

S213571

SUPREME COURT
FILED

6

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA OCT 22 2013

Frank A. McGuire Clerk

Deputy

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent

vs

OCTAVIO AGUILAR,

~~Petitioner~~
Defendant and Appellant

No: _____

Court of Appeal No. A135516

Contra Costa County
Superior Court
No. 51202695

PETITION FOR REVIEW

After Decision by the Court of Appeal
First Appellate District, Division Four
Filed 28 August 2013

KIERAN D.C. MANJARREZ
1535 Farmers Lane 1333
Santa Rosa, CA 95405
Tel: 415 / 520-0440
[CBN: 62000]

By Appointment of the Court
under the First District Appellate Project
Independent Case System

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent

vs

OCTAVIO AGUILAR,

Petitioner and Appellant

No: _____

Court of Appeal No. A135516

Contra Costa County
Superior Court
No. 51202695

PETITION FOR REVIEW

After Decision by the Court of Appeal
First Appellate District, Division Four
Filed 28 August 2013

KIERAN D.C. MANJARREZ
1535 Farmers Lane 1333
Santa Rosa, CA 95405
Tel: 415 / 520-0440
[CBN: 62000]

By Appointment of the Court
under the First District Appellate Project
Independent Case System

TABLE OF CONTENTS

	Page
PETITION FOR REVIEW	1
ISSUES PRESENTED	2
FEDERAL ISSUES RAISED	3
STATEMENT OF CASE	4
STATEMENT OF FACTS	6
ARGUMENT FOR REVIEW	7
I. REVIEW SHOULD BE GRANTED TO CLARIFY WHETHER THIS COURT’S DECISION IN <i>MCCULLOUGH</i> EXTENDS TO COURT ORDERED PAYMENTS OF ATTORNEY FEES AND MONTHLY COSTS OF PROBATION SUPERVISION.	7
A. Issues raised on Appeal.	7
B. Appellate Court Ruling	8
C. Court of Appeal Error	8
D. Necessity for Review.	10
II. REVIEW SHOULD BE GRANTED TO CLARIFY WHETHER THE HOLDING IN <i>MCCULLOUGH</i> APPLIES TO ANY CHALLENGE TO AN IMPOSED BOOKING FEE OR ONLY TO CHALLENGES BASED ON A DEFENDANT’S INABILITY TO PAY.	10
CONCLUSION	14

TABLE OF AUTHORITIES

Citation **Page**

SUPREME COURT CASES

Brinegar v. United States (1949) 338 U.S. 160, 11

Gray v. Netherland (1996) 518 U.S. 152, 3

Hicks v. Oklahoma (1980) 447 U.S. 343, 3

CALIFORNIA CASES

People v. McCullough (2013) 56 Cal.4th 589 passim

People v. Mendoza (2000) 23 Cal.4th 896, 12

People v. Pacheco (2010) 187 Cal.App.4th 1392 passim

STATUTES

Pen. Code, § 243 4, 6

Pen. Code, § 273.5, subd. (a) 4

Pen. Code, § 987.8 2, 4, 7, 9, 11

Pen. Code, § 1203.1b 2, 4, 7, 9, 11

Pen. Code, § 1203.1b (a) & (b) 8

Gov. Code, §§ 29550, subds. (a) & (c) 4, 7

OTHER AUTHORITIES

Cal. Rules of Crt., Rule 8.500, subd. (a) 1

Cal. Rules of Crt., Rule 8.512, subd. (d) 1

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Respondent

vs

OCTAVIO AGUILAR
Petitioner and Appellant

No: _____

Court of Appeal No. A135516

Contra Costa County
Superior Court
No. 51202695

PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

OCTAVIO AGUILAR petitions this court for review following the unpublished decision of the Court of Appeal, First Appellate District, Division One filed 28 August 2013, affirming a judgement of conviction and sentence by the Superior Court of Contra Costa County. (Cal. Rules of Crt., Rule 8.500, subd. (a).) Alternatively, petitioner requests this Court to grant and hold review pending decision in any other cause before this Court involving issues substantially similar to those raised herein or likely to affect the interests of the parties hereto. (Cal. Rules of Crt., Rule 8.512, subd. (d).) A copy of the appellate court opinion is attached hereto.

