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In the Supreme Court of the State of California

<p><b>THE PEOPLE OF THE STATE OF CALIFORNIA,</b>  <b>Plaintiff and Respondent,</b></p> <p>v.</p> <p><b>DONNA MARIE TRUJILLO,</b>  <b>Defendant and Appellant.</b></p>
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Case No. S \_\_\_\_\_

**SUPREME COURT  
FILED**

SEP 30 2013

Frank A. McGuire Clerk  


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Deputy

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

**PETITION FOR REVIEW**

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## **INTRODUCTION**

Respondent respectfully requests review of the Court of Appeal's decision reversing and remanding the case for purposes of determining appellant's ability to pay probation supervision and presentencing fees. The opinion is unpublished. The Court of Appeal filed its opinion on August 22, 2013. (Appendix A.) No rehearing was sought. This petition is timely. (Cal. Rules of Court, rule 8.500(e).)

## **QUESTION FOR REVIEW**

Does a failure to object to a presentence investigation fee and probation supervision fee forfeit a claim of failure to make a finding of ability to pay?

## **STATEMENT**

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

On April 20, 2012, the court suspended imposition of sentence and placed defendant on probation. The court imposed the following fines and fees: a \$240, plus \$24 (10 percent) restitution fund fine (§ 1202.4), with an equal probation revocation fine stayed (§ 1202.44); a \$129.75 criminal justice administration fee (Govt. Code, § 29550.1) payable to the City of San Jose; a \$40 court security fee (§ 1465.8); a \$30 criminal conviction assessment fee (Govt. Code, § 70373); a presentence investigation fee "not

to exceed \$300” and a probation supervision fee “not to exceed \$110 per month” (§ 1203.1b).<sup>1</sup> (5RT 357-358; CT 171; see also CT 153-159.)

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

On defendant’s appeal, the Court of Appeal for the Sixth Appellate District reversed and remanded with directions to the trial court to follow the statutory procedure in section 1203.1b before imposing probation related costs of the presentence investigation and probation supervision.<sup>2</sup> The court found appellant’s failure to object forfeited a challenge to the criminal justice administration fee under *People v. McCullough* (2013) 56 Cal.4th 589. (Typed opn. at p. 10.) However, it found *McCullough* inapplicable to probation-related fees. It noted the fees are not “de minimis.” Notwithstanding *McCullough*’s disapproval of the Sixth District’s decision in *People v. Pacheco* (2010) 187 Cal.App.4th 1392, which allowed challenges to the sufficiency of the evidence to support an ability to pay finding to be raised for the first time on appeal, the court invoked *Pacheco* as authority obligating the trial court to determine defendant’s ability to pay under section 1203.1b. (Typed opn. at p. 6 [“Even if we were to conclude that under *McCullough* [defendant’s] sufficiency of the evidence argument as to probation related costs is

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<sup>1</sup>A copy of section 1203.1b is an appendix to this petition. (Appendix B.)

<sup>2</sup>The court also ordered unrelated corrections to the sentencing minutes.

forfeited, there is nothing in the record to support the conclusion that anyone, whether the probation officer or the court, *made a determination of [her] ability to pay* the probation supervision fee or cost of preparing the presentence investigation report. In other words, there is nothing in the record to support the conclusion that the court or the probation officer complied with the procedural safeguards,” brackets added and fn. omitted].)

### REASONS FOR GRANTING REVIEW

*People v. McCullough, supra*, 56 Cal.4th 589, held that a defendant who failed to challenge a booking fee under Government Code section 29550.2 forfeited a claim of insufficiency of evidence as to an ability to pay finding. (*Id.* at p. 591.) The Court disapproved the Sixth District’s opinion in *People v. Pacheco, supra*, 187 Cal.App.4th 1392, which held that the issue of ability to pay based on sufficiency of the evidence is preserved for appellate review regardless of whether an objection is made at sentencing.

