstrated in *Smith*, in *Butler* and in *Sheena K.* that the forfeiture doctrine will not apply to appeal of a clear and correctable legal error in sentencing matters and in post-trial orders in criminal cases. And, as discussed herein, a probation costs order that does not comply with Penal Code section 1203.1b can, as here, present a clear and correctable legal error.

B. Penal Code section 1203.1b requires the Defendant's knowing and intelligent Waiver of his or her right to an ability to pay Hearing

Penal Code section 1203.1b requires that the trial court hold a hearing on the defendant's ability to pay probation costs, absent the defendant's knowing and intelligent waiver of his or her right to a hearing. (§ 1203.1b, subds. (a) & (b).) The Legislature added these requirements to the statute in 1995, in response to an appellate court decision in 1994 that found a defendant had forfeited his claim for relief by accepting probation without objecting to a probation costs order.

Penal Code former sections 1203 and 1203.1 had long authorized trial courts to require the payment of certain items, such as fines and financial reparation and restitution, in proper cases as conditions of probation. (See, e.g., *People v. Lippner* (1933) 219 Cal. 395, 398; *In re McVeity* (1929) 98 Cal.App. 723, 726; *People v. Baker* (1974) 39 Cal.App.3d 550, 559 (*Baker*).) The *Baker* court concluded, however, that the former statutory scheme did not authorize trial courts to impose a probation condition requiring the defendant to pay for the costs of either his probation supervision or his prosecution. (*Baker, supra,* 39 Cal.App.3d at pp. 559-560.) After *Baker,* the Legislature enacted Penal Code section 1203.1b, effective January 1, 1981 (Stats.1980, ch. 555, § 1), which permitted the trial court to require a defendant to reimburse probation costs if the court determined, after a hearing, that the defendant had the ability to pay all or a

portion of such costs. (*People v. Bennett* (1987) 196 Cal.App.3d 1054, 1056, italics omitted (*Bennett*); *People v. Washington* (2002) 100 Cal.App.4th 590, 595.)

As first enacted, the statute did not explicitly require that the trial court conduct a hearing to determine the defendant's ability to pay probation costs. The statute provided, in relevant part, that:

> [t]he 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 such costs. At a 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.

(Stats.1980, ch. 555, § 1.) Nonetheless, appellate courts interpreted the statute to include that requirement. (See, e.g., *People v. Wilson* (1982) 130 Cal.App.3d 264, 268-269 ["[i]t is plain from the words of the statute that the court itself must hold hearings, if any, and make all orders attendant thereto"]; *Bennett, supra,* 196 Cal.App.3d at p. 1056 ["Penal Code section 1203.1b clearly contemplates a hearing at which the defendant may confront evidence of his ability to pay].) In *People v. Adams* (1990) 224 Cal.App.3d 705 (*Adams*), Division Two of the Fourth District also found that the statute required a hearing as a prerequisite to a probation costs order, and found that "because no hearing was conducted, there is no evidence to support the court's finding that defendant had the ability to pay." (*Id.* at pp. 712-713.)

However, following this Court's opinion in *Welch*, the Court of Appeal for the Sixth Appellate District decided *People v. Phillips* (1994) 25 Cal.App.4th 62 (*Phillips*.) In *Phillips*, the defendant had entered a negotiated plea to narcotics offenses. (*Id.* at p. 66.) Prior to sentencing, the probation officer had

recommended that the court order payment of probation costs, but had made no recommendation on defendant's ability to pay. (*Ibid.*) At sentencing, the court placed the defendant on probation, and inquiring regarding the nature of his employment, elicited that the defendant worked part time. (*Id.* at p. 67.) The court then imposed various fines and fees, including payment of probation costs. (*Ibid.*) Defendant accepted probation under the terms enumerated. (*Ibid.*)

On defendant's appeal of the probation costs order, the Sixth District disagreed with the *Adams* court's interpretation of Penal Code section 1203.1b, and interpreted the statute to permit, but not require, an ability to pay hearing. (*Phillips*, *supra,* 25 Cal.App.4th at pp. 69-70.) The court also found that defendant had forfeited any claim that the statute had required a separate hearing on his ability to pay. (*Id.* at p. 70.) The court also found that the statute did not require the formal presentation of evidence regarding a defendant's ability to pay where the defendant had shown himself "amenable to an informal proceeding" by failing to object. (*Ibid.*) Finally, the court found sufficient evidence in the record to support the trial court's implied ability to pay finding. (*Id.* at pp. 70-72.)