DATED: 18 September 2013

Kieran D. C. Manjarrez
Attorney for Appellant/Petitioner

ISSUES PRESENTED

1. Does this Court's decision in *People v. McCullough* (2013) 56 Cal.4th 589 [*McCullough*] requiring contemporary objection to the imposition of a criminal justice administration fee¹ pursuant to Government Code sections 29500 through 29500.3, apply to court ordered payment of attorney fees (Pen. Code, § 987.8) and costs of probation supervision (Pen. Code, § 1203.1b); or, does *People v. Pacheco* (2010) 187 Cal.App.4th 1392 [*Pacheco*] remain good law with respect to those latter statutes?
2. Was *McCullough* correctly decided and, if so, does it encompass any and all appellate challenges to a court-ordered booking fees or only to those challenges which are based on the absence of findings with respect to a defendant's ability to pay?

¹ As used herein "booking fee" means the criminal justice administration fee imposed under Government Code sections 29500 and 29500.2.

STATEMENT OF FEDERAL ISSUES RAISED
(*Gray v. Netherland* (1996) 518 U.S. 152, 162–163)

Although this petition is framed within the context of state law, it raises issues which implicate: appellant’s federal due process & liberty interests in the application of state laws which create due process expectations by virtue of mandatory pre-requisites and requirements. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

For the reasons discussed herein, each of the statutes providing for the assessment of costs and fees did so on prerequisite determinations of an ability to pay *and* actual costs and gave rise to due process expectations.

STATEMENT OF THE CASE

Upon jury verdict, appellant was convicted of corporal injury on a spouse having sustained a prior conviction for battery (Pen. Code, §§ 273.5, subd. (a)), 243/273.5, subd. (e).) At sentencing, appellant was granted three years formal probation on various terms and conditions and the payment of various fees and fines including, *inter alia*, [1] \$564.00 “criminal administration assessment fee” [see Gov. Code, §§ 29550, subd. (c)]; [2] costs of probation at \$75.00 per month [see Pen. Code § 1202.1, subd. (b)]; and [3] \$500.00 in “attorneys fees” [see, Pen. Code § 987.8, subd.(b)].) (CT 199-201; RT 217-220) ²

On appeal, appellant’s sole contentions was that the above-specified fees were imposed with sufficient factual basis or findings per *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1399.) Supplemental briefing was ordered following this Court’s decision in *People v. McCullough* (2013) 56 Cal.4th 589

² The full list of fees and fines was: **(1)** \$200.00 restitution fine (Pen. Code, § 1202.4, subd.(b) and \$200.00 parole revocation fine (Pen. Code, § 1204.45); **(2)** \$450.00 for “Victim’s Compensation Restitution; ”**(3)** \$200.00 “pursuant to Penal Code Section 1203.097(a)(5)” [i.e. the Domestic Violence Fund]; **(4)** costs of probation at \$75.00 per month [see Pen. Code § 1202.1, subd. (b)]; **(5)** \$176.00 probation report fee [see, Pen. Code, § 1203.1, subd. (b)]; **(6)** \$564.00 “criminal administration assessment fee” [see Gov. Code, §§ 29550, subs. (c) or 29550.2, subd.(a)]; **(7)** \$500.00 in “attorneys fees” [see, Pen. Code § 987.8, subd.(b)]; **(8)** \$25.00 “booking fee” [see Pen. Code, § 1463.07 and/or Gov. Code, § 29550, subd.(f)]; **(9)** \$40.00 “court security fee” [see Pen. Code § 1464.8]; **(10)** \$30.0 “court conviction assessment” (Gov. Code, § 70373). **(11)** costs of alcohol testing at \$10.00/ month, [see *In re Christopher H.* (1996) 50 Cal.App.4th 1001 [court’s discretion].] (CT 199, 201; RT 218-220)

[“*McCollough*”]

On 28 August 2013 , the Court of Appeal affirmed the judgement and sentence.