In the present case, the Sixth District acknowledged the holding in *McCullough*, but nonetheless remanded for an ability to pay finding on authority of *Pacheco*. (Typed slip opn. at p. 6.) It reasoned that the record failed to show the finding of ability to pay presentence investigation and probation supervision fees required under section 1203.1b. The Sixth District distinguished *McCullough* on the grounds that the presentence investigation and probation supervision fees were not de minimis and that the Legislature required a finding of ability to pay for such fees, regardless of the absence of an objection.

Review is necessary to secure uniformity of decision. The present case, although unpublished, conflicts with cases in the First and Third Districts applying the *McCullough* forfeiture rule where the defendant did not object to the ability to pay probation supervision, criminal justice administration/ booking, alcohol testing, and attorney fees (*People v. Aguilar* (Aug. 28 2013, A135516) \_\_\_ Cal.App.4th \_\_\_ [2013 WL



5290314]) and, as in this case, to probation supervision and presentence investigation fees (*People v. Snow* (Aug. 26, 2013, C068833) \_\_\_ Cal.App.4th \_\_\_ [2013 WL 5308726]).

The decision below also requires review to settle an important question of law. (See Cal. Rules of Court, rule 8.500(b)(1).) The decision below poses the question whether *McCullough* amounts to a recondite exception to the Sixth District’s nonforfeiture rule of appellate review of ability to pay findings or, conversely, whether *Pacheco* is simply wrong.

*McCullough* sets forth reasoning that makes clear the answer is the latter. This Court supported its forfeiture holding by reference to a broad array of fines and fees, such as restitution fines (former Gov. Code, § 13967 [see now § 1202.4]) and drug program fees (Health & Saf. Code, § 11372.7). (See *People v. Forshay* (1995) 39 Cal.App.4th 686, 689-690; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517.) The Court said: “By ‘failing to object on the basis of his [ability] to pay,’ defendant forfeits both his claim of factual error and the dependent claim challenging ‘the adequacy of the record on that point.’” (*McCullough, supra*, at p. 597, quoting *Forshay, supra*, at pp. 689-690.)

This Court also cited *People v. Simon* (2001) 25 Cal.4th 1082, 1086, a case applying appellate forfeiture to a defendant who failed to enter a timely trial objection to venue. Observing that the People bear the burden of proving both venue and ability to pay a booking fee by a preponderance of the evidence, the Court stated: “But a defendant who does nothing to put at issue the propriety of imposition of a booking fee forfeits the right to challenge the sufficiency of the evidence to support imposition of the booking fee on appeal, in the same way that a defendant who goes to trial forfeits his challenge to the propriety of venue by not timely challenging it.” (*McCullough, supra*, 56 Cal.4th at pp. 597-598.) The Court’s language implies a broad forfeiture principle, not one constricted to booking fees.

Nothing in the Court’s language suggested a need to go through the Penal Code, fee by fee, to assess whether the forfeiture rule applies. The fundamental principle is the same in each case.

*McCullough* cited other statutes that “similarly require[] a court to determine if a defendant is able to pay a fee before the court may impose it,” including probation supervision fees (§ 987.8), work furlough and electronic monitoring fees (§ 1208.2), parole supervision and treatment fees (§§ 646.94, 3006), reimbursement for cost of court-appointed counsel (§ 987.8), and drug program fees (Health & Saf. Code, § 11372.7). The Court observed these statutes contain varying procedural safeguards not contained in the booking fee statute, such as provision for notice and a hearing and a list of factors that should be taken into account in determining ability to pay. The Court observed that the absence of similar procedural safeguards or guidelines for the imposition of booking fees showed the Legislature considered the burden of the booking fee to be de minimis and made “the rationale for forfeiture particularly strong.” (54 Cal.4th at p. 599.) That the Court chose to articulate its forfeiture ruling in a “particularly strong” case does not imply that the related and analogous cases do not fall under the rule. One court of appeal has recently noted exactly that. (*People v. Aguilar* (2013) \_\_\_ Cal.App.4th \_\_\_ [2013 WL 5290314].)