In 1995, following *Phillips*, the Legislature amended Penal Code section 1203.1b to add the procedural safeguards contained in the present statute. (Stats.1995, ch. 36 § 1.) These amendments provided, in relevant part, that prior to an order for payment of probation costs, the probation officer would inform the defendant of his or her right to a hearing on the defendant's ability to pay probation costs, and that absent the defendant's knowing and intelligent waiver of his or her right to a hearing, the probation officer would refer the matter to the court for the scheduling of a hearing. (*Ibid.*) As in the previous versions, the statute granted the defendant procedural rights with which to confront adverse

evidence and entitled the defendant to a written statement of the court's ability to pay findings. (*Ibid.*) The statute also modified the definition of "ability to pay" to permit trial courts to consider the defendant's reasonably discernible financial position for up to a year following the hearing, rather than six months. (*Ibid.*)

The First District has summarized the Legislature's 1995 amendments as follows: "The right to a separate hearing by the court was made explicit, with provision for an initial determination to be made by the probation officer, and loss of the right to a court determination was made to depend on a knowing and intelligent waiver on the part of the defendant. By having the probation officer inform the defendant of that right, the Legislature tried to ensure that a waiver would be knowing and intelligent. All of this is cast in mandatory language and clearly creates an anti-waiver rule at the trial court level." (*Valtakis, supra,* 105 Cal.App.4th at p. 1075.) Regarding the Legislature's purpose for the 1995 amendments, the First District noted that "[o]ur own perusal of legislative materials for the source bill (Assem. Bill 594 (1995-1996 Reg. Sess.)) unearths no direct reference to [*Phillips*], but an indirect reference to *Phillips's* holding on acquiescence might be discerned in this Legislative Counsel's Digest summary of existing law ..." (*Valtakis, supra,* 105 Cal.App.4th at p. 1074 & fn. 4.) The appellate court quoted the Legislative Counsel's Digest as follows:

> (1) Existing law requires the probation officer to make a recommendation to the court of the defendant's ability to pay all or a portion of the reasonable cost of various activities.... Existing law specifies procedures in which, if the defendant agrees with the recommendation, the probation officer forwards the recommendation to the court for affirmation and a corresponding court order or, if the defendant does not agree, the court conducts a hearing. [¶] This bill would recast this provision to require the probation officer to make a determination of the defendant's ability to pay the above described costs. The bill would provide that the defendant is entitled to a court

> hearing, that includes the right to counsel, to determine the amount of payment and the manner in which the payments shall be made. The bill would specify that this right can only be waived by a knowing and intelligent waiver. (Legis. Counsel Dig. Assem. Bill No. 594 (1995-1996 Reg. Sess.) 5 Stats. 1995, Summary Dig. pp. 11-12.)

(*Valtakis, supra,* 105 Cal.App.4th at p. 1074 & fn. 4.)

In more than 18 years from the effective date of 1995 amendments, the Legislature has retained the procedural safeguards that it added to section 1203.1b. (See, e.g., § 1203.1b, subd. (a) [probation officer must notify defendant of right to hearing and defendant must execute a knowing and intelligent waiver]; § 1203.1b, subd. (b) [absent a waiver, probation officer shall refer matter to court for scheduling of hearing].) The Legislature has also retained the safeguards included in earlier versions of the statute. (See, e.g., § 1203.1b, subd. (b)(1) [in a hearing, defendant entitled to confront adverse evidence]; § 1203.1b, subd. (e)(1)-(4) [definition of "ability to pay"].) The Legislature's retention of the statute's procedural safeguards appears significant in light of judicial opinions that have found the forfeiture doctrine applicable to orders for payment of several types of fines and fees in criminal cases. (See, e.g., *People v. Forshay* (1995) 39 Cal.App.4th 686, 689-690 [restitution fine under former Government Code section 13967]; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1518-1519 [failure to order drug program fee under Health and Safety Code section 11372.7, subdivision (a)]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [booking fee under Government Code section 29550.2]; *Tillman, supra,* 22 Cal.4th at pp. 302-303 [failure to order restitution fine under Penal Code section 1202.4]; *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [crime prevention fee under Penal Code section 1202.5]; *Avila, supra,* 46 Cal.4th at p. 729 [restitution fine under Penal

Code section 1202.4]; *Gamache, supra,* 48 Cal.4th at p. 395 [same]; *Nelson, supra,* 51 Cal.4th at p. 227 [same]; *McCullough, supra,* 56 Cal.4th at pp. 597-599 [booking fee under Government Code section 29550.2]. The Legislature's retention of the procedural safeguards in section 1203.1b indicates its intention that appellate courts review appeals of probation costs orders when trial courts fail to apply the safeguards.

