IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,
v.

FELIX CORRAL RUIZ II,

Defendant and Appellant.

S235556

Court of Appeal, Fifth Appellate District, No .F068737
Tulare County Superior Court No. VCF241607J

Hon. Joseph Kalashian, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

ELIZABETH CAMPBELL
Attorney at Law
State Bar No. 166960

PMB 334
3104 O Street
Sacramento, CA 95816
(530) 786-4108
campbell166960@gmail.com
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FELIX CORRAL RUIZ II, Defendant and Appellant.	F068737 S235556 Tulare County Superior Court No. VCF241607J

APPELLANT'S REPLY BRIEF ON THE MERITS

INTRODUCTION

In the opening brief on the merits, appellant urged this court to reverse the Court of Appeal decision upholding the imposition of a criminal laboratory analysis fee under Health and Safety Code section 11372.5 and a drug program fee under Health and Safety Code section 11372.7, where appellant was not convicted of transportation of controlled substances (Health & Saf. Code, § 11379, subd. (a)) but only of conspiracy to commit that offense (Pen. Code, § 182, subd. (a)). The sole published decision to consider whether these fees may properly be imposed where a defendant is convicted of conspiracy has answered the question in the negative. (*People v. Vega* (2005) 130 Cal.App.4th 183, 194.) The *Vega* decision is not only supported by sound reasoning and statutory analysis, but has been further bolstered by other recent decisions holding that the fees under Health and Safety Code

sections 11372.5 and 11372.7 are not "punishment." (See *People v. Watts* (2016) 2 Cal.App.5th 223, 234; *People v. Moore* (2015) 236 Cal.App.4th Supp. 10.)

Respondent urges this court to uphold the lower court's ruling based on flawed and circular reasoning that ignores the statutory language of both Penal Code section 182, subdivision (a), and the relevant Health and Safety Code provisions. Moreover, respondent's arguments ignore over a decade of case law from this court and the appellate courts setting forth the framework for determining when a monetary assessment constitutes "punishment" under the law.

This court should reject respondent's claims and reverse the holding of the Court of Appeal.

ARGUMENT

THE FEES AND ASSESSMENTS IMPOSED UNDER HEALTH AND SAFETY CODE SECTIONS 11372.5 AND 11372.7 WERE UNAUTHORIZED AND SHOULD BE STRICKEN

Respondent offers two principal arguments in support of the Court of Appeal opinion. First, respondent asserts that regardless of whether the fees imposed under Health and Safety Code sections 11372.5 and 11372.7 are categorized as "punishment," the trial court was required to impose those fees because Penal Code section 182 mandates that the same punishment be imposed for a conspiracy charge as would be imposed for the base offense. (Answer Brief on the Merits, p. 11 et seq.) Second, respondent argues that in any event, the fees under those sections are, in fact, punishment. (Answer Brief on the Merits, p. 13 et seq.) Respondent is incorrect as to both arguments, and this court should not be persuaded.

A. Respondent Improperly Conflates "Punishment" With "Consequence" in Interpreting Penal Code section 182

Respondent's first contention is that, because Penal Code section 182, subdivision (a), requires that a defendant convicted of conspiracy be punished in the same manner as a person who committed the target offense, a person convicted of conspiracy to transport a controlled substance must be subject to drug program and crime lab fees, regardless of whether those fees constitute "punishment." (Answer Brief on the Merits, p. 11 et seq.) This contention amounts to circular reasoning that ignores the

longstanding distinction between fines that constitute "punishment" and those that are not so defined.

The flaw in respondent's argument stems from a conflating of "punishment" with "consequence." Certainly imposition of fees under Health and Safety Code sections 11372.5 and 11372.7 is a *consequence* of a conviction for a violation of Health and Safety Code section 11379. But Penal Code section 182, subdivision (a), does not state that persons convicted of conspiracy shall face identical consequences to those convicted of the target offense. That section instead clearly states that conspirators "shall be *punishable* in the same manner and to the same extent as is provided for the *punishment* of that felony." (Pen. Code, § 182, subd. (a)(6); emphasis added.) Under the laws of this state, "punishment" has a specific legal meaning, one that is narrower and more specific than mere consequence.