Finally, this Court concluded that challenges to booking fees concern “factual determinations” not legal conclusions. For that proposition, *McCullough* cited *People v. Welch* (1993) 5 Cal.4th 228, 236 (probation conditions), and *People v. Scott* (1994) 9 Cal.4th 331, 354-355 (sentencing reasons). These authorities reflected errors that “encompass[] factual matters only” are forfeited in the absence of a trial objection. (*McCullough, supra*, 54 Cal.4th at p. 597.) The forfeiture principle announced in *Welch*, reiterated in *Scott*, and reaffirmed in *McCullough*, clearly applies to a much

broader range of sentencing decisions than whether to impose a booking fee based on ability to pay.

*McCullough*, not *Pacheco*, is the rule of appellate forfeiture.

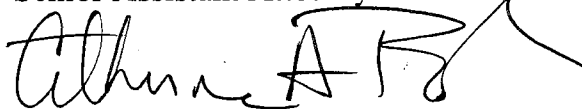
Presentence investigation and probation supervision fees involve the same type of factual determinations of ability to pay as are needed for numerous other fees. Nothing in section 1203.1b abrogates the forfeiture doctrine with respect to such determinations. The Sixth District's view that requires no objection to preserve challenges to one common set of fees but not to a host of others is profoundly dissonant and requires review.

### CONCLUSION

For the foregoing reasons, respondent respectfully requests that review be granted.

Dated: September 30, 2013      Respectfully submitted,

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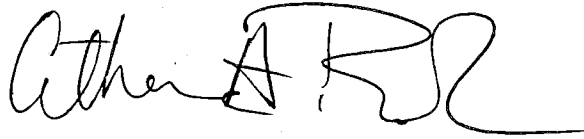
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**CERTIFICATE OF COMPLIANCE**

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 1,598 words.

Dated: September 30, 2013

KAMALA D. HARRIS  
Attorney General of California

A handwritten signature in black ink, appearing to read "Catherine A. Rivlin". The signature is fluid and cursive, with a large initial "C" and "R".

CATHERINE A. RIVLIN  
Supervising Deputy Attorney General  
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# **Appendix A**

**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  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DONNA MARIE TRUJILLO,

Defendant and Appellant.

H038316  
(Santa Clara County  
Super. Ct. No. C1199870)

A jury found Donna Trujillo (appellant) guilty of one count of receiving, concealing, selling, or withholding stolen property (Pen. Code, § 496). The court suspended imposition of sentence and placed appellant on probation on various terms and conditions. Relevant to the issues in this appeal, the court ordered that appellant pay a \$240 restitution fund fine plus a 10 percent administrative fee (§ 1202.4),<sup>1</sup> a probation revocation fine in the same amount (§ 1202.44), which the court imposed but stayed, a \$129.75 criminal justice administration fee (booking fee) payable to the City of San Jose (Gov. Code, § 29550.1), a \$40 court operations assessment (§ 1465.8), a \$30 criminal conviction assessment fee (Gov. Code, § 70373), a presentence investigation fee not to exceed \$300 (§ 1203.1b, subd. (a)), and a probation supervision fee not to exceed \$110 per month (§ 1203.1b, subd. (a)).

<sup>1</sup> All unspecified section references are to the Penal Code.

Appellant filed a timely notice of appeal. On appeal, appellant challenges the orders to pay several of the fines and fees that the court imposed on various grounds, which we shall outline later. For reasons that follow, we order that the sentencing minutes be modified to reflect imposition of a \$200 restitution fund fine plus a 10 percent administrative fee and a probation revocation fine of \$200. (§ 1202.44) However, as we shall explain, we are required to remand this case to the superior court.

Given the issues on appeal, we do not recount the substantive facts and procedural history underlying appellant's conviction.