C. The Sixth District has found clear and correctable Legal Error when the Trial Court failed to obtain the Defendant's knowing and intelligent Waiver of his or right to an ability to pay Hearing

1. The Sixth District's Opinion in *People v. Pacheco*

In *Pacheco,* the Sixth District reviewed the applicability of the forfeiture doctrine to an appeal of a probation costs order under the post-1995 version of Penal Code section 1203.1b. Following the defendant's plea of no contest to fraud, the trial court had suspended imposition of sentence placed him on formal probation for a period of three years, subject to various conditions, including that he pay, among other fines and fees, $100 in attorney fees (Pen. Code, § 987.8), a $259.50 criminal justice administration fee (Gov. Code, § 29550, subd. (c) or § 29550.2), and a $64 per month probation fee (§ 1203.1b, subd. (a).) (*Pacheco, supra,* 187 Cal.App.4th at pp. 1396.) Before imposing any fines and fees, the trial court had referred the defendant "to the Department of Revenue for a determination of his ability to pay certain fines and fees," but did not make any of the fines or fees conditional on this determination or anything else. (*Ibid.*) The Attorney General argued that the defendant had forfeited his appeal of each fee by failing to object in the sentencing hearing. (*Id.* at p. 1397.)

In its analysis, the Sixth District found the forfeiture doctrine inapplicable to claims on appeal that no sufficient evidence supported an order or judgment,

including an order to pay a fine or fee in a criminal case. (*Pacheco, supra,* 187 Cal.App.4th at p. 1397.) For this reason, the appellate court found that defendant had not forfeited his appeal of orders to pay each of the fees at issue. (*Ibid.*)

Turning to the probation costs order in particular, the Sixth District reviewed Penal Code section 1203.1b's procedural safeguards, and concluded that "[t]here is no evidence in the record that anyone, whether the probation officer or the court, made a determination of Pacheco's ability to pay the $64 per month probation supervision fee. Nor is there any evidence that probation advised him of his right to have the court make this determination or that he waived this right. In short, it appears that the statutory procedure provided at section 1203.1b for a determination of Pacheco's ability to pay probation related costs was not followed." (*Pacheco, supra,* 187 Cal.App.4th at pp. 1400-1401.) Accordingly, the Sixth District remanded the case to the trial court with directions to determine "in accordance with the applicable statutes" the defendant's ability to pay probation costs. (*Id.* at p. 1404.)

In deciding *Pacheco*, the Sixth District applied the first rule of statutory construction to interpret Penal Code section 1203.1b: it read the plain, commonsense meaning of the language used by the Legislature. (*People v. Leiva* (2013) 56 Cal.4th 498, 506.) Finding the statute's language unambiguous, the court looked no farther. (*Ibid.*) Furthermore, the Sixth District implicitly recognized that after its decision in *Phillips*, the Legislature had made significant amendments to Penal Code section 1203.1b. (See *Pacheco, supra,* 187 Cal.App.4th at pp. 1398 [citing *Phillips* for holding that in a determination of ability to pay *attorney's fees*, a court's finding of the defendant's present ability to pay need not be express].) Therefore, the Sixth District applied the clear and

correctable legal error exception to the forfeiture doctrine that this Court discussed in *Scott* and implemented in *Smith* and *Butler*.

2. The Sixth District's Opinion in the Instant Case

In the instant case, following defendant's conviction by jury trial for receiving stolen property, the trial court ordered payment of various fines and fees, including a presentencing investigation fee "not to exceed $300" and a probation supervision fee "not to exceed $110 per month" pursuant to Penal Code section 1203.1b. As in *Pacheco*, defendant did not object to the fines and fees, and the trial court made no findings regarding her ability to pay them. Again, upon defendant's appeal of the probation costs order, the Attorney General argued that defendant had forfeited her appeal by failing to object at sentencing.