STATEMENT OF FACTS

At trial, the victim testified that she and appellant had lived together for 14 years and that, on the date in question, he had struck her on the thigh with a belt. In bifurcated proceedings the court struck the arming allegation and found true a prior conviction for battery (Pen. Code, § 243.)

In imposing these above mentioned fees and fines, the court stated: “Many of these fees are going to be based on his ability to pay. When he contacts the probation office, he’ll fill out [a] fiscal financial assessment form and he can talk with the probation deputy about his ability to pay these various fees. The fees for court security fee, the court conviction assessment, booking fee, the attorneys fees, those [are] not conditions of probation, but they are his responsibility. And no lab fee. No drug fee.” (RT 220)

ARGUMENT FOR REVIEW

I. REVIEW SHOULD BE GRANTED TO CLARIFY WHETHER THIS COURT'S DECISION IN *MCCULLOUGH* EXTENDS TO COURT ORDERED PAYMENTS OF ATTORNEY FEES AND MONTHLY COSTS OF PROBATION SUPERVISION.

A. Issues raised on Appeal.

On appeal, relying on *People v. Pacheco*, supra, 187 Cal.App.4th 1392, appellant contended that the imposed criminal justice administration fee (Gov. Code, § 295550, subd. (a) & (c)), the probation fee (Pen. Code, § 1203.1b) and the award of attorney's fees (Pen. Code, § 987.8) were made without the requisite findings of appellant's ability to pay the fees and that there was nothing in the record to support an implied finding of appellant's financial ability to pay the fees ordered.³

Appellant further claimed that there was no evidence in the record of the actual costs of booking or probation supervision, any award of which is limited to actual costs. (Gov. Code, §§ 29550, subd. (c)/29550.2; Pen. Code, § 1203.1b, subd. (a) ; *Pacheco*, supra, at pp. 1400-1401.)

Lastly, appellant contended that he was not advised of and did not waive his Due Process hearing rights with respect to the assessment of probation

³ The record showed that appellant earned \$15 to \$18 an hour but that he did so as an employee of the victim's business and that all major assets were held in the victim's name. Appellant was not independently employable in as much as the record showed he had an immigration hold. (CT 223, 229, 236-237)

supervision fees. (Pen. Code, § 1202.1b, subds. (a) & (b) ⁴ and that the imposition of probation supervision fees was unauthorized in that it was made in the absence of appellant's due process right to a hearing and court determination of the actual average costs of supervision.

B. Appellate Court Ruling

The court denied appellant's contentions on the ground that "[t]he reasoning of *McCullough*, however, applies to all the fees appellant claims were imposed without a finding of ability to pay. (Slip. Opn. pg 3.)

C. Court of Appeal Error

With respect, the Court of Appeal was mistaken. This Court's decision in *McCullough* made clear that *Pacheco* was overruled "to the extent it holds the contrary." (*McCullough*, supra, at p. 600 [emph. added].) Thus, by its express terms, *McCullough* is limited to the booking fee imposed pursuant to

⁴ Penal Code section 1203.1b, subdivision (a) provides that a defendant placed on probation is liable for the "actual average costs" of probation supervision, in accordance with his ability to pay the same. That same section provides that "The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver."

Penal Code section 1203.1b, subdivision (b) goes on to provide that when "the defendant fails to waive the right provided in subdivision (a) to a determination by the court of his or her ability to pay and the payment amount, the probation officer shall refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payments shall be made.

Government Code section 29550.2 and, in other respects, *Pacheco* remains authoritative law.