### *Discussion*

#### *Presentence Investigation Fee and Probation Supervision Fee*

As noted at appellant's sentencing hearing the court ordered that appellant pay a presentence investigation fee and a monthly probation supervision fee. (§ 1203.1b, subd. (a).)

The probation officer recommended that the court impose a presentence investigation fee not to exceed \$300 and a probation supervision fee not to exceed \$110 per month. The probation officer made no recommendation on appellant's ability to pay either fee.

Section 1203.1b, subdivision (a) provides as relevant here, " In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report, whether or not probation supervision is ordered by the court, and in any case in which a defendant is granted probation or given a conditional sentence, the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision or a conditional sentence, of conducting any preplea investigation and preparing any preplea report . . . . , of conducting any presentence investigation and preparing any presentence report . . . . The reasonable cost of these

services and of probation supervision or a conditional sentence shall not exceed the amount determined to be the actual average cost thereof. A payment schedule for the reimbursement of the costs of preplea or presentence investigations based on income shall be developed by the probation department of each county and approved by the presiding judge of the superior court. The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing[] that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver." "[A]lthough section 1203.1b permits a separate hearing on a defendant's ability to pay probation costs, the statute does not prohibit a sentencing court from conducting the hearing as part of the sentencing process." (*People v. Phillips* (1994) 25 Cal.App.4th 62, 70.)

Appellant claims that in her case the court failed to determine her ability to pay the probation related costs, and there is insufficient evidence to support an implied finding that she does have such ability. Appellant did not object to the fees below, but asserts that due to the nature of the claim—insufficiency of the evidence— she did not need so to do to preserve this issue for review.

Respondent argues that appellant has forfeited this issue on appeal because she failed to object below. Respondent concedes that previously this court held in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), that claims based on insufficiency of the evidence to support an order for probation related costs, similar to the argument appellant makes here, do not need to be raised in the trial court to preserve the issue on



appeal. (*Id.* at p. 1397.) Other appellate courts have disagreed. (See *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1071-1072 [claim regarding insufficient evidence to support probation supervision fee forfeited on appeal].) However, during the pendency of this appeal, in *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough*), the California Supreme Court disapproved of our holding in *Pacheco* that challenges to the sufficiency of the evidence to support an ability to pay finding may be raised for the first time on appeal. (*McCullough, supra*, 56 Cal.4th at p. 599.)

In *McCullough*, the Supreme Court granted review to determine whether a defendant who failed to object that the evidence was insufficient to support a finding of his ability to pay a booking fee (Gov. Code, § 29550.2) when the court imposed it forfeited his right to challenge the fee on appeal. (*McCullough, supra*, 56 Cal.4th at p. 591.)

The *McCullough* court distinguished "between an alleged factual error that had necessarily 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.' [Citation.]" (*McCullough, supra*, at p. 594.) The Supreme Court observed, "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.*) "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.' [Citation.]" (*Ibid.*)

The *McCullough* court concluded that a defendant's ability to pay a booking fee does not present a question of law. The court stated that a "[d]efendant may not 'transform . . . a factual claim into a legal one by asserting the record's deficiency as legal error.' [Citation.] By 'failing to object on the basis of his [ability] to pay,' [a] defendant forfeits both his [or her] claim of factual error and the dependent claim challenging 'the adequacy of the record on that point.' [Citations.]" (*McCullough, supra*, at p. 597.)