In its analysis, the Sixth District recognized that during the pendency of the appeal, this Court had in *McCullough* disapproved of *Pacheco's* holding that "challenges to the sufficiency of the evidence to support an ability to pay finding may be raised for the first time on appeal. [Citation.]" (Typed slip opn. at p. 4.) However, the Sixth District found that defendant had not forfeited her claim for relief because, as in *Pacheco*, the trial court had failed to satisfy the mandatory prerequisites for a probation costs order. (Typed slip opn. at pp. 6-7.) Specifically, the Sixth District reasoned that reasoned that "...there is nothing in the record to support the conclusion that anyone, whether the probation officer or the court, *made a determination of appellant's 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. [Footnote.]" (*Ibid.*)

The appellate court also reasoned that, "[w]e reject respondent's assertion that the court implicitly found that appellant had the ability to pay when the court granted probation and ordered defendant to seek and maintain gainful employment. Respondent's position ignores the statutory language of section 1203.1b; and the condition alone reveals nothing about appellant's current financial position, her earning ability, or her expenses, all of which should be considered in determining appellant's ability to pay probation related costs. (§ 1203.1b, subd. (e) (1)-(4) [ability to pay includes a consideration of a defendant's present financial position, future financial position, likelihood the defendant can obtain employment within a one year period and any other factor or factors that may bear upon the defendant's financial ability to reimburse the county for costs].)" (Typed slip opn. at p. 7.) The court concluded that, "[t]he statutory procedure provided at section 1203.1b for a determination of appellant's ability to pay probation related costs was not followed in this case. Accordingly, we must remand this matter to the trial court. [Citation]." (*Ibid.*)

As in *Pacheco*, the Sixth District applied the plain meaning of Penal Code section 1203.1b to the facts before it, and, finding that the trial court had ordered probation costs without complying with the prerequisites for the order, it reversed and remanded the order. The court therefore again applied the clear and correctable legal error exception to the forfeiture doctrine that this Court discussed in *Scott* and implemented in *Smith* and *Butler*.

D. This Court's Precedents do not require application of the Forfeiture Doctrine to the Instant Case

This Court has applied the forfeiture doctrine in appeals of restitution fine orders and booking fees orders. These cases do not foreclose the Sixth District's analysis in the instant case.

1. Restitution Fines under Penal Code section 1202.4

This Court has applied the forfeiture doctrine to appeals of restitution fine orders under Penal Code section 1202.4 in *Avila*, in *Gamache* and in *Nelson*. In *Nelson*, for example, the defendant contended that the trial court had imposed a $10,000 restitution fine under former section 1202.4 without considering his ability to pay. (*Nelson supra,* 51 Cal.4th at p. 227.) The statute at the time of defendant's 1995 crime and 2000 sentencing required the court to consider the defendant's ability to pay in setting a restitution fine. (*Ibid.*) And, at the time of sentencing, the statute required the court, in setting a fine above the $200 statutory minimum, to consider a defendant's "inability to pay." (*Id.* at p. 227 & fn. 22.) However, this Court concluded that the defendant could have objected at sentencing if he believed the trial court had given inadequate consideration to his ability to pay a $10,000 fine. (*Id.* at p. 227.)

This Court also found that the defendant's claim failed on the merits, because he had pointed to no evidence in the record of his inability to pay, beyond the fact of his impending incarceration. (*Nelson, supra,* 51 Cal.4th at p. 227.) Nor could the defendant show that the trial court had breached its duty to consider his ability to pay, because "as the trial court was not obligated to make express findings concerning his ability to pay, the absence of any findings does not demonstrate it failed to consider this factor." (*Ibid*, quoting *Gamache*, *supra,* 48 Cal.4th at p. 409.)

As *Nelson* illustrates, Penal Code section 1202.4 differs from Penal Code section 1203.1b for purposes of application of the forfeiture doctrine. The trial court's imposition of a restitution fine, in the usual case, requires the court of review to presume that the trial court has made an ability to pay determination.