The United States Supreme Court has identified the following factors as relevant to the question of whether a consequence of conviction constituted punishment:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

(*Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144, 168-169 [83 S.Ct. 544; 9 L.Ed.2d], footnotes omitted.) Although the first part of this inquiry is on the burden imposed on the defendant, most of these factors turn on the purpose of the sanction.

This court has adopted a similar focus in distinguishing between "punishment" and "burden." (See *People v. McVickers* (1992) 4 Cal.4th 81, 89.) *McVickers* involved a consideration of whether a requirement for HIV testing violated the ex post facto cause, a question that turned on the issue of whether the testing was "punishment" under the law. The court noted that the question was not simply whether the testing was a "burden," but rather whether it was a "burdonsome punishment." (*Id.* at p. 84.)

Cases after *McVickers* have outlined a variety of factors relevant to the question of whether a consequence constitutes punishment, most of which focus on the intent of the legislature and, to a lesser extent, on the severity of the consequence. (See, e.g., *People v. Castellanos* (1999) 21 Cal.4th 785, 795 (lead opn. of George, C. J.); *In re Jorge G.* (2004) 117 Cal.App.4th 931, 942.) The issue of whether the drug program and criminal laboratory fees are "punishment" within the meaning of Penal Code section 182 will be addressed further in section B of this brief. For the present purpose, the crux of the matter is simply that a distinction exists between "punishment" and other consequences of conviction.

Respondent's reliance on *People v. Athar* (2005) 36 Cal.4th 396 is unpersuasive. In *Athar*, this court held that money laundering enhancements apply to conspiracy to commit money laundering. (*People v. Athar, supra,* 36 Cal.4th at p. 404.) This court's holding in *Athar* was simply that the "punishment" contemplated under Penal Code section 182, subdivision (a), is not limited to the base term of the target offense. (*Id.* at p. 405.) This holding cannot reasonably be construed as expanding the definition of "punishment" under Penal Code section 182, subdivision (a), to encompass consequences that do not amount to punishments. Nothing in *Athar* suggests that a conspiracy conviction requires imposition of consequences that are not "punishment" within the accepted meaning of the latter term.

Respondent does not address the holding in *People v. Superior Court* (*Kirby*) (2003) 114 Cal.App.4th 102, in which the appellate court found that a probation prohibition for certain charges under Penal Code section 1203.065 did not apply to a conviction for conspiracy to commit those offenses. The *Kirby* court held that, although a conspiracy offense is punishable in the same manner as the target felony, probation ineligibility is not encompassed in the "punishment" for the underlying felony. (*People v. Superior Court, supra*, 114 Cal.App.4th at p. 107.)

The court in *Kirby* focused on the language of section 182 requiring that a conspiracy conviction"shall be punishable in the same manner and to the same extent as is provided for the punishment of" the underlying felony. (Pen. Code, § 182, subd.

(a); see also *People v. Superior Court, supra,* 114 Cal.App.4th at p. 105.) The court noted that while the length of the state prison term is unquestionably encompassed within section 182's reference to the "manner" and "extent" of the "punishment," the more difficult question was whether probation ineligibility was likewise so included. (*People v. Superior Court, supra,* 114 Cal.App.4th at p. 105.) The court ultimately found it dispositive that probation ineligibility was not considered "punishment" in other contexts. (*Id.* at pp. 105-106; see also *People v. Vega, supra,* 130 Cal.App.4th at pp. 194-195.)

In sum, because Penal Code section 182, subdivision (a), subjects conspirators to only those consequences of conviction that constitute punishment for the target offense, respondent's contentions to the contrary are unpersuasive.

B. The Fees Imposed Under Sections 11372.5 and 11372.7 Are Not Punishment

Respondent's second contention, that the fees imposed under sections 11372.5 and 11372.7 are in fact punishment, has been addressed at length in the opening brief. (See Appellant's Opening Brief on the Merits, pp. 15-20.) As the court in *People v. Vega* held, because the main purpose of Health and Safety Code section 11372.5 is neither retribution or deterrence, but rather to offset the costs of laboratory tests in the prosecution of narcotics cases, the fee imposed under that section is simply an administrative fee, not punishment. (*People v. Vega, supra,* 130 Cal.App.4th at p. 195.) The court in *People v. Watts* likewise

concluded that the fee was not intended to be punishment, relying in part on *Vega*'s conclusion that the crime lab fee is "a fixed charge that is 'imposed to defray administrative costs,' not 'for retribution and deterrence.'" (*People v. Watts, supra,* 2 Cal.App.5th at p.235, citing *People v. Vega, supra*, 130 Cal.App.4th at p. 195.)