Finally, the Supreme Court noted that in *People v. Scott* (1994) 9 Cal.4th 331, the court had already determined "that the requirement that a defendant contemporaneously object in order to challenge the sentencing order on appeal advanced the goals of proper development of the record and judicial economy." (*McCullough, supra*, 56 Cal.4th at p. 599.) Accordingly, the court concluded, "[g]iven that imposition of a fee is of much less moment than imposition of sentence, and that the goals advanced by judicial forfeiture apply equally" the *McCullough* court saw "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 . . . ." (*Ibid.*) The *McCullough* court explicitly disapproved of this court's decision in *Pacheco* insofar as it held to the contrary. (*Ibid.*)

Nonetheless, in part, the *McCullough* court distinguished the booking fees statutes from other fees statutes, including the statute dealing with probation related costs such as the one at issue here—section 1203.1b. The *McCullough* court noted that in contrast to the booking fees statutes, these statutes have procedural safeguards, which indicated to the *McCullough* court that the Legislature considered the financial burden of the booking fee to be de minimus. (*McCullough, supra*, at pp. 598-599.) The *McCullough* court concluded that since the Legislature "interposed no procedural safeguards or guidelines" for imposition of a booking fee the "rationale for forfeiture is particularly strong." (*Id.* at p. 599.)

As outlined *ante* section 1203.1b 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. We reiterate that the statute requires that a court must first order a defendant report to the probation officer, who will then make a determination of a defendant's ability to pay. (§ 1203.1b, subd. (a).) The court must then inform the defendant of his or her right to a hearing, during which the court will make a determination of defendant's ability to pay. (*Ibid.*) A defendant may waive his or her

right to this hearing, but this waiver must be made knowingly and intelligently. (*Ibid.*) If a defendant does not waive his or her right to a hearing, the matter will be remanded to the trial court that will then determine defendant's ability to pay. (*Ibid.*)

Notably, in *Pacheco, supra*, 187 Cal.App.4th 1392, the defendant not only appealed the imposition of a booking fee but also appealed the imposition of a probation supervision fee, which he argued was imposed without a determination of his ability to pay. (*Id.* at p. 1400.) With respect to this probation related cost we struck the probation supervision fee imposed under section 1203.1b because we found there was "no evidence in the record that anyone, whether the probation officer or the court, made a determination of [defendant's] ability to pay the \$64 per month probation supervision fee." (*Pacheco, supra*, 187 Cal.App.4th at p. 1401.) Further, we did not find that there was "any evidence that probation advised" the defendant "of his right to have the court make this determination or that he waived this right." (*Ibid.*) Thus, we concluded "that the statutory procedure provided at section 1203.1b for a determination of [defendant's] ability to pay probation related costs was not followed. Moreover, these costs, which are collectible as civil judgments," could not be made a condition of probation. (*Ibid.*) "For all these reasons," we concluded the "\$64 monthly probation supervision fee [could] not stand." (*Ibid.*) As can be seen, imposition of the probation related costs in *Pacheco* was erroneous regardless of whether substantial evidence supported an ability to pay.

The same is true in this case. 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.<sup>2</sup> We reject respondent's assertion that the court implicitly found that appellant had the ability to pay when the court granted probation and ordered appellant 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].)

The 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. (See *People v. Flores* (2003) 30 Cal.4th 1059, 1063 [assuming for the purposes of review that remand is the proper remedy when a court orders a defendant to pay attorney fees under section 987.8 without substantially complying with procedural safeguards enumerated in that section].)

#### *Fees as Conditions of Probation*

Appellant asserts that in ordering her to pay a court operations assessment, a criminal conviction assessment, the presentence investigation fee and the probation supervision fees, the court made these fees conditions of her probation. Appellant contends that we must either modify the judgment to delete the court facilities assessment and the criminal conviction assessment and clarify that imposition of these two

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<sup>2</sup> We note that the court referred appellant to the "Department of Revenue . . . for completion of a payment plan for the fines and fees" that the court intended to impose, but there was no requirement that the plan be worked out depending on appellant's ability to pay.

assessments are separate orders. Or remand the matter to the trial court to make findings regarding her ability to pay the costs of probation and to clarify that any orders to pay fees and assessments are not conditions of probation.