(See *Stowell, supra,* 31 Cal.4th at p. 1114 [trial court presumed to have been aware of and followed the applicable law].) That presumption, in turn, forecloses any argument on appeal that the trial court has made a clear and correctable legal error to which the forfeiture doctrine does not apply. In contrast, Penal Code section 1203.1b grants the defendant a right to a separate hearing on his or her ability to pay and requires that the trial court hold such a hearing absent the defendant's knowing and intelligent waiver. (§ 1203.1b, subds. (a) & (b).) Therefore, a probation costs order imposed when the defendant has not executed a knowing and intelligent waiver of his or her right to an ability to pay hearing is a clear and correctable legal error.

2. Booking Fees under Government Code section 29550.2

In *McCullough,* this Court found the forfeiture doctrine applicable to a defendant's appeal of a booking fee under Government Code section 29550.2. In pertinent part, that statute states "'[i]f 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 [booking] fee by the convicted person....'" (Gov. Code, § 29550.2, subd. (a).) The defendant argued that booking fee orders result from application of "'an objective legal standard'" akin to orders for involuntary HIV testing under section 1202.1. (*McCullough, supra,* 56 Cal.4th at pp. 596-597.) In rejecting this argument, this Court referenced the Attorney General's argument that there is no "legal standard" for ability to pay a fee comparable to the legal standard for assessing probable cause, because virtually anything in the record could support the ability to pay a fee — a defendant's current age and health, education, prospects of future earnings, assets, and any other sources of income, as well as other fines and fees ordered. (*Id.* at p. 597.) This Court concluded that

"defendant's ability to pay the booking fee here does not present a question of law in the same manner as does a finding of probable cause." (*Ibid.*)

This Court, therefore, disapproved of the Sixth District's reasoning in *Pacheco* that sufficiency of evidence challenges to a booking fee order are not subject to the forfeiture doctrine. "Given that imposition of a fee is of much less moment than imposition of sentence, and that the goals advanced by judicial forfeiture apply equally here, we see no reason to conclude that the rule permitting challenges made to the sufficiency of the evidence to support a judgment for the first time on appeal 'should apply to a finding of' ability to pay a booking fee under Government Code section 29550.2. [Citation.]" (*McCullough, supra,* 56 Cal.4th at p. 599.) This Court disapproved *Pacheco* "to the extent it holds the contrary." (*Ibid*; fn. omitted.)

However, this Court did not disapprove the *Pacheco* court's reasoning that an order for probation services can present a clear and correctable legal error if the trial court fails to implement Penal Code section 1203.1b's procedural safeguards. This Court noted that Penal Code section 1203.1b and Penal Code section 987.8 [payment of cost of court-appointed counsel] "require defendants to be apprised of their right to a hearing on ability to pay and afford them other procedural safeguards." (*McCullough, supra,* 56 Cal.4th at p. 598.) Notably, this Court did not disapprove of the Sixth District's decision in *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*), in which that court found that "no predicate objection in the trial court ..." (*id.* at p. 1217) was required to assert on appeal the "dearth of evidence that defendant would be able to pay $9,200 in defense costs over the six months following the hearing." (*Ibid.*) Instead, *McCullough* distinguished *Viray,* stating that the case "merely references the general rule that an appellate challenge

to the sufficiency of the evidence 'requires no predicate objection in the trial court.'" (*McCullough, supra,* 56 Cal.4th at p. 599, fn. 2.)

In summary, as with Penal Code section 1202.4, the differences between Government Code section 29550.2 and Penal Code section 1203.1b have consequences for application of the forfeiture doctrine. *McCullough* does not foreclose a finding of clear and correctable legal error in a probation costs order imposed when the defendant has not executed a knowing and intelligent waiver of his or her right to an ability to pay hearing.

E. Decisions in the First and Third Districts do not require application of the Forfeiture Doctrine to the Instant Case

The First District and the Third District have issued opinions that have applied the forfeiture doctrine to appeals of probation cost orders. For differing reasons, these opinions do not require application of the forfeiture doctrine in the instant case.