Respondent's argument hinges, to a large extent, on distinguishing the fees under Health and Safety Code sections 11372.5 and 11372.7 from the mandatory fees imposed under Government Code section 70373 and Penal Code section 1465.8, each of which have been held not to constitute punishment. (See, e.g., *People v. Alford* (2007) 42 Cal.4th 749; *People v. Castillo* (2010) 182 Cal.App.4th 1410.) One factor which respondent cites repeatedly as a distinction between the court facilities fee and the drug and lab fees is that the latter are imposed only in criminal cases. (See Respondent's Answer Brief on the Merits, p. 17.) This argument has no basis in law or logic. The fee under Government Code section 70373 is imposed in a broader range of criminal matters, including traffic matters and infractions, but also serves to offset a broader range of services. (See Gov. Code, § 70373, subd. (a).) This broader application does not alter the fundamental purpose of the drug program and crime lab fees, which is to offset the cost of their respective programs. (See Health & Saf. Code, § 11372.5, subd. (b); § 11372.7, subd. (c).)

Respondent further attempts to distinguish the drug program and crime lab fees from the court security fee under

Penal Code section 1465.8, on the grounds that the court security fee is not subject to penalty assessments, but several courts have held that penalty assessment do apply to the Health and Safety Code fees. (Respondent's Answer Brief on the Merits, pp. 17-18.) This circular reasoning is not persuasive.

Respondent is correct that penalty assessments are only appropriately added to fines, i.e., to monetary assessments that constitute punishment. (See Pen. Code, § 1464; Gov. Code, § 76000.) Further, as appellant has acknowledged, it is also true that most courts to consider the issue have assumed or held that the fees imposed under Health and Safety Code section 11372.5, as well as the similar provision under Health and Safety Code section 11372.7, are subject to penalty assessments. (See *People v. Talibdeen* (2002) 27 Cal.4th 1151; *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1251–1252; *People v. Taylor* (2004) 118 Cal. App. 4th 454, 456; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1257; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1522; *People v. Sierra* (1995) 37 Cal.App.4th 1690.)

The two most recent decisions on the issue, however, have delved into the statutory language and history of sections 11372.5 and 13372.7 and concluded, under different lines of reasoning, that the fee imposed under that section does not constitute "punishment" and thus is not subject to penalty assessments. (*People v. Watts, supra,* 2 Cal.App.5th 223 [considering section 11372.5]; see also *People v. Moore* (2015) 236 Cal.App.4th Supp. 10, 15-19 [considering both section 11372.5 and section 11372.7].)

These cases, taken together, offer a compelling argument for revisiting the longstanding assumption that penalty assessments may be applied to drug and crime lab fees.

As noted in the opening brief on the merits, the court in *People v. Watts* disagreed with several other courts of appeal and held that section 11372.5 was not punitive in purpose and effect, and thus not subject to penalty assessments. (*People v. Watts, supra,* 2 Cal.App.5th 223.) Contrary to respondent's suggestion that *Watts* offered only a superficial analysis, in fact the *Watts* court examined the language of section 11372.5, subdivision (a), in detail. The court highlighted the "internal inconsistency" of section 11372.5, in particular the fact that the first paragraph of subdivision (a) characterizes the fee as a "criminal laboratory analysis *fee*," while the second paragraph characterizes the $50 charge as a "*fine*." (Health & Saf. Code, § 11372.5, subd. (a); see *People v. Watts, supra*, 2 Cal.App.5th at p. 231.) In spite of this inconsistency, the court concluded that "the most sensible interpretation is that the Legislature intended the crime-lab fee to be exactly what it called it in the first paragraph, a fee, and not a fine, penalty, or forfeiture subject to penalty assessments." (*Ibid*; see also *People v. Vega, supra*, 130 Cal.App.4th at p. 195 ["the label the Legislature places on a charge, whether 'fee' or 'fine,' is not determinative, especially where as here the Legislature used both terms"].)