Appellant is incorrect that the court made these fines and assessments conditions of her probation. The record supports the conclusion that these fees and assessments were not made conditions of probation. Following recitation of a number of standard probation conditions, the court announced that it was going to impose the foregoing fees and assessments. The probation officer's report, which the court considered, explicitly stated that these fees and assessments were "not conditions of probation." Further, the minute order from the sentencing hearing does not list the fees and assessments as conditions of probation. More importantly, the court did not expressly condition successful completion of probation upon payment of the fees and assessments.

#### *Restitution Fund Fine*

At the sentencing hearing, the court indicated that it was imposing a restitution fund fine of \$200 with a 10 percent administrative fee under section 1202.4. The probation officer interrupted the court to point out that the minimum fine was \$240. The court then acknowledged that it was now \$240 and stated that the court would impose "the minimum under 1202.4." The court addressed appellant as follows: "The Court [is] required to impose a minimum fine, and I'm in fact giving you the minimum fine." The sentencing minutes indicate that the court imposed a \$240 fine plus a 10 percent administrative fee.

Appellant asserts that the court's order was erroneous because she committed her offense on January 25, 2011, at which time the minimum fine was \$200.

Effective January 1, 2012, the minimum restitution fine in section 1202.4, subdivision (b)(1), increased from \$200 to \$240. (Stats.2011, ch. 358, § 1.) The trial court in this case imposed a \$240 fine, although the minimum restitution fine was \$200 at the time appellant committed her offense. (Stats.2010, ch. 351, § 9, eff. Sept. 27, 2010.)

The prohibition against ex post facto laws applies to restitution fines. (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248; *People v. Souza* (2012) 54 Cal.4th 90, 143 [it is well established that the imposition of restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause and other constitutional provisions].) Nevertheless, the rule of forfeiture is applicable to ex post facto claims (see *People v. White* (1997) 55 Cal.App.4th 914, 917), particularly where any error could easily have been corrected if the issue had been raised at the sentencing hearing.

On the other hand, given that the record shows a commitment by the court to impose the minimum fine, and in order to avoid an ineffective assistance of counsel challenge, we will order that the court modify the sentencing minutes to reflect the imposition of a \$200 restitution fund fine plus a 10 percent administrative fee and a probation revocation fine of \$200. (§ 1202.44 [the court shall impose a probation revocation fine in the same amount as that imposed pursuant to section 1202.4, subdivision (b)].) Although section 1202.4, subdivision (l) allows the court to impose a fee "to cover the actual administrative cost of collecting the restitution fine, not to exceed 10 percent of the amount ordered to be paid," there is no such provision in section 1202.44.

#### *Booking Fee*

Appellant challenges the order that she pay a criminal justice administration fee or booking fee of \$129.75 to the City of San Jose on the ground that there is insufficient evidence that she has the ability to pay the fee. Appellant did not object when the court ordered that she pay the booking fee, which the court imposed pursuant to Government Code section 29550.1.<sup>3</sup>

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<sup>3</sup> We note in passing that Government Code section 29550.1 does not contain an explicit or implicit ability to pay finding. Appellant's challenge to the booking fee raises the initial question of whether equal protection principles require Government Code

Appellant has forfeited this claim by failing to challenge imposition of the booking fee. As noted *ante*, during the pendency of this appeal, the California Supreme Court ruled that "a defendant who does nothing to put at issue the propriety of imposition of a booking fee forfeits the right to challenge the sufficiency of the evidence to support imposition of the booking fee on appeal, in the same way that a defendant who goes to trial forfeits [a] challenge to the propriety of venue by not timely challenging it." (*McCullough, supra*, 56 Cal.4th at p. 598.) The *McCullough* court held 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.) We are bound by this determination. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Accordingly, since appellant raised no objection to the booking fee when it was imposed, her challenge to the fee is forfeited.