Moreover, in reaching its decision with respect to “booking fees,” this Court explicitly distinguished and excluded from its holding costs and fees imposed pursuant to Penal Code sections 987.8 and 1203.1b. (*McCullough*, supra, at pp. 598-599.) This Court distinguished Pen. Code sections 987.8 and 1203.1b, on the ground that those sentencing statutes “require[d] defendants to be apprised of their right to a hearing on ability to pay and afford them other procedural safeguards” whereas no such requirement applied to booking fees. (*McCullough*, at p. 598.) Based on the difference in statutory language, this Court found that because the Legislature had “interposed no procedural safeguards or guidelines” for the imposition of a booking fee,” (*id.*, at p. 599), its evident intent was to regard the [booking] fee under Government Code section 29500.2 as a “de minimis” matter subject to forfeiture absent contemporaneous objection. (*Ibid*)

By virtue of the same reasoning, precisely the opposite conclusion must be drawn with respect to the fees imposed pursuant Pen. Code sections 987.8 and 1203.1b, which the court specifically distinguished from the *rationale* of its holding with respect to the booking fee.

Both the absence of required procedural advisements and the failure of the court to make the specific findings required by statute rendered the imposition of costs under those sections legally unauthorized and contestable on appeal absent challenge below.

D. Necessity for Review.

Evidently, *McCullough* has given rise to uncertainty as to the extent of its holding and conversely the extent to which *Pacheco* is still good law. As noted in the Court of Appeal opinion (slip. opn. p. 3), *Pacheco* states a minority view among intermediate appellate decisions. Thus a conflict in decisional law continues to exist. Lastly, factually speaking, the imposition of fees, fines and costs is no *de minimis* matter for defendants whose conviction and incarceration is likely to reduce their employability and income to minimal levels. The extent to which

II. REVIEW SHOULD BE GRANTED TO CLARIFY WHETHER THE HOLDING IN *MCCULLOUGH* APPLIES TO ANY CHALLENGE TO AN IMPOSED BOOKING FEE OR ONLY TO CHALLENGES BASED ON A DEFENDANT'S INABILITY TO PAY.

In the supplemental briefing requested by the Court of Appeal, appellant raised and preserved a challenge to *McCullough* itself. (Letter Brief, p. 4.)

[1] In reaching its holding *McCullough distinguished People v. Butler* (2003) 31 Cal.4th 1119 [allowing sentence-related probable cause determination to be challenged on appeal without prior objection] on the basis that a "defendant's ability to pay the booking fee ... does not present a question of law in the same manner as does a finding of probable cause." (*Id.*, at p. 587.) With respect, this ground of distinction does not hold. "“In dealing with probable cause . . . , as the very name implies, we deal with probabilities. These are not

technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." (*Brinegar v. United States* (1949) 338 U.S. 160, 175.) Thus, to the extent that the holding in *McCullough* relies on a mischaracterization of the nature of probable cause determinations, it was incorrectly decided.

[2] *McCullough* was also incorrectly (or at least unclearly) decided in that its conclusion that booking fees were legally de minimis does not find support in the statutory language of Government Code sections 29500-29500.2. *McCullough* reasoned that, (in contrast to Penal Code sections 987.8 and 1203.1b), *because* the Legislature "interposed no procedural safeguards or guidelines" for the imposition of a booking fee" the fee could be deemed to be a "de minimis matter." (*Id.*, at 599.) However, Government Code section 29500.2 *does* impose guidelines and finding requirements on the trial court. In addition to determining a defendant's ability to pay the fee, Government Code section 2500.2 also limits that fee to the *actual administrative costs* of "receiving an arrestee into the county detention facility." (*Ibid.*)⁵ These costs include *case-*

⁵ Viz: "As used in this section, "actual administrative costs" include only those costs for functions that are performed in order to receive an arrestee into a county detention facility. Operating expenses of the county jail facility including capital costs and those costs involved in the housing, feeding, and care of inmates shall not be included in calculating "actual administrative costs." "Actual administrative costs" may include the cost of notifying any local agency, special district, school district, community college district, college or university of any change in the fee charged by a county pursuant to this section.

specific factors which cannot be made by some general, once-for-all, finding. The enumeration of such factors is not conceptually different from the enumerated factors in the statutes governing probation supervision costs and attorney fees.