1. *People v. Valtakis*

In *Valtakis*, an opinion pre-dating this Court's opinions in *Stowell* and *Butler*, the defendant had entered a negotiated plea of no contest to possession of narcotics, and prior to defendant's sentencing, the probation officer had recommended that defendant pay, among other fees and fines, a $250 "probation fee." (*Valtakis, supra,* 105 Cal.App.4th at pp. 1068-1069.) The probation officer's report had contained no determination of ability to pay and no advisement of a right to a separate hearing on that issue. (*Ibid.*) At sentencing, defendant's counsel told the court that the defendant remained enrolled in college and had obtained a part-time job. (*Ibid.*) The court, without objection, imposed the recommended probation costs order. (*Ibid.*)

On defendant's appeal, the First District concluded that the procedural safeguards that the Legislature had added to Penal Code section 1203.1b in 1995 had created a clear "anti-waiver rule at the trial court level." (*Valtakis, supra,* 105 Cal.App.4th at p. 1075.) However, the First District found that the forfeiture doctrine nonetheless applied to defendant's claim, reasoning that "the [statute's] waiver language does not speak to appellate review. The context involves trial court procedures (fn.2, ante), and the Legislature was presumably aware of the long-established principles exemplified in *Welch* and *Scott* [citation] and that defendants, unless exercising their right to self representation, enjoy the assistance of counsel, counsel who are familiar with the need to preserve claims of error by objection." (*Ibid.*) The First District also reasoned that, as a matter of policy, that "to construe the language as abrogating *Welch* and *Scott* [and now *Tillman*] would work results horribly at odds with the overarching cost conservation policy of the section." (*Ibid.*)

Alternatively, citing *People v. Watson* (1956) 46 Cal.2d 818, 836, the First District reasoned that if it considered the merits of defendant's claim, it would have to deny the claim for failure to show prejudice arising from the trial court's failure to comply with Penal Code section 1203.1b. (*Valtakis, supra,* 105 Cal.App.4th at p. 1076.) The court reasoned that given the defendant's living arrangements and part-time employment, it appeared "highly unlikely that a remand to assess his financial circumstances at the time of the sentencing would show him to have been unable to pay the $250, even considering the $540 in other fees also imposed." (*Ibid.*)

The First District erred because it construed Penal Code section 1203.1b to conform to the policies underlying the forfeiture doctrine. But, statute's language

is plain and unambiguous. Furthermore, by misconstruing the legislative language, the First District reached an absurd result. Plainly, the Legislature could not have intended that a defendant would forfeit his or her right to appeal by failing to object to the lack of a separate hearing on his or her ability to pay, when the defendant had not been informed of his or her right to such a hearing, as the Legislature had required. (*People v. Thomas* (1992) 4 Cal.4th 206, 210 [courts construe statutes to avoid absurd results].)

The First District also erred in surmising that the Legislature could not have intended to abrogate the "long-established principles exemplified in *Welch* and *Scott*..." (*Valtakis*, *supra,* 105 Cal.App.4th at p. 1076.) However, the phrase "long-established principles," while accurate in some respects, strikes a discordant note. This Court had decided *Welch* in 1993, *Scott* in 1994, and the Legislature had amended Penal Code section 1203.1b in 1995. Both *Welch* and *Scott* had "provided for only prospective application of the rules they announced because formerly such hearings were 'largely conducted under the assumption' that sentencing error claims, including challenges to probation terms, could 'be raised in the first instance on appeal.'" (*McCullough, supra,* 56 Cal.4th at p. 594, quoting *Scott, supra,* 9 Cal.4th at p. 337.) In sum, the First District's view that the Legislature had intended the forfeiture doctrine to apply to non-compliance with the procedural rights it had added to Penal Code section 1203.1b appears, at the least, unpersuasive.

In contrast, the First District reached the correct result when it ruled, in the alternative, that the defendant's appeal failed for an insufficient showing of prejudice. (*Valtakis*, *supra,* 105 Cal.App.4th at p. 1076.) In light of this finding,

the First District's application of the forfeiture doctrine appears both incorrect and unnecessary to reach the correct result.