#### *Disposition*

The judgment (order of probation) is reversed and the matter is remanded with directions to the trial court to follow the statutory procedure in section 1203.1b before imposing probation related costs. The court is ordered to correct the sentencing minutes

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section 29550.1 to be interpreted as including an ability-to-pay requirement. The forfeiture doctrine has been applied to unreserved equal protection claims. (See, e.g., *People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14.) As the *McCullough* court observed, " ' ' ' a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' " ' [Citation.] 'Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal.' [Citation.] ' "The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]" ' [Citation.] Additionally, '[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.' [Citation.]" (*McCullough, supra*, 56 Cal.4th at p. 593.)

to reflect imposition of a \$200 restitution fund fine (§ 1202.4) plus a 10 percent administrative penalty and a probation revocation fine of \$200 (§ 1202.44).

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.



## **Appendix B**

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

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

an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver.

**(b)** When the defendant fails to waive the right provided in subdivision (a) to a determination by the court of his or her ability to pay and the payment amount, the probation officer shall refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payments shall be made. The court shall order the defendant to pay the reasonable costs if it determines that the defendant has the ability to pay those costs based on the report of the probation officer, or his or her authorized representative. The following shall apply to a hearing conducted pursuant to this subdivision:

**(1)** At the hearing, the defendant shall be entitled to have, but shall not be limited to, the opportunity to be heard in person, to present witnesses and other documentary evidence, and to confront and cross-examine adverse witnesses, and to disclosure of the evidence against

the defendant, and a written statement of the findings of the court or the probation officer, or his or her authorized representative.

**(2)** At the hearing, if the court determines that the defendant has the ability to pay all or part of the costs, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability.

**(3)** At the hearing, in making a determination of whether a defendant has the ability to pay, the court shall take into account the amount of any fine imposed upon the defendant and any amount the defendant has been ordered to pay in restitution.

**(4)** When the court determines that the defendant's ability to pay is different from the determination of the probation officer, the court shall state on the record the reason for its order.

**(c)** The court may hold additional hearings during the probationary or conditional sentence period to review the defendant's financial ability to pay the amount, and in the manner, as set by the probation officer, or his or her authorized representative, or as set by the court pursuant to this section.

**(d)** If practicable, the court shall order or the probation officer shall set payments pursuant to subdivisions (a) and (b) to be made on a monthly basis. Execution may be issued on the order issued pursuant

to this section in the same manner as a judgment in a civil action. The order to pay all or part of the costs shall not be enforced by contempt.

**(e)** The term "ability to pay" means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of conducting the presentence investigation, preparing the preplea or presentence report, processing a jurisdictional transfer pursuant to Section 1203.9, processing requests for interstate compact supervision pursuant to Sections 11175 to 11179, inclusive, and probation supervision or conditional sentence, and shall include, but shall not be limited to, the defendant's:

**(1)** Present financial position.

**(2)** Reasonably discernible future financial position. In no event shall the court consider a period of more than one year from the date of the hearing for purposes of determining reasonably discernible future financial position.

**(3)** Likelihood that the defendant shall be able to obtain employment within the one-year period from the date of the hearing.

**(4)** Any other factor or factors that may bear upon the defendant's financial capability to reimburse the county for the costs.

**(f)** At any time during the pendency of the judgment rendered according to the terms of this section, a defendant against whom a

judgment has been rendered may petition the probation officer for a review of the defendant's financial ability to pay or the rendering court to modify or vacate its previous judgment on the grounds of a change of circumstances with regard to the defendant's ability to pay the judgment. The probation officer and the court shall advise the defendant of this right at the time of rendering of the terms of probation or the judgment.

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

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

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

**DECLARATION OF SERVICE BY U.S. MAIL**

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

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 30, 2013, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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Criminal Division - Hall of Justice  
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San Jose, CA 95113-1090

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Santa Clara County District Attorney's Office  
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Sixth District Appellate Program  
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California Court of Appeal  
Sixth Appellate District  
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San Jose, CA 95113

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 30, 2013, at San Francisco, California.

Nelly Guerrero  
\_\_\_\_\_  
Declarant

  
\_\_\_\_\_  
Signature