Since the Court's decision did not address these aspects of the booking fee statutes, , *McCullough* does not extend to a challenge to the booking fee *on the additional and separate ground* that no finding was made with respect to the actual costs of booking.. (*People v. Mendoza* (2000) 23 Cal.4th 896, 915 [a case is not authority for an issue not decided or encompassed within its holding].)

With this omission in mind, the precise significance of *McCullough's* holding becomes clear. This Court did *not* rule that *any* challenge

“Actual administrative costs” may include any one or more of the following as related to receiving an arrestee into the county detention facility:

(1) The searching, wristbanding, bathing, clothing, fingerprinting, photographing, and medical and mental screening of an arrestee.

(2) Document preparation, retrieval, updating, filing, and court scheduling related to receiving an arrestee into the detention facility.

(3) Warrant service, processing, and detainer.

(4) Inventory of an arrestee's money and creation of cash accounts.

(5) Inventory and storage of an arrestee's property.

(6) Inventory, laundry, and storage of an arrestee's clothing.

(7) The classification of an arrestee.

(8) The direct costs of automated services utilized in paragraphs (1) to (7), inclusive.

(9) Unit management and supervision of the detention function as related to paragraphs (1) to (8), inclusive.

to the booking fee must be contemporaneously made at the trial level. The issue it undertook to decide was “whether a defendant who failed to object that the evidence was insufficient to support *a finding of his ability to pay* a booking fee when the court imposed it has forfeited his right to challenge the fee on appeal.” (*Id.*, at p. 591 [emph. added].) What this Court concluded was: “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 29500.2.” (*McCullough*, at p. 599 [emph. added] [mult. quotes omitted].)

In the present case, appellant’s opening brief challenged the booking fee not only for insufficient evidence of his ability to pay but also on the grounds that there was no determination of actual costs. (AOB, p. 12; ARB, pp. 4-5.) Therefore, under a precise and accurate reading of *McCullough*, his challenge to the fee remained viable on that alternative ground.

Whether *McCullough*’s forfeiture rule applies to *any and all* challenges to a booking fee award or whether it applies only to challenges based on an asserted non-finding of an ability to pay is an issue which warrants clarification by this Court.

CONCLUSION

For the foregoing reasons, this court should grant review of the decision below.

Word Count Certification

The undersigned counsel certifies that the word count for this brief is: 2928 words.

Dated: 18 September 2013

Respectfully Submitted

KIERAN D. C. MANJARREZ
Attorney for Appellant/Petitioner

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,
Plaintiff and Respondent,
v.
OCTAVIO AGUILAR,
Defendant and Appellant.

A135516
(Contra Costa County
Super. Ct. No. 51202696)

Octavio Aguilar appeals from a judgment entered following a felony domestic violence conviction. He does not challenge that conviction on appeal, but instead he contends the trial court imposed various fees, including attorney fees, without making the requisite finding of ability to pay. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged with inflicting corporal injury (Pen. Code, § 273.5, subd. (a))¹ on Erika T., a woman who had lived with appellant for 14 years and was the mother of his child. The information further alleged a prior conviction for battery (§ 243) within seven years of the charged offense. (§ 273.5, subd. (e).)

A jury found appellant guilty of inflicting corporal injury on Erika T. Separately, the trial court found true the prior battery conviction allegation. The court, after declining to reduce the conviction to a misdemeanor, placed petitioner on probation on the condition that he serve 300 days in county jail. The court imposed, inter alia, the

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

following fees: (1) Attorney fees of \$500 (§ 987.8, subd. (b)); (2) a probation supervision fee not to exceed \$75 per month (§ 1203.1b, subd. (a)); and, (3) a “Criminal Assessment fee” of \$564. There appears to be no dispute the last item was the “criminal justice administration” fee found in the Government Code. (See Gov. Code, §§ 29550-29550.3.)