Both *Watts* and *Vega* wrestled with the language in Health and Safety Code section 11372.5 regarding the "total fine,"

language that is treated as dispositive by both respondent and by several appellate courts. (See, e.g., *People v. Sharret* (2011) 191 Cal.App.4th 859; see also *People v. Martinez, supra*, 65 Cal.App.4th at p. 1522; *People v. Sierra, supra* 37 Cal.App.4th at p. 1695.) At issue is the following statutory language: "The court shall increase the total fine necessary to include this increment." (Health & Saf. Code, § 11372.5, subd. (a).) As the court in *Sharret* concluded, "Although described as a 'fee,' the criminal laboratory analysis fee is an increment of a fine and as such it is a fine." (*People v. Sharret, supra,* 191 Cal.App.4th at p. 870.)

As previously discussed, the court in *Watts* examined the same passage and concluded that it was not controlling, questioning how a reference to a "total fine" (which in context clearly refers to other calculated penalties) converted an assessment plainly described as a "fee" into a "fine." (*People v. Watts, supra,* 2 Cal.App.5th at p. 234.) The *Watts* court found further support in the statutory language, including the second paragraph of subdivision (a), which does appear to refer to a separate "fine" that may be imposed in circumstances not relevant here. (*People v. Watts, supra,* 2 Cal.App.5th at p. 234.)

The Appellate Division of the Nevada County Superior Court has likewise concluded that the statutory language of Health and Safety Code sections 11372.5 and 11372.7 was not determinative in deciding whether those provisions set forth "punishment" or merely a fee. (*People v. Moore, supra*, 236 Cal.App.4th Supp. 10.) In *Moore*, the court concluded that penalty

assessments cannot be imposed on the lab fee or the drug program fee. The court there described prior attempts to find an answer in the statutory language as a "fool's errand," emphasizing that the text uses all three terms: fee, fine, and penalty. (*People v. Moore, supra*, 236 Cal.App.4th Supp. at p. 16.) Noting that Penal Code section 1463, subdivision (l), defines "total fine" as including both the base fine and penalty assessments, the court in *Moore* concluded that previous courts erred in treating "total fine" as synonymous with "base fine" when those terms are distinct. (*People v. Moore, supra*, 236 Cal.App.4th Supp. at p. 17.) The court in *Moore* concluded that the Legislature intended a sentencing court to first determine the "base fine" applicable to the criminal offense, then levy the proper penalty on it to determine the "total fine," and only after the total fine was determined, to then increase the fine with lab drug program fees. (*Id.* at p. 18.)

Respondent, like the court below, adopts the flawed reasoning of *People v. Sharret*. . As discussed at length in the opening brief on the merits, the reasoning employed by the court in *Sharret* is fundamentally unsound and should not be adopted by this court. (Appellant's Opening Brief on the Merits, pp. 18-20.) Like respondent here (Respondent's Answer Brief on the Merits, p. 14), the court in *Sharret* reasoned that because separate fees are assessed for each count of conviction, the fee is assessed in proportion to the defendant's culpability and is therefore punishment. (*People v. Sharret, supra,* 191 Cal.App.4th at p. 870.) But the imposition of separate fees for each count of conviction

under Penal Code section 1465.8 and Government Code section 70373 was not sufficient to convince this court that those fees were punishment. (*People v. Alford, supra,* 42 Cal.4th at pp. 757-758; *see also People v. Fleury* (2010) 182 Cal.App.4th 1486, 1492.) Fines that have been found to be punitive are those that are imposed as a percentage on other fines that are calculated as an exercise in discretion at sentencing. (See, e.g., *People v. High* (2004) 119 Cal.App.4th 1192, 1198.)