2. *People v. Snow*

In *Snow*, the defendant entered a negotiated plea of no contest to three counts of felony theft and to a misdemeanor. (*Snow, supra,* 219 Cal.App.4th at p. 1149.) The probation officer recommended that defendant pay, among other fees, fines and restitution, $736 for the presentence investigation report and $164 per month for probation supervision. (*Id.* at p. 1150.) The probation officer opined that defendant was "able-bodied with marketable job skills, and therefore, he should have the ability to pay all fines, fees, and restitution, as ordered by the Court." (*Ibid.*) Defendant sought probation, stating his willingness and ability to pay restitution. (*Ibid.*) At sentencing, defense counsel stated that defendant was employed and that he and his brother, a co-defendant, could pay $5,000 in restitution immediately and $1,000 per month in restitution. (*Ibid.*) The court granted defendant probation. (*Ibid.*)

On defendant's appeal of the probation costs order, the Court of Appeal for the Third Appellate District applied the forfeiture doctrine, reasoning that "defendant had adequate notice that the costs of the report and supervision would be imposed but objected to neither in writing or orally and never requested a hearing." (*Id.* at p. 1151.) However, the record did not show that the defendant had made a "knowing and intelligent" waiver of his right to a separate hearing. (Pen. Code, § 1203.1b, subd. (a).) Therefore, in essence, the Third District construed defendant's failure to request a hearing as a "knowing and intelligent" waiver of a hearing, when nothing in the record showed that defendant had been informed of his right to a hearing. The Third District erred.

In summary, the trial court had made a clear and correctable legal error by failing to comply with Penal Code section 1203.1b, and for that reason, as in the instant case, the *Snow* court should have found that the forfeiture doctrine did not apply to the defendant's claim on appeal. Unlike in the instant case, however, the evidence in the record demonstrated the defendant's ability to pay probation costs. (*Snow, supra,* 219 Cal.App.4th at p. 1150.) Therefore, the *Snow* court should have denied the defendant's appeal on the ground of failure to demonstrate a prejudicial statutory error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

CONCLUSION

This Court should affirm the Sixth District's finding in the instant case that the forfeiture doctrine did not apply to the defendant's claim for relief, because the trial court had failed to hold a hearing on her ability to pay the costs of probation services, when she had not executed a knowing and intelligent waiver of her right to a hearing. The trial court's failure to comply with the requirements of Penal Code section 1203.1b presented a clear and correctable legal error.

Dated: January 31, 2014

Respectfully submitted,

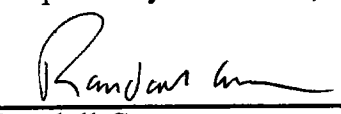
Randall Conner
Attorney for Donna Marie Trujillo

CERTIFICATE OF WORD COUNT

I, Randall Conner, counsel for Donna Marie Trujillo, certify pursuant to the California Rules of Court that this document contains 7,664 words, excluding the tables, this certificate, and any attachment permitted under rule 8.520(c)(3). I prepared this document in Microsoft Word 2003, and this program generated the word count stated above. I certify under penalty of perjury under the laws of the State of California that the foregoing is true.

Executed in Oakland, California, on January 31, 2014.

Respectfully submitted,



Randall Conner
Attorney for Donna Marie Trujillo

DECLARATION OF SERVICE BY MAIL

Re: People v. Donna Marie Trujillo — Case No. S213687
Appellate Case No. H038316

I, the undersigned, declare that on January 31, 2014, I filed in this court an electronic copy of the enclosed answer brief on the merits via this court's electronic filing procedures, and filed the original and eight copies of this brief by U.S.P.S. priority mail service to the following address: Office of the Clerk, Supreme Court of California, 350 McAllister Street, San Francisco, CA 94102-4797.

I served the Sixth District Appellate Program with an electronic copy of the enclosed brief to the following electronic address: sdapattorneys@sdap.org.

I served a true and correct copy of the enclosed brief by U.S.P.S. first-class delivery service to the following:

Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Donna M. Trujillo
3810 Los Altos Court
San Jose, CA 95121

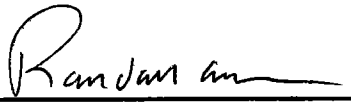
The Honorable Linda R. Clark, Judge
Santa Clara County Superior Court
Hall of Justice East
190 West Hedding Street
San Jose, CA 951110

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

Vicki Gemetti
Deputy District Attorney
Santa Clara County District Attorney
County Government Center, West Wing
70 West Hedding Street
San Jose, CA 95110

Beth Kendall
Deputy Alternate Defender
Santa Clara County Alternate Defender
701 Miller Street
San Jose, CA 95110

I declare under penalty of perjury that the foregoing is true.



Randall Conner, SBN 179122
LAW OFFICE OF RANDALL CONNER
160 Franklin Street, Suite 210
Oakland, CA 94607
p. 510-709-4066
f. 510-839-4689