The trial court noted that appellant might not be required to pay the full amount of these fees and costs. The court stated: “Many of these fees are going to be based on his ability to pay. When he contacts the probation office, he’ll fill out [a] fiscal financial assessment form and he can talk with the probation deputy about his ability to pay these various fees.” (See e.g., § 987.8, subd. (b) [court may order defendant to appear before a county officer to make an inquiry into the ability of the defendant to pay all or a portion of legal assistance provided].)

Appellant did not object to any of the fees or to the court’s statement regarding the probation department’s involvement in determining ability to pay.

II. DISCUSSION

Appellant contends the trial court’s order to pay attorney fees, the probation supervision fee, and the criminal justice administration fee must be reversed because the trial court made no finding of his ability to pay those fees and costs. Each of the pertinent statutes condition imposition of those fees on a finding of ability to pay. Appellant further contends there is no evidence in the record supporting the amount of probation supervision fee and the criminal justice administration fee, which are both limited to the actual costs thereof. (See § 1203.1b, subd. (a) [reasonable cost of probation services and supervision shall not exceed actual average cost thereof]; Gov. Code, § 29550, subd. (a) [fee imposed by county shall not exceed actual administrative costs].) For both contentions appellant relies on *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1399.

Our Supreme Court recently decided *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough*), in which it held a defendant who failed to contest a booking fee in the trial

court forfeited the right to challenge the fee on appeal.² (*Id.* at p. 591.) “[W]e hold here that because a court’s imposition of a booking fee is confined to factual determinations, a defendant who fails to challenge the sufficiency of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal.” (*Id.* at p. 597.) The Supreme Court expressly disapproved *People v. Pacheco*, *supra*, 187 Cal.App.4th 1392, to the extent it held a defendant could challenge, for the first time on appeal, the sufficiency of the evidence supporting a finding of ability to pay a booking fee. (*McCullough*, *supra*, 56 Cal.4th at p. 599.)

The booking fee at issue in *McCullough* appears to be the same fee the trial court here called a criminal assessment fee. (See *McCullough*, *supra*, 56 Cal.4th at p. 590-591 [referring to the criminal justice administration fee found in § 29550.2, subd. (a), as a booking fee].) Petitioner concedes in his supplemental brief that the assessment fee “falls within the ambit of *McCullough*.” The reasoning of *McCullough*, however, applies to all the fees appellant claims were imposed without a finding of ability to pay.³ In fact even before *McCullough*, the decision in *Pacheco* was an outlier, with most courts requiring an objection to preserve fine and fee issues for appeal. (See e.g., *People v. Nelson* (2011) 51 Cal.4th 198, 227 [defendant forfeited his challenge to victim restitution fine by failing to object at his sentencing hearing]; *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [defendant who did not raise issue of ability to pay crime prevention fee in trial court cannot raise issue on appeal]; *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072 [failure to object in trial court to statutory error in the imposition of a probation fee under section 1203.1b waives the matter for purposes of appeal]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [appellate review of booking fee waived for failure to raise issue at time of sentencing]; see also *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1518

² The Supreme Court issued its decision after the parties filed their opening briefs. We solicited and received supplemental briefing from the parties discussing the effect of *McCullough* on the issues raised in this appeal.

³ That includes \$10 per month for costs of alcohol testing that petitioner, for the first time in his supplemental brief, adds to his list of contested fees.

[any error by trial judge in failing to state reasons for not imposing drug program fee waived by the prosecution].)