Similarly, the fact that a fee is mandatory and not subject to an ability to pay assessment does not mean that the fee is punitive. (Respondent's Answer Brief on the Merits, p. 14.) Again, both Penal Code section 1465.8 and Government Code section 70373 are mandatory and not subject to an ability to pay requirement; courts have nonetheless held that neither is punishment. (*People v. Alford, supra,* 42 Cal.4th at pp. 757-758; *People v. Fleury, supra*, 182 Cal.App.4th at p. 1492.)[1]

Finally, respondent fundamentally misstates the law in claiming that even if the *purpose* of the crime lab and drug program fees is not intended to be punitive, the *effect* of those fees is sufficiently punitive that they must be found to constitute punishment. (See Respondent's Answer Brief on the Merits, p. 17.) In support of this proposition, respondent cites to this court's decision in *People v. Alford*, *supra*, 42 Cal.4th at p. 756. But

---

[1]Health and Safety Code section 11372.7 does include a requirement that a defendant have an ability to pay the fee. (Health & Saf. Code, § 11372.7, subd. (b).)

nothing in *Alford* supports this contention. On the contrary, *Alford* relied on a United States Supreme Court holding that emphasized the strong deference to legislative intent:

> "If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is ' "so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil." ' [Citation.] Because we 'ordinarily defer to the legislature's stated intent,' [citation], ' "only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,' [citations]."

(*Smith v. Doe* (2003) 538 U.S. 84, 92 [123 S.Ct. 1140' 155 L.Ed.2d 164].)

The fees imposed under Health and Safety Code sections 11372.5 and 11372.7 can hardly be said to have such a strongly punitive effect that this court should override the intention of the legislature. Absent penalty assessments, which should not be imposed in any case if the fees are not punishment, these fees amount to $50 and $150, respectively, for each offense. (Health & Saf. Code, § 11372.5, subd. (a); Health & Saf. Code, § 11372.7, subd. (a).) The fee under Health and Safety Code section 11372.5, in particular, is only $10 more than the fee imposed under Penal Code section 1465.8, which this court has held does not constitute punishment. (*People v. Alford, supra,* 42 Cal.4th at pp. 757-758.) Moreover, these amounts do not increase based on the severity of the crime: for instance, a defendant who transports an

exceptionally large amount of narcotics may be subject to additional penalties under other statues, but the crime lab and drug program fees remain the same.

The fees under Health and Safety Code sections 11372.5 and 11372.7 are not punishment under the established meaning of that term. The trial court thus erred in imposing them as a consequence of appellant's conviction for conspiracy. This court should reverse the holding of the Court of Appeal.

CONCLUSION

For the foregoing reasons, and for reasons already stated in the opening brief on the merits, appellant requests that this court strike the fees and assessments imposed under Health and Safety Code sections 11372.5 and 11372.7.

Dated: May 1, 2017 Respectfully submitted,

ELIZABETH CAMPBELL
Attorney at Law
State Bar No. 166960

PMB 334
3104 O Street
Sacramento, CA 95816
(530) 786-4108
campbell166960@gmail.com
Attorney for Appellant

CERTIFICATE OF WORD COUNT

As required by California Rules of Court, Rule 8.520(c), I certify that this brief contains 3,918 words, as determined by the word processing program used to create it.

Elizabeth Campbell
Attorney at Law

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a member of the State Bar of California and a citizen of the United States. I am over the age of 18 years and not a party to the within-entitled cause; my business address is PMB 334, 3104 O Street, Sacramento, California, 95816.

On May 1, 2017, I served the attached

APPELLANT'S REPLY BRIEF ON THE MERITS

(by mail) - by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

Felix Corral Ruiz Appellant California Substance Abuse Treat AR5116 P. O. Box 5246 Corcoran, CA 93212-8309	Tulare County Superior Court 221 S. Mooney Blvd. Courthouse, Room 303 Visalia, CA 93291 Tulare County District Attorney County Civic Center 221 S. Mooney Avenue Courthouse, Room 224 Visalia, CA 93291

(by electronic transmission) - I am personally and readily familiar with the preparation of and process of documents in portable document format (PDF) for e-mailing, and I caused said document(s) to be prepared in PDF and then served by electronic mail to the party listed below, by close of business on the date listed above:

Central California Appellate Program 2407 J Street, Suite 301 Sacramento, CA 95816 eservice@capcentral.org	Office of the Attorney General P.O. Box 944255 Sacramento, CA 94244-2550 SacAWTTrueFiling@doj.ca.gov California Court of Appeal, Fifth Appellate District 2424 Ventura Street Fresno, CA 93721 Served via Truefiling.com

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

Executed on May 1, 2017, in Sacramento, California.

_____

DECLARANT