Appellant tries to distinguish attorney fees and the probation fee from the booking fee. He even argues *McCullough* supports his contention that an objection is not required to challenge the ability to pay those fees on appeal. He relies on the fact that the relevant statutes (§§ 987.8; 1203.1b) allow the trial court to delegate the ability to pay determination to the probation department, subject to certain procedural requirements, guidelines, and court review of the probation department's recommendations. In *McCullough*, the Supreme Court contrasted the booking fee statutes with statutes that provide procedural guidelines (including §§ 987.8 and 1203.1b). (See *McCullough, supra*, 56 Cal.4th at p. 598-599.) The opinion states: "We note these statutes because they indicate that the Legislature considers the financial burden of the booking fee to be de minimis and has interposed no procedural safeguards or guidelines for its imposition. In this context, the rationale for forfeiture is particularly strong." (*Id.* at p. 599.)

We disagree with appellant's characterization of this part of the *McCullough* decision. The Supreme Court, in discussing statutes with procedural safeguards or guidelines, was merely providing an additional reason why an objection to the ability to pay a booking fee was required. The Supreme Court was not implying only a booking fee required an objection. As to other fees and costs, the rationale for forfeiture is still strong, just not "particularly strong" as in the case of the booking fee.

Appellant nevertheless suggests he was not advised of, and did not waive, his due process hearing rights with respect to the probation supervision fees. *People v. Valtakis, supra*, 105 Cal.App.4th 1066, however, held a defendant's failure to object at sentencing to noncompliance with the probation fee procedures of section 1203.1b waives any claim of error on appeal. (*Id.* at p. 1068.) Further, any claim by appellant that the probation department failed to follow the procedures set forth in section 1203.1b would rely on facts outside the record on appeal, making habeas corpus or some other post-conviction proceeding the proper way to raise the issue.

Finally, appellant’s challenge to the amount of the criminal justice administration fee and the probation supervision fee is similarly waived. Calculating the actual administrative costs of processing arrestees or supervising probationers is above all a factual determination.⁴ Appellant himself states in his reply brief that the determination involves “disputable issues of fact.” Thus when, as here, the trial court has imposed two routine fees in an amount that is not plainly excessive, the defendant must make an objection. Fairness demands an objection in order to allow the prosecution to marshal the facts to support the calculation of the fees.

III. DISPOSITION

The judgment is affirmed.

REARDON, P. J.

We concur:

RIVERA, J.

HUMES, J.

⁴ The Attorney General states the criminal justice assessment fee in this case was determined by the county board of supervisors based on information provided by the county administrator’s office. The Attorney General refers this court to certain on-line county records and makes a request for judicial notice. Given our conclusion that petitioner forfeited any challenge to the amount of the fees, the request for judicial notice is denied as moot.

PROOF OF SERVICE BY MAIL

Title: People v. Aguilar

Case No.: _____ (A135516)

The undersigned declares:

I am a citizen of the United States of America, over the age of eighteen years and counsel for appellants herein. My business address is 1535 Farmers Lane 133, Santa Rosa, CA 95405

On 23 September 2013 I served the attached, **PETITION FOR REVIEW** on the parties in this action by placing a true copy thereof, in a sealed envelope with first class, mail fully prepaid, in the United States Mail at addresses as follows:

- [] Supreme Court California. 350 McAllister Street, San Francisco, CA 94102 (14)
 - [] + 1 copy for Appellate Counsel + [] SASE (1)
- [] Court of Appeal Dist 1 / Div 5 (1)
 - [] 350 McAllister Street, San Francisco, CA 94102
- [] Attorney General 455 Golden Gate Ave. , Suite 11000 San Francisco, CA 94102 (1)
- [] FDAP 730 Harrison Street, Suite 201, San Francisco, CA 94107 (1)
- [] Superior Court Contra Costa 725 Court Street, Martinez CA 94553 (1)
- [] Antonio Aguile 5555 Giant Highway, Richmond, CA 94508 (1)

W

Total = 20

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

Sworn this 23 September 2013, at Santa Rosa, California.

Kieran D. C. Manjarrez